

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Texas Carriers' Petition to Prohibit)	RM-11841
Use of E-Rate Fund to Build Fiber Networks)	WC Docket No. 13-184
Where Fiber Networks Already Exist)	CC Docket No. 02-06
)	

REPLY COMMENTS OF EDUCATIONSUPERHIGHWAY

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EducationSuperHighway respectfully submits these reply comments in response to the Public Notice in the above referenced proceeding.¹

INTRODUCTION AND SUMMARY

After reviewing the comments submitted during the initial comment period, EducationSuperHighway found the following:

- **Opposition Is Broad, Support Is Narrow:** The record in this proceeding echoes the substantial concerns raised by EducationSuperHighway. Of the comments submitted, there was strong opposition to the Petition, submitted by a broad range of interested parties, including service providers, public interest groups, and state and local government agencies. Conversely, the limited comments submitted in support of the Petition were uniformly submitted by ILECs who, like the original Petitioners, failed to demonstrate the need, basis for, or benefits of opening a rulemaking as proposed by the Petitioners. There was broad agreement among those who submitted comments in

¹ Wireline Competition Bureau Public Notice, issued May 30, 2019, DA 19-493, <https://www.fcc.gov/document/wcb-seeks-comment-texas-carriers-e-rate-petition>.

opposition to the Petition that the Universal Service Program for Schools and Libraries (E-rate) is working to connect underserved eligible applicants to modern broadband, and that there is no need to impose additional administrative burdens and procedural steps to an already complex program with a robust review process in place.

- **The Petitioners Request Anticompetitive Rule Changes:** Many commenters agreed with EducationSuperHighway’s concerns that the rule changes requested by the Petitioners would be anticompetitive. A variety of stakeholders including comments by vendors, E-rate consultants, regional network administrators, and public interest groups all agreed that the Petitioners’ requests would stifle competition in rural markets and negatively impact public schools in those areas.
- **The Requested Rule Changes Would Increase Costs for Schools:** In contrast to the Petitioners’ argument that their proposed rule would limit program waste, at least eleven commenters noted that the existing program rules allow for cost savings and increased bandwidth for E-rate applicants, and that the requested changes would essentially eliminate applicants’ right to join consortia projects for cost savings and improved service if the consortium encompasses areas with existing fiber infrastructure.
- **The Requested Rule Change Would Delay Progress and Connectivity:** The Petitioners ask for six months of review and negotiation time to be added to an application process that is already too long. This additional review and negotiation period would severely limit the timely and orderly processing of applications and negatively impact everyone except the Petitioners and their cohort.
- **The Petitioners Fail to Provide Sufficient Evidence to Justify Commission Consideration:** The Petitioners, and their supporters, fail to cite any change of law, facts, circumstances, or data that support such a foundational reversal of policy, or that support a decision to open an entirely new rulemaking proceeding. The record demonstrates that the Petitioners’ filing is deficient in that it fails to provide sufficient facts, data or evidence to justify a Rulemaking.

THE RECORD UNDERSCORES BROAD AND SUBSTANTIAL CONCERNS WITH PETITIONERS' REQUEST

In addition to ESH, a broad range of commenters share substantial concerns with the Petitioners' proposal and ask the Commission to reject the Petitioners' request for rulemaking including SECA,² Benton,³ ESC-11,⁴ AASA,⁵ New America Commenters,⁶ INCOMPAS,⁷ The Preserving E-rate Competition Parties,⁸ Uniti Fiber,⁹ Infinity,¹⁰ ALA,¹¹ and CVIN.¹² There is

² See, State E-Rate Coordinator's Alliance, RM-11841; WC Docket No. 13-184; CC Docket No. 02-06, pg 1, RM-11841; WC Docket No. 13-184; CC Docket No. 02-06, pg, 5 (submitted July 1, 2019) (SECA Comments): SECA encourages the FCC "to reject the Petition of the Texas Carriers because their requested E-rate rule changes will eviscerate the competitive bidding requirement, which has been the central tenant of the E-rate program since its inception, will cripple program efficiency and increase funding demand."

³ See, Comments of Benton Foundation, RM-11841; WC Docket No. 13-184; CC Docket No. 02-06, pg, 5 (submitted July 1, 2019) (Benton Comments) "Benton opposes the petitioners' request for rulemaking, and urges dismissal of the petition as meritless."

