

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Schools and Libraries Universal Service
Support Mechanism
CC Docket No. 02-6

REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

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By the Commission:

TABLE OF CONTENTS

Table with 2 columns: Heading and Paragraph #. Includes sections I through V with sub-sections and page numbers.

e. Vendors of Internal Connections	72
4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements.....	74
5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.....	75
6. Federal Rules that may Duplicate, Overlap, or Conflict with the Proposed Rules.....	53
E. <i>Ex Parte</i> Presentations	54
F. Comment Filing Procedures.....	55
VI. ORDERING CLAUSES.....	60

APPENDIX A—List of Commenters

APPENDIX B—Final Rules

APPENDIX C—Proposed Rules

I. INTRODUCTION

1. In this report and order and further notice of proposed rulemaking, we address and seek comment on issues regarding the services eligible for funding under the schools and libraries universal service support mechanism, also known as the E-rate program. First, we modify our rules to expressly include interconnected voice over Internet protocol (VoIP) and text messaging as eligible services under the E-rate program. Second, we release the list of services that will be eligible for discounts for E-rate funding year 2010.¹ Finally, we seek further comment on the eligibility of certain services in future funding years, as well as on proposed changes to the process for determining the services that will be eligible for support under the E-rate program.²

2. In the report and order, we conclude that interconnected VoIP service is eligible for E-rate support and should continue to be an eligible service under the E-rate program.³ We also conclude that text messaging is eligible for E-rate support.⁴ In response to the *2010 ESL Public Notice*,⁵ we clarify the E-rate program eligibility of video on-demand servers, ethernet, web hosting, wireless local area network (LAN) controllers, and virtualization software. We find that telephone broadcast messaging, unbundled warranties, power distribution units, softphones, interactive white boards, and e-mail archiving are ineligible for E-rate program funding. Finally, we release the Eligible Services List (ESL) for E-rate funding year 2010.⁶

¹ E-rate funding year 2010 will begin on July 1, 2010, and end on June 30, 2011. See 47 C.F.R. § 54.507(b).

² See 47 U.S.C. § 254(c)(1), (c)(3) (describing the types of services that are to be “establish[ed] periodically” for schools and libraries); see also 47 U.S.C. § 254(h)(2).

³ See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Notice of Proposed Rulemaking, 23 FCC Rcd 11703 (2008) (*ESL NPRM*).

⁴ We note that we are not reaching a determination regarding all of the issues raised in the *ESL NPRM* in this report and order.

⁵ *Comment Sought on Draft Eligible Services List for Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Public Notice, 24 FCC Rcd 7422 (Wireline Comp. Bur. 2009) (*2010 ESL Public Notice*). A list of parties filing comments and reply comments in response to the *2010 ESL Public Notice* is attached as Appendix A.

⁶ Although the Commission’s rules contemplate that the ESL be released as an attachment to a public notice, the intent of the rule is to facilitate, among other things, the ability of both vendors and applicants to determine the

3. In the further notice of proposed rulemaking, we seek comment on whether particular services should be designated as eligible for E-rate support in funding year 2011 and beyond. Specifically, we tentatively conclude that the ESL should not include separately-priced firewall services, anti-virus/anti-spam software, scheduling services, and wireless Internet access applications. Also, we tentatively conclude that web hosting should not be eligible for funding under the E-rate program, or, alternatively, should only be eligible for E-rate program funds as a Priority 2 service. In the further notice we also tentatively conclude that we should change our rules to establish that specific eligible products and services should be listed in the ESL as opposed to being listed individually in the rules.⁷ We seek comment on our tentative conclusions on the process for developing the ESL, including requiring the Universal Service Administrative Company (USAC) to submit any proposed changes to the ESL to the Commission no later than March 30th of each year. Finally, we tentatively conclude to revise our rules to eliminate the requirement that the ESL be released by public notice, which would provide the Commission the flexibility to release the ESL by order.⁸

II. BACKGROUND

A. The Act and Commission Requirements for Eligible Services

4. Under the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may receive discounts for eligible telecommunications services, Internet access, and internal connections.⁹ Section 254 of the Communications Act of 1934, as amended (the Act), gives the Commission the authority to designate “telecommunications services” and certain additional services eligible for support under the E-rate program.¹⁰ The Commission also has determined that it has the authority to designate services eligible for E-rate support as part of its authority to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms and libraries.¹¹

5. Since the initial implementation of the E-rate program in 1998, and consistent with the Commission’s rules and requirements, USAC has developed procedures and guidelines to ensure that E-rate funding is provided only for eligible services.¹² Initially, the Commission directed USAC, in

specific services that are eligible for discounts. 47 C.F.R. § 54.522; *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 26912, 26928, para. 40 (2003) (*Schools and Libraries Third Report and Order*). Releasing the ESL with this report and order fulfills the purpose of the rule; nevertheless, to the extent necessary, we waive the public notice requirement in section 54.522 to release the ESL with this report and order. 47 C.F.R. § 1.3.

⁷ These proposals would require revisions to sections 54.502, 54.503, 54.506, 54.517 and 54.518 of the Commission’s rules. See 47 C.F.R. §§ 54.502, 54.503, 54.506, 54.517 and 54.518. Proposed revised rules are attached as Appendix C.

⁸ See 47 C.F.R. § 54.522.

⁹ 47 C.F.R. §§ 54.502, 54.503, 54.517.

¹⁰ 47 U.S.C. § 254(c)(1), (c)(3), (h)(2)(A).

¹¹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9008-9015, paras. 436-449 (1997) (*Universal Service First Report and Order*), *aff’d in part*, *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 440-42 (5th Cir. 1999) (subsequent history omitted); see also 47 U.S.C. § 254(h)(2)(A).

¹² USAC is an independent, not-for-profit corporation designated as the administrator of the federal universal service fund by the Commission. See *Changes to the Board of Directors of the National Exchange Carrier Association*, Third Report and Order in CC Docket No. 97-21, Fourth Order on Reconsideration in CC Docket No. 97-21 and

consultation with the Commission, to determine whether particular services fell within the eligibility criteria established under the Act and the Commission's rules and policies.¹³ USAC began to update and post to its website on an annual basis a list of services and products eligible to receive discounts under the E-rate program, now known as the ESL.¹⁴ In consultation with the Wireline Competition Bureau (Bureau), USAC updated the list to reflect any changes in rules that had occurred during the previous year and to address issues that arose in the application review process.¹⁵

6. On December 23, 2003, the Commission adopted section 54.522 of its rules, formalizing the process for updating the ESL for the E-rate program.¹⁶ Specifically, under section 54.522, the Commission must seek comment on USAC's proposed ESL and issue a public notice attaching the final ESL for the upcoming funding year at least 60 days prior to the opening of the application funding window for the E-rate program.¹⁷ This process was adopted to provide greater transparency in the development of the ESL, to simplify program administration, and to facilitate the ability of both vendors and applicants to determine the services that are eligible for discounts.¹⁸ It also provides applicants and service providers an opportunity to bring to the Commission's attention areas of ambiguity in the application of program rules in a rapidly changing marketplace.¹⁹ In its current form, the ESL is divided into five main categories – telecommunications service, Internet access, internal connections, basic maintenance of internal connections, and miscellaneous.²⁰

Eighth Order on Reconsideration in CC Docket No. 96-45, 13 FCC Rcd 25058, 25063-66, paras. 10-14 (1998); 47 C.F.R. § 54.701(a).

¹³ See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202, 9213, para. 31 (2003) (*Schools and Libraries Second Report and Order*); see also 47 U.S.C. § 254(c).

¹⁴ See USAC website, Eligible Services List, <http://www.usac.org/sl/tools/eligible-services-list.aspx> (last visited Dec. 2, 2009); see also *Schools and Libraries Third Report and Order*, 18 FCC Rcd at 26926, para. 34.

¹⁵ *Schools and Libraries Third Report and Order*, 18 FCC Rcd at 26926, para. 34.

¹⁶ See 47 C.F.R. § 54.522; *Schools and Libraries Third Report and Order*, 18 FCC Rcd at 26929, para. 40. This process was first implemented in E-rate funding year 2005.

¹⁷ 47 C.F.R. § 54.522.

¹⁸ *Schools and Libraries Third Report and Order*, 18 FCC Rcd at 26929, para. 40.

¹⁹ *Id.* In the *Universal Service Fund Comprehensive Review NPRM*, the Commission sought comment on, among other things, whether to make changes to the ESL process. *Comprehensive Review of Universal Service Fund Management, Administration, and Oversight*, WC Docket Nos. 05-195, 02-60, 03-109, CC Docket Nos. 96-45, 02-6, 97-21, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 20 FCC Rcd 11308, 11323-11326, paras. 34-43 (2005) (*Universal Service Fund Comprehensive Review NPRM*).

²⁰ See, e.g., Eligible Services List, *Schools and Libraries Support Mechanism for Funding Year 2009*, http://www.usac.org/_res/documents/sl/pdf/ESL_archive/EligibleServicesList_112108.pdf (last visited Dec. 2, 2009) (2009 ESL). We note that the ESL lists examples of services or products that are eligible for E-rate support, while the Commission's rules generally include only broad categories. For example, the Commission's rules designate telecommunications services as supported services, and the ESL provides an illustrative list of specific telecommunications services or technologies, such as Centrex and frame relay, that are eligible for E-rate support. Thus, the ESL categories provide additional, practical guidance for beneficiaries and service providers in determining the eligibility of specific services or products.

B. The 2010 ESL Public Notice and ESL NPRM

7. In the *2010 ESL Public Notice*, the Bureau sought comment on changes to the ESL proposed by USAC for funding year 2010.²¹ Comments on the *2010 ESL Public Notice* were due on June 23, 2009, and reply comments were due on June 30, 2009.²²

8. In the *ESL NPRM*, released in July 2008, the Commission sought comment on issues related to eligible services that had been raised by commenters but had not yet been resolved through the ESL public notice and revision process.²³ For example, the Commission sought comment on the inclusion of interconnected VoIP service in the ESL, and whether text messaging, telephone broadcast messaging, and other individual services should be eligible for E-rate support under section 254(c)(3) of the Act.²⁴ The Commission also sought comment on which rules, if any, would need to be amended to implement any changes made as a result of the *ESL NPRM*.²⁵ Comments on the *ESL NPRM* were due on September 18, 2008, and reply comments were due on October 3, 2008.²⁶

III. REPORT AND ORDER

9. In this report and order, we modify our rules to expressly include interconnected VoIP and text messaging as eligible services under the E-rate program. We also release the ESL for E-rate funding year 2010 and make findings about the particular changes to the ESL recommended by USAC.²⁷ Specifically, we adopt the changes or clarifications proposed by USAC to the ESL, with the exception of USAC's proposed changes that would render video-on-demand servers fully ineligible for E-rate support, and would add unbundled warranties to the list of eligible basic maintenance services.

10. Because we are releasing the final ESL for funding year 2010 by this report and order, we also authorize USAC to open the annual application filing window no earlier than December 1, 2009.²⁸ Section 54.522 of the Commission's rules requires that the Commission release the ESL 60 days before the application filing window opens.²⁹ Recognizing that the filing window would open less than 60 days after the release of this report and order, we waive on our own motion section 54.522, because we conclude a waiver will facilitate the application process for E-rate beneficiaries applying for monies for funding year 2010 and thus is in the public interest.³⁰

²¹ See *2010 ESL Public Notice*.

²² *Id.* at 7423.

²³ *ESL NPRM*, 23 FCC Rcd at 11705, para. 7.

²⁴ *Id.* at 11706, para. 7; 47 U.S.C. § 254(c)(3).

²⁵ *ESL NPRM*, 23 FCC Rcd at 11705, para. 7. Similarly, in the *Universal Service Fund Comprehensive Review NPRM*, the Commission requested comment on the process for establishing and administering the ESL. See *Universal Service Fund Comprehensive Review NPRM*, 20 FCC Rcd at 11325, para. 40. In particular, the Commission asked commenters to discuss ways in which the Commission could revise and issue the list of eligible services in a more administratively efficient way, while ensuring that universal service funds are provided for only eligible services. *Id.*

²⁶ *Comment Cycle Established for Notice of Proposed Rulemaking on Services Eligible for E-rate Funding*, CC Docket No. 02-6, Public Notice, 23 FCC Rcd 12651 (Wireline Comp. Bur. 2008).

²⁷ See *2010 ESL Public Notice*.

²⁸ 47 C.F.R. § 54.522.

²⁹ *Id.*

³⁰ See 47 C.F.R. § 1.3 (providing that the Commission's rules may be waived for good cause).

A. Designation of Additional Supported Services

11. *Interconnected VoIP.* We conclude that we should modify our rules to expressly include interconnected VoIP as a service eligible for E-rate support, and we will continue to fund interconnected VoIP service under the E-rate support mechanism.³¹ We also determine that interconnected VoIP service should be a Priority 1 service because regardless of its ultimate regulatory classification, it is defined as “enabl[ing] real-time, two-way voice communications,”³² and thus provides basic connectivity akin to other Priority 1 services.³³ We note, however, that not all of the components of an interconnected VoIP service are eligible for Priority 1 funding. Any components of an interconnected VoIP system that would be considered internal connections would be eligible for Priority 2 funding only, and any components of an interconnected VoIP system that are end-user equipment are ineligible for funding. We also adopt USAC’s proposal that interconnected VoIP be listed in both the telecommunications and Internet access categories of the ESL, despite the fact that the Commission has not yet determined the regulatory classification of interconnected VoIP.

