

July 1, 2019



Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Comments on the Matter of Petition for Rulemaking to Amend and Modernize Part 54 of the Commission's Rules (RM-11841; WC Docket No. 13-184; CC Docket No. 02-06)

Dear Ms. Dortch,

On behalf of AASA, The School Superintendents Association, representing the nation's 14,000 public school superintendents, and the Association of Educational Service Agencies, representing over 500 educational services agencies in 45 states, I write to submit comments in response to the FCC's petition for rulemaking to amend and modernize part 54 of the Commission's rules.

We are concerned that the petition for rulemaking, as filed, does not represent the full picture of how fiber is being supported via the E-Rate program; that the petition represents a federal overreach, a solution in search of a problem; that the petition is changing the rules of the E-Rate process and procedure in the 'middle of the game'; that the petition has monopolistic tendencies that disregard core tenets of the E-Rate program, including cost effectiveness, competitiveness, and supporting state and local decision making; that the petition pits two Universal Service Fund Programs (E-Rate and Connect America Fund) against each other; and that the petition represents an attempt to leverage federal policy to protect incumbent providers at the direct expense of the innovation and competitive pricing that are central not only to E-Rate and the broader Universal Service Fund USF, but to the future expansion of broadband throughout the country.

At the center of the petition is a cited concern for overbuilding and a lack of competition. These are claims that should be taken seriously, if they had merit. The reality of the build out in Texas, in the context of both E-Rate and the Connect America Fund, is one of transparent compliance with E-Rate, Texas state, and local procurement requirements, as well as a case study example of federal policy and state incentives being leveraged by E-Rate applicants to successfully leverage E-Rate dollars to provide expanded cost-effective connectivity to program beneficiaries.

Specific to the petition, there are three educational service centers (ESCs) in Texas that had submitted consortium applications to meet the connectivity needs of the local school districts they serve. In acting to submit their applications, the ESCs were responding, as required by state and local law, to requests from the school districts they serve to provide a different approach to broadband connectivity. Why would ESCs pursue this path? Policy and program incentive alignment which promote more cost-effective networks. The 2014 E-Rate modernization, which included explicit incentives for both fiber build out and consortium applications, also included an incentive for states to provide their own matching funds (Texas created a new set of E-Rate matching funds as part of Governor Abbott and Education Commissioner Mike Morath's 'Classroom Connectivity Initiative'). With the alignment of federal programming and state funding, the request from LEAs for expanded service was the catalyst for the ESCs to pursue a region-wide approach to broadband connectivity. As the districts the ESCs serve continued to exceed the demand that the previous wireless networks could deliver, they asked the ESCs to create a fiber consortium and modernize the utilized infrastructure. In this role, the ESC serves as the applicant, not the provider.

While the focus of this petition is E-Rate, it is important to understand and acknowledge the systemic nature of ESCs and the supports they provide. Outside of serving as an applicant for E-Rate, ESCs perform additional services for school districts, some of whom do not have dedicated technology staff, or whose staff may not have the skillset to manage all aspects of a complex modern network. Outside of explicit E-Rate services, school districts consider the coordinated set of system supports they need to run a fully functional network, including providing a firewall, web filter, wireless access point management, identity management, information security, backup and disaster recovery, and more. A consortium network makes many of these things possible at scale, drastically lowering costs for the participating districts. In addition to savings on the E-rate eligible costs, there are also savings outside of E-Rate. It is absolutely critical to consider these additional savings, including overall technology plans and system planning, when examining the benefits of these networks; to consider E-Rate in a silo completely disregards the reality of administering system technology and the overlapping considerations of connectivity and other network needs, both in terms of cost and full implementation.