⁴ See, Texas Education Service Center Region 11, RM-11841; WC Docket No. 13-184; CC Docket No. 02-06, page 1 (submitted July 1, 2019) (ESC Region 11 Comments) "ESC Region 11 opposes the Petitioners' request for rulemaking because it is unnecessary."

⁵ See, Comments of Association of State Educational Service Agencies (AASA), RM-11841; WC Docket No. 13-184; CC Docket No. 02-06, pg, 4 (submitted July 1, 2019) (AASA Comments). The Petitioners "propose unnecessary rules."

⁶ See, Comments of New America's Open Technology Institute (OTI), Access Humboldt, National Consumer Law Center, on behalf of its low-income clients, Next Century Cities, Public Knowledge, and United Church of Christ, OC Inc. RM-11841; WC Docket No. 13-184; CC Docket No. 02-06, pg, 3 (submitted July 1, 2019) (together, "New America et al") "Commenters strongly urge the Commission to reject the Petition for Rulemaking."

⁷ See, Comments of INCOMPAS RM-11841; WC Docket No. 13-184; CC Docket No. 02-06, pg, 3 (submitted July 1, 2019) Page 13, "INCOMPAS urges the Commission to deny the Petition."

⁸ See, Comments of The Consortium for School Networking (CoSN), the Schools, Health & Libraries Broadband Coalition ("SHLB Coalition" or "SHLB"), the Texas Association of School Administrators ("TASA"), the Texas Association of School Boards ("TASB"), the Texas Association of School Business Officials ("TASBO"), the Texas Computer Education Association, ("TCEA"), the Texas K-12 CTO Council, E-Rate Central, Educational Professional Services, VST Services, CSM Consulting, Inc., the Pacific Northwest Gigapop, and the Utah Education and Telehealth Network (collectively referred to as the "Preserving E-rate Competition Parties") RM-11841; WC Docket No. 13-184; CC Docket No. 02-06, pg,2, "The Preserving E-rate Competition Parties firmly oppose the Texas Carriers' request for a rulemaking and the specific rule changes they propose."

⁹ See Comments of Uniti Fiber RM-11841; WC Docket No. 13-184; CC Docket No. 02-06, pg 12, "the petition for rulemaking should be denied."

¹⁰ See Comments of Infinity Communications & Consulting, Inc. RM-11841; WC Docket No. 13-184; CC Docket No. 02-06, pg, 5 (submitted July 1, 2019) (Infinity Comments). "Infinity asks the Commission to dismiss the Texas Carriers' Petition."

¹¹ See Comments of The American Library Association (ALA) RM-11841; WC Docket No. 13-184; CC Docket No. 02-06, pg, 6 (submitted July 1, 2019) (ALA Comments). "we encourage the Commission not to open an unnecessary proceeding on this issue."

good reason for such broad and strong opposition. As Benton notes,¹³ the proposal has the “potential to waste limited E-Rate resources, leave schools that need high-speed broadband on the wrong side of the digital divide, dramatically raise school costs, increase burdens on school and library applicants, prevent schools from meeting the Commission’s broadband-speed targets, and slow the rollout of scalable fiber across the country.”

CURRENT PROGRAM RULES ARE WORKING

There is broad agreement in the record that current program rules are working to advance program goals and ensure the most cost-effective solutions. While USTelecom’s comments suggest so-called “overbuilding” is occurring “without any check on cost-effectiveness,”¹⁴ the facts point in another direction. The E-rate program already includes an intensive review process for all applications that include Special Construction costs, especially those that request dark or self-provisioned fiber. Applicants receive dozens of questions that require substantive responses supported by hard evidence, as evidenced by the attachments to Preserving E-rate Competition Parties comments on the Petition.¹⁵ The set of questions attached to Preserving E-rate Competition Parties comments runs to over 70 pages, and includes specific questions requiring justification of every foot of new fiber being requested. The depth and breadth of this review process is burdensome to applicants, but it cannot be said to be superficial or incomplete, and as cited in EducationSuperHighway’s initial comments, these reviews often take well over 180 days to complete, and projects found to be noncompetitive or lacking cost-effectiveness are denied on a regular basis. There are no compelling reasons and a complete lack of evidence in either the

¹² See Comments of CVIN LLC dba Vast Networks RM-11841; WC Docket No. 13-184; CC Docket No. 02-06, pg, 1 (submitted July 1, 2019) (CVIN Comments). “CVIN opposes the Petition and requests the Texas Carrier’s petition for rulemaking be denied.”