12. We find that, pursuant to section 254 of the Act, the Commission has the authority to include interconnected VoIP service as an additional service eligible for E-rate support.³⁴ We therefore amend section 54.503 of our rules to designate interconnected VoIP as a supported special service.³⁵ We note that the Commission has not yet classified interconnected VoIP service as either a telecommunications service or an information service. If interconnected VoIP service is found to be a telecommunications service, sections 254(c)(1), (c)(3), and (h)(1)(B) of the Act provide the Commission with the authority to provide E-rate support for all commercially available telecommunications services.³⁶ If, however, interconnected VoIP is determined to be an information service, sections 254(c)(3), (h)(1)(B), and (h)(2) of the Act, as explained in the *Universal Service First Report and Order*, provide the Commission with the authority to provide E-rate support for interconnected VoIP when provided by both

³¹ See *ESL NPRM*, 23 FCC Rcd at 11707-11708, paras. 12-13 (tentatively concluding that interconnected VoIP service should be eligible for E-rate funding as a Priority 1 service). The Commission defines interconnected VoIP service as a service that: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user’s location; (3) requires Internet protocol-compatible customer premises equipment (CPE); and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network. 47 C.F.R. § 9.3; see also *IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10257-58, para. 24 (2005) (asserting ancillary jurisdiction under Title I of the Act to require interconnected VoIP service providers to supply 911 emergency calling capabilities to their customers), *aff’d sub nom. Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006); see also *2010 ESL Public Notice*.

³² 47 U.S.C. § 9.3.

³³ *ESL NPRM*, 23 FCC Rcd at 11708, para. 13. In allocating funds during any given funding year, the Commission gives the highest priority to Internet access and telecommunications services, which it designates as Priority 1 services, and any remaining funds are allocated for internal connections, designated as Priority 2 services. See 47 C.F.R. § 54.507(g); see also *Schools and Libraries Universal Service Support Mechanism*, CC Docket 02-6, Fifth Report and Order, 19 FCC Rcd 15808, 15810, para. 5 (2004); and *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fifth Order on Reconsideration and Fourth Report and Order, 13 FCC Rcd 14915, para. 36 (1998).

³⁴ The Commission designated interconnected VoIP as a supported service in its *2007 ESL Public Notice* but did not modify its rules to expressly include it. *Release of Funding Year 2007 Eligible Services List for Schools and Libraries Universal Service Mechanism*, CC Docket No. 02-6, Public Notice, 21 FCC Rcd 12310, 12311 (2006) (*2007 ESL Public Notice*).

³⁵ See Appendix B.

³⁶ 47 U.S.C. § 254(c)(1), (c)(3); see also *Universal Service First Report and Order*, 12 FCC Rcd at 9006, para. 431.

telecommunications carriers and non-telecommunications carriers because such support will “enhance . . . access to advanced telecommunications and information services” for schools and libraries.³⁷ No matter how interconnected VoIP is ultimately classified, we find that the Commission has statutory authority to include it as an eligible supported service. Therefore, we amend section 54.517 of our rules to permit interconnected VoIP to be provided by non-telecommunications carriers.³⁸

13. Furthermore, we agree with commenters that the permanent inclusion of interconnected VoIP service increases the options available to schools and libraries to encourage meaningful communications among parents, teachers, and school and library administrators.³⁹ Indeed, because interconnected VoIP is increasingly used to replace analog voice service,⁴⁰ funding interconnected VoIP service is consistent with the concept of competitive neutrality, which is the principle of treating similarly situated services in the same manner for E-rate funding purposes, as mandated by the Commission.⁴¹ We also agree with commenters that the inclusion of interconnected VoIP service as an eligible service allows schools and libraries to benefit from the same cost efficiencies and service features that have led many consumers and businesses to choose this technology.⁴²

14. We also sought comment on whether interconnected VoIP service should remain classified in the miscellaneous service category, as it has been in previous ESLs.⁴³ As proposed by USAC in its annual ESL submission, we conclude that interconnected VoIP service should be listed in both the telecommunications and Internet access categories to help minimize applicant confusion noted by commenters.⁴⁴ We clarify that we are not, by this action, ultimately determining that interconnected VoIP is either a telecommunications service or an Internet access service.⁴⁵ Rather, we put interconnected

³⁷ 47 U.S.C. § 254(c)(3), (h)(1)(B), (h)(2)(A); *see also Universal Service First Report and Order*, 12 FCC Rcd at 9009, paras. 436-37.

³⁸ *See* Appendix B.

³⁹ AT&T *ESL NPRM* Comments at 6; ESPA *ESL NPRM* Comments at 10; VON Coalition *2010 ESL Public Notice* Comments at 2.

⁴⁰ *See e.g., Telephone Numbering Requirements for IP-Enabled Service Providers*, WC 07-243, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531, 19541 at para. 18 (2007).

⁴¹ *See Universal Service First Report and Order*, 12 FCC Rcd at 8802, para. 49; *see also* ESPA *ESL NPRM* Comments at 10; Qwest *ESL NPRM* Comments at 1. Commenters also noted that interconnected VoIP providers are already required to contribute to the universal service fund. *See* E-rate Central *ESL NPRM* Comments at 4; ESPA *ESL NPRM* Comments at 11.

⁴² Chicago Public Schools *ESL NPRM* Reply Comments at 4; ESPA *ESL NPRM* Comments at 12; NCTA *ESL NPRM* Comments at 2; One Communications *ESL NPRM* Comments at 3; Spectrum Communications *ESL NPRM* Comments at 3; Verizon *ESL NPRM* Comments at 3; VON Coalition *2010 ESL Public Notice* Comments at 1.

⁴³ *ESL NPRM*, 23 FCC Rcd at 11708, para. 13; *see also* 2007 ESL at 19; 2008 ESL at 21.

⁴⁴ *See 2010 ESL Public Notice* at 1. USAC’s proposed change was supported by several of the commenters. *See* E-MPA *2010 ESL Public Notice* Comments at 1; SECA *2010 ESL Public Notice* Comments at 4-5; VON Coalition *2010 ESL Public Notice* Comments at 1; American Library Association *ESL NPRM* Comments at 3-4; E-Rate Central *ESL NPRM* Comments at 4; Funds for Learning *ESL NPRM* Comments at 4; Funds for Learning *ESL NPRM* Comments at 6; Wisconsin *ESL NPRM* Comments at 2.

⁴⁵ The ESL will include a footnote in both the telecommunications and Internet access categories stating that the inclusion of interconnected VoIP service in the ESL in both categories is not intended to prejudge the regulatory classification of interconnected VoIP. Comcast *ESL NPRM* Comments at 3; NCTA *ESL NPRM* Comments at 2; One Communications *ESL NPRM* Comments at 3-4.

VoIP in both of those ESL categories because interconnected VoIP can be provided by both telecommunications service providers or non-telecommunications service providers. Because of this change, it will no longer be necessary to list interconnected VoIP in the miscellaneous category of the ESL.⁴⁶ We believe this change will also clarify that applicants can apply for and receive E-rate funding for interconnected VoIP service provided by either a telecommunications service provider or an Internet access service provider. We encourage applicants soliciting bids for interconnected VoIP services to post for the services in both categories to expand the number of service providers that can bid on the services sought. Consistent with USAC's recommendation, we clarify that applicants are not required to prepare a technology plan if they are seeking discounts only for interconnected VoIP.⁴⁷ Thus, we amend section 54.504(b) of our rules to make clear that no technology plan is needed if applicants are applying only for interconnected VoIP.⁴⁸

15. We also agree with Funds for Learning that any interconnected VoIP hardware that does not meet the test for Priority 1 services in the *Tennessee Order* should be considered Priority 2 internal connections and should be ineligible for Priority 1 funding.⁴⁹ In the *Tennessee Order*, the Commission stated that a service is considered a component of internal connections if it is necessary to "transport information within one or more instructional buildings of a single school campus."⁵⁰ The Commission also stated that it was reasonable to presume that if facilities are located on an applicant's premises, then such facilities are necessary to transport information within one or more buildings of the school campus, and are thus a Priority 2 internal connections service and not part of an end-to-end Internet access service, i.e., a Priority 1 service.⁵¹ This presumption can be rebutted with evidence that the applicant does not own or have exclusive use of the facilities.⁵² Thus, leased VoIP telephone systems will need to be evaluated in accordance with the conditions in the *Tennessee Order*, to determine whether they should be eligible as Priority 2 internal connections only or if some portion of the system would be eligible as Priority 1. For example, only the lease of a single basic terminating component is eligible as a Priority 1 service under E-rate and this may include a VoIP gateway device located on the applicant's premises,⁵³ but hubs, routers and switches are not considered basic terminating components and would be subject to the on-premise Priority 1 equipment conditions set forth in the *Tennessee Order*.

⁴⁶ In USAC's proposed changes to the ESL for funding year 2010, interconnected VoIP is listed in the miscellaneous category but will be removed from that category in the final version of the funding year 2010 ESL.

⁴⁷ A technology plan is not required for interconnected VoIP regardless of whether the applicant chooses to obtain interconnected VoIP as a telecommunications or Internet access service. See 47 C.F.R. § 54.504(b)(2)(iv).

⁴⁸ See Appendix B.

⁴⁹ Funds for Learning 2010 ESL Public Notice Comments at 4; Funds for Learning ESL NPRM Comments at 5-6; see also Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc., CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13734 (1999) (*Tennessee Order*).

⁵⁰ *Tennessee Order*, 14 FCC Rcd at 13754, para. 37.

⁵¹ *Id.* at 13754, para. 39.

⁵² *Id.* The Commission stated that some factors to consider in distinguishing between an end-to-end service and an internal connection include "ownership of the facility used to provide the service, any lease-purchase arrangements regarding such facility, exclusivity arrangements regarding such facility, maintenance agreements regarding such facility and upfront capital costs." *Id.*

⁵³ A gateway device is analogous to equipment such as channel service unit/data service units, network interface devices, and cable modems.

16. In the *ESL NPRM*, we also sought comment on whether applicants requesting funding for interconnected VoIP service as an Internet access service must comply with and certify to requirements identified in the Children’s Internet Protection Act (CIPA).⁵⁴ Enacted in 2001, CIPA imposed requirements on schools and libraries “having computers with Internet access” and prohibits schools and libraries from receiving discounted services if those requirements are not met.⁵⁵ This prohibition is not applicable to a school or library that receives discounted services “only for purposes other than the provision of Internet access, Internet service, or internal connections.”⁵⁶ Thus, the Commission determined that schools or libraries receiving only discounted telecommunications services were not required to comply with CIPA.⁵⁷ Consistent with the majority of commenters’ arguments,⁵⁸ we conclude that applicants requesting funds for interconnected VoIP service alone are not required to comply with and certify to CIPA requirements.⁵⁹ While interconnected VoIP service may traverse the Internet, interconnected VoIP service, by definition, is not used to provide an Internet access service, Internet service, or internal connections.⁶⁰ Therefore, we find that CIPA compliance is not required for applicants that receive funding for interconnected VoIP service. Applicants seeking support for interconnected VoIP service that also seek support for Internet access, Internet service, or internal connections would certify their CIPA compliance separately for the Internet access.⁶¹

⁵⁴ *ESL NPRM*, 23 FCC Rcd at 11708, para. 13. CIPA amended section 254(h) of the Act and added section 254(l). See 47 U.S.C. § 254(h)(5), (l).

⁵⁵ 47 U.S.C. § 254(h)(5), (h)(6). Under CIPA, no school or library having Internet access may receive universal service discounts unless the authority with responsibility for administration of the school or library makes required certifications and ensures the use of computers in accordance with these certifications. Specifically, the school or library must certify that it is enforcing a policy of Internet safety and has in place a technology protection measure, i.e., filtering technology. The policy of Internet safety must include a technology protection measure that protects against Internet access by both adults and minors to visual depictions that are: (1) obscene; (2) child pornography; or (3) with respect to use of the computers by minors, harmful to minors. In carrying out its certification responsibilities under CIPA, an entity receiving E-rate supported services must also adopt and implement, pursuant to section 254(l) of the Act, an Internet safety policy addressing: (i) access by minors to inappropriate matter on the Internet and World Wide Web; (ii) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications; (iii) unauthorized access, including so-called “hacking,” and other unlawful activities by minors online; (iv) unauthorized disclosure, use, and dissemination of personal information regarding minors; and (v) measures designed to restrict minors’ access to materials harmful to minors. 47 U.S.C. § 254(l).

⁵⁶ 47 U.S.C. § 254(h)(5)(A)(ii), (h)(6)(A)(ii).

⁵⁷ *CIPA Order*, 16 FCC Rcd at 8195-8196, para. 28.

⁵⁸ AT&T *ESL NPRM* Comments at 7; Chicago Public Schools *ESL NPRM* Reply Comments at 4; Comcast *ESL NPRM* Comments at 3; Funds for Learning *ESL NPRM* Comments at 6; NCTA *ESL NPRM* Comments at 3; One Communications *ESL NPRM* Comments at 4-5; Qwest *ESL NPRM* Comments at 2. *But see* Council of the Great City Schools *ESL NPRM* Comments (arguing that interconnected VoIP should be an Internet access service subject to CIPA requirements).

⁵⁹ 47 U.S.C. §§ 151 *et seq.*; *Federal-State Joint Board on Universal Service, Children’s Internet Protection Act*, CC Docket No. 96-45, Report and Order, 16 FCC Rcd 8182 (2001) (*CIPA Order*); *see also* Schools and Libraries Universal Service, Receipt of Services Confirmation Form, OMB 3060-0853 at 5 (April 2007) (FCC Form 486). We note that applicants seeking E-rate support for interconnected VoIP for the purpose of voice service only are already exempt from CIPA requirements. 47 U.S.C. § 254(h)(5)(A)(ii), (6)(A)(ii); *CIPA Order*, 16 FCC Rcd at 8195-96, para. 28.

