

FCC Commences E-Rate Program Overhaul

by Christine A. Reilly and Glenn S. Richards

The August 20, 2013 Federal Register (“FedReg”) included a notice officially establishing the comment and reply cycle associated with the Federal Communications Commission’s (“FCC” or “Commission”) recently released Modernizing the E-Rate Program for Schools and Libraries Notice of Proposed Rulemaking (“NPRM”).¹ According to the FedReg notice, comments are due September 16, 2013 and reply comments are due October 16, 2013. This is the Commission’s latest effort to modernize and streamline the E-Rate program.

The catalyst for this ambitious initiative is President Obama’s ConnectED initiative (the “Initiative”)², which establishes that within five years 99 percent of U.S. students will have access to broadband and high-speed Internet access (at least 100 MBPS with a goal of 1 GPS within five years) within their schools and libraries. The Initiative includes: 1) providing the training and support for teachers needed for the effective use of technology in the classroom and 2) encouraging the development and deployment of complimentary devices and software to enhance learning experiences and 3) resurrecting the U.S. as a world leader in educational achievement.

The E-rate program was created in 1997 to “ensur[e] that schools and libraries ha[d] the connectivity necessary to enable students and library patrons to participate in the digital world.”³ According to the NPRM, the program commenced when “only 14 percent of the classrooms had access to the Internet, and most schools with Internet access (74 percent) used dial-up Internet access.”⁴ Seven years later, “nearly all schools had access to the Internet, and 94 percent of all instructional classrooms had Internet access.” A year later, “nearly all public libraries were connected to the Internet....”⁵



¹ *Modernizing the E-rate Program for Schools and Libraries*, FCC 13-100 (rel. July 23, 2013) (“NPRM”).

http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0723/FCC-13-100A1.pdf (retrieved August 17, 2013).

² www.whitehouse.gov/sites/default/files/docs/connected_fact_sheet.pdf (retrieved August 17, 2013)

³ NPRM at 2.

⁴ Id.

⁵ Id.

The E-rate program requires recipients to file annual funding requests. Those funding requests are categorized as either Priority One or Priority Two. Priority One funds may be applied to support telecommunications services, telecommunications and Internet access services, including but not limited to, digital transmission services, e-mail services, fiber and dark fiber, interconnected VoIP, paging, telephone service, voice mail service and wireless Internet access. Priority Two funds are allocated for support of internal connections, including, but not limited to, cabling/connectors, circuit cards and components, data distribution, data protection, interfaces, gateways and antennas, servers and software. The funds are calculated as discounts for acquiring, constructing and maintaining the services. Discount eligibility, which ranges between 20-90 percent, is established by the recipient's status within the National School and Lunch Program ("NSLP") or an "alternative mechanism".⁶ The NPRM indicated that, "the most disadvantaged schools and libraries, where at least 75 percent of students are eligible for free or reduced price school lunch, receive a 90 percent discount on eligible services, and thus pay only 10 percent of the cost of those services."⁷

The advent of high-capacity broadband has transformed Internet access into a portal by which students can experience interactive and collaborative learning experiences regardless of their geographic (rural or urban) location while preparing them to "compete in the global economy."⁸ As with most improvements, this transformation is encumbered in the ways and means for acquiring, constructing and maintaining such technology. The E-rate program, including its administration and funding provisions, has remained relatively unchanged since 1997. The initial, and still current, cap on funding was \$2.25 billion dollars. The FCC has indicated that requests for funding have exceeded that cap almost from the beginning. In 2013, requests for E-rate funding totaled more than \$4.9 billion dollars.

Between 1997 and 2013, populations (rural and urban) have increased educational demands and expectations but the static E-rate program has been unable to meet the evolving funding demands.

The NPRM, which seeks comments on more than 300 items and responses to more than 600 questions, focuses generally on the disclosure and discussion of the FCC's goals to further overhaul the current E-Rate program. Those goals are:

1. Ensuring schools and libraries have affordable access to 21st century broadband that supports digital learning;
2. Maximizing the cost-effectiveness of E-rate funds; and
3. Streamlining the administration of the E-rate program.

The following were among the items raised in the FCC's inquiry:

- Affordable Access:
 - Modernize
 - Updating the list of eligible services
 - Establishing and executing performance measures for some or all participating schools

⁶ NPRM at 60.

⁷ Id.

⁸ NPRM at 3.

