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HIGHWAY ROBBERY ONLINE: IS E-RATE WORTH THE FRAUD?

I. INTRODUCTION

In today's digital age, there is an increasing societal pressure to be connected to the Internet¹ and those who are not are being left behind. The digital divide is separating many groups of Americans from mainstream society, particularly low-income Americans. Public access to the Internet, found primarily in libraries and schools, is very important in connecting low-income Americans to the World Wide Web.² The Schools and Libraries Universal Service Support Mechanism, commonly known as E-Rate, is a means by which schools and libraries can gain financial support for Internet access from the federal government.³ Since 1997, the Universal Services Administrative Company (USAC)⁴ has disbursed over \$30.3 billion in funding to schools and libraries.⁴ The \$2.25 billion a year, funded by taxes on telephone bills that USAC disburses, places the Internet in classrooms "from Indian reservations and the inner city to the most rural areas."⁵ Unfortunately, the fund has had its share of financial abuse.⁶

1. For purposes of this article, "Internet" will be referred to as "an electronic communications network that connects computer networks and organizational computer facilities around the world." Merriam Webster Online Dictionary, <http://www.m-w.com/dictionary/Internet> (accessed Feb. 4, 2006).

2. See Jonathan Meer, *Getting on the Net: The Struggle for Digital Inclusion of the Navajo*, 22 IEEE Tech. and Socy. Mag. 53 (2003) (explaining that schools and libraries have been the primary public places local citizens access the Internet).

3. See Universal Serv. Admin. Co., *Schools and Libraries Program*, <http://www.sl.universalservice.org> (last modified Mar. 6, 2006) (on file with author) (providing discounts to assist most schools and libraries in the United States to obtain affordable telecommunications and Internet access).

4. F.C.C., *In re Comprehensive Review of Universal Service Fund Management, Administration, and Oversight*, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-124A1.pdf (June 14, 2005) [hereinafter *Comprehensive Review*]; Ken Foskett & Jeff Nesmith, *Abuses Tarnish E-Rate Program*, Atlanta J. and Const. 1A (May 24, 2004).

5. Foskett & Nesmith, *supra* n.4, at 1A.

6. See Kendra Mayfield, *E-Rate Fund Hit by Rampant Fraud*, <http://www.wired.com/news/school/0,1383,57172,00.html> (Jan. 13, 2003) (on file with author) (arguing that E-Rate has been the victim of deceitful contractors and egregious accounting errors by beneficiaries). See also Foskett & Nesmith, *supra* n. 4 (stating that E-Rate has provided benefits and costs across the country, but so

The abuse of E-Rate has led to a controversy over whether it is worth continuing. As of the summer of 2004, there were at least forty nationwide criminal investigations into E-Rate fraud.⁷ As one editorial explained, “it is easy for sly computer and telecom companies to persuade poor and technologically unsavvy school districts to buy equipment and services that they don’t need, and to overcharge the districts, knowing that most of the tab will be picked up by E-rate.”⁸ USAC, which controls the E-Rate fund, along with the FCC and Congress, have all made attempts to fix E-Rate.⁹ Nevertheless, some people have openly argued that E-Rate is not worth saving.¹⁰ With so much federal funding in jeopardy, it is time to take a long, hard look and determine whether the system is worth saving.

This article generally provides an overview of the E-Rate program and demonstrates the overall success of the program. Part II begins with a background section of E-Rate’s history, funding, and accomplishments. Specifically, this section details specific examples of its failures and the temporary fixes the federal government put in place. Part III of this article offers the basic criteria used in determining whether the E-Rate program should be maintained and further proposes recommendations to sustain it. Finally, the conclusion in Part IV considers E-Rate’s place in American Society, tying together its past, present, and future role in preparing our children for the technological future.

has the fraud).

7. *Fraud in E-Rate*, The Providence J. (R.I.) B-04 (July 22, 2004) (stating that hearings by the U.S. House Committee on Oversight and Investigation were the result of the criminal investigations).

8. *Id.* (continuing his editorial by asking policy makers to use more caution in solving the problems in education in the United States).

9. See Universal Serv. Admin. Co., *Whistleblower Hotline (Code 9 Calls)*, <http://www.sl.universalservice.org/reference/whistle.asp> (last modified May 2, 2003) (on file with author) (creating a whistleblower hotline, by USAC, to report when E-Rate policies are being violated); see also *FCC Updates Rules for E-Rate Program*, Telecom A.M., Today’s News Section (Aug. 6, 2004), <http://www.warren-news.com/telecomservices.htm> (adopting new rules by the FCC, to help “uncover abuse, to tighten certification requirements for applicants and to set lengthy document retention requirements”); see generally Bart Jansen, *Last-Minute Deal Fixes E-Rate Budget; Congress Delays an Accounting Change That Would Jeopardize Internet Access of Schools*, Portland Press Herald B1 (Dec. 10, 2004) (passing a law to provide a temporary fix to the USAC accounting problem).

10. See e.g. David Hughes, *End E-Rate Now*, http://www.isp-planet.com/fixed_wireless/politics/2004/hughes_v_erate.html (July 23, 2004) (on file with author) (believing, by one industry member, that E-Rate is just forcing schools to buy telecommunication services, which makes E-Rate like a subsidy for the telephone companies).

II. BACKGROUND

A. History of E-Rate

E-Rate was signed into law by President Clinton on February 8, 1996 as part of the Telecommunications Act of 1996,¹¹ in an effort to assist schools and libraries in obtaining telecommunication services at a discounted rate.¹² Since its inception, the Schools and Libraries Division of USAC has administered E-Rate.¹³ Offering discounts for Internet access was just one part of the Department of Education's plan to effectively implement technology in elementary and secondary education.¹⁴

Congress initially provided up to \$2.25 billion annually to provide discounts of twenty to ninety percent in four categories of Internet service, three of which are Telecommunications Services, Internet Access, and Internal Connections.¹⁵ "Telecommunications Services and Internet Access are considered 'priority one' and are consistently funded; 'priority two' Internal Connections requests are only funded when the budget allows."¹⁶ As the FCC states, "[t]echnology has great power to enhance education. The FCC is working to bring every school and library

11. Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996) (articulating that the main goal of this legislation was to let anyone enter any communications business and to let any communications business compete in any market against any other).

12. F.C.C., *Early History of the Universal Service Proceeding*, <http://www.fcc.gov/learnnet/> (last updated Jan. 8, 2004) [hereinafter *Early History*] (on file with author) (supporting the bill were President Clinton, Vice President Gore and FCC Chairman William Kennard); see also Mike Mills, *FCC Pares School Internet Program; Funding for Program Cut Nearly in Half*, Wash. Post. D1 (July 13, 1998).

13. *Early History*, *supra* n. 12 (defining the role of the Schools and Library Division which is an independent not-for-profit corporation, whose purpose is to administer universal services).

14. U.S. Dept. of Educ., *e-Learning: Putting a World-Class Education at the Fingertips of All Children*, <http://www.ed.gov/about/offices/list/ost/technology/reports/e-learning.html> 9 (last modified Jan. 6, 2004) (implementing E-Rate became one part of the nation's first educational technology plan in 1996).

15. See Sprint, *E-Rate User's Guide*, <http://www.eschoolnews.com/resources/reports/empowered/erlink8.cfm> (Oct. 8, 2004) (on file with author) (breaking down this Act, one provision provides for affordable access to telecommunications services for all eligible K-12 public schools, private schools, and public libraries, particularly those in rural and inner-city areas).

16. *Id.* (funding for internal connections are available only twice in a five year period); see generally Universal Serv. Admin. Co., *Eligible Services List*, http://www.sl.universalservice.org/data/pdf/EligibleServicesList_102704.pdf (Oct. 5, 2004) (on file with author). Some examples of telecommunications services include 800 numbers, cellular service, DSL, interactive television, and wide area network (WAN) services. Examples of Internet Access include not only broadband, cable, and DSL, but also e-mail and firewall service. Internal connections range from cabling, documentation, maintenance and technical support, and satellite dishes. *Id.*

in America into the information age.”¹⁷

I. Public outcry

Public outcry at the inception of E-Rate focused mainly on its financing.¹⁸ Long-distance phone companies added a special charge (either a five percent increase or a flat monthly fee in the ninety-cent range) to consumers' bills starting July 1, 1998. These fees were earmarked to be used for financing E-Rate, as well as programs to “ensure ‘universal’ low-cost phone service to rural and high-cost areas.”¹⁹ The FCC cut the initial amount of E-Rate funding from \$2.3 billion to \$1.3 billion, reduced the salary of the program's administrator, and targeted the remaining funds in order to ensure that the neediest schools would get the money first.²⁰

Aside from the initial phone tax problem, there were also questions about what exactly E-Rate would fund.²¹ Another aspect of E-Rate criticism revolved around the integration of computers and the Internet into education in general.²² Some were pessimistic because research had yet to show convincing evidence of educational gains from “the nation's infatuation with computers in the classroom.”²³ As one journalist noted, “[t]he current bandwagon to put a computer in every classroom in the U.S., or even to get every child in school a laptop, is absurd and wasteful. When the industry bangs this drum, it looks self-serving and greedy.”²⁴ Many believed that access to the Internet and computers was not the solution, but only a compliment to education reform.²⁵

17. *Id.* (expressing the desire that every school and library in the United States enter the information age).

18. *See Mills, supra* n. 12 (opposing the tax were not only consumers, but also the telephone carriers).

19. *See id.* (introducing a flat-fee approach provided more clarity to the consumer and some found this more appealing).

20. *Id.* (reacting to complaints from constituents about their phone bill; this is one response from the FCC).

21. *Gore, The E-Rate and Gobbledygook*, *The Tampa Tribune* 16 (Nov. 27, 1998). Wiring of classrooms and funding for Internet service providers seemed to be what E-Rate would fund. However, some reports even stated that it would provide cable service, carpet, and painting for the schools, which was not the reality. *Id.*

22. Julia Malone, *The Digital Divide: Other Views*, *Atlanta J. & Const.* 9R (Nov. 15, 1998) (arguing by critics that it would create “a generation of children who can point and click, but not think and imagine. They speak of students who can send e-mail to pals across the ocean but not relate to classmates sitting next to them.”).

23. *Id.* (viewing by critics labeling the Internet as “mostly a time-consuming wasteland”).

24. Gary Chapman, *The Cutting Edge; Digital Nation; A Wish List for High-Tech: Get Serious*, *L. A. Times* C1 (Dec. 21, 1998) (articulating that while technology industry leaders are claiming that computers will transform education, opponents claim this argument is without proof).

25. *See id.* (feeling that the Internet needs to be put “into a context that makes sense,” along

Another criticism was that the \$2.25 billion a year cost for Internet service was only a fraction of the overall expense of computerizing schools, estimated as high as \$100 billion for ten years.²⁶ Some felt this type of funding for schools should be used for other problems, such as building repairs, more textbooks, and the “many children who arrive in the mornings too hungry or too afraid to concentrate on studies.”²⁷

2. E-Rate funding criteria

The USAC implemented certain E-Rate funding criteria to distribute over two billion dollars in available funds each year. Schools eligible for E-Rate discounts include elementary and secondary public schools, non-profit elementary and secondary parochial and private schools (with endowments under fifty million dollars), public libraries, and many private, non-profit libraries accessible to the public.²⁸ A specific matrix determines how much of a discount the E-Rate program can provide to schools. Discounts are determined by income, or more specifically, by the percentage of students eligible for the National School Lunch Program.²⁹

Although E-Rate funding has been in place for a number of years and fewer schools are being denied funding because of filing difficulties, some schools still fail at the application process. There are five basic steps in filling out the E-Rate application: (1) prepare a technology plan, which includes determining how much technology will be used to achieve specific curriculum reforms or library service improvements; (2) open the competitive process by posting your list of competitive bids at least twenty-eight days before signing any contracts and sending in the form by January sixth of the desired funding year; (3) seek discounts on eligible services by selecting the vendor and submitting this form with a listing of requested products/services by February fourth of the desired funding year; (4) confirm the receipt of services by confirming services

with some guidance).