⁶⁰ 47 C.F.R. § 9.3.

⁶¹ AT&T *ESL NPRM* Comments at 7.

17. *Text Messaging.* We find that we should modify our rules to include text messaging, known as short message service (SMS), as a service eligible for E-rate support.⁶² We agree with commenters who noted that text messaging is similar to other E-rate-eligible services used by applicants to communicate, such as e-mail and paging services.⁶³ Moreover, we believe our decision to add text messaging is analogous to our decision in the *Schools and Libraries Second Report and Order* to add voice mail service to the list of E-rate-eligible services.⁶⁴ Thus, for similar reasons, we designate text messaging as a service eligible for E-rate support.⁶⁵ We note that we include text messaging as an eligible service irrespective of whether text message is ultimately categorized as a telecommunications service or an information service.⁶⁶ This service will be categorized in the ESL in the telecommunications service category as a component of telephone service because text messaging has generally been available in conjunction with wireless telephone service, and the charges for text messaging are typically bundled with wireless telephone service or the separate charges for the text messaging service appear on the same bill as the telephone service.⁶⁷ We therefore amend section 54.503 of our rules to designate text messaging as a supported special service.⁶⁸

⁶² *ESL NPRM*, 23 FCC Rcd at 11712, para. 19. SMS enables the transmission of alphanumeric messages, typically up to 160 characters and often sent between mobile subscribers. See, e.g., <http://electronics.howstuffworks.com/sms.htm> (last visited Nov. 25, 2009). In the past, text messaging may have been supported as part of wireless voice service.

⁶³ Funds for Learning *ESL NPRM* Comments at 10; SECA *ESL NPRM* Comments at 9; Sprint Nextel *ESL NPRM* Comments at 4; Verizon *ESL NPRM* Comments at 7 (noting that educators use text messaging in the same way they use e-mail for educational purposes and can also use text messaging in situations when they are not able to use e-mail).

⁶⁴ *Schools and Libraries Second Report and Order*, 18 FCC Rcd at 9212, para. 29-30.

⁶⁵ *Id.* In the *Schools and Libraries Second Report and Order*, the Commission determined that voice mail is an “integral part of communications” and adding voice mail as a service eligible for discounts is consistent with Congress’ intent “to enhance . . . access to advanced telecommunications and information services” for schools and libraries. *Id.* at 9212, para. 29. Moreover, the Commission noted that making voice mail eligible would reduce administrative costs, because the cost of voice mail would not need to be broken out of the cost of a bundled price for telecommunications service. *Id.* at 9212, para. 30. This would be analogous with text messaging when text messaging is offered in a bundled package with wireless telephone service.

⁶⁶ The Commission has not determined the regulatory classification of text messaging, and we decline to do so here. However, similar to our statutory analysis with regard to interconnected VoIP, we find that we have the authority to designate text messaging as a service eligible for E-rate support under either categorization. See *supra* para. 12. As with interconnected VoIP, this categorization is not intended to prejudice the regulatory classification of text messaging.

⁶⁷ In another unrelated proceeding, the Commission has stated that “SMS is typically bundled as a feature on the handset with other [mobile] services, such as real-time, two-way switched mobile voice or data that are interconnected with the public switched network.” See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, 15837, para. 55 (2007) (finding that the common carrier obligation to provide roaming extends to services that are real-time, two-way switched voice or data services that are interconnected with the public switched network and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls). We note that a technology plan is not required for text messaging.

⁶⁸ See Appendix B. We do not amend section 54.517 at this time because we are not aware of any non-telecommunications carriers providing text messaging.

18. We remind applicants that text messaging is eligible for E-rate support when used for educational purposes only.⁶⁹ The Commission had established a presumption that activities that occur in a library or classroom or on library or school property are integral, immediate, and proximate to the education of students or the provision of library services to library patrons.⁷⁰ We caution applicants that for purposes of the E-rate program, eligible text messaging would not include applications, software or other special features that, for example, are used to facilitate the mass distribution of text messages, or the creation or management of distribution groups for text messaging.⁷¹

B. Clarifications Regarding the Eligibility for Support of Services in the Funding Year 2010 ESL

19. To assist both applicants and vendors in determining what funding year 2010 ESL services are eligible for discounts, we clarify the eligibility of video on-demand servers, ethernet, web hosting, wireless LAN controllers, VoIP-related services, and virtualization software.

1. Services Eligible for Support in the Funding Year 2010 ESL

20. *Video On-Demand Servers.* Although USAC had proposed to make “video on-demand servers” ineligible in their entirety, we clarify that applicants can continue to receive E-rate discounts as internal connections for the portion of a video on-demand server that enables the transport of video to the classroom or parts of a library.⁷² The portion of a video on-demand server that enables the storage of video or other content, however, would remain ineligible. To clarify the eligibility status of a video on-demand server, we add the term “video content storage” to the list of ineligible storage components on the ESL. This should more clearly delineate the portion of a video on-demand server that is ineligible for discounts.⁷³ Currently, applicants are using servers that house video for various purposes, including transporting information over a wide area network (WAN) or LAN to classrooms from a central server.⁷⁴ We note that there may be video on-demand servers that are primarily dedicated to the storage of video and other content and the cost-allocation used by the manufacturer should accurately reflect the true use of the server. We also caution applicants that duplicative products or services are ineligible.⁷⁵ If applicants are using other products or services to transport video or information throughout their school or library buildings, the portion of a video on-demand server that also provides this capability will be considered duplicative and ineligible.

21. *Ethernet.* We clarify that ethernet is an eligible digital transmission technology in the telecommunications funding category of the ESL.⁷⁶ Ethernet technology provides a network that

⁶⁹ “Educational purposes” has been defined as activities that are integral, immediate, and proximate to the education of students or library patrons. *Schools and Libraries Second Report and Order*, 18 FCC Rcd at 9208, para. 17.

⁷⁰ *Id.*

⁷¹ An example of this type of ineligible application would be broadcast or blast messaging.

⁷² This is similar to eligible video components. *See* 2009 ESL at 15.

⁷³ *Id.*

⁷⁴ Funds for Learning 2010 ESL Public Notice Comments at 12; Library Video Company 2010 ESL Public Notice Comments at 4-7; *see also infra* para. 23 (finding wireless LAN controllers to be eligible for E-rate program funding).

⁷⁵ *See Schools and Libraries Second Report and Order*, 18 FCC Rcd at 9209-10, paras. 22-23; 2009 ESL at 22.

⁷⁶ *See* 2010 ESL Public Notice (draft ESL at 3).

connects computers.⁷⁷ Although traditionally associated with local area networks, technology has evolved such that ethernet networks can span large distances and can provide connections from within an eligible school or library to other locations beyond the school or library.⁷⁸ Therefore, we find that for purposes of the E-rate program, ethernet service is eligible in the telecommunications funding category. We agree with commenters who state that adding ethernet to the ESL “reflects the evolution of telecommunications technologies that are commercially available and is a clarification of previous eligibility.”⁷⁹ We also note that although it was not specifically listed in the ESL for funding year 2009, ethernet is a type of digital transmission service that has been eligible for E-rate discounts when purchased as a Priority 1 telecommunications service.⁸⁰

22. Web hosting. We clarify that web pages protected by a username and password are eligible for funding as part of web hosting services.⁸¹ The fact that a school or library restricts access to all or part of its website to certain users—e.g., school administrators, teachers, librarians and students—does not render the service ineligible for E-rate funds. Web hosting has been on the ESL since funding year 2004, as Internet access.⁸² We emphasize that an eligible web hosting service is limited to hosting a school or library’s website – software applications, end-user file storage, and content editing features are still ineligible components of a web hosting service.⁸³ Such ineligible web hosting features would include, but would not be limited to, the posting of content created by third party vendors, any type of interactive application feature that would allow for blogging, and any features involving data input or retrieval including searching of databases for grades, student attendance files, or other reports. We caution applicants that they must cost-allocate these types of ineligible features.⁸⁴ The clarification to allow funding for web pages protected by a username and password was intended to allow school administrators, parents, students, and library employees to view web pages that, may, for various reasons, need to be restricted from viewing by the rest of the public. This clarification was not intended to allow applicants to obtain funding for additional web hosting-related applications and features beyond the

⁷⁷ See How Ethernet Works, Nick Pidgeon, <http://www.howstuffworks.com/ethernet.htm/printable> (last visited Dec. 2, 2009). Ethernet networks traditionally operated within a single building, connecting devices in close proximity. *Id.* At most, ethernet devices could have only a few hundred meters of cable between them, making it impractical to connect geographically dispersed locations. *Id.* Modern advancements have increased these distances considerably, allowing ethernet networks to span tens of kilometers. *Id.*

⁷⁸ *Id.* Aside from on-premises Priority 1 equipment, any equipment that does not extend beyond a school campus or library branch would be considered an internal connection and eligible for Priority 2 funding only. See 2009 ESL at 10.

⁷⁹ *Id.* at 4.

⁸⁰ Funds for Learning 2010 ESL Public Notice Comments at 3.

⁸¹ This is a clarification of the existing funding treatment of this type of web hosting. See Schools and Libraries News Brief, dated April 10, 2009, http://www.usac.org/sl/tools/news-briefs/preview.aspx?id=219&WT.mc_id=sl-newsbrief-20090424 (last visited Dec. 2, 2009).

⁸² See, e.g., Eligible Services List, Schools and Libraries Support Mechanism for Funding Year 2004, http://www.usac.org/_res/documents/sl/pdf/ESL_archive/EligibleServicesList_101003.pdf (last visited Dec. 2, 2009) (2004 ESL).

⁸³ See 2009 ESL at 7.

⁸⁴ 47 C.F.R. § 54.504(g) (requiring requests for discounts for services that includes both eligible and ineligible components to allocate the cost of the contract to eligible and ineligible components.)

service that enables a school or library to have hosted web pages, including any application software or features that may be required to maintain password protected web pages.⁸⁵

23. *Wireless LAN Controllers.* We agree with USAC that wireless LAN controllers should be specifically listed in the ESL as eligible internal connections under the data distribution category.⁸⁶ A wireless LAN controller is a device that is a central component of a wireless network solution and that helps to manage the large-scale deployment of a wireless network.⁸⁷ In its proposed changes to the ESL for E-rate funding year 2010, USAC proposes to include a definition of a wireless LAN controller as a component that is used in conjunction with access points to create a wireless local area network.⁸⁸ USAC defines an “access point” as a base station in a wireless LAN and states that access points are typically stand-alone devices that may plug into an ethernet hub or server or may provide a repeater function for wireless networks.⁸⁹ When a school or library is relying on a wireless network solution, wireless LAN controllers, in conjunction with access points, are necessary for the delivery of information all the way to the classrooms of the school or rooms of the library. Under the E-rate program, internal connections components are those that are necessary to “transport information within one or more instructional buildings of a single school campus or within one or more non-administrative buildings that comprise a single library branch.”⁹⁰ Wireless LAN controllers, therefore, are eligible for support under the E-rate program as internal connections. Applicants have been receiving support for wireless LAN controllers as eligible internal connections and this change to the ESL is merely a clarification of the service’s existing funding status.⁹¹

24. *Interconnected VoIP-Related Software.* We agree with USAC that we should clarify that funding for user licenses for VoIP systems are eligible server based software and can be requested in the internal connections funding category.⁹² Interconnected VoIP user licenses are necessary for the utilization of the VoIP system. They are similar to client access licenses for eligible software products,

⁸⁵ Indeed, SchoolSpeak claims that, for vendors to provide password protected pages, the vendors need to be application service providers, so that they can manage user names and passwords, user authentication web pages, and support the logic for creating and displaying appropriate pages based on privileges. SchoolSpeak, Inc. *2010 ESL Public Notice Comments* at 1-2. We agree with SchoolSpeak that this portion of a web hosting service is not “pure web hosting” where a school creates web pages and either uses file transfer protocol or a web interface to upload files.

⁸⁶ See *2010 ESL Public Notice* (draft ESL at 12).

⁸⁷ See *The Benefits of Wireless LAN Controller in Small and Mid-sized Business Networks*, Netgear, http://www.netgear.com/upload/product/wfs709tp/enUS_WP_WFS709TP.pdf (last visited Dec. 2, 2009). Traditional wireless LAN deployments consist of access points operating as separate and independent nodes that are autonomously configured. *Id.* at 1. Also called “fat” access points, these access points on the network are managed, operated, and configured independently. *Id.* A wireless LAN controller is a centralized device in a network, usually located at the data center, to which all the wireless access points on the network are directly or indirectly connected. *Id.* at 2. By virtue of its centralized location and intelligence, the wireless LAN controller is aware of the wireless LAN environment. *Id.* It provides services that can lower the cost of deployment, simplify management, and provide multiple layers of security. *Id.*

⁸⁸ See *2010 ESL Public Notice* (draft ESL at 47).

⁸⁹ See *id.* (draft ESL at 28).

⁹⁰ 47 C.F.R. § 54.506(a); see also *Tennessee Order*, 14 FCC Rcd at 13754, para. 37.

⁹¹ See *IBM 2010 ESL Public Notice Comments* at 2; *Funds for Learning 2010 ESL Public Notice Comments* at 6.