¹³ Benton Comments, page 5.

¹⁴ See Comments of USTelecom, RM-11841; WC Docket No. 13-184; CC Docket No. 02-06, (submitted July 1, 2019) page 5.

¹⁵ See Comments of the Consortium for School Networking (CoSN) Schools, Health & libraries Broadband (SHLB) Coalition, Texas Association of School Administrators (TASA) Texas Association of School Boards (TASB) Texas Association of School Business Officials (TASBO) Texas Computer Education Association (TCEA) Texas K-12 CTO council, et al, RM-11841; WC Docket No. 13-184; CC Docket No. 02-06, (submitted July 1, 2019) attachments beginning page 15.

original Petition, nor the comments filed in support of it, to add either additional rules or time to this process.

Not only are current rules working well to ensure that the most cost-effective options are chosen, they are also working in concert with state and local procurement requirements. As pointed out by SECA,¹⁶ AASA,¹⁷ ALA,¹⁸ and Infinity,¹⁹ the rules the Petition proposes would create a conflict with numerous state and local procurement codes requiring public school districts to award service contracts based on the outcome of a competitive bidding process. For example, New Mexico's state procurement code (NMSA Chapter 13) requires that all contracts with a value over \$60,000 be awarded to the winner of a competitive bidding process.²⁰ Similarly, Chapter 30B of Massachusetts' state law requires that contracts with values over \$50,000 be awarded to the winner of a competitive bid.²¹ California Public Contract Code Sections 20111/20651 stipulates that contracts for services to California school districts involving an expenditure of \$50,000 or more must be awarded to the lowest responsible bidder.²² In any of these states, or in other states and local jurisdictions with similar requirements, the challenge process that the Petitioners propose could result in situations where school districts are forced to award contracts not to the winner of the competitive bidding process, but to the incumbent provider, thereby violating state and local laws.

PROPOSED RULES ARE ANTICOMPETITIVE

The proposed rule changes would, by giving incumbent providers who have received High Cost funding the ability to challenge any application for fiber service from a competitor,

¹⁶ SECA comments, Page 6, Proposal "would run afoul of state and local bidding requirements."

¹⁷ AASA comments, Page 2, "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." Page 3, "The proposal in the rule making represents federal overreach and is inconsistent with -- and would preempt -- state laws."

¹⁸ ALA Comments, Page 3, "a 60-day "challenge period" will not be permitted under many local or state procurement regulations."

¹⁹ Infinity Comments, Page 3, "In many of the states we work in, giving the incumbent carrier any type of preference either prior to a bid going out or after bids are received would violate state competitive bidding laws."

²⁰ <https://laws.nmonesource.com/w/nmos/Chapter-13-NMSA-1978>

²¹ <https://www.mass.gov/service-details/chapter-30b-history>

²² http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PCC§ionNum=20111.

restrict fair and open competition. ESH agrees with SECA, Benton, ESC-11, AASA, New America Commenters, Incompas, The Preserving E-rate Competition Parties, CDT, Uniti Fiber, Infinity, ALA, and CVIN that the proposed rules are anti-competitive.

For example, as ALA points out, the challenger process proposed gives the challenger pricing and other information from initial 471 bid selection, which is “a major violation of the Commission’s own rules to maintain an open and neutral competitive bidding process.”²³ In addition, as ESC-11 describes, “the Petitioners’ proposal would alter the program towards an anti-competitive and monopolistic model that would not result in the most cost-effective solutions for applicants or the program.”²⁴ The end result, as Benton notes, is that “[t]he proposed rule would require E-Rate participants to pay more than is required by mandating less competition than is available.”²⁵

As discussed in Infinity’s comments,²⁶ the Petitioners ask for preferential treatment for providers who have received High Cost subsidies, but there are other Federal and state programs that provide support to fiber construction.

