BALLER STOKES & LIDE
A PROFESSIONAL CORPORATION
2014 P Street, NW
Suite 200
Washington, DC 20036
(202) 833-1180 (FAX)
www.Baller.com

MEMORANDUM

To: **Clients, Colleagues, and Other Interested Persons**

From: **Baller Stokes & Lide, PC**

Date: **January 2019**

Re: **E-Rate Program Overview**

The federal Universal Service Schools and Libraries Program, commonly known as the "E-Rate Program" or simply "E-Rate," is administered by the Universal Service Administrative Company (USAC) as an agent for the Federal Communications Commission (FCC). The E-Rate program enables schools and libraries to obtain substantial discounts, ranging from 20% to 90%, off the cost of data transmission, broadband Internet access, internal connections, and related services and facilities.

This memorandum focuses on the process by which applicants and service providers receive E-Rate funding. We begin with an overview of the E-Rate program, including a brief summary of the FCC's two Modernization Orders. We then review the type of applicants and service providers that are eligible for E-Rate funding, as well as the services and products for which funding is now available under the program. Next, we turn to the specifics of the application process, detailing each step for applicants and service providers. We follow this with a discussion of ways to respond to rejected applications and how to avoid pitfalls that can lead to serious problems for applicants and service providers. Finally, we address some common application questions.

Disclaimer

TABLE OF CONTENTS

I.   E-RATE OVERVIEW

The E-Rate Program partially subsidizes the costs that schools and libraries incur in acquiring data transmission services, broadband connectivity, and related services and facilities. The amount of the subsidy is based primarily on the percentage of students that are eligible for free or reduced-price lunches under the National School Lunch Program in the geographic area served by the school or library in question. Generally, the E-Rate discount will be between 20% - 90% of the cost of the eligible services. E-Rate subsidies are distributed from July 1 of one year to June 30 of the next, known as the "funding year."

- Schools and libraries can receive subsidies on the recurring costs of leasing lit or dark fiber, and will also have various other options. Subject to certain conditions, they can receive subsidies on "special construction" costs of either lit fiber or dark fiber, both within and beyond the school's or library's property line. If seeking dark fiber, they can also include the modulating equipment necessary to light the fiber. They can also self-construct ("self-provisioned broadband"), but they must seek bids for lit fiber and dark fiber networks and conclude that self-construction is the most cost-effective option over the useful life of the facilities under consideration.

With the 2014 *Modernization Orders*,[1] the FCC restructured the program to emphasize access to and support for robust broadband connections for schools and libraries, including internal wireless connections and construction of on-premise and off-premise (laterals) fiber connections. These changes make the program an increasingly important source of support for vital broadband connections; however, participation in the program still requires much advanced planning. An application for funding must be submitted months before the funding year, and several steps must occur before the application is submitted. In fact, many applicants begin soliciting bids between nine months and one year prior to the funding year.

Once an applicant begins soliciting bids, it may select a service provider as early as 28 days after the bidding process begins. Once the service provider is selected, the applicant and service provider will apply for USAC funding during a defined "application window." The application window varies from year to year. This year it is open from January 16 – March 27, 2019. Even after a funding application is submitted, it can take USAC months to make a funding determination. This entire process takes place on USAC's E-Rate Productivity

---

[1]   *In the Matter of Modernizing the E-Rate Program for Schools and Libraries; Connect America Fund*, *Report and Order and Further Notice of Proposed Rulemaking*, WC Dkt. Nos. 13-184 and 10-90, (rel. July 23, 2014), ("*First E-Rate Modernization Order*"), https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-99A1.pdf; *In the Matter of Modernizing the E-Rate Program for Schools and Libraries; Connect America Fund*, *Report and Order*, WC Dkt. Nos. 13-184 and 10-90, (rel. December 19, 2014), ("*Second E-Rate Modernization Order*"), https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-189A1.pdf.

Center (EPC), the online account and application management portal for the E-Rate program.

The FCC has recognized that the application process can be cumbersome, and recently took several steps to streamline the process.[2] While participation in the E-Rate program can be relatively complex, with a firm understanding of the process and good planning a school, library, or service provider should be able to do so with minimal administrative overhead.

II.   ELIGIBILE ENTITIES

A.   Applicants

The E-Rate program was created to support schools and libraries, and they remain the only entities eligible to receive E-Rate funds for eligible services. Although schools and libraries may apply for E-Rate support directly, the FCC also allows them to form or join a consortium to represent them. The following subsections explain how each group can determine if it is eligible to apply for E-Rate funding.

1.   Schools

In order to receive E-Rate funding, schools must meet the definition of elementary and secondary schools set forth in the No Child Left Behind Act of 2001 (20 U.S.C. § 7801(18) and (38)). They may be public or private institutional schools, or public charter schools, but they must operate as a non-profit and must not have an endowment exceeding $50 million.

2.   Libraries

Libraries must meet the definition of "library" or "library consortium" in the 1996 Library Services and Technology Act (Pub. L. 104-208) in order to receive E-Rate funding. They must be eligible for assistance from a state library administrative agency under that Act. They must have budgets separate from any schools, including elementary, secondary, and colleges and universities. They must operate as a non-profit.

3.   Consortia

A consortium is a group of entities that come together to undertake a project or achieve a goal that is beyond the resources of the entities acting individually. For the purposes of the E-Rate program, a consortium is broadly defined and may consist of a group of schools or libraries, a school district, several school districts, etc. Each consortium must designate

---

[2]   Some of these steps included simplifying the application process for multi-year contracts, easing the signed contract requirement, removing the technology plan requirement, and requiring electronic filings. *See First E-Rate Modernization Order, First Report and Order,* ¶ 6.

a lead to ensure that all necessary certifications are made on behalf of the consortium members during the pre- and post-commitment processes.