⁹² See *2010 ESL Public Notice* (draft ESL at 15). The listing for “Software” in the ESL will be changed to add VoIP user licenses.

except that they are specific to VoIP systems. Client access licenses are currently eligible for E-rate funding.⁹³ Commenters agree with the proposed clarification, noting that applicants have received funding for these services in prior funding years.⁹⁴

25. Virtualization Software. We agree with USAC that virtualization software is eligible for E-rate support as internal connections.⁹⁵ As stated above, under the E-rate program, internal connections components are those that are necessary to “transport information within one or more instructional buildings of a single school campus or within one or more non-administrative buildings that comprise a single library branch.”⁹⁶ USAC’s draft ESL for funding year 2010 states that virtualization software allows for the creation of multiple virtual servers on a single server, essentially allowing the work of multiple servers to be performed on one server.⁹⁷ We agree with Funds for Learning that virtualization software should be eligible for E-rate funding when it is used for eligible server functions.⁹⁸ Moreover, one of the internal connections for which the E-rate program provides discounts is operating system software, which enables the basic operations of a computer system or other electronic device.⁹⁹ We find that virtualization software is a type of operating system software. Applicants can use virtualization software to transport information within its school or library, and, in so doing, would be using a single server to perform the tasks of what would usually take multiple servers. Thus, virtualization software may be a cost-effective technology for applicants and is eligible for E-rate funding. If applicants also use virtualization software for functions that are ineligible for E-rate support, such as archiving, functions that support ineligible applications, or network management, the applicants must perform a cost allocation to remove the ineligible functions from their E-rate funding requests.

2. Services Ineligible for Support in the Funding Year 2010 ESL

26. In this section, we determine that several services are not eligible for funding under the E-rate program’s current definitions of eligible services.

27. Telephone Broadcast Messaging. We agree with USAC that telephone broadcast messaging should not be added to the ESL because we find that it does not fit within any of the current categories of supported services. A broadcast messaging service is one that can call hundreds or thousands of recipients and play a pre-recorded message from school administrators about information including, but not limited to, weather delays or closings, school absences, or child safety issues.¹⁰⁰ Broadcast messaging has been described by commenters as an add-on to voice mail service and an

⁹³ The 2009 ESL defined a “client access license” as a software licensing approach used by some vendors that provides authorization to access a software product. *See* 2009 ESL at 31.

⁹⁴ *See* E-MPA 2010 ESL Public Notice Comments at 1; Funds for Learning 2010 ESL Public Notice Comments at 7; SECA 2010 ESL Public Notice Comments at 5. We note that, similar to client access licenses, user licenses for VoIP systems are internal connections and therefore the two-in-five rule applies. *See* 2009 ESL at 10, 26.

⁹⁵ *See* 2010 ESL Public Notice (draft ESL at 15).

⁹⁶ 47 C.F.R. § 54.506(a); *see also* Tennessee Order, 14 FCC Rcd at 13754, para. 37.

⁹⁷ *See* 2010 ESL Public Notice (draft ESL at 46). The draft also states that the virtual servers efficiently share the hardware of the server upon which the software is installed. *Id.*

⁹⁸ *See* Funds for Learning 2010 ESL Public Notice Comments at 10-11; IBM 2010 ESL Public Notice Comments at 2.

⁹⁹ *See* 2009 ESL at 13, 39. Operating system software, for example, can configure the communication paths between memory and storage, and provides basic functions for other software to operate correctly. *Id.* at 39.

¹⁰⁰ *See* Blackboard ESL NPRM Comments at 4; Leib Lurie ESL NPRM Comments at 1.

application riding on top of a service provider's telecommunications infrastructure.¹⁰¹ Only a few categories of software are eligible for E-rate funding, however, including operating system software, e-mail software, and software for a server-based, shared voice mail system. While voice mail has been designated as an eligible service,¹⁰² and the E-rate program pays for the software for a server-based shared voice mail system, the record in the *ESL NPRM* proceeding established that telephone broadcast messaging is an "add-on to voice mail" service and not software for voice mail itself. Therefore, we find that broadcast messaging consists of applications or features that do not fit into any of the current categories of supported services and thus, should not be added to the list of software applications that are currently eligible for support as internal connections. Moreover, we find that it would not be in the public interest to add telephone broadcast messaging to the ESL when requests for E-rate funding consistently exceed the funding cap. While we believe that many school districts find telephone broadcast messaging a useful service, we do not believe it is essential to the educational purposes of schools and libraries, and funding this service may have an adverse effect on funds available for other already eligible services.¹⁰³

28. *Unbundled Warranties.* We find that unbundled warranties are not services eligible for E-rate discounts as basic maintenance of internal connections.¹⁰⁴ In its proposed changes to the ESL, USAC proposes to add unbundled warranty to the basic maintenance category of the ESL and defines "unbundled warranty" as a separately priced warranty allowing for broken equipment to be fixed or, in the event that the problem is beyond repair, replaced.¹⁰⁵ The Commission has found that basic maintenance services are eligible for universal service support as Priority 2 internal connections service if, but for the maintenance at issue, the internal connection would not function and serve its intended purpose with the degree of reliability ordinarily provided in the marketplace to entities receiving such services.¹⁰⁶ We do not add unbundled warranties to the ESL at this time because we find that a warranty may be duplicative of an applicant's maintenance agreement or contract, which is eligible for E-rate discounts. To avoid the potential waste of E-rate resources, we decline to allow applicants to receive E-rate discounts for duplicative unbundled warranties.¹⁰⁷ Moreover, the current ESL states that basic maintenance is eligible for discount only if it is a component of a maintenance agreement or contract for eligible components.¹⁰⁸ An unbundled warranty would not be a component of a maintenance agreement or contract for eligible components. Therefore, we find that an unbundled warranty is not eligible for E-rate funds as basic maintenance.

29. *Power Distribution Units.* We agree with USAC that the ESL should be updated to clearly state that power distribution units are not eligible for E-rate support as internal connections.¹⁰⁹

¹⁰¹ See Leib Lurie *ESL NPRM* Comments at 1; On-Tech Consulting, Inc. *ESL NPRM* Reply Comments at 2.

¹⁰² *Schools and Libraries Second Report and Order*, 18 FCC Rcd at 9212-13, paras. 28-30.

¹⁰³ See *Telecommunications: Long-Term Strategic Vision Would Help Ensure Targeting of E-rate Funds to Highest-Priority Uses*, United States Government Accountability Office Report to Congressional Requesters, GAO-09-253 at 18-21 (March 2009) (March 2009 GAO Report). Priority 2 services include cabling, components, routers, switches, and network servers that are necessary to transport information to individual classrooms, public rooms in a library, or eligible administrative areas. *Id.* at 7.

¹⁰⁴ See 2010 *ESL Public Notice* (draft ESL at 20).

¹⁰⁵ *Id.* at 20 and 45.

¹⁰⁶ *Schools and Libraries Third Report and Order*, 18 FCC Rcd at 26921-22, para. 23; see also 47 C.F.R. § 54.506(b).

¹⁰⁷ See 2009 ESL at 22.

¹⁰⁸ 2009 ESL at 19.

¹⁰⁹ See 2010 *ESL Public Notice* (draft ESL at 17).

USAC proposes to define a “power distribution unit” as a power strip designed for data centers or racks with greater capacity and features than a power strip, and a “power strip” as a group of sockets that allow for multiple power cords to plug into a single device.¹¹⁰ Power strips have not previously been eligible for E-rate funding and, because a power distribution unit is merely a type of power strip with additional capacities and features, we find that it is also ineligible for E-rate program funds.¹¹¹

30. Softphones. We agree with USAC’s proposal to clarify in the ESL that softphones are software that is ineligible for E-rate funding.¹¹² The Commission has approved operating system software, e-mail software, and software for a server-based, shared voice mail system as eligible software under the internal connections funding category for E-rate.¹¹³ USAC proposes to define a softphone as end-user application software that allows users the use of a personal computer’s microphone and speakers to make telephone calls in place of a physical end-user telephone.¹¹⁴ This type of application software is unlike the types of software the Commission has previously approved for E-rate funding and, as commenters note, softphones perform the same functions as physical desktop telephones, which are end-user equipment and are not eligible for E-rate funding.¹¹⁵

31. Interactive White Boards. We agree with USAC and commenters that the ESL should clarify that interactive white boards are end-user equipment that is ineligible for E-rate funding.¹¹⁶ End-user equipment, such as desktop telephones, personal computers, fax machines, and modems, for example, is not eligible for E-rate discounts.¹¹⁷ In its draft ESL for funding year 2010, USAC defines an “interactive white board” as a device that allows end-users to display information with a vast array of interactive features.¹¹⁸ We find, therefore, that interactive white boards are end-user equipment that is not eligible for E-rate funding.

32. E-mail Archiving. We agree with USAC’s proposal to clarify in the ESL that e-mail archiving is an ineligible component of an e-mail service.¹¹⁹ In addition, we agree with USAC’s clarification to the draft ESL for funding year 2010 that, for purposes of E-rate support, storage products

¹¹⁰ See *id.* (draft ESL at 41).

¹¹¹ See, e.g., 2009 ESL at 16.

¹¹² See 2010 ESL Public Notice (draft ESL at 18).

¹¹³ See 2009 ESL at 13-14.

¹¹⁴ See 2010 ESL Public Notice (draft ESL at 43).

¹¹⁵ See Funds for Learning 2010 ESL Public Notice Comments at 13; SECA 2010 ESL Public Notice Comments at 6-7.

¹¹⁶ See 2010 ESL Public Notice (draft ESL at 18-19); see also Funds for Learning 2010 ESL Public Notice Comments at 13; SECA 2010 ESL Public Notice Comments at 6-7.

¹¹⁷ See *Common Carrier Reiterates Services Eligible for Discounts to Schools and Libraries*, CC Docket No. 96-45, Public Notice, 13 FCC Rcd 16570 (Comm. Car. Bur. 1998).

¹¹⁸ See 2010 ESL Public Notice (draft ESL at 36). Interactive whiteboards typically have a screen onto which the computer image is projected. See *How Classroom Video Conferencing Works*, Jennifer Horton, <http://communication.howstuffworks.com/classroom-video-conferencing.htm/printable> (last visited Nov. 25, 2009) (Classroom Video Conferencing Description). Teachers and students can write on the screen, and software can save the lesson. Classroom Video Conferencing Description. Similar add-ons include features such as document cameras, which allow the simultaneous display of photos or written documents. Classroom Video Conferencing Description.

¹¹⁹ See 2010 ESL Public Notice (draft ESL at 7).

may be used for eligible e-mail files but not for e-mail archiving.¹²⁰ USAC's draft ESL for funding year 2010 defines e-mail archiving as a form of electronic recordkeeping, often compressing e-mail files to make available greater in-box space.¹²¹ For example, when e-mail is archived to reduce in-box size, reduce hard drive space, and retain records for future retrieval, it constitutes the storage of end-user files and is ineligible for E-rate discounts. Although E-rate eligible e-mail services can include a short-term storage component that enables the user to view current e-mails, any long-term storage service is ineligible for E-rate discounts and we agree with USAC that this distinction should be made clear to applicants in the 2010 ESL.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

33. In this further notice of proposed rulemaking, we seek comment on the tentative conclusions we make regarding services discussed in the *ESL NPRM* that were not addressed in the attached order. Congress charged the Commission with establishing competitively neutral rules to enhance access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms and libraries; and also provided the Commission with the authority to designate "special" or "additional" services eligible for universal service support for schools and libraries.¹²² It is by this authority that we tentatively conclude that separately priced firewall services, anti-virus and anti-spam software, teleconferencing scheduling services, and wireless Internet access applications, should not be added to the ESL. Additionally, we tentatively conclude that web hosting should not be eligible for funding under the E-rate program, or, alternatively, should only be eligible for E-rate program funds as a Priority 2 service. We also seek comment on our tentative conclusions that specific eligible products and services should be listed only in the ESL as opposed to being listed individually in the rules, and to require USAC to submit any proposed changes to the ESL to the Commission by March 30th of each year. We also tentatively conclude that we will remove the requirement in the rule that the Commission release a public notice when annually releasing the draft ESL and final ESL. By not specifying the procedural vehicle by which the ESL will be released, the rules will provide the Commission with flexibility to decide to release the ESL by public notice or order and, as necessary, to provide more details as to why certain services are changed, added, or excluded from the ESL.

A. Services

34. Firewall. We tentatively conclude that we should decline to add separately priced firewall services to the ESL.¹²³ In the 2007 ESL, the Commission clarified that only basic firewall services that are provided as a standard component of a vendor's Internet access service are eligible for E-rate program discounts.¹²⁴ Some commenters support the inclusion of separately priced firewall services as necessary protection for Internet services and equipment.¹²⁵ Another commenter supports an updated

¹²⁰ See *id.* (draft ESL at 15).

¹²¹ See *id.* (draft ESL at 34).

¹²² 47 U.S.C. § 254 (h)(2), (c)(3).

¹²³ *ESL NPRM*, 23 FCC Rcd at 11713, para. 20.

¹²⁴ 2007 ESL at 6-7. Firewall service is described as "a hardware and software combination that sits at the boundary between an organization's network and the outside world, and protects the network against unauthorized access or intrusions." See 2008 ESL at 34.