While the Second E-rate Modernization Order states that “[u]nder the obligation we establish here, high-cost recipients will be obligated to bid on category one telecommunications and Internet access services in response to the posting of an FCC Form 470 requesting such services for eligible schools and libraries located in the areas where the carrier is receiving high-cost support,”²⁷ several commenters noted that the Petitioners did not submit bid responses to any of the projects that fit the description given in the original Petition.²⁸ As pointed out in the comments by the State E-rate Coordinator’s Alliance (SECA), “Considering the FCC’s directive that High Cost carrier recipients must respond to FCC Form 470 applications, at the very least, these Carriers should be required to produce evidence of their efforts to participate in the

²³ ALA comments, page 5

²⁴ ESC region 11 comments, page 1

²⁵ Benton comments, pages 1-2

²⁶ See Infinity Comments, page 2, section 2, “The Texas Carriers seem to assert...”

²⁷ at Para. 66

²⁸ See Comments of The Preserving E-rate Competition Parties, footnote 5, “Clearly, by their own admission, the Texas Carriers chose not to bid.” See also AASA comments, Page 2, “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).”

procurements, and the specific language in the Form 470 or RFP documents that prevented them from submitting a proposal.”²⁹ Instead of participating in a public, open, fair and competitive bid process for the services needed by their customers, the Petitioners are attempting to insert rules into the process that would short-circuit local decision-making and undo the stated intention of the E-rate Modernization Orders of 2014 to encourage aggregated purchasing consortia and greater rural connectivity among E-rate applicants.³⁰

SCHOOLS WOULD SUFFER DELAYS AND INCREASED COSTS

Commentors echoed the strong concerns ESH has that the proposed rule change would increase costs to schools and the program, and would lead to unconscionable delays. For example, SECA, Benton, ESC-11, AASA, New America Commenters, Incompas, the Preserving E-rate Competition Parties, Uniti Fiber, Infinity, and ALA all raised concerns that the proposed rules would drive up costs. AASA notes that the proposals will “drive up costs in the E-Rate program.” CVIN cited a compelling example in which they demonstrate that if the Petition’s rules had previously been in place, in just one case “the incumbent would have walked away with a windfall \$21 million contract” which would have been even higher had the incumbent been assured that there would be no competition.³¹ The end result, as INCOMPAS explains, would be that “the E-rate program and local taxpayers will pay more over time, harming the ability of the program to provide better and more affordable services to schools and libraries.”³²

By contrast, WTA puzzlingly suggests that these “narrow” changes being proposed would not “force schools to overpay for broadband service.”³³ Instead, ESH agrees with Benton’s assessment that, “[t]he Commission should not be fooled by petitioners who have

²⁹ See SECA Comments, page 11

³⁰ FCC 14-189, “Modernizing the E-rate Program for Schools and Libraries, Second Report and Order on Reconsideration,” 12/11/2014, Paragraphs 60-76

³¹ CVIN comments, page 3

³² INCOMPAS comments pages 11-12

³³ See Comments of WTA – Advocates for Rural Broadband (“WTA”) RM-11841; WC Docket No. 13-184; CC Docket No. 02-06, pg, 4 (submitted July 1, 2019)

framed an issue as ‘overbuilding’ but whose proposal would allow them to escape the E-Rate’s rigorous competitive bidding process. The consequence of this would be ‘over-charging.’”³⁴

The Petitioners also ask for six months of review and negotiation time to be added to an application process that is already too long, time which will severely limit the timely and orderly processing of applications and negatively impact everyone except the Petitioners and their cohort. SECA, Benton, INCOMPAS, the Preserving E-rate Competition Parties, Uniti Fiber, ALA and CVIN all raised concerns about the harms of these delays. While NTCA suggested that the proposed changes would add only a “quick step” to the process,³⁵ ALA more correctly explains, “some fiber application decisions will likely be delayed well over eight months beyond a funding decision made under the current rules and well beyond the Commission’s own rule deadline to have all workable applications funded by September 1.”³⁶