In the First E-Rate Modernization Report and Order, the FCC recognized the potential cost savings presented by a consortium's purchasing power.[3] Consequently, the Order amended the FCC's rules to allow a consortium lead to seek bids on behalf of all of its identified members, even if the consortium lead does not have authority to purchase services for the consortium members.

B.   Service Providers

Almost any entity capable of providing eligible telecommunications, Internet access, internal connections services, and equipment for eligible schools and libraries can elect to participate in the E-Rate program. Until 2011, schools and libraries could only obtain discounted services from regulated "telecommunications carriers," which had the effect of excluding many public service providers (such as community broadband networks) and entities operating on a private-carriage basis. In late 2010, the FCC adopted changes to the E-Rate program allowing schools and libraries to obtain subsidized telecommunications and Internet access from any entity, including municipalities, state governments, and other non-traditional service providers.

More recently, as noted above, the FCC updated its E-Rate rules again to allow applicants to construct their own, or portions of their own, networks when self-construction is the most cost-effective solution. In such circumstances, a school or library may act as both an applicant and a service provider. Self-construction came under fire in 2017, when FCC Commissioner Michael O'Rielly argued that subsidies for self-construction can lead to overbuilding rather than targeting construction in truly unserved areas.[4] Despite his vocal opposition to self-construction, the E-Rate rules still permit self-constructed networks.

Despite changes to procedures and system issues that were intended to eliminate the delays experienced in FY 2016 and FY 2017, fiber applicants were still subject to significant delays and denials in 2018. On average, schools wait 240 days for an answer to their fiber applications.[5] Often delays lead to denials; some fiber applicants were still waiting on

---

[3]   *First E-Rate Modernization Order*, ¶ 168.

[4]   Letter from Michael O'Rielly, FCC (Feb. 9, 2017) available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0210/DOC-3434 62A1.pdf?mc_cid=a6f2f0bf56&mc_eid=ac5d5060c3.

[5]   Issie Laposwky, *FCC Delays Are Keeping Broadband From Rural School Kids*, Wired (April 4, 2018) available at: https://www.wired.com/story/fcc-delays-keeping-broadband-from-rural-school-kids/.

funding they applied for in 2016[6] making them unable to make their previous service implementation deadline.[7]

All service providers must apply for a Service Provider Identification Number (SPIN), a unique nine-digit number assigned by USAC, before they can begin providing services. Some service providers apply for more than one SPIN, if their business units are separated by state, type of service, etc. (We turn again to the SPIN and other service provider requirements in Section V.)

C.   State Master Contracts

The FCC also permits states to create a master contract, in which schools and libraries in the state may participate to receive E-Rate support. A state master contract is a contract that is competitively bid and put in place by a state government entity for use by other eligible entities in the state. Depending on how the state structures the master contract, applicants (schools, libraries, or consortia) may use the state master contract in lieu of filing their own Form 470 and cite to the contract in its Form 471. Alternatively, applicants can file a Form 470 and consider the state master contract as one of its bids.

III.   SERVICES ELIGIBLE FOR E-RATE SUPPORT

A.   Eligible Services List

The Eligible Services List (ESL) informs applicants of the types of services that are eligible for E-Rate Support and the conditions under which those services are eligible.[8] The FCC used amendments to the ESL to carry out several of the reforms that it adopted in its E-Rate Modernization Orders.

Previously, the ESL was organized into two main groups, "Priority One" and "Priority Two" Services. Priority One Services included telecommunications, telecommunications services, and Internet access services. Priority Two Services included internal connections, including wireless services, various other services, and basic maintenance associated with the various eligible services. Now, the FCC has replaced the terms "Priority One" and

---

[6]   Stephen Noonoo, Why the FCC's E-rate Makes Funding High-Speed Internet a Slow Crawl, EdSurge (Aug. 7, 2018) available at: https://www.edsurge.com/news/2018-08-07-why-the-fcc-s-e-rate-makes-funding-high-speed-internet-a-slow-crawl; in the matter of request for waiver by Utah education and telehealth networks, May 8, 2018.

[7]   *In the Matter of Request for Waiver by Utah Education and Telehealth Network; Schools and Libraries Universal Service Support Mechanism*, CC Dkt. Nos. 02-6, (rel. May 8, 2018), ¶ 10.

[8]   Eligible Services Lists from the last several years are available on the USAC website: http://usac.org/sl/applicants/beforeyoubegin/eligible-services-list.aspx.

"Priority Two" with "Category One" and "Category Two" services, respectively. More important, the FCC has eliminated or reduced funding for some Category One and Category Two services, while increasing funding for others.

Specifically, the FCC is phasing out some of the legacy services enumerated in the ESL, including, for example, voice telephony services. Meanwhile, the FCC will now support more infrastructure and dark fiber projects that enhance connectivity. Schools or libraries will still be largely responsible for providing additional resources such as end-user equipment (computers, telephones, etc.), software, professional development and other elements necessary to realize the objectives of that connectivity.

B.   Category One Services: Connectivity

Focusing on connectivity to schools and libraries, Category One services include data transmission service and Internet access. The following sections further describe Category One services (based on the Eligible Service List for the 2019 Funding Year).[9]

1.   Data Transmission Services and Internet Access Services

In general, data transmission and broadband Internet access services are eligible for E-Rate support as Category One services. Examples include: Asynchronous Transfer Mode (ATM), Broadband over Power Lines (BPL), cable modem, DSL, DS-x and fractional T-1 or T-3, Ethernet, leased lit fiber, dark fiber, self-provisioned broadband networks, frame relay, Integrated Services Digital Network (ISDN), Multi-Protocol Label Switching (MPLS), OC-x, satellite service, Switched Multimegabit Data Service (SMDS), telephone dial-up, and wireless services.

a. Dark and Lit Fiber

The FCC equalized the treatment of lit and dark fiber beginning in FY 2016. As a result, dark fiber, whether leased or self-provisioned, is eligible for the same level of E-Rate support as lit fiber.