26. Malone, *supra* n. 22 (alleging that this potential spending on technology for education would only lead to high-tech companies making an enormous profit on schools).

27. *Id.* (arguing that students are living in an abstract world and computer training is “perhaps harmful until high school”).

28. eChalk, *E-Rate Application Process*, <http://www.echalk.com/erate.html> (accessed Mar. 6, 2006) (on file with author) (describing a specific matrix that determines how much discount the E-Rate program can provide a school system).

29. *Id.* (For example, if less than one percent of students are eligible for free lunch and the school is located in an urban area, the discount will be twenty percent. But for a school in a rural location, the discount is twenty-five percent. If seventy-five percent to one hundred percent of the students are eligible for the free lunch program, the discount in both urban and rural location is ninety percent.).

to School and Libraries Division within 120 days of funding letter or service start date, whichever is later; and (5) receive an invoice for services by collecting E-Rate funds by check or discount within 120 days after the last date to receive service, usually late-October.³⁰

B. Positive Effects of E-Rate:

In 1998, E-Rate's first year, the program provided schools and libraries with \$1.66 billion in funding.³¹ It was reported that in 1998 more than fifty percent of schools had Internet access, an increase from twenty-seven percent in 1997. The twenty-seven percent increase was a significantly bigger jump from the three percent increase in 1994.³² As President Bill Clinton noted:

Because of our efforts, children in the most isolated inner city or rural town will have access to the same universe of knowledge as a child in the most affluent suburb. Our children will be "technologically literate"³³—and better prepared for the high-tech, high-wage jobs of the future.

The breakdown of the \$1.66 billion in funding included \$897 million for internal wiring, another \$661.2 million for Internet access, and \$101.8 million for Internet service support costs.³⁴ By 2002, the fifth year of E-Rate, Internet connectivity in all American public schools rose to ninety-eight percent.³⁵ To summarize the far-reaching effects of E-Rate, one district coordinator noted that "[t]he landscape has changed completely."³⁶

1. Success stories

Despite the problems, E-Rate has had a positive affect on schools.

30. See Sprint, *supra* n. 15 (recommending such steps for a higher success rate in the E-Rate application process).

31. Courtney Macavinta, *E-Rate Wins Praise for 1998*, http://news.com.com/E-rate+wins+praise+for+1998/2100-1023_3-222374.html?tag=nl (Mar. 1, 1999) (on file with author) (describing that of the 30,121 E-Rate applications in 1998-99, 25,785 school districts received funding).

32. *Id.* (determining that smaller and economically disadvantaged schools and larger, wealthier schools were just as likely now to have the Internet).

33. *Id.* (demonstrating that E-Rate was a President Clinton backed plan).

34. *Id.* (receiving the most subsidies was California, followed by New York and Texas, with Delaware receiving the least).

35. Mickey Revenaugh, *The E-Rate at Five*, <http://www.districtadministration.com/page.cfm?p=181> (accessed Mar. 6, 2006) (on file with author) (demonstrating the success of E-Rate that even in the poorest school systems, ninety-four percent were connected to the Net).

36. *Id.* (explaining that one way "[t]he landscape has changed" is that now eighty-five percent of E-Rate applications are filed online).

One example of E-Rate's success is in Mississippi.³⁷ When E-Rate came into existence in 1997, only half of the state's nine hundred schools had Internet access, federal funding for technology was low (only seven million dollars), and the student-to-computer ratio was 28:1.³⁸ By 2002, with \$123 million in E-Rate funding, the student-to-computer ratio in Mississippi was down to 7:1 and one hundred percent had Internet access.³⁹

Another positive example of E-Rate funding in a rural environment is Delta View Joint Union School District in central California.⁴⁰ This district has a total enrollment of ninety students, most of whom do not have computers or Internet access at home.⁴¹ E-Rate, in providing this district with more than \$180,000 in Internet funding, equipped every classroom with five Internet-connected computers.⁴² With Internet in the school, the students' standardized test scores increased dramatically.⁴³

A final example of an E-Rate success story can be seen in New York City where in 1998, a typical school had only two dialup Internet accounts. In 2002, with the help of \$750 million in E-Rate funding, all 1,200 New York City schools were connected to the Internet through the district's frame relay network.⁴⁴ An important consideration for the New York City schools was not only asking for funds sufficient to purchase a system the district could sustain, but also evenly distributing the E-Rate funds to each school.⁴⁵

These examples demonstrate that E-Rate is making a difference. Sam Simon, the chairman of Telecommunications Research & Action Center, said it best: "Ten years ago, most classrooms didn't even have phone lines, much less Internet connectivity. That's changed, and I don't think the country would have gotten there without E-rate."⁴⁶

37. *Id.* (discussing how all the school systems throughout the state have technologically improved because of E-Rate).

38. *Id.* (responding to E-Rate, the State set up the Council for Education Technology, a cooperation of the state's department of education, library system and universities, to create a technology plan for the state).

39. *Id.* (findings by the Urban Institute that Mississippi was one of the top nine "big winners" with E-Rate funding per capita).

40. *Id.*

41. *Id.* (looking toward E-Rate as the "great equalizer" in giving the students the best opportunity to succeed).

42. *Id.* (lowering the district's student-to-computer ratio to 3:1).

43. *Id.*

44. *Id.* (creating a local network of more than 85,000 computers).

45. *Id.* (wiring one school at a time for the Internet might have been more efficient, but this would have left some schools "waiting four or five years with nothing").

46. Marguerite Reardon, *Fraud Threatens Internet Program for U.S. Schools*, http://news.com.com/Eroding+E-rate/2009-1028_3-5236723.html (June 17, 2004) [hereinafter

C. Negative Consequences of E-Rate

1. E.-Rate fraud

While E-Rate has helped connect schools to the Internet, a major downside to the program is that taxpayer dollars have been wasted through fraud. Recently, the FCC, the Department of Justice, and the FBI investigated approximately forty E-Rate fraud cases.⁴⁷ As one commentator noted, “E-rate is the classic example of a program that was begun with good intentions and has found itself suffering from corruption, because there wasn’t sufficient oversight.”⁴⁸ Some view E-Rate as a program that public officials were too eager to initiate, resulting in too few safeguards that caused school districts to fall victim to greedy vendors.⁴⁹ Another factor was that E-Rate has had a low operational cost, and this frugality may have unintentionally compromised setting up proper oversight.⁵⁰ Some disagree, however, noting that there has not been a vast amount of outright fraud, that most of the abuse happened in 1999 and 2000, and that overall, E-Rate administrators “want to follow the rules.”⁵¹

It is speculated that many of the fraud problems come from E-Rate’s structure. While the FCC sets the guidelines for E-Rate, the fund is managed by USAC, a subsidiary of the National Exchange Carrier Association (NECA).⁵² Essentially, the E-Rate fund is partly administered by the industry that receives the money: “telephone companies and Internet service providers.”⁵³

On the other hand, E-Rate’s program director George McDonald seems to be blaming the vendors and service providers for taking “advantage of school districts, persuading them to buy goods and

Reardon, *Fraud*] (on file with author) (stating this praise of E-Rate in the midst of criticism of the problems in the program).

47. *Id.* (investigating the abuses has prompted questions in front of Congress).

48. *Id.* (reviewing such projects like E-Rate have gotten more scrutiny since the financial scandals of WorldCom and Enron).

49. See Paul Davidson, Greg Toppo & Jayne O’Donnell, *Fraud, Waste Mar Plan to Wire Schools to Net*, USA Today 1A (June 9, 2004) (arguing by some that the Universal Service Program’s rapid growth in itself can be the reason for the auditing oversights).

50. See *id.* (operating cost for E-Rate’s is only one percent of the total E-Rate funding).

51. Reardon, *Fraud*, *supra* n. 46 (discussing that the largest scandal involving E-Rate began in 2000).

52. Foskett & Nesmith, *supra* n. 4 (representing 900 U.S. Telephone companies including companies like Verizon, AT&T, Earthlink, and Cox Communications that have officials on the USAC board).

53. *Id.* (deducing one commentator to report that the telecommunication industry involvement in E-Rate is “almost a formula for fraud and abuse”).

services they don't need."⁵⁴ In the forty criminal investigations into E-Rate spending, auditors uncovered millions of wasted dollars.⁵⁵ These criminal investigations occur not only in rural America or with small vendors, but they also include big city school districts and Fortune 500 companies.⁵⁶

Even with the many fraud investigations, government officials acknowledge that E-Rate funding is still not being audited enough to determine whether the funds are being effectively allocated by the school systems.⁵⁷ An auditing process was not even in place until the third year of E-Rate funding.⁵⁸ In 2004, the FCC "completed 110 audits, almost three times as many as in the program's first four years," which was a small fraction compared to the 35,000 applications that were granted.⁵⁹ Despite the small number of audits that were conducted, the results revealed that only about one in three school districts and library systems audited had compliance problems.⁶⁰ The bottom line is that as of October 2004, the E-Rate program has cost the American public thirteen billion dollars, however, with less than one percent of E-Rate recipients being audited, "these cases may be just the tip of the iceberg."⁶¹

2. Puerto Rico fraud example

The largest scandal involving E-Rate has affected Puerto Rico schools. In 2000, it was discovered that Victor Fajardo-Velez, the former Secretary of Education for Puerto Rico, "mismanaged nearly \$100 million in E-rate subsidies."⁶² The E-Rate discounts awarded between 1998 and 2000 were intended to connect all of Puerto Rico's 1,500 schools to the Internet, but as of 2001 only nine schools were connected

54. *Id.* (feeling that service providers and consultants are taking over the application process).

55. *See id.* (Examples of waste include equipment and services that were never delivered, procurement fraud, and kickbacks.).

56. *See id.* (NEC, IBM, and SBC are some examples of companies that have been caught up in E-Rate fraud, affecting such places as San Francisco, Chicago, New York, Atlanta, El Paso, and Puerto Rico.).

57. *Id.* (quoting Tom Bennet, an assistant inspect general at the FCC, "[e]verybody wants to know what is the level of waste, fraud and abuse in the program. We can't answer that question yet because we haven't done enough oversight.").

58. *Id.* (noting that, even once there was an auditing process, only a few school districts were reviewed).

59. *Id.* (realizing it is hard to generalize the results of 110 audits to determine the overall level of fraud in the program).

60. *Id.* (arguing that auditing cannot take the place of an independent oversight).

61. Lisa Snell, *School Net Scams: No Tech Firm Left Behind*, <http://reason.com/0410/ci.ls.school.shtml> (Oct. 2004) (on file with author) (noting that despite the iceberg analogy, Congress is continuing to support E-Rate).

62. Reardon, *Fraud*, *supra* n. 46.

to the Web.⁶³ A criminal indictment was brought against several contractors involved and subsequently, Puerto's Governor, Sila Calderon, announced that all government contracts awarded to Puerto Rico's Department of Education were canceled.⁶⁴ Auditors found numerous problems, such as the allocation of three million dollars a month for Internet connections for schools that did not have computers, as well as "\$23 million in equipment that had never been installed in the schools."⁶⁵ As a result, the Puerto Rico schools have not received E-Rate funding since.⁶⁶ Fajardo-Velez was eventually fined four million dollars for the funding irregularities and sentenced to three years in prison.⁶⁷ The FCC has recently given its approval to Puerto Rico's reforms and allowed the schools to apply for E-Rate funds in 2004.⁶⁸ As Representative James Greenwood, the chairman of the House and Energy and Commerce Committee's Oversight Subcommittee, put it, Puerto Rico is "one of a very large number of bad cases."⁶⁹

3. New York fraud example

In 2003, Connect2 Internet Network was charged with federal crimes⁷⁰ because it allegedly overpaid for equipment the school did not need nor could afford, created counterfeit invoices suggesting that the schools had paid their share, then instructed school officials to "lie about the arrangements."⁷¹ With the above plan, Connect2 was "able to sell

63. *Id.* (complicating matters, Puerto Rico also did not even have the budget to buy the Internet equipment).