Comments submitted by SECA and Infinity Communications & Consulting point out a crucial issue with the Petition’s requested changes to the procurement processes followed by E-rate applicants. These applicants are in the majority public entities and, as such, are subject to myriad state and local laws, regulations and procedures governing the procurement of goods and services.³⁷ Wisely, the general rule of thumb that has been used by the Commission in the past is that applicants must follow whichever is stricter of USAC or their own procurement guidelines. However, the addition of a challenge process allowing an incumbent provider to interrogate a public entity’s procurement process and potentially delay that entity’s ability to implement needed services in a timely fashion will result in direct conflicts with state and local rules.³⁸

³⁴ Benton Comments, page 7

³⁵ See comments of NTCA–The Rural Broadband Association (“NTCA”) RM-11841; WC Docket No. 13-184; CC Docket No. 02-06, (submitted July 1, 2019) (NTCA Comments).pg, 3 “the limited safeguards proposed by NTCA in 2014 and discussed further below would add a simple and quick step”

³⁶ ALA Comments, page 5

³⁷ SECA Comments, page 6

³⁸ Infinity Communications & Consulting Comments, page 3

A PETITION WITHOUT MERIT

ESH agrees with the broad array of comments who find the Petitioners have failed to meet the requirement of providing sufficient facts and data to support a petition for rulemaking.³⁹ More specifically, ESH agrees with the INCOMPAS analysis of deficiencies in the Petitioner's request for rulemaking.⁴⁰ The Commission's rule requiring that Petitioners provide the facts and data necessary is to ensure that neither the Commission's nor other interested parties' resources are wasted on unsupported requests. As Benton notes, "The Texas Carriers have failed to cite any change of law, facts, circumstances, or data that support such a foundational reversal of policy, or that support a decision to open an entirely new rulemaking proceeding."⁴¹

For example, as Uniti Fiber discusses, the Petitioners wrongly assume E-Rate special construction support duplicates high cost support.⁴² The Telecommunications Act of 1996 ("Act") which created the E-Rate program established a separate support mechanism to meet unique funding purposes -- a program designed to ensure that schools and libraries requesting support obtain service in an efficient and cost-effective manner. While the E-Rate program has a proven method for determining the most cost-effective provider, neither legacy nor modelled High Cost funding considers the cost-effectiveness of carrier networks. The Petitioners incorrectly assert High Cost supported carriers should have priority over cost-effective E-Rate carriers. As Uniti Fiber points out, "[t]he Petition provides no basis for determining that High Cost Support in an *area* should trump *connection-specific* E-Rate funding. Were the Commission to enact rules providing High Cost carriers with the right to challenge E-Rate funding, the Commission would be explicitly favoring the High Cost program over the E-Rate program."

The Petitioners and their supporters have adopted the term "overbuilding" to describe the problem they purport to be solving with their requested rule changes. Overbuilding is not a term that is generally used in telecommunications, except in the engineering sense of building a

³⁹ For example Comments of Benton page 12, New America Commenters page 8, INCOMPAS page 2-5, the Preserving E-rate Competition Parties page 4, Uniti Fiber page i, and Infinity Communications

⁴⁰ INCOMPAS comments pages 2-5

⁴¹ Benton Comments, page 12

⁴² Uniti Fiber comments page 4 -7

network or device to be much more robust than is currently needed.⁴³ They have adopted the term because it has a negative ring to it, an implication that something is being done twice. This is quite simply not the case. In fact, what they describe as overbuilding is really overprotection of incumbency at the expense of the free market. It is a cover for a circumstance where an incumbent provider who has accepted federal funds to serve an area would rather deny its local schools and libraries the right to conduct a fair and open competitive bidding process than to simply bid on the requested services as is expected of an incumbent. EducationSuperHighway believes - and has the data to support - that fair and open competition between motivated providers is the best and quickest way to get modern, scalable broadband to our nation's schools in an affordable and efficient manner. The rule changes proposed by the Petitioners and their supporters are antithetical to this approach.

CONCLUSION

The Petition lacks the data and documentation necessary to justify a new rulemaking proceeding, let alone to support such a radical departure from the pro-competition policies established under the 1996 Telecommunications Act to create a regime that enables schools and libraries to embrace the most cost-effective broadband options for meeting the Commission's articulated speed goals. **Thus, the Commission should reject the Petitioners' request for proposed rulemaking, and dismiss the petition as meritless.**

Respectfully submitted,

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⁴³ <https://www.conexon.us/conexon-blog/overbuilding-aka-competition-is-the-american-way/>