Prior to Funding Year 2016, the FCC required that dark fiber be lit immediately in order to qualify for funding, and it did not subsidize construction costs for dark fiber. Now, leased dark fiber is eligible for support if it is lit in the same funding year. Should an entity elect to light the dark fiber, the necessary modulating equipment is also covered.

Furthermore, the FCC now provides E-Rate support for special construction costs for leased lit fiber, dark fiber, and self-provisioned broadband networks, including construction that extends beyond the property line of the school or library. There are three

---

[9]   The 2019 Eligible Service List was issued in November 2018 and is available here: https://docs.fcc.gov/public/attachments/DA-18-1173A1.pdf

components of special construction: construction of network facilities, design and engineering, and project management. Special construction can begin up to six months early if a valid competitive bidding process is completed, the construction is for infrastructure necessary to the operation of a recurring Category One service, and service starts after the start of the funding year.

The FCC will match state funds for special construction costs on a dollar-for-dollar basis, for up to 10% of the costs.[10] Although the FCC has designated special construction costs as eligible for E-Rate subsidies in practice, it can be difficult to receive funds for special construction projects. Indeed, over one-half of special construction applications to date have been rejected. Delays in processing an initial application can inhibit E-rate support for special construction of leased or self-provisioned fiber. Additionally, applicants seeking subsidies must submit accurate information on their eligibility and project calculations. As a result, it is important to seek expert counsel in making an application that includes special construction costs.

Applicants seeking bids for leased dark fiber or dark fiber obtained through an indefeasible right of use (IRU) must also seek bids for lit fiber service, regardless of whether the funding request includes special construction. Applicants seeking bids for self-provisioned broadband networks must also seeks bids for broadband Internet services provided over third-party networks. Applicants must fully consider all responsive bids and choose the most cost-effective option.

b.   Internet Access

Eligible Internet access may include basic firewall protection, domain name service, and dynamic host configuration when those features are provided as a standard component of a vendor's Internet access service. Firewall protection must be provided by the Internet access provider in order to be eligible for E-Rate support. It cannot be purchased separately.

2.   Services No Longer Eligible for Category One Support

The FCC began phasing out support of voice service in funding year 2015, and as of funding year 2019, voice services (local and long distance wired telephone service; interconnected VoIP; and cellular phone service) are no longer eligible for any Category One E-Rate Support.[11] Other services that are no longer eligible for Category One E-Rate Support include 900/976 call blocking, custom calling services, direct inward dialing,

---

[10]   USAC has published a list of eligible state funding programs, available at: http://www.usac.org/sl/applicants/beforeyoubegin/state-matching-provision.aspx.

[11]   *First E-Rate Modernization Order, First Report and Order,* ¶ 135; *In the Matter of Modernizing the E-Rate Program for Schools and Libraries;* WC Dkt. No. 13-184 (rel. Nov. 16, 2018) ¶ 4 ("E-Rate Eligible Services for FY 2019"), https://docs.fcc.gov/public/attachments/DA-18-1173A1.pdf.

directory assistance charges, email, inside wire maintenance plans, paging, text messaging, voice mail, and web hosting.

C. Category Two Services: Internal Connectivity

Category Two services focus on the connections inside schools and libraries buildings, including internal connections such as wireless connections. Category Two services also include the necessary components of these connections and the management and maintenance of them.

Applicants requesting funding for Category Two services are limited to a budget based on the number of students in a school or the square footage of a library. A school or library may elect to spend all its budget in one year, spread out receipts over five years, or use the funds in any other combination. Applicants are also permitted to use the budget on any combination of Category Two services.

1. Internal Connections Components

Category One services include support for components needed for connectivity within schools and libraries, including wireless. This includes most components located at the applicant site that are necessary to transport information to classrooms, to publicly accessible rooms of a library, and to eligible administrative areas or buildings. In some cases, on-premise equipment can be funded under Category One – e.g., if the on-premise equipment is an integral part of an end-to-end Category One data transmission service or Internet access service.[12] In the majority of cases, however, equipment that is located at the applicant site is considered for funding under the eligibility requirements for Internal Connections under Category Two.

Eligible Broadband Internal Connections Components include access points used in a wireline local area network (LAN) or a wireless local area network (WLAN) environment – i.e., wireless access points, antennas, cabling, caching, connectors, firewall services and components, switches, routers, racks, Uninterruptible Power Supply (UPS)/Battery Backup, network operating system software, and wireless controller systems.[13]

In addition, data plans and wireless data cards for mobile devices are eligible for Category One support in instances when the school or library can demonstrate that individual data plans are the most cost-effective option for providing internal broadband access at schools and libraries. Applications should compare the price of data plans or air cards for mobile

---

[12]   *In the Matter of Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, FCC (Oct 5, 2017) (clarifying "the eligibility of on-premises Network Equipment with both Category One and Category Two functionalities") available at: https://apps.fcc.gov/edocs_public/attachmatch/DA-17-973A1.pdf.

[13]   *See* E-Rate Eligible Services for FY 2019, App. B.

devices with the cost of Internet access and data transmission services to the school or library.

2.   Managed Internal Broadband Services

The E-Rate program provides Category Two support for services provided by a third party for the operation, management, and monitoring of eligible broadband internal connections components, such as the management and operation of a LAN/WLAN, and may include installation, activation, and initial configuration.

3.   Basic Maintenance of Internal Connections

E-Rate support is available for basic maintenance and technical support necessary to ensure reliable operation of the internal connections. The following are types of maintenance that is eligible for E-Rate support: repair and upkeep of eligible hardware, wire and cable maintenance, basic technical support, and configuration changes, and software upgrades and patches including bug fixes and security patches.

4.   Services Ineligible for Category Two Support

The following services are ineligible for Category Two funding: circuit cards/components, data protection (except for firewall and uninterruptible power supply), interfaces, gateways, antennas (with exceptions), servers (other than necessary for caching), software (other than the software that supports eligible broadband internal connections), storage devices, telephone components, video components, and voice/video over IP components.