64. *Data Research Corp. v. Hernandez*, 261 F. Supp. 2d 61, 65-66 (D.P.R. 2003) (Data Research Corp., a Puerto Rico corporation, submitted bids to the USAC, which were accepted for the purpose of providing Internet access to 760 public schools; however, Internet access was only provided for a small fraction of the schools.).

65. Reardon, *Fraud*, *supra* n. 46 (recognizing that many of the products that were purchased with E-Rate funds are still usable).

66. Davidson, Toppo & O'Donnell, *supra* n. 49 (referring to the fraud as a "rip-off," Puerto Rico's current education Secretary Cesar Rey stated that the audits have eliminated the mismanagement).

67. Reardon, *Fraud*, *supra* n. 46 (recognizing the problem now for Puerto Rico is "trying to go back to square one to build credibility and trust").

68. *Id.* (demonstrating that the reforms by the Department of Education in Puerto Rico were required to receive FCC acceptance).

69. Davidson, Toppo & O'Donnell, *supra* n. 49 (explaining the spending of funds by the school district on Internet access, even though the district was missing computers and upgraded electrical systems).

70. William McQuillen, *Four Men Charged with Bilking Internet Program for Poor Schools*, <http://www.detnews.com/2002/technology/0212/20/technology-39459.htm> (Dec. 19, 2002) (on file with author) ("These defendants sought to line their pockets with government funds intended to help kids in our community.") (quoting U.S. attorney James Comey).

71. Todd Oppenheimer, *The Internet School Scam*, Nation, <http://www.thenation.com/doc/>

almost limitless quantities of E-Rate eligible goods and services to schools across the New York City area, with little or no control on the price they charged, and impose the entire cost on the government.”⁷² Connect2’s nine million dollars of improper E-Rate funds put its owner, John Angelides, in jail. He plead guilty to one count of conspiracy.⁷³

4. San Francisco fraud example

In October 2000, the city of San Francisco was awarded fifty million dollars from E-Rate to network schools in the region.⁷⁴ When it was discovered that the district could build the system for less than its share, suspicions were aroused about NEC’s, the vendor that won the San Francisco project, bid.⁷⁵ The irregularities led to not only the FCC’s involvement, but also the Governmental Fraud Unit of the FBI and the Antitrust Division of the Department of Justice.⁷⁶ Overall, from 1998 through 2004, fifty-three E-Rate applications at twenty schools involving NEC were suspected of fraud, totaling \$380 million in requested E-Rate funding.⁷⁷ Two of the smaller conspirators pled guilty, leading to a guilty admission from NEC.⁷⁸ Then in May 2004, NEC agreed to plead guilty to one count of wire fraud and to one count of conspiracy “to suppress and eliminate competition in violation of the Sherman Antitrust Act” ultimately leading to NEC paying over twenty million dollars in criminal

20040216/oppenheimer (Feb. 16, 2004) (exemplifying one of many questionable financial dealings that the FCC’s Inspector General uncovered).

72. John Schwartz, *Schools’ Internet Subsidies Are Called Fraud-Riddled*, N.Y. Times A14 (Jan. 10, 2003) (receiving improper E-Rate funds from 1998 to 2001).

73. Oppenheimer, *supra* n. 71 (accusing other employees in the Connect2 scandal that involved thirty-six schools); *see also Businessman Is Guilty in School Aid Scheme*, N.Y. Times B6 (May 24, 2003).

74. Oppenheimer, *supra* n. 71 (contributing eighteen million dollars by the city of San Francisco for the project).

75. *Id.* It was discovered that NEC marked up prices on computer hardware and Internet Services as much as four hundred percent, leaving one commentator to compare the outrageous markup to the “\$640 toilet seats famously sold to the Pentagon by military contractors during the Reagan Administration.” *Id.*

76. H.R. Subcomm. on Oversight & Investigation of the Comm. on Energy & Commerce, *Problems with the E-Rate Program: Waste, Fraud, and Abuse Concerns in the Wiring of Our Nation’s Schools to the Internet—Part 3*, 108th Cong. 10 (Sept. 22, 2004) (statement of H. Walker Feaster III, Inspector General, FCC) [hereinafter *Hearing Statement of H. Walker Feaster III*] (available at <http://a257.g.akamaitech.net/7/257/2422/18jan20051100/www.access.gpo.gov/congress/house/pdf/108hr96098.pdf>) (coming into play is the Antitrust Division because a large number of the E-Rate violations deal with “bid rigging and other violations related to the Sherman Act”).

77. *Id.* at 10 (representing as well, over \$40 million dollars in funding commitments and \$29.7 million funding already disbursed).

78. *Id.* at 11 (including Desmond McQuoid and US Machinery, both pleading guilty to mail fraud).

finer, civil settlement, and restitution.⁷⁹ Finally, when the San Francisco Unified School District alerted the FBI of the conspiracy, the District only received \$3.3 million from the fine the NEC paid the federal government.⁸⁰

5. *Wisconsin/Chicago fraud example*

Recently, two brothers, both Pakistani nationals, illegally used E-Rate funds intended for schools in the Milwaukee and Chicago areas.⁸¹ The two used their consulting company to submit E-Rate applications on behalf of twenty-one schools.⁸² Of the sixteen million dollars in E-Rate funds awarded to these schools, \$1.2 million worth of goods and services were never provided.⁸³ It was later discovered that the brothers had wired money to Pakistan, paid off a home mortgage, and purchased several automobiles with the E-Rate funds.⁸⁴ On January 28, 2005, they were each sentenced to six years in prison for conspiracy, fraud, and money laundering.⁸⁵

Similarly, in Chicago, "\$5 million in computer equipment became obsolete before it was ever installed in Chicago Public Schools."⁸⁶ There was ministerial outcry when this fact was revealed⁸⁷ and Southern Bell Communications (SBC), which was hired to manage and install the equipment, agreed to refund the money to the schools.⁸⁸

79. *Id.* at 11. Feaster testified that there were some aspects of the NEC investigation that were ongoing and that he could not address. *Id.* at 10.

80. Heather Knight, *Guilty Plea in School Grant Fraud; S.F. District Blew Whistle—Will Get \$3.3 Million*, S.F. Chron. B1 (May 28, 2004) (ending with NEC paying \$16 million dollars to the federal government, \$3.3 million of which went directly to the San Francisco schools).

81. *Pakistani Brothers Plead Guilty*, United Press Int'l. (Oct. 22, 2004) (describing that this fraud, conspiracy, and money laundering occurred in 2001).

82. *Id.*

83. *Id.* (falling short \$1.2 million of goods and services to 3 of the 21 schools they applied to E-Rate on their behalf).

84. *Five Indicted in E-Rate Fraud Scheme in Wisconsin, Illinois*, <http://www.fundsforlearning.com/cgi-bin/NewsList.cgi?world=§ion=&rec=503&cat=E-Rate> (Apr. 7, 2004) (on file with author) (This investigation included the Antitrust Division, the FBI, the IRS, the FCC, and the U.S. Attorney's office for the Eastern District of Wisconsin.).

85. Gina Barton, *Brothers Get Six Years for E-Rate Fraud: Pair Took \$1.2 Million Meant for Schools*, <http://www.jsonline.com/news/metro/jan05/297218.asp> (Jan. 29, 2005) (on file with author) (facing charges in connection with the scheme is a third brother, who is a fugitive believed to be in Pakistan. Charges against their mother and one of the brother's wives were dismissed).

86. Shamus Toomey, *Computer Fiasco Ripped by Ministers*, Chi. Sun Times Spec. Ed. 5 (Jan. 25, 2004) (on file with author) (loathing as an "abominable waste" that only deprived the students; currently being investigated why the equipment was never installed).

87. *Id.*

88. *See id.* (following this mismanagement, the district acted quickly and the schools are now wired).

6. *El Paso fraud example*

In Ysleta, Texas, a suburb of El Paso within the El Paso Independent School District, IBM became entangled in an E-Rate controversy. The company's behavior was questioned when it not only precluded other vendors from bidding on eighteen million dollars in E-Rate funds, but also maximized "the federal subsidy, 'not necessarily to promote educational goals.'"⁸⁹ IBM has been a big player with E-Rate nationally, receiving "\$351 million of E-rate money" in 2002 and 2003.⁹⁰ In February 2002, USAC received a letter from a troubled taxpayer that alleged wrongdoing by IBM in providing E-Rate support to the El Paso Independent School District (EPISD) and the Ysleta Independent School District (ISD) for funding in 2001 and 2002.⁹¹ USAC concluded that the Ysleta ISD "failed to comply with program requirements and that those Ysleta funding requests associated with IBM should be denied."⁹² Despite the FCC closing their investigation into IBM, USAC continued to deny numerous applications involving IBM, which affected a quarter of a billion dollars in support to nine applicant schools or libraries.⁹³

IBM failed to meet E-Rate requirements for a couple of reasons. USAC discovered that a number of applicants from across the country had "virtually identical 'cookie-cutter'" lists of requests for a "'strategic technology partner . . . —to assist the district in securing E-rate funds.'"⁹⁴ Additionally, there exists a desire for competitive bidding within the E-Rate program, because it is "'the most efficient means for ensuring that eligible schools and libraries are informed about all of the choices available to them.'"⁹⁵ The Ysleta/IBM partnership was not in keeping

89. Oppenheimer, *supra* n. 71 (causing the eighteen million dollars in E-Rate funds to be terminated once the IBM-Ysleta relationship was brought to light).

90. *Id.* (seeking overall approximately one billion dollars in E-Rate funds to use on school projects).

91. *Hearing Statement of H. Walker Feaster III, supra* n. 76, at 11.

92. *Id.* Funding was also to be denied for any IBM funding requests that "fit the pattern of Ysleta ISD and EPISD." *Id.* at 12.

93. H.R. Subcomm. on Oversight & Investigation of the Comm. on Energy & Commerce, *Problems with the E-Rate Program: Waste, Fraud, and Abuse Concerns in the Wiring of Our Nation's Schools to the Internet—Part 3*, 108th Cong. 20 (Sept. 22, 2004) (available at <http://a257.g.akamaitech.net/7/257/2422/18jan20051100/www.access.gpo.gov/congress/house/pdf/108hr/96098.pdf>) (statement of Jeffrey Carlisle, Chief, Wireline Competition Bureau, FCC) [hereinafter *Hearing Statement of Jeffrey Carlisle*]. There is also a bar on fund recipients from "receiving additional program benefits if they have yet to repay the fund for past erroneous disbursements," known as the "red light" rule. *Id.* at 23.

94. *Hearing Statement of H. Walker Feaster III, supra* n. 76, at 12 (indicating an "'over-involvement in the competitive bidding process'").

95. *Id.* (skipping the competitive bid process for goods and services, several school districts selected IBM as their service provider, as exemplified here).

with this desire.⁹⁶ Likewise, EPISD and Ysleta ISD did not base their selection of a service provider primarily on price, and therefore violated E-Rate rules.⁹⁷

7. Atlanta fraud example

Problems also arose in Atlanta when “[t]he Atlanta Public Schools misspent or mismanaged nearly \$73 million” of E-Rate funds.⁹⁸ Not only did they waste money, the city of Atlanta also has to pay more than fourteen million dollars a year just to operate and maintain their network without the E-Rate funding.⁹⁹ Basically, “Atlanta asked E-Rate to pay the same \$231,250 price for equipment at every school,” even though they varied greatly in size.¹⁰⁰ Wireless Internet access was installed in most of the schools, but because the cost of laptops was so high, the district abandoned the wireless project.¹⁰¹ BellSouth installed a new network in 2001 in the middle and high schools around the city, but E-Rate refused to pay the BellSouth bill.¹⁰² The district allowed most of its computer maintenance contracts to lapse “rather than pay the service costs for ‘tens of millions of dollars’ worth of equipment.”¹⁰³ Moreover, there are still incomplete records and obsolete equipment. Atlanta Public Schools billed E-Rate for three million dollars worth of servers, but the district managers do not know how many servers were actually received.¹⁰⁴ Storage facilities house millions of dollars of unopened computer components that were never installed the year they were purchased, as federal guidelines require.¹⁰⁵

96. *Id.*

97. *See id.* at 13 (analyzing that there were other problems with the bid, such as specifying services that IBM would provide where many of the services proposed were not eligible for funding).