¹²⁵ AT&T *ESL NPRM* Comments at 8; ESPA *ESL NPRM* Comments at 13.

definition of eligible firewall services.¹²⁶ Others noted that the addition of separately priced firewall services may have an adverse affect on the funds available for other types of services.¹²⁷ The E-rate program already funds basic firewall services, giving applicants a basic level of protection.¹²⁸ We tentatively conclude that the inclusion of separately priced firewall services is not essential and may have an adverse effect on funds available for other already eligible services.¹²⁹ We seek comment on this tentative conclusion and also ask that commenters provide examples of how separately priced firewalls are used by schools and libraries so that we can determine whether we should reexamine our tentative conclusion. We also seek comment on a suggested updated definition of basic firewall services and whether that would provide better guidance to applicants on what types of basic firewall services are eligible for E-rate funding.¹³⁰

35. Anti-Virus/Anti-Spam Software. We tentatively conclude that we should not add anti-virus and anti-spam software to the ESL and seek comment on this tentative conclusion.¹³¹ Some commenters noted that these types of software are necessary for the protection of Internet services and equipment.¹³² Anti-virus and anti-spam software is not an Internet access service itself but is a separate software application designed to enhance the operation of Internet access service. Only a few categories of software are eligible for E-rate funding, however, including operating system software, e-mail software, and software for a server-based, shared voice mail system.¹³³ We tentatively conclude that anti-virus and anti-spam software should not be added to the list of eligible software under internal connections because this software does not fit into the categories of software that are currently on the ESL.¹³⁴ Even if anti-virus and anti-spam software are generally considered necessary for the operation of e-mail, we agree with commenters that noted that such products should not be funded because their addition to the ESL may have an adverse affect on the funds available for other services.¹³⁵ We seek comment on these tentative conclusions.

36. Scheduling Services. We tentatively conclude that we should not adopt scheduling services as eligible for E-rate funding.¹³⁶ As explained above, only operating system software, e-mail software, and software for a server-based, shared voice mail system have been approved for E-rate funding.¹³⁷ Scheduling software allows schools and libraries to use video teleconferencing for distance

¹²⁶ Council of the Great City Schools *ESL NPRM* Comments at 5 (stating that the Commission must be careful to reimburse only firewall-related functions, and not other functions).

¹²⁷ American Library Association *ESL NPRM* Comments at 5; E-Rate Central *ESL NPRM* Comments at 3.

¹²⁸ 2007 ESL at 6-7.

¹²⁹ See March 2009 GAO Report.

¹³⁰ See Funds for Learning *ESL NPRM* Comments at 9.

¹³¹ *ESL NPRM*, 23 FCC Rcd at 11713, para. 21.

¹³² AT&T *ESL NPRM* Comments at 8; ESPA *ESL NPRM* Comments at 13-15.

¹³³ The software that is eligible for E-rate funding is eligible under Priority 2 as internal connections.

¹³⁴ *Tennessee Order*, 14 FCC Rcd at 13754, para. 37; Funds for Learning *ESL NPRM* Comments at 9.

¹³⁵ American Library Association *ESL NPRM* Comments at 5; Council of the Great City Schools *ESL NPRM* Comments at 5; E-Rate Central *ESL NPRM* Comments at 3. Funds for Learning also noted that USAC might have difficulty discerning the appropriate eligibility of anti-virus software without a specific definition. Funds for Learning *ESL NPRM* Comments at 9.

¹³⁶ *ESL NPRM*, 23 FCC Rcd at 11713-14, para. 22.

¹³⁷ See 2009 ESL, at 13-14.

learning by coordinating between locations.¹³⁸ We believe that scheduling services, while potentially useful for schools and libraries, does not fit into the categories of software that are currently on the ESL. We also find that schools and libraries are able to use video teleconferencing for distance learning without scheduling services and therefore such services are not essential. The E-rate program is operated with a finite amount of funding and we tentatively conclude that funds should not be shifted from necessary components to add scheduling services to the program. We seek comment on this tentative conclusion.

37. *Web hosting.* Web hosting, as an unbundled Internet access service, was added to the ESL in October 2003, for funding year 2004.¹³⁹ In funding year 2004, web hosting was described as an Internet service provided by an Internet service provider that will host a school or library's website (www.schoolname.org) as part of a bundled service offering, or as an optional service.¹⁴⁰ Because web hosting is listed in the ESL as Internet access, it is funded under the E-rate program as a Priority 1 service. Although web hosting has been included as part of Internet access, we now seek comment on whether web hosting should continue to be eligible for funding under the category of Priority 1 Internet access. We tentatively conclude that web hosting should not be eligible for funding under the E-rate program, or, alternatively, should only be eligible for E-rate program funds as a Priority 2 service. We tentatively conclude that we should remove web hosting from the ESL because, while many school districts find web hosting to be a useful way to post information for parents and the community, we do not believe it is essential to the educational purposes of schools and libraries. We seek comment on this tentative conclusion.

38. If we decide to retain web hosting on the ESL, we tentatively conclude that web hosting is not Internet access or an information service and it should move to Priority 2. In funding year 2004, there was a presumption in the ESL description of web hosting that web hosting was to be provided by an Internet service provider.¹⁴¹ In today's marketplace, web hosting vendors are not necessarily Internet service providers, and although a basic web hosting service is comprised of the physical rental of space on a vendor's server for the hosting of an applicant's web site, comments in the *2010 ESL Public Notice* demonstrate that web hosting service has greatly evolved with a variety of optional or included features.¹⁴² To the extent the Commission adopts the tentative conclusion that web hosting service is eligible as a Priority 2 service, what aspects of this service should be eligible and how should an eligible Priority 2 web hosting service be described in the ESL? Also, SECA suggests that contracts between web hosting vendors and applicants should be required to itemize the pricing of E-rate eligible features and elements of web hosting.¹⁴³ We seek comment on SECA's proposal.

39. *Wireless Internet Access Applications.* We tentatively conclude that certain wireless Internet access applications including, but not limited to, services that could be used on school buses to transmit emergency information, track students, and locate buses with GPS technology, are ineligible for

¹³⁸ See, e.g., Embarq *ESL NPRM* Comments at 13.

¹³⁹ *2004 ESL* at 12.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See Edline *2010 ESL Public Notice* Reply Comments; SchoolSpeak Inc. *2010 ESL Public Notice* Comments; SECA *2010 ESL Public Notice* Comments at 10-17.

¹⁴³ See SECA *2010 ESL Public Notice* Reply Comments at 3. SECA claims that web hosting "vendors have become adept at packaging their services so to increase the cost of the [eligible services] and decrease the cost of ineligible services" and that K-12 web hosting vendors are charging fees for eligible web hosting features that are significantly higher than web hosting fees charged in other market sectors. SECA *2010 ESL Public Notice* Comments at 15-16.

E-rate support.¹⁴⁴ In their comments, Sprint Nextel and Verizon noted that the restriction on services that go beyond basic conduit access to the Internet is outdated.¹⁴⁵ They note that these applications should be funded if they are used for an “educational purpose,” as defined by the Commission.¹⁴⁶ We seek comment on how or why these applications serve an educational purpose. Other commenters noted that more time is needed to evaluate these applications before allowing applicants to use E-rate program funds to purchase them.¹⁴⁷ Like scheduling software, we find that wireless Internet access applications are non-essential services and we tentatively conclude that we should not add them to the ESL at this time. We seek comment on this tentative conclusion.

B. Administrative Matters Related to the ESL

40. *Commission’s Rules Regarding Eligible Services.* In the *ESL NPRM*, we sought comment on whether we should reorganize or restructure the rules relating to eligible services and the ESL to better inform applicants of which services are supported.¹⁴⁸ Currently, sections 54.502 and 54.503 of the Commission’s rules state that telecommunications carriers may provide telecommunications, Internet access, and internal connections; section 54.506 defines internal connections; section 54.517 provides that non-telecommunications carriers may provide voice mail, Internet access, and internal connections; and section 54.518 describes the wide area network services that will be supported.¹⁴⁹ We tentatively conclude that the rules should be restructured so that all of the provisions relating to eligible services can be located in the same place and seek comment on this tentative conclusion. We propose rules in Appendix C but seek comment on whether the rules should be restructured differently.¹⁵⁰

41. As noted above, there are several Commission rules that address the services that are eligible for E-rate support. The rules generally provide that telecommunications, Internet access, internal connections, and basic maintenance are eligible for E-rate support.¹⁵¹ They also, however, refer to specific services such as voice mail or wide area networks.¹⁵² The ESL also lists specific services that are eligible for E-rate support, e.g., Centrex is listed as a supported service under the telecommunications services category.¹⁵³ Applicants may be confused by the differences between the Commission’s rules and the ESL. Thus, we propose that the rules regarding eligible services should make clear that the specific

¹⁴⁴ *ESL NPRM*, 23 FCC Rcd at 11714-15, para. 24.

¹⁴⁵ Sprint Nextel *ESL NPRM* Comments at 2; Verizon *ESL NPRM* Comments at 8; *see also* Qualcomm 2010 *ESL Public Notice* Reply Comments at 4-8; San Diego Unified School District 2010 *ESL Public Notice* Reply Comments at 3; Sprint Nextel 2010 *ESL Public Notice* Comments at 1-2, Verizon 2010 *ESL Public Notice* Comments at 2-4.

¹⁴⁶ Sprint Nextel 2010 *ESL Public Notice* Comments at 1; Sprint Nextel *ESL NPRM* Comments at 1-2; Verizon 2010 *ESL Public Notice* Comments at 2-3; Verizon *ESL NPRM* Comments at 8-10. “Educational purposes” has been defined as activities that are integral, immediate, and proximate to the education of students or library patrons. *Schools and Libraries Second Report and Order*, 18 FCC Rcd at 9208, para. 17. The Commission found that examples of educational purposes included wireless telecommunications services on a school bus or on a library’s mobile unit van. *Id.* at 9209, n.28.

¹⁴⁷ Council of the Great City Schools *ESL NPRM* Comments at 6; ESPA *ESL NPRM* Comments at 18.

¹⁴⁸ *See ESL NPRM*, 23 FCC Rcd at 11705-06, para. 7.

¹⁴⁹ 47 C.F.R. §§ 54.502, 54.503, 54.506, 54.517, and 54.518.

¹⁵⁰ *See* Appendix C.

¹⁵¹ *See* 47 C.F.R. §§ 54.502, 54.503, 54.506, and 54.517.

¹⁵² *See* 47 C.F.R. §§ 54.517-54.518.

¹⁵³ *See* 2009 ESL at 3.

services eligible for support under the general categories of telecommunications, Internet access, and internal connections will be listed in the ESL and not specifically named in the Commission's rules. We tentatively conclude that any reference to specific services or products in the rules should be removed and instead the rules should state that all products and services eligible for E-rate support will be listed in the ESL. We seek comment on this tentative conclusion.

42. Section 54.522 of the Commission's rules provides a transparent process by which the ESL can be changed from funding year to funding year. The process requires USAC to submit any proposed changes to the ESL for the following funding year by June 30th of each year to the Commission so that the Commission can release such proposals by public notice for comment. Any final changes to the ESL for the following funding year are voted on and released after this comment period. We find that this process provides the public with ample notice of any potential changes to the eligibility status of certain products and services. Requiring the Commission to change its rules with the addition of each new service or change to the ESL does not enable USAC and Commission to keep up with the rapidly changing needs of schools and libraries to access telecommunications and advanced services. We find that our tentative conclusion to remove from our rules all references to specific services eligible for support will provide the Commission with the flexibility to make E-rate discounts available on new and improved products and services in a fluid yet predictable environment. We seek comment on the reasons we have provided for our tentative conclusion. We also seek comment on any alternative proposals or ideas that would better inform the public of the services that are eligible for E-rate support.

43. Because we tentatively conclude that reference to specific services should not be made in the rules, we propose to remove section 54.518 from our rules.¹⁵⁴ Section 54.518 states that applicants cannot receive E-rate support to build or purchase a WAN.¹⁵⁵ Instead, the program's requirements pertaining to WANs will be included in the ESL. We emphasize that this proposal will not change the current eligibility of WANs.¹⁵⁶ We seek comment on our tentative conclusion to delete this rule.

44. In addition, we tentatively conclude that we should change the name of the category of supported services currently called "Internet access" to "Internet access and information services" in the ESL. We have defined Internet access as "basic conduit access to the Internet."¹⁵⁷ The current ESL, however, also includes e-mail under the category of "Internet access." While e-mail uses the Internet, it is not, itself, Internet access. As such, we believe including "information services" in the descriptive title of the category would more accurately reflect the type of services eligible. We seek comment on this proposed change.

45. *Commission's Rules Regarding the ESL Process.* We tentatively conclude that we should change the process by which the Commission adopts changes to the ESL. First, we tentatively conclude that USAC should file its proposed ESL with the Commission no later than March 30th each year. Section 54.522 of the Commission's rules requires USAC to submit a draft ESL with any proposed changes to the Commission by June 30th of each year.¹⁵⁸ The Commission then releases a public notice seeking comment on USAC's proposed ESL. Section 54.522 of the Commission's rules requires the Commission to release the final ESL at least 60 days prior to the opening of the application filing window for the next

¹⁵⁴ See 47 C.F.R. § 54.518; Appendix C.

¹⁵⁵ *Id.*

¹⁵⁶ Applicants can receive support for leasing a WAN but, at this time, building or purchasing a WAN will remain ineligible. *Id.*

¹⁵⁷ *Universal Service First Report and Order*, 12 FCC Rcd at 9008-09, para. 436.

¹⁵⁸ 47 C.F.R. § 54.522.