D.   Partial Eligibility

If a service or product includes both eligible and ineligible uses or components, the eligible portion may still qualify for E-Rate discounts. The applicant requesting discounts will be required to do a cost allocation to determine the cost of the eligible service or product. If a Form 471 contains a request for discounts and more than 30% of the services or products are ineligible for E-Rate funding, the entire request will be denied.

IV.   E-RATE APPLICATION PROCESS FOR APPLICANTS

A.   Process Overview

The following outline provides a high-level overview of the application process for school and library applicants. In the next section, we delve into these requirements in greater detail.

- Manage program processes, receive notifications, contact customer service
    - E-Rate Productivity Center (EPC)
    - Use to activate account, create a new user, add a consultant user, manager user permissions, and modify your account administrator

- Identify needed services and open competitive bidding process to allow service providers to bid
  - **Form 470** / RFP
  - Fall prior to funding year – as early as 12 months before the funding year, but often between 8-9 months before the funding year

- Review all bids received, select provider(s), enter contract or legally binding agreement
  - Late Fall/Winter prior to funding year

- Seek E-Rate discounts on eligible services from selected providers
  - **Form 471**
  - During USAC's filing window – normally between January and March of the funding year

- Receive Funding Decision Commitment Letter from USAC

- Confirm that service provider(s) have begun providing services
  - **Form 486**
  - Start of the funding year

- Invoice USAC for services
  - **Form 472** or **Form 474**
  - During the funding year

1. **Steps**

   1. **Create an EPC Account and Account Administrator**

The E-Rate Productivity Center (EPC) is the online account and applicant management portal for E-Rate. Applicants must have an account in EPC to file program forms, receive notifications, and conduct other program activities. You must have an account administrator, who manages your account and grants rights to other users.

   2. **Identify Services and Open Bidding Process**

The FCC Form 470 is the vehicle through which applicants initiate the competitive bidding process. Each Form 470 provides specific information about the applicant and identifies the services for which the applicant wishes to receive bids. Once an applicant posts a Form 470 to the USAC website, the competitive bidding process begins and service providers may begin to review the information provided and make responsive bids.

a. FCC Form 470 – Identifying Services

The FCC no longer requires applicants to submit technology plans for review before they seek bids through the Form 470. [14] Applicants must nevertheless understand their connectivity needs and plan their requests accordingly. On the Form 470, an applicant must describe the specific products and services requested and must identify the category of services for each product and service (e.g., data transmission, Internet access, managed internal broadband services, internal connections, and basic maintenance of internal connections).

In *addition* to participating in the Form 470 process, an applicant *may* issue a separate Request for Proposal (RFP) with more detailed information about the services that it wishes to receive. In practice, an RFP process is often used for significant requests for services. Moreover, while an RFP is optional for the E-Rate Program, state or local procurement laws may require the issuance of an RFP and dictate the way it is performed. If an RFP exists, an applicant must upload the RFP to Form 470.

If multiple products or services are requested, an applicant may file one Form 470 for all services and add separate service requests.

b. FCC Form 470 – Filing Requirements

An applicant must file a Form 470 if applying for discounts for one of the following types of services: (1) tariffed or month-to-month services for which it does not have a signed, written contract or (2) services for which a new written contract is sought for the Funding Year. Form 470 must be submitted each funding year for requests for tariffed or month-to-month services and for new contractual services. A Form 470 can be filed with USAC as much as 12 months before the start of a funding year, depending on when USAC's timeline. Form 470 must be filed at least 28 days before filing FCC Form 471 (which will be elaborated upon below).

c. Competitive Bidding Requirements

The FCC requires that the competitive bidding process be "fair and open." According to the FCC, "'[f]air' means that all bidders are treated the same and that no bidder has advance knowledge of the project information. 'Open' means there are no secrets in the process –

---

[14] Before 2011, all E-Rate applicants were required to produce a detailed technology plan to be eligible for funding. The 2010 E- Rate Order removed this requirement insofar as it related to Category One services. The *First E-Rate Modernization Order* removed the requirement for applicants seeking Category Two services, finding that the burden of getting formal approval and certification for the technology plans outweighed the plan's benefit to the program. Accordingly, the program no longer requires an applicant to prepare a technology plan for either Category One or Category Two services.

such as information shared with one bidder but not with others – and that all bidders know what is required of them."[15] ***Both applicants and service providers should take the competitive bidding requirement very seriously, as it can lead to rejection or retroactive invalidation of an application, with onerous refunds, interest, and penalties.*** We discuss this further in Section VI.

To promote open and fair competition, the FCC requires that a Form 470 be completed by the entity (the applying school, library or consortium) that will negotiate with potential service providers. *Potential service providers cannot be involved in preparing the Form 470, nor can they exercise undue influence over its preparation by the applicant.* An applicant cannot select a service provider until at least 28 days after Form 470 is posted, and at least 28 days after an RFP is publicly available, and it must consider all bids received before making a decision and executing a contract. Even after a service provider is selected, the applicant must be able to demonstrate that price was the primary factor in selecting the winning bidder.

d.   Exceptions to Filing Form 470

In some circumstances, applicants need not submit a Form 470. For example, filing a Form 470 is not required for multi-year contracts previously awarded via a prior Form 470. However, applicants still need to file a new FCC Form 471 for E-rate support.

In addition, applicants are exempt from the competitive bidding rules when ordering business-class Internet access services if the service meets the following three conditions.

1.   The pre-discount cost is $3,600 or less annually.

2.   The bandwidth provided is at least 100 Mbps downstream and 10 Mbps upstream.

3.   The service and price are commercially available. This means that the service must be publicly available to non-residential customers, such as small businesses or other government customers, in the same form and at the same rates that it is offered to schools and libraries.