98. Paul Donsky & Ken Foskett, *A \$73 million Spending Spree*, Atlanta J. and Const. 1A (May 23, 2004) (funding was spent by the district without requiring the bid for the best price and there was little oversight from school board members).

99. *Id.* (astounding that the fourteen million dollars needed is three times the district’s budget for textbooks).

100. *Id.* (adding that the vendors sometimes did not charge the school district proper amounts for the services provided).

101. *Id.* (wiring of some schools twice created a network that “produced more horsepower than that available to Georgia Tech students”).

102. *Id.*

103. *See Donsky & Foskett, A \$73 million Spending Spree, supra* n. 98 (noting that in 2003, it would have cost the district \$3.8 million, just to service all of its equipment).

104. *Id.* (learning that the district also stopped installing those servers in schools several years earlier).

105. *Id.* (The district not only funded the wiring of an elementary school that they voted to shut down, but also made a proposal of funds for equipment for forty-four classrooms, even though the doomed school only had twenty classrooms.).

In a report to Congress, the Atlanta Public Schools admitted “a few missteps, but denied major failings” in their E-Rate spending.¹⁰⁶ While the district admitted its spending may have been sloppy, it claimed that it never bought any unnecessary equipment and also stated that those responsible were no longer with the district.¹⁰⁷ However, a former public schools contract employee admitted that while working with its consultants, IBM improperly influenced the school district to win a contract.¹⁰⁸

The problems with E-Rate in Atlanta are not confined to the Atlanta Public Schools. Atlanta’s Metropolitan Regional Education Service Agency (MRESA) spent about nineteen million dollars trying to make an Internet project work, however, it never did.¹⁰⁹ A web designer at MRESA suggested asking for \$60,000 in an E-Rate proposal, to which his boss replied, “[y]ou won’t get a grant for \$60,000. Ask for \$60 million and you might get it.”¹¹⁰ When the E-Rate money started coming in, Spherus executives, the company that contracted with MRESA, cashed out and awarded bonuses of fifty thousand dollars or more to company executives.¹¹¹

D. Government actions to curb E-Rate fraud

As mentioned in the previous sections, the E-Rate program has been, for the most part, a success. However, examples from across the country demonstrate that the system is not without problems. Fraud in the system has compelled the government to take action. Congress, the FCC, and President Bush have all taken steps to curb fraud.

1. Congressional action to end E-Rate

Beginning in 1999, members of Congress took various actions regarding E-Rate. In 1999, Representatives Tom Tancredo, Pete Sessions, and Ed Royce circulated “a Dear Colleague letter,” expressing

106. Ken Foskett & Paul Donsky, *Schools Admit E-Rate Slip-ups, Defends Actions*, Atlanta J. and Const. 1A (Sept. 25, 2004) (segmenting one part of a 116 page report to Congress).

107. *Id.*

108. Ken Foskett, *E-Rate Report Reveals Discrepancy by APS*, Atlanta J. and Const. 1A (Sept. 28, 2004) (admitting by one former APS contract employee that she knew that IBM and its consultant involvement was wrong, but that she was powerless to contradict her superiors).

109. Ken Foskett, *E-Rate Deal Squanders \$19 Million; Video System Didn’t Work, but Company Still Cashed In*, Atlanta J. and Const. 1A (July 11, 2004) (explaining that this “little known” state agency, devoted mostly to teacher training, now ranks as one of E-Rate’s “colossal” failures).

110. *Id.*

111. *Id.* (indicating that MRESA signed a three-year contract with Spherus Corp worth \$67 million, but E-Rate only approved \$28.8 million in the first phase).

their desire to propose legislation that would end E-Rate, which they named the "E-rate Termination Act."¹¹² However, this bill never made it out of committee hearings.¹¹³ Later in 2003, Representative Tancredo talked about spearheading another bill that would end E-Rate or at least give Congress more control of its funds.¹¹⁴ Tancredo believed that E-Rate was a "hidden tax" and a program riddled with "waste, fraud, and abuse."¹¹⁵ Like Tancredo, House Energy and Commerce Committee Chairman Tauzin and Chairman Burns of the Senate Communications Committee also remain critics of the current E-Rate program.¹¹⁶

a. Congressional Hearings on E-Rate

There have been a string of hearings in Congress on how to curb the fraud, waste, and abuse in the E-Rate program. The first major hearing on E-Rate fraud took place in the Spring of 2003 when the House Energy and Commerce Committee began their own inquiries, "convinced that the problem was far worse than [they] feared."¹¹⁷ At another hearing on September 22, 2004, a number of people were asked to testify about their experiences with the E-Rate system.¹¹⁸ The testimonies heard ranged from E-Rate regulators in the FCC, to vendors providing the services, to applicant school districts receiving the services.¹¹⁹ The predominate cry from school officials was that Congress should tighten the regulations of E-Rate rather than end the program because E-Rate is a good

112. Benton Foundation, *New E-Rate Attack*, <http://www.benton.org/publibrary/E-Rate/attack99.html> (Jan. 29, 1999) (on file with author) (stating that the E-Rate legislation is a "backdoor tax" that is not needed).

113. See The Library of Congress; *Thomas; Bills, Resolutions; H.R. 692*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:h.r.00692>; (accessed Mar. 6, 2006) [hereinafter *H.R. 692*].

114. See Davidson, Toppo & O'Donnell, *supra* n. 49 (Representative Tancredo considered re-introducing the bill in 2004 because nearly all the schools across the country already have access to the Internet.).

115. Am. Sch. & U., *Congressman Seeks to End E-Rate Program*, http://asumag.com/mag/university_inside_technology/ (May 1, 2003) (on file with author) (believing as well that if states still wanted funding for the Internet, the states individually should provide it).

116. See Bob Williams, *Congressmen Call for Probe of Fraud-Plagued Phone Fund for Schools, Libraries*, <http://www.publicintegrity.org/telecom/report.aspx?aid=95&sid=200> (Jan. 30, 2003) (on file with author) (speaking for Representative Tauzin, spokesman Ken Johnson stated that "schools are hooked up to the Internet for free and the federal government is robbed blind").

117. Oppenheimer, *supra* n. 71 (stating that before the first hearing, only two cases had gone to court).

118. See Funds for Learning, *House Committee Holds Third Hearing on E-Rate Abuse, Funds for Learning*, <http://www.fundsforlearning.com/cgi-bin/NewsList.cgi?world=§ion=&rec=555&cat=E-rate> (Sept. 22, 2004) (on file with author) (focusing this hearing "on the potential for waste, fraud and abuse in the E-rate program").

119. See *id.* (stating that at one point, two panels of witnesses testified about their experiences with the program).

program.¹²⁰

One particularly significant testimony heard by the House Committee was Inspector General Feaster of the FCC.¹²¹ He noted that the E-Rate program relies heavily on “applicant and service provider certifications,” meaning that the school has “all of the resources, including computers, training, software, maintenance, and electrical connections” necessary for using the services provided by E-Rate, and is in compliance “with all applicable state and local laws regarding procurement of services for which support is being sought.”¹²² USAC has taken some steps to deal with over-reliance on the school’s certifications to strengthen the Program Integrity Assurance (PIA) process.¹²³ However, Feaster stated that the main problem with E-Rate is the lack of adequate resources to implement an oversight program.¹²⁴ While the FCC has made progress with approximately 100 E-Rate audits so far, it is not enough. Until more oversight is provided, Feaster says he feels unable to give the public “assurance that the program is protected from fraud, waste, and abuse.”¹²⁵

Another federal government official, Mr. Jeffrey Carlisle, Chief of the Wireline Competition Bureau at the FCC, testified at the hearing.¹²⁶ He addressed the number of regulations adopted by the FCC to prevent E-Rate fraud.¹²⁷ He then discussed the FCC’s recommended changes. He explained that the FCC believes that applicants should contribute more to their purchases, because it would “encourage schools and libraries to make better economic choices, and further minimize the opportunities for abuse.”¹²⁸ He also noted the importance of closer monitoring of the bidding process to ensure that it is competitive.¹²⁹ Without competitive

120. Andrew Mollison, *Reform, Don’t Kill, E-Rate, Official Urges*, Atlanta J. and Const. 3D (July 23, 2004) (recognizing the positives of E-Rate, it has been acknowledged, even by school officials, that the program needs to be reformed).

121. See *Hearing Statement of H. Walker Feaster III*, *supra* n. 76.

122. *Id.* at 13 (quoting USAC’s investigation report stating that self-certification has been exploited, which has led to a significant amount of wasteful spending).

123. *Id.*

124. *Id.* at 15 (arguing that the result of the audits so far makes him believe E-Rate is subject to “an unacceptably high risk of fraud, waste and abuse through noncompliance and program weaknesses”).

125. *Id.* (believing that the best way to fund the increased oversight of E-Rate would be for the FCC to have direct access to the E-Rate fund).

126. See *Hearing statement of Jeffrey Carlisle*, *supra* n. 93.

127. *Id.* at 22 (noting the various changes the FCC has made with E-Rate funds as recently as April 2003 and July 2004).

128. *Id.* at 23. A similar idea is seen in the *Schools and Libraries Fifth Report and Order*, which added an additional requirement to the Technology Plan guidelines that “an applicant show that it has the necessary resources to achieve its technology aims.” *Id.*

129. See *id.*

bidding, “service providers and applicants may inflate prices to maximize their gains.”¹³⁰

At the hearing, two vendors who provided service to schools in connection with the E-Rate program also testified.¹³¹ Sun Microsystems was represented by one of their former contractors, Paula Glogovac.¹³² She is responsible for reading the school requests for services, making initial contact with applicants, and discussing how Sun can help.¹³³ She testified that some service providers have not followed the rules, “prey[ing] upon applicants that have no knowledge of the program, but are told that this service provider can get them money for computers.”¹³⁴ However, she then stated that the applicants themselves have also been at fault with the rule violations.¹³⁵

Christopher Caine also testified at the hearing on behalf of IBM, one of the companies suspected of fraud.¹³⁶ He explained how IBM acquired government E-Rate funds¹³⁷ and discussed the positive actions it had taken after E-Rate was created. Caine also addressed the El Paso/Ysleta problem.¹³⁸ In IBM’s defense, he stated that the lowest bid was not always going to be “the most cost-effective solution over time” and a school district might choose IBM over others based on technical

130. *Id.* at 25.

131. See H.R. Subcomm. on Oversight & Investigation of the Comm. on Energy & Commerce, *Problems with the E-Rate Program: Waste, Fraud, and Abuse Concerns in the Wiring of Our Nation’s Schools to the Internet—Part 3*, 108th Cong. 155 (Sept. 22, 2004) (available at <http://a257.gakamaitech.net/7/257/2422/18jan20051100/www.access.gpo.gov/congress/house/pdf/108hr/96098.pdf>) (statement of Paula Glogovac, Former Contractor, Sun Microsystems) [hereinafter *Hearing Statement of Paula Glogovac*] (bidding company on the Ysleta independent School District that was allegedly obstructed by IBM); see H.R. Subcomm. on Oversight & Investigation of the Comm. on Energy & Commerce, *Problems with the E-Rate Program: Waste, Fraud, and Abuse Concerns in the Wiring of Our Nation’s Schools to the Internet—Part 3*, 108th Cong. 245 (Sept. 22, 2004) (available at <http://a257.gakamaitech.net/7/257/2422/18jan20051100/www.access.gpo.gov/congress/house/pdf/108hr/96098.pdf>) (statement of Christopher G. Caine, Vice President, Governmental Program, IBM) [hereinafter *Hearing Statement of Christopher G. Caine*] (representing IBM in his capacity as Vice President of the IBM governmental program).

