

**Before the
Federal Communications Commission
Washington, DC 20054**

In the Matter of:

Texas Carriers' Petition to Prohibit Use Of)	WC Docket No. 02-6
E-rate Funds To Build Fiber Networks In)	WC Docket No. 13-184
Areas Where Fiber Networks Already Exist)	

**Reply Comments of the
Wisconsin Department of Public Instruction
(Filed July 16, 2019)**

The Wisconsin Department of Public Instruction (WIDPI, department) is the state education and library agency. The department has statutory oversight for our state's 421 public school districts and 384 public libraries. We have provided E-rate support to our schools and libraries since the program's inception. At the national level, our staff are active in the State E-rate Coordinators' Alliance (SECA) and the American Library Association's E-rate Task Force. Our department has commented on many E-rate rulemaking notices back to the start of the program in 1996 and we appreciate the opportunity to file Reply Comments on this important issue.

Parties who generally oppose the Texas carriers' petition

We want to state our position upfront: We see no need to open a rulemaking process on the supposed issue of fiber "overbuilds". Thus we support the parties who filed comments opposing the Texas carriers' petition. Below are several observations we have on some of the comments filed by various parties in opposition.

From a high level perspective we very much agree with the comments filed by INCOMPAS which document the many deficiencies in the petition. This is most notable in the points made

by INCOMPAS on pages 3-4.¹ Here is just one example: “The petition fails to provide a basic analysis of the current prices the Texas Carriers charge schools and libraries for the use of their fiber connections.”² We encourage the Commission to review all the other cogent points made by INCOMPAS in their comments.

One of the specific requests of the Texas carriers’ petition is that they want a special, privileged bidding response period of sixty days when schools and libraries apply for fiber construction. This sixty day period would only come after the normal 28 day minimal bidding period established by form 470 and it would only be open to a school or library’s current provider. The comments filed by many organizations oppose this request. For example, the American Library Association’s (ALA) states that, “The petitioners’ request for an additional sixty day “challenge period” beyond the 28 days is simply not needed and appears to be little more than an effort to skew the competitive bidding process to their advantage.”³ And several parties also noted that this request was already addressed by the Commission as part of its 2014 E-rate reforms.⁴ In relation to this the Benton Foundation states, “The Commission previously considered and rejected these same requests in 2014 as a part of its E-Rate Modernization Order. There are no new laws, facts, or substance that merit a new rulemaking, nor is there a need for new safeguards.”⁵ These comments by ALA, the Benton Foundation and others raise two obvious questions: Why do the incumbent providers need more time and a special bidding status to respond to an applicant’s form 470?⁶ Or stated in a different way: Why can’t the incumbent providers respond to the form 470 in the same manner and timeframe as all other, non-incumbent providers?

The petitioners claim that schools and libraries in service areas of carriers who are recipients of High Cost funds should be precluded from receiving E-rate funds to build another fiber

¹ INCOMPAS comments submitted July 1, 2019. Pages 3-4.

² *Id.* Page 4.

³ American Library Association comments submitted July 1, 2019. Page 2. (ALA).

⁴ *Modernizing the E-rate Program for School and Libraries*, Second Report and Order and Order on Reconsideration. Released December 19, 2014. Paragraphs 43-54. (2014 Second E-rate Order.)

⁵ Benton Foundation comments submitted July 1, 2019. Page 2.

⁶ Any provider who already has fiber to a school or library should easily be able to respond in the minimum 28 days a form 470 must be open before a school or library selects a provider. It is any new providers who may have difficulty responding in 28 days because of all the engineering work, permitting work, etc., needed as part of any new fiber build. Considering this, the current rules already give the incumbent provider an advantage over any new competitors.

connection. Yet as the State E-rate Coordinators' Alliance (SECA) has stated, in some cases the recipient of High Cost funds charge more in ongoing costs for a school or library fiber broadband connection than a bid response from another provider.⁷ As SECA notes, "Under these conditions it would be and should be appropriate and efficient to use E-rate funds to pay for the new company to install service because the price from the new provider was more cost effective than the price proposed by the other carrier, in spite of the fact that the other company had the benefit of High Cost funds to offset their costs."⁸ And comments from Uniti Fiber, a group of companies providing telecommunication services, offers a specific example of how competition among providers has resulted in dramatically lower costs for fiber connectivity for the schools in the Archdiocese of New Orleans.⁹ As Uniti notes, "Without competition, this customer would likely still be paying more for less service."¹⁰ (In this case, "paying more for less service" means paying more to the incumbent provider.)