3.   Select Service Provider(s)

After the applicant has selected one or more service providers, the applicant and the selected service provider(s) must enter into legally binding agreements. This must be done before the applicant submits its FCC Form 471 to USAC. Previously, the FCC required a signed contract before an applicant could submit its Form 471, but the FCC would often waive the signature requirement for parties that could demonstrate that an agreement was made. The FCC now accepts "legally binding agreements" that reflect the parties' intent

---

[15]   USAC, "Conducting an Open and Fair Bidding Process" available at: http://www.usac.org/sl/applicants/step01/competitive-bidding.aspx.

to contract, even if it does not include all of the elements of a formal contract signed by both parties. The FCC has provided the following example of such a "legally binding agreement":

> "For example, a bid for the services that includes all material terms and conditions provided in response to an FCC Form 470 would be sufficient evidence of an offer and an email from the applicant telling the service provider the bid was selected would suffice as evidence of acceptance."[16]

Although the FCC has made strides in allowing more flexibility regarding agreements between the parties, several important requirements remain in effect. First, the applicant may not award the contact to a service provider ("the Contract Award date") until at least 29 days after posting the Form 470. Applicants must retain relevant documents (including emails) that indicate no prior agreement was made. Second, the FCC and USAC encourage applicants and service providers to include provisions in contracts specifying whether USAC payment is to be made on a discounted invoice or reimbursement basis (Form 474 – SPI, or Form 472 – BEAR, as described in greater detail below). Third, the applicant must commit to paying the non-discounted portion of the service.

4. Request Funding (Form 471)

a. General Information About Form 471

Form 471, the Services Ordered and Certification Form, functions as a request for E-Rate discounts from USAC for eligible services that were competitively bid pursuant to Form 470.[17] Form 471 can consist of one or more individual funding requests, separated by service category.

Applicants must submit the following information on their Form 471:

- Information identifying the entities (schools/libraries) receiving service, including Billed Entity Numbers and NCES and/or FSCS codes.

- Specific information relating to the service provider, including the service provider's name and SPIN number, cost of the services, contract or description of the contract, and the start and end dates of service.

- A detailed description of products and services to be provided

---

[16] *First E-Rate Modernization Order*, ¶ 204.

[17] Form 471 must be completed and filed electronically. A sample Form 471 is available here: http://www.usac.org/_res/documents/sl/pdf/forms/471.pdf.

- The discount level of the school district, primarily according to the percentage of students eligible for free and reduced lunches under the NSLP. If the applicant is a multi-district consortium, the discount is averaged across the districts in the consortium. Additional discounts may be available for applicants located in rural areas. Form 471 includes a discount matrix for this purpose.[18]

An applicant must also certify on its Form 471 that it has "secured access" to all resources and funding required to procure and utilize the services requested, including the non-discounted portion. (This is in addition to the certification it made on its Form 470 attesting to the same).

b. Filing Details

Form 471 must be submitted during a designated filing window. The filing window varies, but in recent years, the window has been from early January to late March preceding the start of the funding year. The exact dates are posted on USAC Schools and Libraries Program (SLP) website.[19]

Each billed entity (i.e., each entity responsible for making payments to the service provider, which may or may not itself qualify for discounts) must file a Form 471 application, even if several billed entities together filed a single Form 470. Services requested on one or more Forms 470 may be combined into a single Form 471, or a Form 471 may be filed for each Form 470 filed. Applicants applying for both Category One and Category Two services are "strongly encouraged" by USAC to file separate Forms 471 for Category One and Category Two services, respectively.

After a Form 471 has been filed, USAC issues a Form 471 Receipt Acknowledgement Letter (RAL) to both the applicant and the service provider(s), providing details of information the applicant submitted on its Form 471. It is sent before USAC reviews the substance of Form 471 for purposes of evaluating eligibility and funding commitment levels. Information in the RAL can be corrected by the applicant within 15 days of the date of the RAL.

Discounts are not awarded on a rolling basis. All Forms 471 received during the filing window are treated as if simultaneously received.

5. Receive Funding Decision from USAC

After a Form 471 is filed, USAC's Program Integrity Assurance (PIA) reviewers check the information on the form for completeness and accuracy and may have additional questions. Applicants must respond within 15 days to any PIA question. After the PIA completes its review of a Form 471 (which can take a while), USAC issues a Funding Commitment

---

[18]   http://www.usac.org/_res/documents/sl/pdf/samples/Discount-Matrix.pdf

[19]   USAC SLP Website available at: http://www.usac.org/sl/.

Decision Letter (FCDL) to both the applicant and the service provider, stating its decision for each funding request. The application review process can take months, although USAC has stated that it prioritizes application review for state and regional consortia applicants. If an application is rejected, applicants can appeal the decision to USAC and, ultimately, the FCC. (See Section VI).

6. Confirm Initiation of Services (Form 486)

After receiving a funding commitment and initiating service, applicants must submit a Form 486 to USAC. This form indicates that services have started, that the service provider is in compliance with the Children's Internet Protection Act (CIPA), and that invoicing may begin. Applicants should separately list each service for which funding was approved and service has begun. Funding may be reduced if Form 486 is received more than 120 days after date of the Funding Commitment Decision Letter, or 120 days after the Service Start Date, whichever is later.

Applicants may choose to file a Form 486 before services have started if:

- The applicant has received an FCDL,

- Services will start in the month of July,

- The applicant can certify compliance with CIPA requirements, and

- The form is filed on or before July 31.

7. Receive the Discount

There are two methods to invoice USAC for the discount. First, a service provider can bill the applicant at the discounted rate and then submit an invoice to USAC for the remaining costs by filing a Form 474. Alternatively, an applicant can pay the service provider in full and file a Form 472 (Billed Entity Applicant Reimbursement Form). Both methods require a series of steps before invoicing can occur. Before submitting an invoice to USAC, applicants and service providers must have received a FCDL from USAC with a positive commitment for the services being invoiced. Applicants must certify Form 486 and receive a Notification Letter. Service providers must have filed Form 473. Applicants filing a Form 472 must also file a Form 498 (Billed Entity Identification Number), identifying a bank account to which reimbursement may be paid.