132. *Hearing Statement of Paula Glogovac*, *supra* n. 131, at 155.

133. *Id.* Glogovac is also responsible for reviewing the E-Rate program rules for applicants and service providers and to make sure the Sun sales and marketing team knows the rules. *Id.*

134. *Id.* at 156 (detailing that some contractors block other service providers from bidding by not giving the specifics of the service needs, while others provide ineligible products).

135. See *id.* (describing that some applicants close the twenty-eight day waiting window early, require attendance at a pre-bid conference prior to or very shortly after the services are requested, or require specific brand names of products so that no one else can respond).

136. *Hearing Statement of Christopher G. Caine*, *supra* n. 131, at 245.

137. *Id.*

138. See *id.* at 245–46 (providing an account of IBM’s actions after E-Rate was created). IBM produced a booklet that described E-Rate and mailed it to over twelve thousand school districts across the country. It followed up by holding seminars about E-Rate for school officials. *Id.* at 247.

qualifications.¹³⁹ With regard to IBM's requests for funding for products that are not eligible for E-Rate funding, Caine stated that the E-Rate rules are not clear on eligibility "given the rapid advances in networking and information technology."¹⁴⁰ Caine represented that IBM would like clear and simple rules that are fully disclosed to the public, as well as timelier application reviews and appeals, more advance notice of rule changes, a clarified list of eligible services, and disclosure by E-Rate consultants about "their business relationship with service providers for both applicants and other services providers."¹⁴¹

Also at the hearing were Sharon Foster, the current Executive Director of Technology Information Systems of the Ysleta Independent School District,¹⁴² and Charles Tafoya, the superintendent of the El Paso Independent School District.¹⁴³ They represented school administrations' viewpoints on how E-Rate was working. Foster said the biggest improvements E-Rate provided were the school districts' network infrastructure, wiring all classrooms with high-speed Internet access, providing distance learning systems, and providing integrated phone networks.¹⁴⁴ However, she also pointed out that the two big problems with E-Rate funding are that it is "nearly always delayed" and numerous restrictions make it hard to manage multi-year projects.¹⁴⁵ Additionally,

139. See *id.* at 250 (arguing that the local school boards had sufficient expertise and experience to make their decision).

140. *Id.* at 254 (noting that while qualifying pieces of technology are part of "the evolving nature," clarity would be a concern, especially if certain eligibility/ineligibility of products becomes retroactive).

141. *Id.* at 255. The denial of later funding by the USAC hurt IBM because it had extended millions of dollars on projects that were not going to come to fruition. *Id.* at 252.

142. See H.R. Subcomm. on Oversight & Investigation of the Comm. on Energy & Commerce, *Problems with the E-Rate Program: Waste, Fraud, and Abuse Concerns in the Wiring of Our Nation's Schools to the Internet—Part 3*, 108th Cong. 148 (Sept. 22, 2004) (available at [http://a257.g](http://a257.g.akamaitech.net/7/257/2422/18jan20051100/www.access.gpo.gov/congress/house/pdf/108hrg/96098.pdf)

[.akamaitech.net/7/257/2422/18jan20051100/www.access.gpo.gov/congress/house/pdf/108hrg/96098.pdf](http://a257.g.akamaitech.net/7/257/2422/18jan20051100/www.access.gpo.gov/congress/house/pdf/108hrg/96098.pdf)) (statement of Sharon Foster, Executive Director of Technology Information Systems of Ysleta Independent School District, El Paso, Texas and the former Head of the Instructional Technology Department at the El Paso ISD) [hereinafter *Statement of Sharon Foster*].

143. See H.R. Subcomm. on Oversight & Investigation of the Comm. on Energy & Commerce, *Problems with the E-Rate Program: Waste, Fraud, and Abuse Concerns in the Wiring of Our Nation's Schools to the Internet—Part 3*, 108th Cong. 123 (Sept. 22, 2004) (available at <http://a257.g>

[.akamaitech.net/7/257/2422/18jan20051100/www.access.gpo.gov/congress/house/pdf/108hrg/96098.pdf](http://a257.g.akamaitech.net/7/257/2422/18jan20051100/www.access.gpo.gov/congress/house/pdf/108hrg/96098.pdf)) (statement of Charles Tafoya, Superintendent, El Paso Independent School District, El Paso, Texas) [hereinafter *Hearing Statement of Charles Tafoya*].

144. See *Hearing Statement of Sharon Foster*, *supra* n. 142, at 152 (explaining that her school district would have never been able to afford the training for skilled network technicians, nor the cabling and networking initiatives, if not for E-Rate).

145. *Id.* at 153.

if teachers are not trained to use the equipment and technology, the district cannot fully capitalize on the technology that E-Rate provides.¹⁴⁶ She then stated her belief that if E-Rate were not in existence, the YISD could not maintain its network, which would lead to “much smaller access to Internet resources, limited student e-mail availability, and virtually no services for teachers.”¹⁴⁷ Tafoya spoke about the problems with interpreting the E-Rate guidelines. He commented that if government offices cannot agree upon rule interpretations, “it is difficult, if not impossible, to expect a typical school district elsewhere in the nation to fully and properly understand what is expected of it under the rule.”¹⁴⁸ Like the other witnesses that testified at the hearing, Tafoya had a number of suggestions to improve E-Rate.¹⁴⁹ He said he supported the E-Rate program because, despite its problems, it has been a successful way of providing “much-needed technology to school districts across the country.”¹⁵⁰

2. FCC Action

The FCC has also taken intermediary steps in trying to reform E-Rate in order to prevent fraud. Early changes to E-Rate were made because demand was too high.¹⁵¹ In 2002, the FCC initiated a review process of the rules and regulations that govern E-rate.¹⁵² In April 2003, the FCC adopted new rules to help “remove unnecessary impediments to the flow of support, while continuing to ensure that adequate safeguards are in place to prevent waste, fraud and abuse.”¹⁵³ There was also a

146. *Id.* at 154 (As Foster stated, “technology projects fail when there is no identified instructional need for the technology.”).

147. *Id.* at 155.

148. *Hearing Statement of Charles Tafoya, supra* n. 143, at 134 (noting that the rules become harder to follow with slow funding decisions, and the appeals process only compounds the time issue).

149. *Id.* at 139–140. Tafoya praised E-Rate’s ability to help districts like El Paso “make great strides in catching up to other, more affluent school districts and providing its students with a fair opportunity to compete and succeed in the real world.” *Id.* at 141.

150. *Id.*

151. See Cara Branigan, *FCC May Change Rules for eRate Funding*, <http://www.eschoolnews.com/news/showStory.cfm?ArticleID=2609> (May 3, 2001) (on file with author) (explaining that instead of funding based on first priority request of telecommunication services and Internet access, the proposed change would have funding priority for schools that did not receive funding the previous year).

152. See Cara Branigan, *FCC Seeks Comment on eRate Rules*, <http://www.eschoolnews.com/news/showStory.cfm?ArticleID=3476> (Feb. 1, 2002) (on file with author) (soliciting comments on the program in five major areas: “the application process, the disbursement of funds, the appeals process, program integrity assurance, and what to do with unused or unclaimed funds”).

153. Roy Mark, *FCC Adopts E-Rate Reform Rules*, <http://www.interentnews.com/xSP/article.php/2195701> (Apr. 23, 2003) (on file with author) (including one rule prohibiting certain

change in guidelines which ended funding for duplicate services to the same people.¹⁵⁴

Later in 2003, the FCC made additional modifications to the E-Rate rules. From these additional modifications, schools and libraries can now only apply twice within a five-year period for funding discounts on internal wiring connections.¹⁵⁵ Additionally, the FCC added a three-year limit on transferring equipment purchased through E-Rate funds when, for example, a school is temporarily or permanently closed. The FCC also made a request for comments on other potential changes to the program.¹⁵⁶

The latest change to E-Rate came on August 13, 2004, with the issuance of the Fifth Report and Order: *In the Matter of Schools and Libraries Universal Service Support Mechanism*.¹⁵⁷ Since E-Rate's inception, the FCC has made it clear that it can recover E-Rate funds that have been distributed in violation of the rules.¹⁵⁸ One rule authorizes the FCC to "bar beneficiaries or service providers from receiving additional benefits" if they have failed to pay funds back to E-Rate.¹⁵⁹ Even if the debts are paid back to the Universal Service Fund, those beneficiaries may be subject to a closer review.¹⁶⁰ Another rule requires a stronger record retention requirement leading to better enforcement of program rules.¹⁶¹ Both vendors and schools must maintain contracts and retain all documents "related to the purchase and delivery of E-Rate eligible services and equipment" for a period of five years.¹⁶² A third issue

participants from applying for E-Rate funds if they have been convicted criminally or held civilly liable for their misconduct with the program).

154. *Id.* (commenting by Commissioner Kathleen Abernathy that "[w]hile these are important changes, they represent only the first stage in a more comprehensive reform effort").

155. Cara Branigan, *FCC Adopts New eRate Rules*, <http://www.eschoolnews.com/news/showStory.cfm?ArticleID=4794> (Dec. 18, 2003) (on file with author) (realizing that technology is not progressing that fast to necessitate new wiring every year).

156. *See id.*

157. F.C.C., *In re Schools and Libraries Universal Service Support Mechanism*, www.e-ratecentral.com/FCC/FCC-04-190A1.pdf (Aug. 13, 2004). The FCC has made changes "to protect against waste, fraud, and abuse in the administration of . . . the E-rate program"). *Id.* at 2. There were nine new rules adopted by this order. *Id.* at 39–43.

158. *See id.* at 7 (stating the framework for recovery of E-Rate funds has been in place since 1996).

159. *Id.* at 2 (noting this is also known as the red light rule).

160. *See id.* at 15 (continuing the rule that was enacted in the wake of the E-Rate fraud in Puerto Rico).

161. *Id.* at 16 (requiring all documents to be kept for a period of five years after the last date of service in order to assist in the auditing process).

162. *Id.* at 17–18 (requiring service providers to keep records for service bids that were both successful and unsuccessful, not for records where their bid was not selected).

addressed in the report was the technology plan.¹⁶³ Schools' technology plans must now be approved under the Department of Education's Enhancing Education Through Technology (ETTT) program or must have the same basic elements required by the ETTT program.¹⁶⁴

Furthermore, the report also states that funds can be recovered if beneficiaries fail to consider price as the primary factor when evaluating bids.¹⁶⁵ Other violations in which recovery is possible include "failure to complete delivery of services by the relevant deadline for a particular funding year," as well as failure to properly calculate the appropriate discount rate.¹⁶⁶ Recovery can also be initiated on the excess money when only partial services are provided.¹⁶⁷ However, the report states that recovery for rule violations is not always appropriate, such as when the administrative costs of trying to recover the funds exceeds the amount of improperly disbursed funds.¹⁶⁸

The report also discusses auditing. Early in program, the government only had funding to initiate a few audits, which lead to a low recovery of E-Rate funds.¹⁶⁹ Currently, there is a three-way agreement underway between USAC, the Office of Inspector General of the FCC, and an independent public accounting firm for the audits of beneficiaries.¹⁷⁰ These audits "can reveal instances in which universal service funds were improperly disbursed or used in a manner inconsistent with the statute or the Commission's rules."¹⁷¹

Following these changes, the June 14, 2005 "Notice of Proposed Rulemaking" was implemented. It regards the Universal Service Fund management, administration, and oversight, as well as the Schools and Libraries Universal Service Support Mechanism.¹⁷² The FCC sought

163. *Id.* at 21.

164. *Id.* at 22 (including elements such as the following: (1) a realistic strategy and goal for the telecommunication requested, (2) professional development training for staff, (3) assessment of the telecommunication services, (4) budget for the non-discounted elements of the plan, and (5) an evaluation process to monitor progress toward specified goals).

165. *Id.* at 8-9 (allowing for the same full recovery of funds if the beneficiary fails to pay its non-discounted share).