We also think SECA makes a very valid point when it states that in cases where a carrier receives High Cost funds, but did not bid on an applicant's form 470 seeking fiber connectivity, the Commission should ask the incumbent carrier to "explain why they either failed to bid or failed to offer a reasonable price to the school and library customer given that they already received universal service funding to provide these broadband services."¹¹ Directly related to this is the information that the Preserving E-rate Competition group provides in its comments. Our department specifically directs the Commission's attention to this group's detailed narrative in its footnote #5 where they ask if the petitioners have violated the requirement in the *Second E-rate Modernization Order* that requires recipients of High Cost funds to bid on category one telecommunications and Internet services.¹² Of interest, the Texas carriers' claim they were prevented in some manner from bidding on the consortium's form 470 but they offer no details supporting this claim. As SECA's comment's state, the petitioners "fail to provide any

⁷ State E-rate Coordinators' Alliance comments submitted July 1, 2019. Page 4. (SECA).

⁸ *Id.* Page 6. Anyone with even rudimentary knowledge of the E-rate program knows that cost of a service must be the primary factor when selecting a provider. (47 C.F.R. § 54.503(c)(2).)

⁹ Uniti Fiber comments submitted July 1, 2019. Page 11.

¹⁰ *Ibid.* Page 11.

¹¹ SECA. Page 8. We also note of interest SECA's statement on p. 12 that in their petition the Texas carriers failed to mention their regulatory obligation to bid on the applicants' 470s.

¹² Preserving E-rate Competition comments submitted July 1, 2019. According to this group and as documented in the petition, the carriers filing the petitioner did not bid on the 470s filed by the schools and libraries. Starting on page 16, the Preserving group's comments offer considerable documentation on the bidding process undertaken by the impacted Texas schools.

supporting facts, such as any Form 470 or Form 471 application numbers, or even the names of the E-rate applicants, from whose procurements they claim they were barred from participating.”¹³

Many of the comments filed in opposition to the Texas carriers’ petition also reference the unrealistic nature of the petitioners’ proposed solutions to this non-existent problem. For example, the petition asks that another 180 days be added to the application process and for contract negotiations. As EducationSuperhighway (ESH) states, “Adding on an additional 180 days to a nearly year-long review process would extend the clock so long that it would be impossible for projects to be completed in the funding years for which they were applied.”¹⁴

The E-rate regulations require applicants to adhere to bidding and procurement rules established by the Commission and to any local or state bidding and procurement rules. The petitioners’ request for a 60 day “challenge” period would run afoul of many local and state bidding and procurement regulations, including our state’s regulations. As ALA succinctly states, “Once a bid process closes there generally is no way to reopen it unless the applicant receives no viable responses.”¹⁵ And SECA also references this issue noting that “The challenge process that the Texas Carriers propose could nullify contracts that were awarded after complying with a host of state and local bidding requirements as well as E-rate requirements.”¹⁶

In their request for a rulemaking the petitioners claimed they had issues with consortium applications.¹⁷ But as ALA noted in its comments, nothing prevents the providers from forming their own consortium to respond to a form 470 request.¹⁸ And SECA references the very successful provider consortia here in Wisconsin that has responded to our state Division of

¹³ SECA. Page 10.

¹⁴ EducationSuperHighway comments submitted July 1, 2019. Page 4. This added delay is even more egregious when considering—as ESH has documented—that “In 2018, the median time for USAC to review and issue a funding commitment decision to Texas consortia projects was 296 days.”

¹⁵ ALA. Page 5.

¹⁶ SECA. Pages 8-9.

¹⁷ Petition for Rulemaking of Central Texas Telephone Cooperative, Inc., Peoples Telephone Cooperative, Inc. and Telcom Communications, LLC. May 22, 2019. CC Docket No. 02-6; WC Docket No. 13-184. (Petitioners). Page 2.

¹⁸ ALA. Page 5.

Enterprise Technology’s Request for Proposals (RFP) for our statewide BadgerNet network.¹⁹ This provider consortium of over 70 telecommunication carriers formed in the mid-1990s to bid on the first BadgerNet RFP and they have bid on all five successive RFPs since then. Most members of the BadgerNet consortium are small, rural carriers with limited service areas.