USAC bases the billing mode for each funding request (discounting or reimbursement) on the first type of invoice it processes for payment. (*See* V.B.8.a-b for more information).

V. E-RATE APPLICATION PROCESS FOR SERVICE PROVIDERS

A. Process Overview

The following outline summarizes the application process for service providers. Each step is discussed in greater detail in the following sections.

- Create an EPC account and account administrator
- Obtain Service Provider Identification Number (SPIN) and Form 499 Filer ID

- Respond to RFP and/or Form 470
  - Fall/Winter prior to funding year

- Once selected by applicant, contract or make legally binding agreement for service
  - Fall/Winter prior to funding year

- Assist with Form 471, as appropriate
  - During the filing window established by USAC – normally between January and March of the funding year

- Commence service
  - In most cases service cannot begin prior to July 1st – the start of the funding year

- Process discount (either reimbursement or discounted invoice).   In either case, USAC only pays the service provider.
  - Form 472 or Form 474
  - During the funding year

B.   Steps

1.   Create an EPC Account and Account Administrator

Your company must have an account in EPC to file program forms, receive notifications, and conduct other program activities. You must have an account administrator, who manages your account and grants rights to other users.

2.   Obtain a Service Provider Identification Number (SPIN)

In order to obtain a SPIN, service providers must file a Form 498. Form 498 registers the service provider with USAC, and USAC will issue a SPIN to the service provider. Form 498 collects contact, remittance, and payment information for service providers receiving support from any of the federal USF programs, including the E-Rate.   (A provider which has already participated in another USF program will already have a SPIN.)

Note that Form 498 includes a space for the provider to provide its "Form 499 Filer ID." A Form 499 Filer ID is issued by USAC upon the initial filing of Form 499-A, which is the primary reporting mechanism for the federal Universal Service Program by providers of interstate telecommunications, telecommunications service, or interconnected Voice over Internet Protocol. While the Form 498 Instructions clearly state that a Form 499 Filer

0ID is *not* required to obtain a SPIN,[20] it has been our experience that USAC does not apply that principle consistently. That is to say, USAC may take the position that a provider must obtain a Form 499 Filer ID, whether or not the provider has an independent obligation to file Form 499-A. We recommend that service providers proceed with caution on this point.

3. Bid on Applicant's Form 470 and/or RFP

Service provider must submit a bid to applicant, consistent with state and local bidding process guidelines.

4. Execute Contract or Legally Binding Agreement with Applicant

If selected by the applicant, the service provider and applicant must sign a contract (unless for tariffed or month-to-month services) or have another legally binding agreement in place prior to filing a Form 471. (*See* IV.B.2). This rule represents a slight departure from the previous rule, which required a signed contract to be in place before an applicant could submit a Form 471. The new rule ensures the applicant and service provider have negotiated and agreed to contractual terms before filing a Form 471, but is more flexible as to what constitutes an agreement. For example, the FCC stated that a service provider's bid may be considered an offer if it contains all the material terms and conditions.

5. Assist Applicant With Form 471

Selected service providers can provide assistance to applicants in their completion of Form 471, in particular with regard to the detailed description of products and services. After an applicant submits Form 471, USAC send a Form 471 Receipt Acknowledgement Letter (RAL) to both the applicant and the service provider. USAC may subsequently request additional information from the service provider and/or the applicant.

6. Receive Funding Commitment Decision Letter (FCDL)

After reviewing the Form 471, USAC will issue a funding eligibility decision in the form of Funding Commitment Decision Letters (FCDLs). Service providers and applicants should review for accuracy.

7. Commence Service

Service providers generally cannot provide services before the start of the funding year on July 1, except under a recently adopted exception involving advance installation: the FCC and USAC now allow a service provider to begin installing Category One infrastructure prior to the funding year where doing so is necessary to enable the service provider to

---

[20] "You do not need an FCC Form 499 Filer ID number to be issued a FCC Form 498 ID." *Instructions for Completing the Service Provider and Billed Entity Identification Number and Contact Information Form*, OMB3060-0824, at 15, http://www.usac.org/_res/documents/cont/pdf/forms/2013/FCC_498_Form-Instructions.pdf

commence Category One services during the same funding year. Four conditions must be met in order for USAC to provide support for infrastructure costs performed before the funding year:

- Installation cannot begin before selection of the service provider pursuant to a posted Form 470 and no more than six months before July 1st of the funding year;

- The Category One service must depend on the installation of the infrastructure;

- The underlying Category One service cannot have a service start date prior to July 1 of funding year; and

- No invoices can be dated prior to July 1 of the funding year. USAC will treat the infrastructure as delivered (and provide payment) when the service begins during the funding year.[21]

Once the applicant files a Form 486 to indicate to USAC that the service provider has begun providing services (*see* IV.B.), the service provider may begin to invoice USAC for the discounted portion of the services.

8.   File Annual Certification (Form 473)

Each year, service providers must certify on Form 473 that they will comply with E-Rate program rules. USAC will not pay invoices unless USAC has a Form 473 on file for the funding year designated on the invoice.

9.   Invoice USAC

As discussed in greater detail below, applicants may choose to receive the discount either on a reimbursement basis (Form 472) or on an invoice basis (Form 474).

a.   Form 472

Form 472, the Billed Entity Applicant Reimbursement (BEAR) Certification, uses what is known as the "Reimbursement Method." Under this approach, the applicant pays for the products and services in full and submits a Form 472 to USAC to receive reimbursement of the discounted portion. If the applicant chooses this method, the applicant must submit the BEAR form, which must be signed by the service provider. The service provider will receive the reimbursement payment and pass it on to the applicant.

The applicant can submit a Form 472 only after it has submitted a Form 486, and after it has paid the total amount to the service provider, including the non-discount share and the amount of USF support to be paid by USAC.