Specific to the request for proposal (RFP) process at the center of the petition for rule making, all three RFPs were thorough, transparent, and compliant not only with E-Rate rules and requirements but also state and local procurement policies. All three applicants held their RFPs open for far longer than the 28 days required by the E-Rate program, giving potential providers (including the petitioners) ample opportunity to respond to the RFPs. Even with the extended timelines none of the carriers submitting the petition for rulemaking submitted an application to the RFP in their area of service (despite the fact that all three petitioners are participants in the high cost program and consequently required to submit an application for any/all E-Rate RFPs in their service area). Of particular interest, all three RFPs anticipated that some of the smaller, current providers might not have the ability/willingness to upgrade or extend their networks to serve the extended region covered by the RFPs and explicitly included provisions that would allow the smaller providers to submit a bid for the subset of the region where they COULD provide, or to provide in partnership with another provider, or to form a consortium with rural providers to serve the full area. An excellent example of such an approach is not merely hypothetical: The Texas Lone Star Network (TLSN) network of telecommunications carriers in Texas, with deep roots and history in providing quality services to rural Texas customers. TLSN has experience in submitting a consortium bid in response to a region-wide RFP, having submitted just such a bid on a different 2009 request, a bid that included at least one of the petitioners, and all three petitioners are part of TLSN. In fact, the efficiency benefits of buying consortia have a strong track record within the E-Rate program, with smaller providers having successfully worked together to meet regional needs, with examples in Washington, Arkansas, Wisconsin and South Dakota.

As the RFP process moved forward, the providers/carriers filing the petition were absent from all aspects of the RFP process. They failed to participate in the Q&A processes open to vendors. They failed to seek additional information about the services sought. They failed to submit responses to the RFP. The petitioners were understandably frustrated to have missed out on being awarded the RFPs, but it is very hard to win a competitive proposal process for which one does not submit an application. Further complicating these claims of overbuilding and inability to engage, the application that served ESC 15 was ultimately implemented in a manner that significantly reduced the reliance on new fiber building, resulting in less than 300 new miles of fiber being built, and in the winning provider meeting its regional commitment through sub-contracts with smaller providers, including one of the petitioners, who not only uses existing fiber, but is receiving money for their work to lay new fiber. In fact, for this specific contract, more than half (52%) of the awarded amount is sub-contracted to small, local providers.

We strongly disagree with the petitioner's claim that because the regions include hundreds of schools and cover thousands of square miles, only select, large service providers would be able to respond to the RFPs because small providers already serving individual schools within the region might be unable to respond to the RFPs due to the sheer size of the requested wide area networks. As noted above, the three RFPs were open to and would have accepted, considered, and awarded (if most cost effective) myriad approaches to meeting the regional need: one single bid to single-handedly serve the regional need; stand-alone bids from individual providers to serve the geographic portion of the region they could handle with existing fiber and/or new build; or a

consortium of providers banding together to collectively meet the regional need, through a combination of existing and new fiber. Per the requirements of state law and the E-rate program, however, the work of the RFP can only be awarded to a provider that has responded to the RFP, a bid that can be reviewed and evaluated.

Given the concern of overbuild or the idea that this region-wide consortia approach duplicates networks of existing fiber networks that were previously constructed using USF funds: ESCs and the districts they serve have no way of knowing where fiber exists, particularly if a given provider (including all three petitioners) is not currently serving the ESC or one of its member districts. Procurement policies often preclude ESCs (which exist in 45 states and are sometimes called educational service agencies, or ESAs) from soliciting bids from specific providers, as the procurement process must remain neutral to preserve a level playing field among all potential providers, and ESCs must not be in the position of sharing the RFP with one or some of the potential providers, but not all. The proposal in the rule making represents federal overreach and is inconsistent with -- and would preempt -- state laws. This petition would allow a provider that failed to participate in the RFP process to invalidate a state-bid award. Further, this process has potentially direct and negative impacts on winning applicants, who would face myriad lawsuits and debt as they work to void contracts or honor the contracts while paying cancellation charges. If anything, the petitioner's concern calls for enforcement of existing policy that all high cost providers (those who have received high cost funds) to apply for all E-Rate bids—both out of a responsibility to ensure that federally funded fiber projects are eligible for consideration in other federally funded projects as well as to provide a clearer picture of their price point and where fiber exists and could be accessed or leveraged to meet broader, more regional connectivity needs. It is in the federal government's best interest, in terms of both protecting previous fiber build out and ensuring cost competitiveness in future projects—to ensure that providers owning existing fiber are making their fiber available for consideration in other federal bids.