166. *Id.* at 10 (permitting parties to seek an extension of time to complete service, which is generally the exception).

167. *Id.*

168. *Id.* at 8 (retaining discretion when application of the recovery by the FCC would be against public interest).

169. *Id.* at 4 (For funding year 1998, there were only seventeen audits. For funding years 1999 and 2000, the audits increased to twenty-five, and in late 2002, an additional seventy-nine audits were completed for selected beneficiaries from funding year 2000.).

170. *Id.* (Auditing is also being done by USAC's internal audit division which has conducted two internal control audits and fifty-seven audits of E-Rate recipients.).

171. *Id.* at 6.

172. *Comprehensive Review, supra* n. 4, at 2.

comment on how modifications to the current administrative structure would affect the independence and neutrality of the Universal Service Fund program administration.¹⁷³ Questions were also raised regarding the measurement of E-Rate's efficiency.¹⁷⁴ Additionally, FCC commissioners did not agree on the means of distributing E-Rate funds.¹⁷⁵ A plan to directly distribute funds to schools and libraries according to their size concerned Commissioner Michael J. Copps, who noted that "if schools are given a sum of money to be used for unspecified purposes rather than for specified and verifiable services and equipment, it could be much more difficult to identify fraud."¹⁷⁶ Some other proposals on which the FCC sought comment in the name of fraud prevention were how USAC should conduct audits, whether to create a cap on the total amount an applicant can request, whether to create a minimum or maximum bid limit, and how to address in the future those guilty parties who defrauded E-Rate.¹⁷⁷

3. Action by President Bush

In 2003, President Bush recommended an extra three million dollars for more FCC oversight of E-Rate. In January 2004, the Senate removed the money from USAC's appropriation.¹⁷⁸ USAC itself has done some policing such as implementing rules that limit the amount schools can request in subsidies.¹⁷⁹ The Bush administration has even considered converting USAC's E-Rate funds into block grants for states as a means of reducing fraud.¹⁸⁰

173. *Id.* at 8 (desiring those distributing the Universal Service funds to be subjected to ethics standards and procedures for conflicts of interest questions).

174. *Id.* at 12 (recognizing that the current method of using the percentage of public schools connected to the Internet does not include all E-Rate participants, including libraries and private schools).

175. *Id.* at 15 (disputing the proposed improvement to the management, administration, and oversight of Universal Services funds).

176. *Id.* See also *Comprehensive Review*, *supra* n. 4, at 54 (noting statement of Michael J. Copps, Commissioner, FCC).

177. See *Comprehensive Review*, *supra* n. 4, at 30, 36–38. (An increasing amount of audits has led to the concern that the process may use government money even if the audit is unnecessary; if the USAC requires E-Rate recipients to conduct their own independent audit, that cost might outweigh the benefit of E-Rate to that recipient. With regards to bid maximums and minimums, the possibility of impracticability looms large for many potential E-Rate applicants. USAC's debarment rule can automatically suspend a person who has been held civilly or criminally liable for E-Rate fraud, but questions arose regarding the reduction of an E-Rate beneficiary's discount level for repeated violations.)

178. Foskett & Nesmith, *supra* n. 4, at 4 (comparing these audits to those of a defense contract, E-Rate audits pale in comparison).

179. *Id.* (aiming to discourage schools from requesting more money than they really need).

180. Davidson, Toppo & O'Donnell, *supra* n. 49, at 3 (figuring that a block grant would shift

4. The Temporary FCC and Congressional Plan

On October 6, 2004, the FCC ordered a moratorium on new subsidies for the E-Rate program while USAC implemented new “stringent government accounting standards.”¹⁸¹ For example, the Schools and Libraries Division of the USAC had been giving millions of dollars in discounts to schools even if they did not have the funding available.¹⁸² In addition, the government began using accounting procedures that no longer allowed USAC to invest its funds in government bonds and money market funds. Instead, the change limited USAC to investing only in U.S. treasuries or keeping cash funds.¹⁸³ Since the accounting change at USAC halted future E-Rate funding, many school systems’ requests were put on hold.¹⁸⁴ On November 3, 2004, the suspension of E-Rate funds was lifted, but a coalition of education groups lobbied Congress to draft a bill exempting E-Rate from the current federal accounting rule, the Anti-Deficiency Act, to prevent future slowdown of funds.¹⁸⁵

At the end of 2004, Congress also made modifications to E-Rate funding. Senators Olympia Snowe and John D. Rockefeller, IV pushed through legislation that created a temporary fix for the E-Rate fraud problem, and more importantly, “allow[ed] schools and libraries to receive their Internet funding.”¹⁸⁶ This legislation exempted the

the burden of oversight from the federal government to the local state government).

181. Darla Martin Tucker, *Funding Moratorium Hurts Local Firm, Schools; Federal Program Represents Most of Spectrum’s Revenue*, The Business Press (Oct. 18, 2004) (In 2003, the FCC mandated that the USAC switch to government-type accounting system.).

182. Norman Oder, *\$40M in E-Rate Funds Suspended*, www.libraryjournal.com/index.asp?layout=articlePrint&articleID=CA475006 (Nov. 1, 2004) (on file with author) (affecting not only the schools receiving the funding, but the moratorium also impacts the vendors who provide the schools with Internet service).

183. Cara Branigan, *eRate Chaos Looms for Schools: Senators View Delays with Bipartisan Alarm*, <http://www.eschoolnews.com/news/PFshowstory.cfm?ArticleID=5341> (Nov. 4, 2004) (on file with author). Previously, the USAC generated an extra twenty-five million dollars in interest from its three billion dollar investment in government bonds and money market funds. With the accounting change, USAC had to liquidate. As a result of switching to U.S. Treasuries, it lost five million dollars in face value. *Id.*

184. *See id.* (explaining that more than \$400 million of committed E-Rate funding for schools and libraries have not been met and this legislation allowed those commitments to be fulfilled).

185. Cara Branigan, *eRate Flows Again: ‘04 Apps Still Pending*, <http://www.eschoolnews.com/news/PFshowstory.cfm?ArticleID=5376> (Nov. 9, 2004) (on file with author) (asking that phone companies increase their percentage contribution to the Universal Service Fund, but asserting that even an increased percentage does not mean that approved E-Rate applicants will get their funding commitment sooner).

186. Senator Jay Rockefeller, *Snowe, Rockefeller: Senate Passage of Telecom Legislation Good News for All Americans*, <http://rockefeller.senate.gov/news/2004/pr120904.html> (Dec. 9, 2004) (adding from Senator Rockefeller that “E-rate, in particular, has been a wonderful success story because it has fundamentally transformed education in this country”).

Universal Service Funds from the Anti-Deficiency Act for one year, which meant that E-Rate could still issue future commitments based on future revenue.¹⁸⁷ It was argued that if this bill was not passed, the current 8.9% tax on customer's interstate long-distance calls would rise to 12.5%.¹⁸⁸ President Bush signed this legislation into law on December 23, 2004.¹⁸⁹ Senators Snowe and Rockefeller then introduced a bill in the 109th Congress to permanently exempt E-Rate from the Anti-deficiency Act.¹⁹⁰

III. ANALYSIS

Despite these temporary fixes, the future of E-Rate is still in jeopardy. Its future depends on affirmative answers to each of the following questions: (1) Does the Internet improve education? (2) Is E-Rate needed to incorporate the Internet into education in schools? and (3) Has E-Rate been a success? Evaluating E-Rate under these criteria will lead to sound future recommendations for the program. A negative answer to any of the questions means E-Rate funding is not justified. However, a favorable response to all these points does not necessarily indicate that the status quo of E-Rate is satisfactory. It does support, however, the premise that the program is worth fixing.

A. Does the Internet improve education?

Not surprisingly, studies have shown that the public policy goal of the Internet improving education has been met.¹⁹¹ In its 2005 report, the

187. *Id.* During the passing of the law, both Senators Snowe and Rockefeller hoped that a more permanent remedy would be considered during the 109th Congress. *Id.*

188. Jansen, *supra* n. 9, at 2 (arguing by some that the threat of increasing the tax on phone service would not have been considered if E-Rate was exempted from the accounting change as were the National Park Service and Conservation Trust).

189. George W. Bush, *President's Statement on H.R. 5419*, <http://www.whitehouse.gov/news/releases/2004/12/20041223-4.html> (Dec. 23, 2004) (on file with author). The legislation, officially entitled the "Universal Service Antideficiency Temporary Suspension Act," was just one of three parts of H.R. 5419. *Id.*

190. Corey Murray, *eRate Requests Are Down for Second Straight Year*, <http://www.eschoolnews.com/news/PFshowstory.cfm?ArticleID=5682> (June 1, 2005) (on file with author) (believing that if S.241 is not passed by the end of 2005, the accounting chance would come back into effect).

191. See U.S. Dept. of Educ., *U.S. Department of Education Releases National Education Technology Plan*, http://nationaledtechplan.org/docs_and_pdf/NETP2005_pressrelease.doc (Jan. 7, 2005) [hereinafter *Education Releases*] (on file with author); Ron Reed, *Streaming Technology Improves Student Achievement*, 30 T.H.E. J. 7 (Feb. 2003); Cara Branigan, *New Study: Technology Boosts Student Performance*, <http://www.eschoolnews.com/news/showstory.cfm?ArticleID=1750> (Nov. 30, 2005) (on file with author); Pew Internet & American Life Project, *Future of the Internet*, http://www.clon.edu/predictions/2004_experts_survey.pdf (Jan. 9, 2005) [hereinafter *Future of the*

U.S. Department of Education noted that education in the United States has been “bolstered by the increasing use of educational technology.”¹⁹² In a study by the Pew Internet and Life Project, entitled *The Future of the Internet*, fifty-seven percent of the experts surveyed believed that in ten years “most students will spend at least part of their ‘school’ days in virtual classes, grouped online with others who share their interests and skills rather than by age.”¹⁹³ In a third study, students who received instruction with streaming video on the Internet showed “dramatic improvement in achievement,” which the author noted was largely a result of E-Rate.¹⁹⁴ A state study in Illinois concluded that the use of educational technology has had “a small but significant impact” on student performance, with no instances of technology having a negative impact.¹⁹⁵ In some rural schools, E-Rate has increased the capabilities of schools through broadband Internet access and videoconferencing.¹⁹⁶ As an American Library Association official said, E-Rate has increased students’ Internet access and “[t]here is no way to argue against that.”¹⁹⁷

There are valid reasons for the heightened concern about the quality of education in the United States. The Organization for Cooperation and Development noted that education in the United States has made some progress, but now many countries are outperforming the U.S.¹⁹⁸ One

Internet] (on file with author).

192. *Education Releases*, *supra* n. 191, at 1 (adding to the statements that technology in education would also have “greater accountability and growing new partnerships between tech-savvy students and teachers”).

193. *Future of the Internet*, *supra* n. 191, at ii (noting that experts feel that broadband adoption will expand and that “vastly more people and objects would be linked online in the next decade”).

194. Reed, *supra* n. 191, at 1 (reporting that the control group of 1,400 elementary and middle school students in Virginia showed an average increase of 12.6% improvement compared to students who received traditional instruction alone).

195. Branigan, *supra* n. 191 (finding that the impact was stronger in the higher grades, more specifically on 11th grade science and 10th grade reading test scores).

196. See Del Stover, *E-Rate Proves to Be a Powerful Tool for Raising Student Achievement*, School Board News (July 22, 2003) (available at http://www.nsba.org/site/doc_sbn_issue.asp?TrackID=&SID=1&DID=31449&CID=1151&VID=55) (using the Alaska Lower Kuskokwin School District as an example, which is made up of a number of extremely isolated schools; E-Rate funds have allowed the district to have broadband Internet access and videoconferencing, helping the district meet federal mandates).