---

[21]   Step 4 Starting Services, Service Provider Process, USAC (last updated June 2018) available at: https://www.usac.org/sl/service-providers/step04/default.aspx.

b.   Form 474

Alternatively, service providers may submit Form 474, Service Provider Invoice, to receive payment from USAC for the discounted amount of the products and services provided. Under this approach, the service provider only bills the applicant for the non-discounted amount and receives the discounted portion directly from USAC.

The service provider may submit a Form 474 only after the applicant has submitted a Form 486 verifying the services start date, and after the service provider has provided a discounted bill to the applicant.

10.   Complete the Services

A funding year ends on June 30. Recurring services must be delivered on or before the end of the funding year in order to receive the appropriate funding. Services that roll over from year to year under a multi-year contract are considered to start again in the new funding year, and they receive a new FRN each year.

Non-recurring services (i.e., infrastructure installation, equipment delivery, internal wiring) can occur through September 30 following the end of the funding year. A service provider or applicant can also request a service delivery extension if more time is needed to deliver services.

VI.   REJECTED APPLICATIONS

A.   Reasons for Rejection

The most common reasons for denial of an E-Rate funding request are failure to comply with the competitive bidding requirements, failure to meet deadlines, and insufficient documentation. Other reasons for denials include problems with the Form 470, ineligible products or services, contractual problems, and lack of cost-effectiveness. In the following sections, we review common pitfalls that can cause applications to be rejected.

1.   Failure to Conduct a Fair and Open Competitive Bidding Process

As noted previously, the E-Rate program requires that applicants select service providers pursuant to a competitive bidding process that is fair and open. To have an open and fair competition, the applicant and service provider should not have a relationship that would (or would appear to) unfairly influence the outcome of the competition. The applicant and service provider must also avoid any relationship that would give the service provider access to "inside" information or other means to unfairly compete. For example, USAC has stated that "a conflict of interest exists when the applicant's consultant is associated

with a service provider that is selected and is involved in determining the services sought by the applicant and the selection of the applicant's service provider(s)."[22]

It is not always clear what constitutes an improper relationship under these definitions, but examples can be illustrative. USAC does permit applicants and service providers to engage in "marketing discussions" but says that any conversations must be neutral. These conversations must take place prior to bidding. Permissible conversations may include discussion involving new product offerings, teaching applicants about new technologies, and presenting product demonstrations.[23]

While some marketing discussion are permissible, the rules are much more stringent once bidding begins. USAC does not allow service providers to serve as the Form 470 contact person, even in a consultant capacity. For example, an individual who is authorized by the applicant to make decisions on its behalf can never be associated with the service provider that submits bids in response to the applicant's Form 470 and, ultimately, appears on the Form 471.

Additionally, a service provider cannot provide funding for the applicant's non-discount portion, nor can it seek or assist in locating other resources (such as grants or foundations) to pay the non-discount portion, unless such funds are committed to the applicant prior to the filing of Form 471. Service providers are also not permitted to waive the applicant's non-discount portion.

For more on this issue, please refer to the competitive bidding guidance materials available on the USAC Schools and Libraries Program web page.[24]

2. Insufficient Documentation / Lack of Responsiveness

Filing complete documents in accordance with the established deadlines is a critical component of the E-Rate application process. USAC will not review a Form 471 that is received past the close of the filing window. Additionally, incomplete documentation may result in denial of an application. Generally, USAC will notify applicants if information is missing from their applications and will request additional or clarifying information. Requests for information and/or documentation may pertain to an applicant's FCC Form 471 or any other form. Applicants typically have 15 days to reply to USAC requests.

---

[22] Step 1 Competitive Bidding, USAC (last updated December 2017) available at: http://www.usac.org/sl/applicants/step01/competitive-bidding.aspx.

[23] E-Rate Program – Program Compliance, Fall 2014 Applicant Trainings (Power Point), http://www.usac.org/_res/documents/sl/training/2014/3-Program-Compliance-Constants.pdf.

[24] *See supra* note 13.

3. Ineligible Products or Services

If 30 percent or more of the products or services included on a funding request not eligible for E-Rate support, the funding request will be denied. This rule is known as the "30% Rule."

B. Appeal Process

Parties that may appeal a USAC decision include applicants, service providers, and entities that have filed an FCC Form 499. Parties wishing to appeal a USAC decision must begin by appealing the decision directly to USAC. After an appeal has been heard by USAC, the party may appeal a decision at the FCC.

To initiate an appeal, a complete appeal must be received by USAC within sixty days after the USAC decision is issued. The appeal must include documentation of USAC's decision, details regarding the reasons for the appeal, and the relief sought. Failure to provide all required documentation for the appeal within sixty days will result in the appeal's dismissal.

VII. OTHER UPDATES FOLLOWING E-RATE MODERNIZATION

A. Measures to Ease Multi-Year Applications

If an applicant has signed a multi-year contract pursuant to a posted Form 470, it need not submit a new Form 470 to be eligible to apply for discounts on services provided under that contract for future funding years. Previous rules required an applicant to annually submit a Form 471 in order to receive discounts on eligible services for the coming year, even if provided under a multi-year contract awarded pursuant to Form 470. The E-Rate Modernization Order created a streamlined application process for multi-year contracts in situations in which the contract for E-Rate supported services is no more than five years, the applicant has filed a complete Form 471, and any changes in the requested services are provided within the scope of the establishing Form 470 and applicable contract. Under these rules, an applicant is only required to submit a complete Form 471 for the first funding year in which it seeks E-Rate support for a multi-year contract. In subsequent years, the applicant can use a streamlined application process that will be shorter, will require less information from the applicant, and will be approved through an expedited review. Details of the streamlined application process will be forthcoming.