One disconnect with the petition as drafted is that the petitioners are claiming harm, when the reality is that the fiber they own—laid with federal support—is currently not used by districts because it is either not available (since the providers have not submitted bids) and/or may not be the most cost effective option. If implemented as drafted, the petition would ignore the market forces of participation and price competition to provide a stand-alone monopolistic opportunity for providers to bypass initial RFP engagement to respond to, challenge, and outbid competing applications who were able to submit an application in normal order and process. This petition disregards these critical concepts of fairness and a level playing field among applicants.

The applicants (ESCs) properly complied with the E-Rate application and procurement process. Ultimately the issue around the petitioners' bids not being awarded boils down to the fact that the petitioners failed to bid. In light of these facts, what is the role of the federal government here beyond ensuring compliance with the E-Rate program and application process, to oversee fidelity in program implementation? If this petition were to go forward as written, it would be in direct conflict with the central focus of a separate FCC NPRM: As the FCC proposes an overall cap on the Universal Service Fund (including a cap for the E-Rate program), this petition for rulemaking will not only drive up costs in the E-Rate program, it will be in direct conflict with one of the central pillars of the E-Rate program, which requires beneficiaries to select the most cost effective services bid. Further, over the last 15 plus years, the central thrust of telecommunications law has focused on the idea that the federal government needs to step to the side so that carriers can provide facilities-based competition. The FCC refocused its priorities in the early 2000s so as to encourage providers to build their networks in a way that supported facilities-based competition. While there is room for improvement, the reality is that consortium applications—like those submitted by the ESCs—represent one of the most efficient ways for facilities-based competition to reach small, rural communities.

The proposal within the petition is protectionist and anti-competitive, providing them with a second, protected opportunity to bid after non-incumbent providers participate in the initial bidding process. The proposal is in direct conflict with the Telecommunications Act's focus on promoting competition. The use of the term 'overbuild' is a vague misnomer. E-Rate is a program steeped in competitive bidding, with a clear and established priority for the most cost-effective provider. The program already includes protections for already-existing USF

resources via the embedded competitive bidding processes. If anything, existing providers already have a competitive advantage—not the prohibitive access they claim—by the mere fact that they have already received subsidies to build out their infrastructure and their costs should be lower than other bids, especially those that would rely on new build and not existing fiber.

Small providers are reporting negative impact because of the E-Rate and state program in support of E-Rate, which when leveraged together leave them no lane in which to operate. To the extent that consideration of the merit of this petition includes the concept of preserving free enterprise, that concept must be applied equally to both the E-Rate and CAF programs, and both the small providers and applicants. While ESCs are education-centric, they are also agents of free enterprise positioned to help implement local, state and federal programs—including E-Rate—in a manner that supports and facilitates economic and cost efficiency and competition. ESCs are non-profit entities and through this consortium application process have demonstrated their ability to provide connectivity to schools at a lower cost, saving tax payers money by not having to pay the higher costs they would incur if they used the private providers (both directly, in terms of lower prices, and indirectly, in terms of less draw on the Universal Service Fund).

The reasonable middle ground in this scenario already exists: providers/carriers which are recipients of high cost funds must participate in any E-Rate competitive bidding opportunity in which they have existing fiber. There is flexibility in how they engage: they could form selling consortia and partnerships in a manner they have done in the past and as the ESCs have done more recently; they could pursue wholesale opportunities to lease existing facilities—including dark fiber and unbundled network elements—to competitors; or some combination of the two. These options can only be utilized if providers participate in the competitive bidding process, but the petitioners, instead of proposing bids, would rather propose unnecessary rules that allow them to remain on the sidelines without consequence.

Sincerely,



Noelle Ellerson Ng

Associate Executive Director, Policy & Advocacy
AASA, The School Superintendents Association
Legislative Liaison, AESA