197. Debra Lau Whelan, *E-Rate Program under Fire*, <http://www.schoollibraryjournal.com/index.asp?layout=articlePrint&articleid=CA294396> (May 1, 2003) (on file with author) (acknowledging that with sixty-five percent of libraries nationwide having received E-Rate funds it is understandable that the “library community has been a huge supporter of this program”).

198. Kari Huus, *U.S. Slides among World’s Top Educators: Graduation Rates Stagnate as Other Wealthy Countries Climb Ranks*, <http://www.msnbc.msn.com/id/5993839/> (updated Sept. 14, 2004) (on file with author) (stating that “[o]ther countries have gone right past it (for high school education) and the numbers suggest the same will happen for college education” (quoting Barry McGaw, Director for Education at the Organization for Economic Cooperation and Development)).

major reason for this is the educational gap between the rich and the poor, a problem that increased technology funding could help bridge.¹⁹⁹ However, to make Internet use effective, teachers need training in using the technology and new lesson plans to navigate the Internet, not to mention computers actually in the school.²⁰⁰

B. Is E-Rate needed to incorporate the Internet into education at schools?

Although other mediums offer Internet access in public schools, E-Rate allows quicker and less costly service and provides services that some schools would not otherwise have. As one commentator put it, “[w]ithout . . . E-rate it would have taken years for many of these schools to achieve this level of technology use.”²⁰¹ E-Rate participation is, of course, not required, but districts in every state apply and in some states, all school districts participate.²⁰² Alaska’s Lower Kuskokwim School District was proudly listed as an E-Rate success in terms of improving education in the region.²⁰³ However, when E-Rate funds were suspended in late 2004 with USAC accounting modification, district administrators had no other funding for Internet access and had to suspend their basic Internet service.²⁰⁴

Governmental assistance in assimilating new technologies, like the Internet, in public schools, has previously occurred. In some ways, E-Rate is like a federal counterpart to *Cable in the Classroom*. *Cable in the Classroom*’s mission for the past fifteen years has been to improve teaching and learning for children in schools. Among other learning

199. *Id.* (noting that the United States does spend more per student than the other thirty member nations of the Organization for Economic Cooperation and Development, which is made up of wealthy, market-driven countries).

200. See William R. Thomas, *E-Rate Status in Southern States*, http://www.sreb.org/programs/EdTech/pubs/ERate/E-Rate_Status.pdf (Dec. 2000) (on file with author) (offering from the U.S. Department of Education a grant called *Preparing Tomorrow’s Teachers*, which helps instruct new teachers to be technologically competent).

201. *Id.* at 6. “Without [E-Rate], as many as 40 percent of the schools in [Oklahoma] would either have no Internet access or . . . inadequate connections.” (The source attributed to the quote was merely cited to as “Oklahoma.”) *Id.* at 1.

202. See *id.* (including some reasons why not every school district applies, such as a lack of understanding of the Internet’s potential for teaching, problems managing new technologies, and a lack of knowledge about the E-Rate requirements).

203. Marguerite Reardon, *Schools Lose Net over E-Rate Freeze*, http://news.com.com/Schools+lose+Net+over+E-rate+freeze/2100-1038_3-5419852.html (Oct. 21, 2004) (on file with author) (conferencing with video over the Internet connected all nine of its schools and helped compensate for staffing shortages).

204. *Id.* During the suspension of E-Rate funding, two other Alaskan school districts also had to cancel their Internet service. *Id.*

tools, *Cable in the Classroom* provides Internet access, demonstrating that it is not a new idea to encourage this medium to improve education.²⁰⁵ The program reaches seventy-eight percent of K-12 students in the nation.²⁰⁶

Overall, there has been a growing amount of money spent on technology in schools.²⁰⁷ Such funding originates from a variety of federal, state, and local sources.²⁰⁸ Most technology funding is provided by the respective state Department of Education or federal funds such as E-Rate.²⁰⁹ Various states' education departments have also helped to create a centralized source of information on E-Rate, enabling more school districts to apply for and succeed in receiving E-Rate funding.²¹⁰

Although E-Rate has some problems, supporters note that its triumphs far outweighs its failures. E-Rate funding provides schools with basic Internet services they would not otherwise have. More than 30,000 schools apply for E-Rate discounts every year with approximately ninety percent receiving some funding.²¹¹ Many local governments have cut Internet funding for schools because of a lull in the economy, which means that more and more schools are depending on E-Rate discounts to continue providing Internet access.²¹²

However, E-Rate cynics question whether the economy should

205. *Cable in the Classroom—CIC at a Glance*, <http://www.ciconline.org/AboutCIC/TheOrganization/ataglace.htm> (accessed Feb. 21, 2006) (on file with author) (investing multi-millions of dollars over the past thirteen years by the cable television industry has improved education and today 8500 local cable companies provide high speed Internet access through cable modems).

206. *Cable in the Classroom—Mission*, <http://www.ciconline.org/AboutCIC/TheOrganization/mission.htm> (accessed Feb. 21, 2006) (on file with author). *Cable in the Classroom* focuses on five essential elements for quality education in the 21st century: “visionary and sensible use of technologicis, engagement with rich content, community with other learners, excellent teaching, and the support of parents and other adults.” *Id.*

207. See *First Annual State-of-the-States Survey*, <http://www.thejournal.com/magazine/stateofthestates/> (May 2001) (on file with author). During the 2001/2002 school year, the money put into technology in education was equal or grater than in the previous school year. *Id.*

208. See *id.* (funding sources include the respective state Department of Education, other state agencies, local, federal, school fundraisers, and corporate gifts).

209. See *id.* (remarking that states like Louisiana, Mississippi, New York, North Carolina, and Rhode Island have the largest percentage of funds from federal funds); see also *2003 E-Rate Funding Up as States Educate Their Districts on Taking Advantage of Program* (on file with author) (stating that funding for technology is a premium in California because the state’s budget does not allocate a substantial amount, which is why its \$353 million in E-Rate funds in 2003 is very important).

210. *2003 E-Rate Funding Up as States Educate Districts on Taking Advantage of Program*, *supra* n. 209 (Texas Education Agency Director of Educational Technology remarking that “[h]aving a centralized source of information about E-rate funding with a Web Site and help desk is especially useful to districts with limited personnel or changing personnel.”).

211. Reardon, *Fraud*, *supra* n. 46, at 6.

212. See *id.*

dictate technology funding for schools, instead of a federal discount program for Internet services like E-Rate. Studies have shown that wealthier communities across the country have access to the Internet faster than less affluent communities, creating a digital divide between the haves and “have nots.”²¹³ Also, if the economy were to dictate Internet funding, it would require the local governments and communities to support education’s growing need for technology. However, according to the *State of the States Survey*, of the eighteen states that provided estimates of where technology money originated, only four indicated that most of their funding for technology came from local government, school fundraisers, and corporate gifts combined.²¹⁴ Moreover, as the economy has been sputtering for the last couple of years, E-Rate has been referred to as “a lifeline for schools” and “a reliable source of funding for technology in an environment that has seen state and local resources for education technology cut and private philanthropy diminished.”²¹⁵

C. Has E-Rate been a success?

While there may be uncertainty as to where the E-Rate program is going in the future, its accomplishments thus far are clear. Ninety-nine percent of the public schools in the United States are online, up from thirty-five percent in 1994.²¹⁶ Ninety-two percent of all classrooms are connected to the Internet, up from three percent in 1994.²¹⁷ Additionally, the ratio of students to computers with Internet access has increased to 4.8:1.²¹⁸ A major accomplishment of E-Rate is that it has helped many

213. U.S. Dept. of Com., *Falling through the Net: Toward Digital Inclusion* xv (Oct. 2000). Digital divides continue to exist among people with different levels of education, racial and ethnic groups, young and old, single and dual parent families, and those with disabilities. *Id.* at xvi.

214. See *First Annual State-of-the-States Survey*, *supra* n. 207, at 8 (concluding that Idaho, Maine, Maryland, and Washington have local funding as the largest percentage source of technology funds, which is contrasted with five states that rely the most on federal funds and the eight states rely on their own education department or other state agencies the most).

215. Educ. and Libraries Networks Coalition, *E-Rate: A Vision of Opportunity and Innovation* 6 (July 2003) (using Louisiana as an example, it is argued that a shortfall in the state budget reduced spending on technology and “[w]ithout E-rate funding, librarians in that state would be unable to maintain key databases”).

216. U.S. Dept. of Educ., Natl. Ctr. for Educ. Statistics, *Internet Access in U.S. Public Schools and Classrooms: 1994–2002* 3, <http://nces.ed.gov/pubs2004/2004011.pdf> (Oct. 2003) [hereinafter *Internet Access*]. This is part of a steady trend, with Internet access at ninety-eight percent in 2000 and ninety-nine percent in 2001. *Id.* at 18.

217. *Id.* (analyzing the data further, the largest jump in percentage of classrooms with the Internet was from twenty-seven percent in 1997 to fifty-one percent in 1998, coincidentally the first year of E-Rate funding).

218. *Id.* at 7 (reflecting a dramatic improvement from 1998 when the ratio was 12.1:1; also, it is important to note that this ratio is lower in schools with the lowest poverty concentration

school districts meet the mandates of the *No Child Left Behind Act*.²¹⁹ Newspapers have praised the program, noting that despite its problems, "E-rate has been a dazzling success."²²⁰

A big question for the future of the Internet in public schools is wireless connections. Some critics feel that the approximately eighty billion dollars spent over the past decade for wiring schools with the Internet will become obsolete.²²¹ However, the cry that funds were wasted on wiring schools for the Internet might be too soon. In 2002, only eight percent of public schools loaned laptops computers to students, prime equipment for wireless Internet access.²²² There have been some private donations made by corporations for wireless access, but for many of those schools, there is no other way to access the Internet besides a wireless connection.²²³

D. E-Rate's future

After a decade of E-Rate, it seems clear the program will continue. E-Rate has bridged, and will continue to bridge the digital divide in the United States. While the latest E-Rate frauds have led to some concern, most people believe its problems can be fixed without ending the program all together.²²⁴ Past attempts to end E-Rate have not succeeded

compared to those with high poverty).

219. 20 U.S.C. §§ 6301-7941 (Supp. 2002); *See also* Educ. and Libraries Networks Coalition, *supra* n. 215, at 7. Logan, New Mexico's School District Business Manager noted that without E-Rate providing Internet access, "I don't think it would be feasible for us to comply with the *No Child Left Behind Act*." *Id.* at 11.

220. Greg Toppo, *Schools Achieving a Dream: Near-Universal Net Access*, USA Today 6D (June 9, 2004) (deducing from local recipients that believe E-Rate frees up thousands of dollars in the school budget; "It's been an ongoing, driving force in our technology.").

221. *See* Oppenheimer, *supra* n. 71 (recalling that the wiring of schools took place when the economy was strong, not in a time when states are struggling with budget cuts).

222. *See Internet Access*, *supra* n. 216, at 10. Also, of the ninety-two percent of schools without laptop computer for students, only seven percent planned in 2003-04 to make laptops available for students. *Id.*

223. *See* W. Wireless Corp., *News Release, Wireless Companies Donate Their Services to Improve Communication and Education for Native American Schools*, <http://www.cellularonewest.com/About/PressRoom/4-September-2003.asp> (Sept. 4, 2003) (donating the Internet services by Western Wireless and Nokia were part of the ClassLink program, which is a "wireless industry initiative to increase the quality of education in America through the use of wireless technology").