B. Ownership of Wide Area Networks (WAN)

The Eligible Services List (ESL) for 2017 provided clarifications regarding USAC's treatment of applicant-owned wide area networks (WANs). [25] In the *Second E-Rate Modernization Report and Order*, the FCC updated its E-Rate rules to allow applicants to construct their own networks, or portions of their own networks when self-construction is

---

[25]   *Id.*

the most cost-effective solution. In the ESL for 2017, the FCC confirmed that, consistent with that decision, the FCC eliminated a restriction on applicant-owned WANs. The FCC continued by saying that lease arrangements for non-exclusive access to service provider WANs have long been eligible for Category One support. In practice, most applicants that need WAN service will probably obtain them via lease, as a Telecommunications Service. Applicants can also obtain WAN service as an Internet Access Service, if leasing the WAN is the most cost-effective means of obtaining Internet Access.

The ESL for 2017 also highlighted the difference between a WAN connection and an internal connection. The FCC stated that "[f]or broadband, connections forming a data network between *multiple* eligible schools or libraries are WAN connections for the purposes of the E-Rate program"[26] Connections between or among multiple buildings of the same school campus or single library branch, however, are not considered WAN connections, but are instead classified as Category Two internal connections for E-Rate purposes.[27] Otherwise stated, if a school or library has multiple buildings on the same campus, connections between those buildings are internal connections. If different schools or libraries have buildings are on the same campus, however, those buildings are eligible for Category One support. Alternatively, if the same school has buildings on multiple campuses, those buildings can also be classified as a WAN connection eligible for Category One support.

C. Retention of Records

The FCC recently extended its required document retention period from five years to ten years. As a result, applicants must maintain all records, including all bids received, for at least ten years after the last date of service delivered.[28] USAC and FCC periodically audit a sample of E-Rate applicants.

---

[26] The Eligible Services List for 2017 is available online at: https://apps.fcc.gov/edocs_public/attachmatch/DA-16-1023A1.pdf

[27] Additional clarifications are available in the ESL for 2017. For example, "connections that distribute broadband to buildings of a single school located on multiple campuses located miles apart would not be internal connections, and may be eligible for Category One support."

[28] *See* 47 C.F.R. § 516(a)(2).

VIII.   POTENTIAL CHANGES TO THE E-RATE PROGRAM

Despite comments by FCC Chairman Ajit Pai and Commissioner Michael O'Rielly questioning the E-Rate program's financial viability and its potential fraud and abuse,[29] there were minimal changes to the program in 2018. Fears that the $3.9 billion annual cap for E-Rate spending would be reduced now that Chairman Pai and Commissioner O'Rielly are in the majority at the FCC did not come to fruition. USAC was directed to fully fund eligible category one and category two E-rate requests. The changes implemented under Chairman Pai can effectively be thought of as "streamlining."

Notably, EPC was further integrated into the E-Rate program as a one-stop portal for applicants and service providers. USAC made several changes to the application process, in the way of form reduction, to make the entire process more efficient. In addition, as of May 2018, the U.S. Treasury distributed USF Funds, instead of USAC.   While this change does not directly impact recipients of USF Funds, it does increase the degree of direct government oversight over the process.

In addition to recent efforts toward streamlining the program, multiple statements over the past couple of years suggest that more substantial changes could be forthcoming from the FCC. More recently, Commissioner O'Rielly wrote a letter to USAC asking for assistance "in identifying and eradicating potential waste in the E-rate program as a result of applicants seeking funding to overbuild existing networks, so that the Commission can make any necessary changes to the program to protect ratepayers."[30] The FCC also recently rescinded an earlier FCC report that had touted the successes of the E-Rate program.[31] Among other things, the rescinded report had found that the percentage of school districts meeting minimum federal connectivity targets had risen from 30 percent in

---

29   *See, e.g.,* Dissenting Statements of Comm'rs Pai and O'Rielly, *In the Matter of Modernizing the E-rate Program for Schools and Libraries …, Second Report & Order*, 29 FCC Rcd. 15538, 2014 WL 7331851 (rel. Dec. 19, 2014); *see also* Sean Cavanaugh, "Ajit Pai, Net Neutrality Foe and Critic of E-Rate Policies, Named FCC Chair," *Education Week* (January 23, 2017), https://goo.gl/VtFBWP.

30   Letter dated February 9, 2017, from FCC Commissioner Michael O'Rielly to USAC CEO Chris Henderson, available online at: https://goo.gl/WEnSLE.

31   FCC, *In the Matter of E-Rate Modernization Progress Report*, *Order*, DA 17-129, Order, https://goo.gl/TVwlx5, rescinding *E-Rate Modernization Progress Report*, dated January 18, 2017, https://goo.gl/RWqw6U.

to 77 percent between 2013 and 2016 and that the cost schools paid for bandwidth fell from $22 to $7 per megabit per second during that period.[32]

Future changes could involve a reduction of the $3.9 billion annual cap for E-Rate spending, streamlining the application process, tightening eligibility criteria, targeting funds primarily to rural schools and libraries, favoring lit services purchased from existing services providers over support for dark fiber or self-provisioned networks, barring support for overbuilds, increasing enforcement, and various other measures to cut back the program.

VIII.   FURTHER INFORMATION

There are a number of sources that provide additional guidance for E-Rate applicants and service providers. In particular, USAC has recently uploaded videos to its website to help applicants and service providers understand the form filing process. Those videos are available on the USAC website in its online learning page, which can be accessed here: http://www.usac.org/sl/about/outreach/online-learning.aspx.

For further information, please contact:

Jim Baller, Jim@baller.com, 202-833-1144
Sean Stokes, SStokes@baller.com, 202-833-0166
Casey Lide, Casey@baller.com, 202-277-6276
McKenzie Schnell, Mckenzie@baller.com, 509-844-1487

---

[32]   *Id.*; *see also* Benjamin Herold, "Under New Leadership, FCC Quashes Report on E-Rate Program's Success," *Education Week* (February 8, 2017), https://goo.gl/s8E8gE.