E-rate funding year.¹⁵⁹ For the last two years, USAC has opened the application filing window in early November for funding year 2008 and early December for funding year 2009.¹⁶⁰ The current rule, therefore, allows approximately three months for the Commission to release the proposed draft of the ESL, for the public to review and comment on the draft, and for the Commission to release the final ESL. After five years of experience with this process, we have found that we have not had enough time to complete all of the steps required by the rule and release the final ESL 60 days prior to the opening of the application filing window. Indeed, on at least three prior occasions, as we have done this year, we have waived section 54.522 to allow USAC to open the application filing window without having to wait 60 days from the release of the final ESL.¹⁶¹ We find that requiring USAC to submit the proposed ESL earlier will allow additional time for the Commission to review the proposal and to review and analyze public comment on the proposed ESL. In the alternative, we seek comment from the public on any other methods by which we can streamline this process and keep it one that allows for ample public notice and opportunities for public participation.

46. We also tentatively conclude that we should change the provision in section 54.522 of the Commission's rules that requires the Commission to issue a public notice seeking comment on USAC's proposed annual changes to the ESL and another public notice announcing the release of the final ESL for the upcoming funding year.¹⁶² Specifically, we believe the rules should be changed to remove the requirement that the ESL be released as a public notice by the Commission. This will provide the Commission with flexibility to provide, for example, more detailed explanations regarding changes to the ESL in an order when it deems necessary. We seek comment on this tentative conclusion.

V. PROCEDURAL MATTERS

A. Paperwork Reduction Act Analysis

47. This report and order does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

B. Final Regulatory Flexibility Certification

48. The Regulatory Flexibility Act of 1980, as amended (RFA),¹⁶³ requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial

¹⁵⁹ *Id.*

¹⁶⁰ See, e.g., *Schools & Libraries News Archives for 2008*, 11/24/2008 - FY2009 Application Filing Window Dates Established, <http://www.usac.org/sl/tools/news-archive/2008.aspx> (last visited Dec. 2, 2009); *Schools & Libraries News Archives for 2007*, 10/29/2007 - FY2008 Application Filing Window Dates Established, <http://www.usac.org/sl/tools/news-archive/2007.aspx> (last visited Dec. 2, 2009).

¹⁶¹ See *Release of Funding Year 2009 Eligible Services List for Schools and Libraries Universal Service Mechanism*, CC Docket No. 02-6, Public Notice, 23 FCC Rcd 17646 (2008); *Release of Funding Year 2008 Eligible Services List for Schools and Libraries Universal Service Mechanism*, CC Docket No. 02-6, Public Notice, 22 FCC Rcd 18751 (2007); *Release of Funding Year 2007 Eligible Services List for Schools and Libraries Universal Service Mechanism*, CC Docket No. 02-6, Public Notice, 21 FCC Rcd 12310 (2006).

¹⁶² See Appendix C; see also 47 C.F.R. § 54.522.

¹⁶³ The RFA, see 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

number of small entities.”¹⁶⁴ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹⁶⁵ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹⁶⁶ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹⁶⁷

49. In the report and order, we modify our rules to expressly include interconnected voice over Internet protocol (VoIP) and text messaging as eligible services in our rules governing the E-rate program. We also release the list of services that will be eligible for discounts for E-rate funding year 2010.¹⁶⁸ This Eligible Services List (ESL) is released on an annual basis to enable school and library applicants and other affected entities to determine the services and products that are eligible for E-rate discounts. In the report and order we add services to the ESL but do not remove any services from the list. Thus, the only changes made in our report and order result in the ability of schools and libraries to seek E-rate discounts for more services than were available to them in the prior funding year. This means that the rule revisions will result in a positive net impact on small entities. Therefore, we certify that the requirements of the report and order will have no significant economic impact.

50. The Commission will send a copy of the report and order, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act.¹⁶⁹ In addition, the report and order (or summary thereof) and this final certification will be published in the Federal Register, and will be sent to the Chief Counsel for Advocacy of the U.S. Small Business Administration.¹⁷⁰

C. Initial Paperwork Reduction Act Analysis

51. This further notice of proposed rulemaking does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified “information collection burden for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

D. Initial Regulatory Flexibility Analysis

52. As required by the Regulatory Flexibility Act of 1980, as amended,¹⁷¹ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) for this further notice of proposed

¹⁶⁴ 5 U.S.C. § 605(b).

¹⁶⁵ 5 U.S.C. § 601(6).

¹⁶⁶ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

¹⁶⁷ 15 U.S.C. § 632.

¹⁶⁸ See Appendix D.

¹⁶⁹ See 5 U.S.C. § 801(a)(1)(A).

¹⁷⁰ See 5 U.S.C. § 605(b).

¹⁷¹ 5 U.S.C. § 603.

rulemaking (FNPRM), of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this (FNPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the FNPRM. The Commission will send a copy of the FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.¹⁷² In addition, the FNPRM and IRFA (or summaries thereof) will be published in the Federal Register.¹⁷³

1. Need for, and Objectives of, the Proposed Rules

56. The Commission is required by section 254 of the Act to promulgate rules to implement the universal service provisions of section 254. On May 8, 1997, the Commission adopted rules to reform its system of universal service support mechanisms so that universal service is preserved and advanced as markets move toward competition.¹⁷⁴ Specifically, under the schools and libraries universal service support mechanism, also known as the E-rate program, eligible schools, libraries, and consortia that include eligible schools and libraries may receive discounts for eligible telecommunications services, Internet access, and internal connections.¹⁷⁵ Since the initial implementation of the E-rate program, USAC has developed various procedures and guidelines, consistent with the Commission's rules and requirements, to ensure that funding is provided only for eligible services.¹⁷⁶

57. Pursuant to the Commission's rules, the Commission released the Public Notice seeking comment on USAC's proposed ESL for Funding Year 2010.¹⁷⁷ The ESL indicates whether specific products or services are eligible for discounts under the E-rate program.¹⁷⁸ In *2009 ESL Public Notice*, we noted that this proceeding is limited to determining what services are eligible under the Commission's current rules and is generally not intended to be a vehicle for changing any eligibility rules.¹⁷⁹ We also noted, however, that the Commission sought comment on various issues including the eligibility of specific services in the *ESL NPRM* released last year and invited parties that wanted their *ESL NPRM* comments considered in response to the public notice to refile those comments.¹⁸⁰

58. In the FNPRM, we seek comment on the Commission's tentative conclusion that the ESL should not add separately-priced firewall services, anti-virus/anti-spam software, scheduling services, and wireless Internet access applications. The Commission agrees with commenters that these services are either not eligible under the Act or are not essential to furthering the goals and purposes of the E-rate program. Further, we agree with commenters that paying for the discount on these services would have an adverse effect on services that are already being funded. We also seek comment on the Commission's tentative conclusion that web hosting should not be eligible for funding under the E-rate program, or,

¹⁷² See 5 U.S.C. § 603(a).

¹⁷³ *Id.*

¹⁷⁴ *Universal Service Order*, 12 FCC Rcd 8776.

¹⁷⁵ 47 C.F.R. §§ 54.502, 54.503.

¹⁷⁶ See USAC website, Eligible Services List, http://www.usac.org/_res/documents/sl/pdf/ESL_archive/EligibleServicesList_112108.pdf (last visited Dec. 2, 2009).

¹⁷⁷ *Comment Sought on Draft Eligible Services List for Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, DA 09-1233, Public Notice (rel. June 2, 2009) (*2009 ESL Public Notice*).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 2.

¹⁸⁰ *Id.*

alternatively, should only be eligible for E-rate program funds as a Priority 2 service. The Commission does not believe that web hosting is essential to the educational purposes of schools and libraries. We also seek comment on changes to our rules to establish that specific eligible products and services should be listed in the ESL as opposed to being listed individually in the rules. We seek comment on our tentative conclusions on the process for developing the ESL, including requiring the Universal Service Administrative Company (USAC) to submit any proposed changes to the ESL to the Commission no later than March 30th of each year. Finally, we seek comment on the Commission's tentative conclusion to revise our rules to eliminate the requirement that the ESL be released by public notice, which would provide the Commission the flexibility to release the ESL by order. All of these administrative changes would bring clarity and transparency to the ESL process and would benefit all participants in the program.

2. Legal Basis

59. The legal basis for the FNPRM is contained in sections 1 through 4, 201 through 205, 254, 303(r), and 403 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. §§ 151 through 154, 201 through 205, 254, 303(r), and 403, and section 1.411 of the Commission's rules, 47 C.F.R. § 1.411.

3. Description and Estimate of the Number of Small Entities to Which Rules Will Apply

60. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.¹⁸¹ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹⁸² In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹⁸³ A small business concern is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.¹⁸⁴ Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.¹⁸⁵ A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."¹⁸⁶ Nationwide, as of 2002, there were approximately 1.6 million small organizations.¹⁸⁷ "Small governmental jurisdiction"¹⁸⁸ generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."¹⁸⁹ Census Bureau

¹⁸¹ 5 U.S.C. § 603(b)(3).

¹⁸² 5 U.S.C. § 601(6).

¹⁸³ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

¹⁸⁴ Small Business Act, 15 U.S.C. § 632.

¹⁸⁵ See SBA, Programs and Services, SBA Pamphlet No. CO-0028, at 40 (July 2002).

¹⁸⁶ 5 U.S.C. § 601(4).

¹⁸⁷ Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2002).

¹⁸⁸ 47 C.F.R. § 1.1162.

¹⁸⁹ 5 U.S.C. § 601(5).

data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.¹⁹⁰ We estimate that, of this total, 84,377 entities were “small governmental jurisdictions.”¹⁹¹ Thus, we estimate that most governmental jurisdictions are small.

61. Small entities potentially affected by the proposals herein include eligible schools and libraries and the eligible service providers offering them discounted services, including telecommunications service providers, Internet Service Providers (ISPs), and vendors of the services and equipment used for internal connections.¹⁹²

a. Schools

62. As noted, “small entity” includes non-profit and small government entities. Under the schools and libraries universal service support mechanism, which provides support for elementary and secondary schools, an elementary school is generally “a non-profit institutional day or residential school that provides elementary education, as determined under state law.”¹⁹³ A secondary school is generally defined as “a non-profit institutional day or residential school that provides secondary education, as determined under state law,” and not offering education beyond grade 12.¹⁹⁴ For-profit schools, and schools and libraries with endowments in excess of \$50,000,000, are not eligible to receive discounts under the program.¹⁹⁵ Certain other statutory definitions apply as well.¹⁹⁶ The SBA has defined for-profit, elementary and secondary schools having \$7 million or less in annual receipts as small entities.¹⁹⁷ In funding year 2007 approximately 105,500 schools received funding under the schools and libraries universal service mechanism. Although we are unable to estimate with precision the number of these entities that would qualify as small entities under SBA’s size standard, we estimate that fewer than 105,500 schools might be affected annually by our action, under current operation of the program.

b. Libraries

63. As noted, “small entity” includes non-profit and small government entities. Under the schools and libraries universal service support mechanism, which provides support for libraries, the definition of library includes public libraries, public elementary school or secondary school libraries, academic libraries, certain research libraries and private libraries where the state has determined that the library should be considered a library for purposes of this definition.¹⁹⁸ For-profit libraries are not eligible to receive discounts under the program, nor are libraries whose budgets are not completely separate from

¹⁹⁰ U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, page 272, Table 415.

¹⁹¹ We assume that the villages, school districts, and special districts are small, and total 48,558. *See* U.S. Census Bureau, Statistical Abstract of the United States: 2006, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

¹⁹² 47 C.F.R. §§ 54.502, 54.503, 54.517(b).

¹⁹³ 47 C.F.R. § 54.500(c).

¹⁹⁴ 47 C.F.R. § 54.500(k).

¹⁹⁵ 47 C.F.R. § 54.501.

¹⁹⁶ *See id.*

¹⁹⁷ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 611110.

¹⁹⁸ 47 C.F.R. § 54.500(d).

any schools.¹⁹⁹ Certain other statutory definitions apply as well.²⁰⁰ The SBA has defined for-profit libraries having \$7 million or less in annual receipts as small entities.²⁰¹ In funding year 2007 approximately 10,950 libraries received funding under the schools and libraries universal service mechanism. Although we are unable to estimate with precision the number of these entities that would qualify as small entities under SBA's size standard, we estimate that fewer than 10,950 libraries might be affected annually by our action, under current operation of the program.

c. Telecommunications Service Providers

64. *Incumbent Local Exchange Carriers (LECs)*. Neither the Commission nor the SBA has developed a size standard for small incumbent local exchange services. The closest size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁰² According to Commission data, 1,311 incumbent carriers reported that they were engaged in the provision of local exchange services.²⁰³ Of these 1,311 carriers, an estimated 1,024 have 1,500 or fewer employees and 287 have more than 1,500 employees.²⁰⁴ Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted herein.

65. We have included small incumbent local exchange carriers in this RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."²⁰⁵ The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.²⁰⁶ We have therefore included small incumbent carriers in this RFA analysis, although we emphasize that this RFA action has no effect on the Commission's analyses and determinations in other, non-RFA contexts.

66. *Interexchange Carriers*. Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under the SBA rules is for wired telecommunications carriers.²⁰⁷ This provides that

¹⁹⁹ 47 C.F.R. § 54.501.

²⁰⁰ *See id.*

²⁰¹ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 519120 (NAICS code 519120 was previously 514120).

²⁰² 13 C.F.R. § 121.201, NAICS code 517110.

²⁰³ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.5, Page 5-5 (August 2008) (*2008 Trends Report*).

²⁰⁴ *Id.*

²⁰⁵ 5 U.S.C. § 601(3).

²⁰⁶ *See* Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC, dated May 27, 1999. The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* U.S.C. § 632(a) (Small Business Act); 5 U.S.C.