224. *Six Firms Charged with eRate Fraud*, <http://www.eschoolnews.com/news/Pfshowstory.cfm?ArticleID=5619> (Apr. 12, 2005) (on file with author) (indicting companies and individuals based out of California and New Hampshire); *Report: Agency Sets Aside \$5 Million for Possible eRate Fines*, <http://www.eschoolnews.com/news/PFshowstory.cfm?ArticleID=5697> (June 1, 2005) (on file with author) (involving two state agencies in Indiana that failed to follow E-Rate's competitive bidding rules); *see also* Mills, *supra* n. 12, at 2 (commenting that since E-Rate began in 1996 when the bill passed, not only has E-Rate survived, it has also thrived).

and probably will not succeed in the future.²²⁵ Senator John McCain noted that regardless of E-Rate's "endemic problems, its popularity makes it clear that it is not going away."²²⁶ However, E-Rate is not, as one court defined it, "a panacea for all of the public schools' technology woes."²²⁷ Continual funding will be needed for internal connections, telecomm service, and Internet access since technology is now an essential part of the education of our youth.²²⁸ Policies like *No Child Left Behind*²²⁹ make E-Rate funding critical for districts to give their students the best education.²³⁰

In order to avoid future problems, changes are still in order for E-Rate. This should be done with increased auditing and lessening of funds available for distribution.²³¹ Federal money is being mismanaged at various levels of the E-Rate funding process and auditing is one way of exposing and alleviating such fraud. While schools complain that more auditing slows down the distribution of funds, fewer funds wasted by wrongdoers will make more funding available to school districts.²³² For example, by 2004, USAC had recovered \$7.6 million for violations of its rules. Currently, USAC has guidelines for E-Rate beneficiaries on auditing and indicates that being audited "is not necessarily an indication that the USAC believes problems exist."²³³ In 2005, the FCC is likely to

225. See *H.R. 692, supra* n. 113 (The bill to end E-Rate never made it out of committee hearings.).

226. Branigan, *supra* n. 183 (stating that it is "incumbent upon us to ensure, with thorough oversight or legislation, if necessary, that eRate functions as intended").

227. *Campaign for Fiscal Equity v. State*, 719 N.Y.S. 2d 475, 514 (Sup. Ct., N.Y. County 2001) (discussing concerned parents and students challenging the state of New York's funding of New York City's public schools).

228. *Education Releases, supra* n. 191, at 1 (Secretary of Education Page stated that "[w]e are already seeing some remarkable results, and I believe this trend bodes well for the future of our country. As the report noted, America's students are our ultimate constituents, and we need to listen to them.").

229. 20 U.S.C. §§ 6301-7941.

230. Educ. and Libraries Networks Coalition, *supra* n. 215, at 7, 14. E-Rate is assisting the *No Child Left Behind Act* by providing a resource for training teachers so that they are quality teachers. *Id.* at 15.

231. See generally Foskett & Nesmith, *supra* n. 4; Winston E. Himsworth, *Ten Rules for eRate Success*, eSchool News, 1 (Nov./Dec. 2004); Kathy Ishizuka, *Use of E-Rate Funds Still Lags*, <http://www.schoollibraryjournal.com/index.asp?layout=articlePrint&articleid=CA406660> (Apr. 1, 2004) (on file with author).

232. Davidson, Toppo & O'Donnell, *supra* n. 69, at 5 (noting that one USAC board member said that "[i]f we quadrupled our workforce, you'd have less money going into schools and libraries").

233. Universal Serv. Admin. Co., *Audits of Beneficiaries Fact Sheet*, <http://www.sl.universalservice.org/reference/AuditFactSheet.asp> (last modified Oct. 25, 2004) (on file with author). This fact sheet notes that the purposes of the audits "is to ensure that beneficiaries and service providers receiving financial support under the E-rate complying with FCC rules and regulations." *Id.*

begin auditing up to 250 schools annually.²³⁴ USAC is also planning to visit 1,000 E-Rate recipients to educate them on program rule compliance, which some have described as “shorter, more targeted audits.”²³⁵ There is also a call to increase the bans on contractors and district administrators for wrongs committed in the past during the E-Rate bidding process. As Tom Bennett, the Assistant Inspector General for the Universal Services Fund stated, “(e)ven though it would take away from money that could directly help schools and libraries, more money needs to be spent on supervision.”²³⁶

The amount of E-Rate funds available also needs to be lowered. From 1998 to 2004, the percentage of total E-Rate funding spent on internal connections has decreased, the percentage of total funding spent on Internet access has increased, and the percentage of total funding spent on telecomm services has increased.²³⁷ The percentage of funds spent on a priority does not necessarily reflect the number of applicants applying for that priority. As demonstrated with the division of funds spent in Wisconsin for funding in 2004, there are fewer schools making requests for internal connections, but when a school is granted funds for internal wiring, it receives a substantial amount.²³⁸ This means that even

234. Himsworth, *supra* n. 231, at 41 (advising that applicants should assume that “sooner or later, they will be audited”); *see also Comprehensive Review*, *supra* n. 4, at x (stating that in 2004, there were 222 audits conducted into E-Rate beneficiary compliance).

235. Himsworth, *supra* n. 231, at 1; *see also* Emily Montandon, *E-Rate Inspection*, <http://www.govtech.net/magazine/story.php?id=91692&issue=10:2004> (Oct. 4, 2004) (on file with author) (stating that the USAC is conducting these one thousand cite visits because it is believed that “100 audits just isn’t enough”).

236. Reardon, *Fraud*, *supra* n. 46, at 5. The FCC’s Office of the Inspector General has hired more auditors and created assistant general position to monitor E-Rate. *Id.*

237. *See* Universal Serv. Admin. Co., *Cumulative National Data—Funding Year 2004*, <http://www.sl.universalservice.org/funding/y2004/national.asp> (last modified Jan. 19, 2006) (on file with author); *Cumulative National Data—Funding Year 2003*, <http://www.sl.universalservice.org/funding/y2003/national.asp> (last modified June 1, 2005) (on file with author); Universal Serv. Admin. Co., *Cumulative National Data—Funding Year 2002*, <http://www.sl.universalservice.org/funding/y5/national.asp> (last modified Sept. 9, 2003) (on file with author); Universal Serv. Admin. Co., *Cumulative National Data—Funding Year 2001*, <http://www.sl.universalservice.org/funding/y4/national.asp> (last modified Apr. 3, 2003) (on file with author); Universal Serv. Admin. Co., *Cumulative National Data—Funding Year 2000*, <http://www.sl.universalservice.org/funding/y3/national.asp> (last modified Apr. 3, 2003) (on file with author); Universal Serv. Admin. Co., *Funding Year 1999 Cumulative National Data*, <http://www.sl.universalservice.org/funding/y2/national.asp> (last modified Apr. 3, 2003) (on file with author); Universal Serv. Admin. Co., *Cumulative National Data Funding Year 1998*, <http://www.sl.universalservice.org/funding/y1/national.asp> (last modified Apr. 3, 2003) (on file with author). These figures include both schools and libraries from Funding Year 1998 to Funding Year 2004. The percentage of total funding spent is likely more accurate than the dollar amount, for not only has there been a gradual increase in funding allocated to E-Rate, but also for Funding Year 2004, the moratorium on funds during the early fall decreased the total amount of funds committed. *Id.*

238. *See* Wis. Dept. of Pub. Instr., *Wisconsin E-Rate Information*, <http://www.dpi.state.wi.us/>

more of the E-Rate funds used to bring technology to libraries—about forty million dollars in Funding Year 2004²³⁹—are being used for telecomm services.²⁴⁰

In addition, schools are not spending all of their approved discounts, which bolsters the argument that the E-Rate fund is too large.²⁴¹ In E-Rate's first year, most schools used their funding for wiring and related equipment, a need that has lessened over time.²⁴² USAC's Schools and Libraries Division receives \$4.5 billion in award requests for \$2.5 billion of funds.²⁴³ Such a large amount of funding may entice more people to take advantage of the system, leading to a proposed ceiling on the amount of funding a recipient can request.²⁴⁴ Also, the decline in E-Rate requests in 2005 further suggests that schools' reliance on E-Rate funds

dlel/pld/erate.html (accessed Feb. 26, 2005) (on file with author). In 2004, thirteen schools received funding for internal connections for \$2.3 million, compared to the 433 schools who received funding for Internet access for \$2.9 million and the 658 schools who received funding for telecommunication services at \$19.9 million. Also, looking at Wisconsin's numbers from 1998, the first funding year, \$23.5 million was spent on internal connections in 547 school, \$1.4 million for Internet connections in 384 schools, and \$13.2 million spent on telecommunication services in 1349 schools. *Id.*

239. Oder, *supra* n. 182, at 1 (knowing that four percent of E-Rate money goes to libraries); see generally Debra Lau Whelan, *Mixed Reviews for New E-Rate Rules*, <http://www.schoollibraryjournal.com/index.asp?layout=articlePrint&articleid=CA377847> (Feb. 1, 2004) (on file with author) (explaining also that sixty-five percent of libraries nationwide in 2004 used E-Rate funds).

240. See generally Or. St. Lib., *E-Rate Funding Commitments FY 2003: Oregon Public Libraries a/o 10/1/03*, <http://www.osl.state.or.us/home/libdev/erate/eratefy2003.pdf> (accessed Feb. 21, 2006) (on file with author) (breaking down funding in libraries, more went to telecommunication services versus Internet access); Neb. Lib. Commn., *E-Rate Year Two (1999) in Nebraska Public Libraries Report*, <http://www.nlc.state.ne.us/libdev/erate/YearTwoE-Rate1999.html> (accessed Feb. 6, 2005) (on file with author) (demonstrating in these examples that more funding went towards telecommunications); St. Lib. of Iowa, *Iowa E-Rate Discounts Received*, <http://www.silo.lib.ia.us/for-ia-libraries/e-rate/weberate2.pdf> (accessed Feb. 21, 2006) (on file with author) (funding on telecommunications was practically double than that requested for Internet access); Idaho St. Lib., *Idaho E-Rate Funding 1998-2004*, <http://www.lili.org/forlibs/erate/2005erate-funding-commitments.pdf> (accessed Feb. 21, 2006) (on file with author) (analyzing that E-Rate Internet funding for Internet access was half as much compared to telecommunications).

241. Ishizuka, *supra* n. 231, at 1 (noting that applicants in Kentucky, Michigan, and Hawaii have only spent forty-five percent of their 2002 committed E-Rate funding and even in states like Alaska, Wisconsin, Colorado, and Montana, only seventy-one percent of funding was used); see also Whelan, *Mixed Reviews for New E-Rate Rules*, *supra* n. 239, at 1 (stating that there was \$420 million of unused school and library funds from funding years 1999 to 2002).

242. Thomas, *supra* n. 200, at 3 (noting that once a school is wired for Internet access, funds then have to be allocated to maintain that network).

243. Hal Stuckcr, *E-Rate Administrator to Ramp Up Outreach*, <http://www.schoollibraryjournal.com/article/CA496201.html> (Jan. 19, 2005) (on file with author) (providing online tutorials by the USAC on the E-Rate application process).

244. *Comprehensive Review*, *supra* n. 4, at 37 (repeating the proposal from 2003, which believed waste, fraud, and abuse of E-Rate harmed schools and libraries, whose requests were not funded due to insufficient resources).

has diminished.²⁴⁵ While less funding is needed overall for the program, some funding should be reserved for new schools that are constructed and for districts that have yet to apply for E-Rate.

IV. CONCLUSION

Overall, those involved in the E-Rate program, from teachers to administrators to members of Congress, view it as a successful government program and the few problems that it has experienced has not caused the program to end.

The Twenty-First Century is a digital age and it is imperative that students have access to the tools of technology in order to succeed. Congress and the FCC continue to make changes to the E-Rate program and should continue to do so. The proposed plan of decreasing the total funds allotted to E-Rate and increasing auditing does not signify the end of the program but is rather a means to extend its life. However, fraud in the system cannot be ignored. Enacting and enforcing stricter guidelines and making less funding available will effectively increase the efficiency of the E-Rate program, allowing schools to continue to use E-Rate in preparing our nation's children for the technological future of tomorrow. E-Rate has been a success and will continue to thrive as it helps to improve the educational system in the United States. Enacting and enforcing stricter guidelines and making less funding available will effectively increase the efficiency of the E-Rate program, allowing schools to continue to use E-Rate in preparing our nation's children for the technological future of tomorrow.

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245. See Murray, *supra* n. 190, at 1 (analyzing that there was a \$600,000 or fifteen percent decline from \$4.28 billion in 2004).

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