- Benchmarking performance based on specific speed measurements
 - Adopting the targets established by the State Education Technology Directors Association (100 MBPS per 1000 students/staff by 2015 and 1 GPS per 1000 students/staff by 2018)
 - Adopting a target of 1 GPS for all libraries by 2020
 - Determining if, and when, schools and libraries, should have one-to-one device support
 - Establishing procedures for testing and reporting access measures
 - Determining how to identify the available broadband providers for respective schools and libraries (use of the National Broadband Map and census blocks)
 - Determining how to measure the affordability of access (i.e. lowest corresponding price (“LCP”), which limits the price that providers may offer service to similarly situated schools, libraries and other consortia)
 - Determining if a measure exists to identify the effects of E-rate funding in schools and libraries
- Reform
- Options for ensuring equitable access to funding in the face of excess demand
 - Whether to increase matching funds required by recipients
 - Consider reducing the overall discounts to ensure wider distribution of funds
 - Consider the use of annual budgets and allocations based on per student or per building costs so that all or most levels receive some funding
 - Elimination of the two-in-five year rule (limitation on Priority Two disbursement of funds for internal connections to twice every five years)
 - Ensuring that funded services are used for the core purposes
 - Redefining what and how existing services are funded
 - Homogenizing funds used for lit and dark fiber
 - Phasing out legacy services (directory services, paging and certain voice components)
 - Phasing out support for unrelated supplemental services such as e-mail and webhosting
 - Determining whether to prioritize fiber over broadband
- Other
- Redirection of additional state, local and federal funds for school connectivity
 - Establishment of public-private partnerships to deploy and expand services
 - Reduction of high-capacity broadband deployment costs for schools and libraries

- Dissipation of large project costs over numerous years
- Determining if construction and installation costs should be capped
- Consideration of leasing versus purchasing equipment and services
- Maximized Cost-effectiveness
 - Increasing consortium/bulk buying of services and related incentives
 - Identifying legal, geographic or other barriers to consortium purchasing
 - Increase transparency of service pricing, bidding and purchasing
 - Increase transparency of spending and prices (collection and publication of specific data)
 - Revamp the competitive bidding processes (LCP)
 - Increase efficient use of funding (Are current policies and application procedures “sufficient to ensure cost-effective purchasing on an application-by-application basis?”)⁹
 - Potential establishment of formal review and assessment
- Streamlining the administration of the program
 - Electronic submission of all E-rate documentation
 - Streamline processing of funding requests
 - Mandated review and disbursement timeframes
 - Limitation on opportunities to supplement funding requests
 - Eradication of document extension requests
 - Consider exempting recipients of multi-year service contracts from the duplicative annual review (absent interim contractual changes)
 - Limitation on multi-year contracts (three years)
 - Streamline the appeals process
 - Retain the multi-level review (USAC/Bureau/FCC)
 - Reduce the Bureau/FCC’s burden to publish a detailed analysis of its decision
 - Reduce the levels of appeal
 - Improve the disbursement of funds
 - Disbursement directly from USAC
 - Procedures to reduce the amount of unused E-rate funds
 - Consider the carryover impact delaying the issuance of certain funds
 - Establish invoice submission deadlines (three months after the close of the funding year)



⁹ NPRM at 211.

- Increasing the transparency with the E-rate administrator – Universal Service Administrative Company (“USAC”)
- Other Related Issues
 - Children’s Internet Protection Act Obligations
 - Compliance issues associated with
 - Access to E-rate services using “devices not owned by E-rate recipients”¹⁰
 - Alternatively, use of E-rate recipient owned devices off-premises
 - Identification of rural schools and libraries
 - Election to use the “rural” definition as defined by the U.S. Department of Education’s National Center for Education Statistics (location defined as “town-distant,” “town-remote,” “rural-distant,” or “rural-remote”)
 - NSLP changes
 - Impact associated with the alternate funding program – the Community Eligibility Option (“CEO”), which funds the provision of free meals to all attending students, not just those applying by need
 - Participants in CEO no longer collect eligibility data – which could result in an over qualification for E-rate discount purposes
 - Consider employing an alternative to the NSLP mechanism
 - Fraud, waste and abuse protection measures
 - Identification of additional means to combat fraud, waste and abuse
 - Extension of E-rate document retention from five to ten years
 - Community use of E-rate supported services
 - Funding of wireless hotspots off-premises
 - National Emergency procedures
 - Creation of special funding windows following a natural disaster or other emergency
 - Determination of eligibility
 - Presidentially defined “Emergency”
 - Federal Emergency Management Agency defined “Major Disaster”
 - Defined scenarios or “major disruptions”¹¹
 - Mandatory certification for emergency requests for funding to avoid fraud, waste and abuse

Beyond the expectations of President Obama’s Initiative, the fact remains that, at the current pace, the E-rate program will be unable to fund all of the Priority One requests, much less any Priority Two demands.

¹⁰ NPRM at 271.

¹¹ NPRM at 325.

As a result, the FCC may be forced to uncharacteristically fast-track its program overhaul to resolve the E-rate NPRM issues sooner rather than later.

If you have any questions about the content of this advisory, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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