§ 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

²⁰⁷ 13 C.F.R. § 121.201, NAICS Code 517110.

a wired telecommunications carrier is a small entity if it employs no more than 1,500 employees.²⁰⁸ According to the Commission's *2008 Trends Report*, 300 companies reported that they were engaged in the provision of interexchange services.²⁰⁹ Of these 300 IXC's, an estimated 268 have 1,500 or few employees and 32 have more than 1,500 employees.²¹⁰ Consequently, the Commission estimates that most providers of interexchange services are small businesses that may be affected by the rules and policies adopted herein.

67. *Competitive Access Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to competitive access services providers (CAPs). The closest applicable definition under the SBA rules is for wired telecommunications carriers.²¹¹ This provides that a wired telecommunications carrier is a small entity if it employs no more than 1,500 employees.²¹² According to the *2008 Trends Report*, 1,005 CAPs and competitive local exchange carriers (competitive LECs) reported that they were engaged in the provision of competitive local exchange services.²¹³ Of these 1,005 CAPs and competitive LECs, an estimated 918 have 1,500 or few employees and 87 have more than 1,500 employees.²¹⁴ Consequently, the Commission estimates that most providers of competitive exchange services are small businesses that may be affected by the rules and policies adopted herein.

68. *Wireless Telecommunications.* Neither the Commission nor the SBA has developed a definition of small entities specifically for wireless telephony. The closest definition is the SBA definition for wireless telecommunications (except satellite).²¹⁵ Under this definition, a cellular licensee is a small entity if it employs no more than 1,500 employees.²¹⁶ According to the *2008 Trends Report*, 434 providers classified themselves as providers of wireless telephony, including cellular telecommunications, Personal Communications Service, and Specialized Mobile Radio (SMR) Telephony Carriers.²¹⁷ Of these 437 wireless telephony providers, an estimated 222 have 1,500 or few employees and 212 have more than 1,500 employees.²¹⁸ Consequently, the Commission estimates that more than half of the providers of wireless telephony services are small businesses that may be affected by the rules and policies adopted herein.

69. *Other Wireless Services.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to wireless services other than wireless telephony.²¹⁹ The closest

²⁰⁸ *Id.*

²⁰⁹ *2008 Trends Report*, Table 5.3, page 5-5.

²¹⁰ *Id.*

²¹¹ 13 C.F.R. § 121.201, NAICS Code 517110.

²¹² *Id.*

²¹³ *2008 Trends Report*, Table 5.3, page 5-5.

²¹⁴ *Id.*

²¹⁵ 13 C.F.R. § 121.201, NAICS Code 517210.

²¹⁶ *Id.*

²¹⁷ *2008 Trends Report*, Table 5.3, page 5-5.

²¹⁸ *Id.*

²¹⁹ The Commission has adopted a number of service-specific definitions of small businesses for various categories of wireless service, principally in the context of the Commission's rules governing spectrum auctions. *See Assessment and Collection of Regulatory Fees for Fiscal Year 2001*, MD Docket No. 01-76, Report and Order, 16

applicable definition under the SBA rules is again that of wireless telecommunications (except satellite), under which a service provider is a small entity if it employs no more than 1,500 employees.²²⁰ According to the *2008 Trends Report*, 69 providers classified themselves as wireless data carriers or other mobile service providers.²²¹ Of these 69 providers, an estimated 65 have 1,500 or few employees and 4 have more than 1,500 employees.²²² Consequently, the Commission estimates that most providers of wireless services other than wireless telephony are small businesses that may be affected by the rules and policies adopted herein.

70. *Paging and Messaging Service Providers.* In the *Paging Third Report and Order*, we developed a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.²²³ A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000.²²⁴ Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. At present, there are approximately 24,000 Private-Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to Commission data, 281 carriers reported that they were engaged in the provision of paging services, messaging services, or other mobile services.²²⁵ Of those, the Commission estimates that 279 are small, under the SBA approved small business size standard.²²⁶

d. Internet Service Providers

71. Under the category of Internet service provider, a small business is one having annual receipts of \$23 million or less.²²⁷ According to SBA data, there are a total of 2,829 firms with annual receipts of less than \$10 million, and an additional 111 firms with annual receipts of \$10 million or more.²²⁸ Thus, the number of On-line Information Services firms that are small under the SBA’s \$18

FCC Rcd 13525, Attachment A, paras. 31-54 (2001). For purposes of administering the E-rate program, however, we find that it is appropriate to address the various non-telephony wireless services as a group.

²²⁰ 13 C.F.R. § 121.201, NAICS Code 517212.

²²¹ *2008 Trends Report*, Table 5.3, page 5-5.

²²² *Id.*

²²³ *Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, GN Docket No. 93-252, PP Docket No. 93-253, Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068-70 paras. 291-295 (1997), 62 FR 16004 (Apr. 3, 1997), at paras. 291-295.

²²⁴ *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, PR Docket No. 93-253, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, at para. 98 (1999).

²²⁵ *2008 Trends Report*, Table 5.3, page 5-5.

²²⁶ *Id.*

²²⁷ 13 C.F.R. § 121.201, NAICS Code 518111.

²²⁸ 1997 Census Report, Establishment and Firm Size, U.S. Census Bureau, U.S. Department of Commerce, Economics and Statistics Administration, Document EC97S51S-SZ, <<http://www.census.gov/prod/ec97/97s51-sz.pdf>>, at 24.

million size standard is between 2,829 and 2,940. Further, some of these Internet Service Providers (ISPs) might not be independently owned and operated. Consequently, we estimate that there are fewer than 2,940 small entity ISPs that may be affected by the decisions and rules of the present action.

e. Vendors of Internal Connections

72. *Communications Equipment Manufacturers.* The Commission has not developed a definition of small entities applicable to the manufacturers of internal network connections. The most applicable definitions of a small entity are the definitions under the SBA rules applicable to manufacturers of “Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing”²²⁹ and “Other Communications Equipment Manufacturing.”²³⁰ According to the SBA's regulations, manufacturers of these types of communications equipment must have 750 or fewer employees in order to qualify as a small business.²³¹ The most recent available Census Bureau data indicates that there are 1,187 companies with fewer than 1,000 employees in the United States that manufacture radio and television broadcasting and communications equipment, and 271 companies with less than 1,000 employees that manufacture other communications equipment.²³² Some of these manufacturers might not be independently owned and operated. Consequently, we estimate that there are fewer than 1,458 small entity internal connections manufacturers that may be affected by the decisions and rules of the present action.

73. *Wireless Communications Equipment Manufacturers.* The SBA has established a small business size standard for radio and television broadcasting and wireless communications equipment manufacturing. Under this standard, firms are considered small if they have 750 or fewer employees.²³³ Census Bureau data for 1997 indicate that, for that year, there were a total of 1,215 establishments²³⁴ in this category.²³⁵ Of those, there were 1,150 that had employment under 500, and an additional 37 that had employment of 500 to 999. The percentage of wireless equipment manufacturers in this category is approximately 61 percent,²³⁶ so the Commission estimates that the number of wireless equipment manufacturers with employment under 500 was actually closer to 706, with an additional 23 establishments having employment of between 500 and 999. Given the above, the Commission estimates that the majority of wireless communications equipment manufacturers are small businesses.

²²⁹ 13 C.F.R. § 121.201, NAICS Code 334220.

²³⁰ 13 C.F.R. § 121.201, NAICS Code 334290.

²³¹ *Id.*

²³² 1997 Economic Census, Manufacturing, Industry Series, Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, Document No. E97M-3342B (August 1999), at 14; 1997 Economic Census, Manufacturing, Industry Series, Other Communications Equipment Manufacturing, Document No. EC97M-3342C (September 1999), at 14 (both available at <<http://www.census.gov/prod/www/abs/97ecmani.html>>).

²³³ 13 C.F.R. § 121.201, NAICS Code 334220.

²³⁴ The number of “establishments” is a less helpful indicator of small business prevalence in this context than would be the number of “firms” or “companies,” because the latter take into account the concept of common ownership or control. Any single physical locations for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses. In this category, the Census breaks-out data for firms or companies only to give the total number of such entities for 1997, which was 1,089.

²³⁵ U.S. Census Bureau, 1997 Economic Census, Industry Series: Manufacturing, “Industry Statistics by Employment Size,” Table 4, NAICS code 334220 (issued August 1999).

²³⁶ *Id.* Table 5, “Industry Statistics by Industry and Primary Product Class Specialization: 1997.”

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

74. The FNPRM does not result in additional recordkeeping requirements for small businesses. To the extent that new items are added to the ESL, schools, libraries and service providers will merely have additional choices of services eligible for discount when they voluntarily participate in the E-rate program. Likewise, removing or not adding a service to the ESL would have no additional impact on recordkeeping requirements.

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

75. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance and reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or part thereof, for small entities.²³⁷

76. In the FNPRM, we seek comment on a number of issues related to services eligible for E-rate discounts, including issues raised by the commenters that may not have been addressed as part of prior ESL proceedings. Specifically, we determine that anti-virus and anti-spam software and other services should not be added to the ESL. We believe that keeping these services off the ESL will not have an adverse impact on small entities since the services were never funded in the first place. Applicants and service providers have never had an expectation that E-rate discounts would apply to these services and will therefore not be harmed by a decision to maintain the status quo. We seek comment on this tentative conclusion.

77. We also make the tentative conclusion that web hosting be removed from the ESL. We propose, however, that this change should be implemented in the funding year following the rule change. This will give applicants affected by the removal of web hosting time to find alternative funds for the service, if necessary. Delaying the removal of web hosting will also mitigate any economic impact on those small entities providing the service. In addition, we propose additional outreach from USAC to inform and educate applicants and service providers on the change. We seek comment on these proposals to mitigate the impact of removing web hosting and seek comment generally on the economic impact of this tentative decision.

78. We also make tentative conclusions regarding administrative matters such as restructuring the eligible rules, requiring USAC to submit a proposed draft ESL to the Commission on March 30th of each year, and revising our rules to state that all products and services eligible for E-rate support will be named in the ESL. We believe these changes will have no economic impact on entities participating in the E-rate program and, indeed, will benefit participants by making the rules and application process easier to understand and administer. We welcome, however, comments from parties that have opinions different from those reached in this analysis.

²³⁷ See 5 U.S.C. § 603(c).

6. Federal Rules that may Duplicate, Overlap, or Conflict with the Proposed Rules

53. None.

E. *Ex Parte* Presentations

54. These matters shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.²³⁸ Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.²³⁹ Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission’s rules.²⁴⁰

F. Comment Filing Procedures

55. Pursuant to sections 1.415 and 1.419 of the Commission’s rules,²⁴¹ interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission’s Electronic Comment Filing System (ECFS); (2) the federal government’s eRulemaking Portal; or (3) by filing paper copies.²⁴²

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.
 - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, “get form.” A sample form and directions will be sent in response.
 - Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.
- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.
 - The Commission’s contractor will receive hand-delivered or messenger-delivered paper filings for the Commission’s Secretary at 236 Massachusetts Avenue, NE, Suite 110,

²³⁸ 47 C.F.R. §§ 1.1200-1.1216.

²³⁹ 47 C.F.R. § 1.1206(b)(2).

²⁴⁰ 47 C.F.R. § 1.1206(b).

²⁴¹ 47 C.F.R. §§ 1.415, 1.419.

²⁴² See *Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-115, Report and Order, 13 FCC Red 11322 (1998).

Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington, DC 20554.

56. In addition, one copy of each pleading must be sent to the Commission's duplicating contractor, Best Copy and Printing, Inc, 445 12th Street, SW, Room CY-B402, Washington, DC 20554; website: www.bcpiweb.com; phone: 1-800-378-3160. Furthermore, three copies of each pleading must be sent to Antoinette Stevens, Telecommunications Access Policy Division, Wireline Competition Bureau, 445 12th Street, SW, Room 5-B521, Washington, DC 20554; e-mail: antoinette.stevens@fcc.gov.

57. Filings and comments are also available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, S.W., Room CY-A257, Washington, D.C., 20554. Copies may also be purchased from the Commission's duplicating contractor, BCPI, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554. Customers may contact BCPI through its website: www.bcpiweb.com, by e-mail at fcc@bcpiweb.com, by telephone at (202) 488-5300 or (800) 378-3160 (voice), (202) 488-5562 (tty), or by facsimile at (202) 488-5563.

58. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov; phone: (202) 418-0530 or TTY: (202) 418-0432.

59. For further information, contact James Bachtell or Cara Voth at (202) 418-7400 in the Telecommunications Access Policy Division, Wireline Competition Bureau.

VI. ORDERING CLAUSES

60. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1 through 4, 201-205, 254, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 through 154, 201 through 205, 254, 303(r), and 403, this further notice of proposed rulemaking IS ADOPTED.

61. IT IS FURTHER ORDERED, that pursuant to the authority contained in sections 1 through 4, 201-205, 254, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201 through 205, 254, 303(r), and 403, this report and order IS ADOPTED.

62. IT IS FURTHER ORDERED, that pursuant to the authority contained in sections 1 through 4, 201-205, 254, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201 through 205, 254, 303(r), and 403, sections 54.503, 54.507, and 54.517 of the Commission's rules, 47 C.F.R. §§ 54.503, 54.507 and 54.517, IS AMENDED as set forth in Appendix B, effective thirty (30) days after the publication of this report and order in the Federal Register.

63. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this report and order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

64. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this further notice of proposed rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A**List of Commenters**

Parties Filing Comments in Response to the *ESL NPRM*

Commenters

1. Acton Public Schools and Acton-Boxborough Regional School District
2. Agawam Public Schools
3. Alisal Union School District
4. American Library Association
5. Amherst-Pelham Regional Schools
6. Amherst Public Schools
7. Pelham Elementary School
8. Andover Public Schools
9. Atlantic City Schools
10. AT&T, Inc.
11. Attica Central School District
12. Avoyelles Parish School District
13. BASCOM Global Internet Services, Inc.
14. Belvidere Community Unit School District #100
15. Berkeley Albany YMCA
16. Berkeley County School District
17. Berryessa Union School District
18. Blackboard Inc. Blackboard
19. Black Oak Mine Unified School District
20. Boyertown Area School District
21. Brockton Public Schools
22. Calhoun County School District
23. Carrollton-Farmers Branch ISD
24. Castaic Union School District
25. Cedar Rapids Public Library
26. Central School District
27. Ceres Unified School District
28. Chaffey Joint Union High School District
29. Charles City Community School District
30. Chicopee Public Schools
31. City School District of New Rochelle
32. Clover Park School District
33. Comcast Corporation Comcast
34. Community Consolidated School District 93
35. Community Unit School District 95
36. Council of the great City Schools
37. Crespi Carmelite High School
38. Deer Park School District
39. eChalk eChalk
40. Edgecombe County Public Schools
41. Education and Libraries Network Coalition (EdLINC)
42. Elkin City Schools District
43. Embarq Corporation
44. Emerson Board of Education

45. Emerson Public Schools
46. E-Rate Central
47. E-Rate Service Providers Association (ESPA)
48. Everett School District #2
49. Fairfax County Public Schools
50. FiberTower Corporation
51. Fillmore USD
52. Flagstaff USD No. 1
53. Floyd County Schools
54. Folsom Cordova USD
55. Francis Howell R-III School District
56. Frenchtown School District #40
57. John P. Mazzola, Vice-Chair
58. Judy McKay, Principal/Director of Academics
59. Funds for Learning, LLC
60. Gaston County School District
61. Greater Lowell Technical High School
62. Greenfield Public Schools
63. Greenport Union Free School District
64. Gulfport School District
65. Gustine USD
66. Hamilton County School District
67. Hampden-Wilbraham Regional School District
68. Hanford Joint Union High School District
69. Henrico County Public Schools
70. Hickman County School System
71. Holbrook Public Schools
72. Indian Prairie School District #204
73. Indianapolis Public Schools
74. Isle of Wight County Schools
75. Jefferson-Scranton Community School District
76. Kaneland Community School District #302
77. Keansburg School District
78. Kershaw County School District
79. Lake Elsinore Unified School District
80. Lancaster School District
81. Lassen Union High School District
82. Lawndale Elementary School District
83. Lexington County School District Two
84. Lexington Public Schools
85. Lincoln Public School District
86. Livermore Valley Joint USD
87. Lower Moreland Township School District
88. Ludlow Public Schools
89. Lynnfield Public Schools
90. Madison School District #321
91. Magnolia School District
92. Marian High School
93. Marietta City Schools District
94. Martin County School District
95. Middle Country Central School District

96. Monroe County School District
97. Mooresville Graded School District
98. Murrieta Valley USD
99. Myers Memorial Library
100. National Cable & Telecommunications Association (NCTA)
101. National Emergency Response & Rescue Training Center
102. Newark Central School District
103. New Orleans Center for Creative Arts
104. Northampton Public Schools
105. Norwalk La Mirada USD
106. Nyack Union Free School District
107. One Communications Corp.
108. Orange County Public Schools
109. Oswego Community Unit School District 308 Oswego
110. Owen J. Roberts School District
111. Paterson Public Schools District
112. Pearland ISD
113. Pioneer Union School District
114. Pleasant Valley School District
115. Pollock Pines School District
116. Port Chester Rye UFSD School District
117. Prairie Valley Community School District
118. Qwest Communications International Inc.
119. Redding School District
120. Roanoke Rapids Graded School District
121. Rowland USD
122. Sampson County School District
123. Sanger USD
124. San Juan USD
125. Santa Maria-Bonita School District
126. Sapulpa Public Schools
127. School Administrative Unit 34 SAU #34
128. School Board of Polk County
129. Seymour Public Schools
130. Shaffer Union School District
131. Snowline Joint USD
132. Southampton Union Free School District
133. South Vermillion Community Schools
134. Sparta Elementary School
135. Spectrum Communications, Inc.
136. Spring ISD
137. Sprint Nextel Corporation
138. State E-Rate Coordinators Alliance (SECA)
139. Stokes County Schools District
140. Surry County Schools
141. Sylvan Union School District
142. Taylor County School District
143. Technology for Education
144. Tabettha Koerth, Inside Sales Account Manager
145. Daniel Kronke, Design Engineer
146. Crystal Pena, Inside Support Specialist

147. Jeff Strain, Sales Director
148. Jeremy E. Zahirniak, Account Executive, Texas Region XIII
149. Technology in Education Partnership
150. Tennessee School for the Blind
151. Thermalito Union School District
152. Tornillo ISD
153. Twin Rivers USD
154. Upper Arlington City Schools
155. Verizon and Verizon Wireless
156. Victor Valley Union High School District
157. Walton County Public Schools
158. Waterloo Central School District
159. Wayne Central School District
160. West Contra Costa USD
161. Western Boone County Community School Corporation
162. Western Dubuque County Community School District
163. Westport Public Schools
164. West Shore School District
165. Wethersfield Public School District
166. Wilmington Public Schools
167. Wisconsin Department of Public Instruction
168. Yosemite USD
169. Ysleta ISD
170. Yuma Elementary School District 1

Reply Commenters

1. AT&T Inc.
2. Baltimore County Public Schools
3. Blackboard Inc. Blackboard
4. Chicago Public Schools
5. Indianapolis Public Schools
6. Larkspur School District
7. Richland Grade School District 88A
8. Seneca Falls Central School District
9. South Dakota Department of Education
10. Wisconsin Association of Distance Education Networks

Parties Filing Comments in Response to the *2010 ESL Public Notice*

Commenters

1. AT&T Inc.
2. eChalk
3. E-Rate Central
4. E-Rate Management Professionals Association
5. E-Rate Service Providers Association
6. Funds for Learning, LLC
7. IBM Corporation

8. Library Video Company
9. SchoolSpeak Inc.
10. Sprint Nextel Corporation
11. State E-Rate Coordinators Alliance
12. VBrick Systems
13. Verizon and Verizon Wireless
14. VON Coalition

Reply Commenters

1. Edline
2. Qualcomm Incorporated
3. San Diego Unified School District
4. State E-Rate Coordinators Alliance

APPENDIX B**Final Rules****PART 54 -- UNIVERSAL SERVICE**

1. Section 54.503 is revised to read as follows:

54.503 Other supported special services.

For the purposes of this subpart, other supported special services provided by telecommunications carriers include voice mail, interconnected VoIP, text messaging, Internet access, and installation and maintenance of internal connections in addition to all reasonable charges that are incurred by taking such services, such as state and federal taxes. Charges for termination liability, penalty surcharges, and other charges not included in the cost of taking such services shall not be covered by the universal service support mechanisms.

2. Section 54.504 is amended by revising subparagraph (b)(2)(iv) to read as follows:

54.504 Requests for Services

(b) *Posting of FCC Form 470.*

(2)(iv)

(iv) The technology plan(s) has/have been approved by a state or other authorized body; the technology plan(s) will be approved by a state or other authorized body; or no technology plan needed because the applicant is applying for voice mail, interconnected VoIP, or basic local, cellular, PCS, or long distance telephone service only.

3. Section 54.507 is amended by revising subparagraphs (g)(1)(i) and (ii) to read as follows:

54.507 Cap.

(g) *Rules of priority.* The Administrator shall act in accordance with paragraph (g)(1) of this section with respect to applicants that file an FCC Form 471, as described in § 54.504(c) of this part, when a filing period described in paragraph (c) of this section is in effect. The Administrator shall act in accordance with paragraph (g)(2) of this section with respect to applicants that file an FCC Form 471, as described in § 54.504(c) of this part, at all times other than within a filing period described in paragraph (c) of this section.

(1) When the filing period described in paragraph (c) of this section closes, the Administrator shall calculate the total demand for support submitted by applicants during the filing period. If total demand exceeds the total support available for that funding year, the Administrator shall take the following steps:

(i) The Administrator shall first calculate the demand for services listed under the telecommunications and Internet access categories on the eligible services list for all discount levels, as determined by the schools and libraries discount matrix in § 54.505(c). These services shall receive first priority for the available funding.

(ii) The Administrator shall then calculate the amount of available funding remaining after providing support for the telecommunications and Internet access categories for all discount levels. The Administrator shall allocate the remaining funds to the requests for support for internal connections, beginning with the most economically disadvantaged schools and libraries, as determined by the schools

and libraries discount matrix in § 54.505(c) of this part. Schools and libraries eligible for a 90 percent discount shall receive first priority for the remaining funds, and those funds will be applied to their requests for internal connections.

(iii) To the extent that funds remain after the allocation described in §§ 54.507(g)(1)(i) and (ii), the Administrator shall next allocate funds toward the requests for internal connections submitted by schools and libraries eligible for an 80 percent discount, then for a 70 percent discount, and shall continue committing funds for internal connections in the same manner to the applicants at each descending discount level until there are no funds remaining.

4. Section 54.517 is amended by revising paragraph (b) to read as follows:

54.517 Services provided by non-telecommunications carriers.

(b) Supported services. Non-telecommunications carriers shall be eligible for universal service support under this subpart for providing interconnected VoIP, voice mail, Internet access, and installation and maintenance of internal connections.

APPENDIX C**Proposed Rules**

Part 54 of the Code of Federal Regulations is amended as follows:

PART 54 -- UNIVERSAL SERVICE

1. The authority citation continues to read as follows:

Authority: 47 U.S.C. § 151, 154(i), 201, 205, 214, and 254 unless otherwise noted.

Subpart F -- Universal Service Support for Schools and Libraries

2. Section 54.502 is amended to place the existing text in paragraph (a) and adding paragraphs (b), (c) (formerly placed in section 54.506) and (d) (formerly placed in section 54.517) and is revised as follows:

54.502 Supported services.

(a) Telecommunications services - For purposes of this subpart, supported telecommunications services provided by telecommunications carriers include all commercially available telecommunications services in addition to all reasonable charges that are incurred by taking such services, such as state and federal taxes. Charges for termination liability, penalty surcharges, and other charges not included in the cost of taking such service shall not be covered by the universal service support mechanisms. All supported telecommunications services are defined and listed in the Eligible Services List as updated annually in accordance with section 54.503 of the Commission's rules.

(b) Internet access and information services – For purposes of this subpart, supported Internet access and information services include basic conduit access to the Internet and all the services defined in section 54.5 of the Commission's rules as Internet access. All supported Internet access and information services are defined and listed in the Eligible Services List as updated annually in accordance with section 54.503 of the Commission's rules.

(c) Internal connections –

(1) For purposes of this subpart, a service is eligible for support as a component of an institution's internal connections if such service is necessary to transport information within one or more instructional buildings of a single school campus or within one or more non-administrative buildings that comprise a single library branch. Discounts are not available for internal connections in non-instructional buildings of a school or school district, or in administrative buildings of a library, to the extent that a library system has separate administrative buildings, unless those internal connections are essential for the effective transport of information to an instructional building of a school or to a non-administrative building of a library. Internal connections do not include connections that extend beyond a single school campus or single library branch. There is a rebuttable presumption that a connection does not constitute an internal connection if it crosses a public right-of-way. All supported internal connections are defined and listed in the Eligible Services List as updated annually in accordance with section 54.503 of the Commission's rules.

(2) Basic maintenance services – For purposes of this subpart, basic maintenance services shall be eligible as an internal connections service if, but for the maintenance at issue, the internal connection would not function and serve its intended purpose with the degree of reliability ordinarily provided in the marketplace to entities receiving such services. Basic maintenance services do not include services that maintain equipment that is not supported or that enhance the utility of equipment beyond the transport of information, or diagnostic services in excess of those necessary to maintain the equipment's ability to transport information. All supported basic maintenance is defined and listed in the Eligible Services List as updated annually in accordance with section 54.503 of the Commission's rules.

(3) Frequency of discounts for internal connections services. Each eligible school or library shall be eligible for support for internal connections services, except basic maintenance services, no more than

twice every five funding years. For the purpose of determining eligibility, the five-year period begins in any funding year in which the school or library receives discounted internal connections services other than basic maintenance services. If a school or library receives internal connections services other than basic maintenance services that are shared with other schools or libraries (for example, as part of a consortium), the shared services will be attributed to the school or library in determining whether it is eligible for support.

(d) Non-telecommunications carriers shall be eligible for universal service support under this subpart for providing the supported services described in paragraph (b) and (c) of this section for eligible schools, libraries, and consortia including those entities. Such services provided by non-telecommunications carriers shall be subject to all the provisions of this subpart, except Sections 54.501(a), 54.502(a), and 54.515.

3. Section 54.503 is amended to remove all of the text and replace it with the text from section 54.522 in subsection (a) and adding subsection (b) as follows:

54.503 Eligible services list.

(a) The Administrator shall submit by March 30 of each year a draft list of services eligible for support, based on the Commission's rules, in the following funding year. The Wireline Competition Bureau will issue a Public Notice seeking comment on the Administrator's proposed eligible services list. At least 60 days prior to the opening of the window for the following funding year, the final list of services eligible for support will be released.

(b) All supported services are defined and listed in the Eligible Services List as updated annually in accordance with subsection (a) of this section.

4. Sections 54.506, 54.517 and 54.518 are removed.