Parties who generally support the Texas carriers’ petition

Like the parties that oppose the Texas carriers’ petition, various parties filed comments in support of the petition. We reference several of these parties’ comments below and state why we generally oppose their positions.

The Concerned Rural Carriers support the Texas Carriers’ proposals to amend the E-rate rules to have a process in place allowing E-Rate applicants to “Notify existing providers of proposed special construction projects seeking new fiber builds....”²⁰ There is no need to amend the rules because there is already a process in place; namely the form 470 request for fiber service. Filing a form 470 alerts *any* provider—whether it’s an incumbent or a potentially new provider—of the applicant’s intent to seek fiber broadband connectivity. Indeed, as a safeguard to give incumbent providers the opportunity to bid the December 2014 *E-rate Modernization Order* requires that “Applicants interested in pursuing self-construction must solicit bids for both service and construction in the same FCC Form 470 and must provide sufficient detail so that cost-effectiveness can be evaluated based on the total cost of ownership....”²¹

Comments from NTCA, The Rural Broadband Association, correctly document that they have long been on record as requesting a special, privileged status for incumbent fiber broadband providers.²² Many organizations filed comments noting that NTCA’s request was considered as part of the E-rate Modernization process but not adopted by the Commission.²³ Of interest, our

¹⁹ SECA. Page 12.

²⁰ Concerned Rural Carriers comments submitted July 1, 2019. Page 3.

²¹ *2014 Second E-rate Order*. Paragraph 48. The phrase “solicit bids for both service” refers to bids from an incumbent provider, assuming there is one.

²² See letter from Michael R. Romano, NTCA, to Marlene H. Dortch, Secretary, FCC. Filed Nov. 21, 2014. See also footnote #5 in their comments in this Texas Petitioners’ docket.

²³ For example, see page 2 in our above comments citing the Benton Foundation. See also ALA’s comments in this docket, page 2. And see also New America’s Open Technology Institute, et al., comments in this docket, page 4.

department filed comments with the Commission as part of the E-rate Amortization Notice²⁴ where we also opposed NTCA’s request in that docket to restrict special fiber construction by schools and libraries.²⁵

USTelecom acknowledges the success of the E-rate program but then states that “the current rules are not carefully tailored to protect existing fiber resources.”²⁶ We think it is more accurate to say the current rules are not carefully tailored to protect existing fiber providers. We support the current rules which require open, competitive bidding among providers in response to an applicant’s form 470 fiber service request. However, this critical requirement of the E-rate program would be fatally compromised by giving existing providers a privileged bidding status as requested by the petitioners.

Most of the USTelecom comments in this proceeding generally mirror the comments they submitted on several occasions during the 2013-2014 E-rate Modernization process. For example, on page 4 they reference their 2013 comments that fiber ownership “should be limited to schools and libraries in areas that do not already have commercially-deployed fiber.”²⁷ But the Commission’s December 2014 *Second Report and Order* stated, “there are schools and libraries that currently have broadband access, including in non-rural areas, that may be able to purchase more affordable broadband services if they take advantage of the self-construction option.”²⁸ Thus, as the Commission rejected the request by USTelecom to restrict the open bidding process for fiber in 2014 it should reject it again in this proceeding.

* * * *

In conclusion, we agree with the many parties who filed initial comments stating their opposition to the Texas carriers’ petition. We think the current rules and processes are sufficient to address fiber build-outs and the petitioners’ requests are little more than an attempt to tilt the competitive

²⁴ *Notice of Proposed Rulemaking In the Matter of E-Rate Program Amortization Requirement*. WC Docket No. 19-2, WC Docket No. 13-184. January 31, 2019.

²⁵ Wisconsin Dept. of Public Instruction comments on the E-rate Amortization Notice submitted April 1, 2019. Page 2-3.

²⁶ USTelecom comments submitted July 1, 2019. Page 2.

²⁷ *Id.* Page 4.

²⁸ *2014 Second E-rate Order*. Para 53.

bidding process in their favor. Therefore, we do not see any reason for the Commission to grant the Texas petitioners' request to open a rulemaking proceeding on fiber network build-outs.

Thank you very much for reviewing our Reply Comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Kurt J. Kiefer". The signature is fluid and cursive, with the first name "Kurt" being the most prominent.

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