

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Promoting Fair and Open Competitive Bidding)	WC Docket No. 21-455
in the E-Rate Program)	
)	

COMMENTS OF

**BARRY COUNTY TELEPHONE COMPANY,
CENTRAL TEXAS TELEPHONE COOPERATIVE, INC.,
PEOPLES TELEPHONE COOPERATIVE, INC.,
TOTELCOM COMMUNICATIONS, LLC, AND
VALLEY TELEPHONE COOPERATIVE, INC.**

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SUMMARY

On December 16, 2021, the Federal Communications Commission (“FCC” or “Commission”) released a *Notice of Proposed Rulemaking* (“*NPRM*”) seeking comment on several proposed changes to the bidding process related to the E-Rate program, including: a proposal to implement a central bidding portal through which service providers would be required to submit bids directly to the Universal Service Administrative Company (“USAC”) rather than to applicants; requiring USAC to temporarily withhold submitted bids from applicants for a stated minimum period of time; and whether to require applicants to submit competitive bidding documentation to USAC.

The Rural Companies provide telephone, broadband, and other communications services throughout rural portions of Michigan, Texas, and Arizona, and have successfully built broadband infrastructure to provide school and library connectivity with the assistance of the E-Rate program. While the E-rate program has been wildly successful in its mission of providing connectivity to schools and libraries, over the years the Rural Companies have also experienced firsthand the waste and inefficiencies associated with the E-Rate program, and have themselves fallen victim to biased and flawed bidding practices. Indeed, the Rural Companies have consulted with FCC staff about their concerns, and made various filings to that effect, urging the Commission to make changes to E-Rate bidding rules. As such, the Rural Companies welcome the Commission’s push for reform within the E-Rate program, and support any proposal that would increase transparency and accountability in the bidding process, especially those proposals contained in the *NPRM*.

While the Rural Companies support the reforms set out in the *NPRM*, they also encourage the Commission to take further steps to eliminate fraud and waste, and level the

playing field for smaller service providers in the bidding process. First, the Rural Companies urge the Commission to require that applicants file FCC Forms 470 and Requests for Proposals (“RFP”) in every zip code in which service is being requested, to avoid the situation where regional consortia, who serve hundreds of schools across multiple counties, post a region wide RFP under a single zip code, leaving service providers outside of the vicinity of that single zip code unaware of bidding opportunities they are otherwise qualified for. Additionally, the Commission should implement automatic notifications to service providers if an RFP has a zip code within their operating area.

Second, the Rural Companies are aware of several instances where E-Rate funds have been used to overbuild existing fiber networks that were previously constructed using Universal Service funds, and as such, the Rural Companies encourage the Commission to adopt safeguards/promulgate rules that would discourage such overbuilding. To further discourage overbuilding, the Rural Companies urge the Commission to increase the RFP bidding window to 60 days for RFPs that cover more than 50 miles so that smaller providers are given ample time to partner with other service providers to form a group bid. In cases where the selected provider requires special construction costs for new fiber, the Commission should add an additional 60-day period of time to allow incumbent service providers to demonstrate that a lease of their existing fiber facilities could provide the same level of service to the schools or libraries in question at a lesser overall cost to the E-Rate program.

Lastly, in order to prevent waste, the Rural Companies request the Commission implement additional documentation requirements when applicants are requesting special construction costs, including providing: an accounting of what is being constructed; the scoring rubric used for bids, and the identification of the names of consultants involved in the project.

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Barry County Telephone Company (“BCTC”), Central Texas Telephone Cooperative, Inc. (“CTTC”), Peoples Telephone Cooperative, Inc. (“Peoples”), Totelcom Communications, LLC (“Totelcom”), and Valley Telephone Cooperative, Inc. (“Valley Telephone”) (collectively, the “Rural Companies”), by counsel, hereby submit these comments in response to the *Notice of Proposed Rulemaking* (“NPRM”) in the above captioned proceeding.¹ The *NPRM* seeks comment on, among other things: a proposal to implement a bidding portal through which potential E-Rate service providers would be required to submit bids to the Universal Service Administrative Company (“USAC”), instead of directly to applicants; requiring USAC to temporarily withhold submitted bids from applicants for a stated minimum period of time; and requiring applicants to submit bidding selection documentation, such as bid comparison matrices and related contract documents at the time applicants request funding.² For the reasons stated

¹ *In the Matter of Promoting Fair and Open Competitive Bidding in the E-Rate Program*, WC Docket No. 21-455, Notice of Proposed Rulemaking, (rel. Dec. 16, 2021) (“*NPRM*”).

² *Id.* at ¶¶ 3, 10.

herein, the Rural Companies agree that greater transparency and accountability is crucial for the success and efficiency of the E-rate program and support the proposals made by the Commission in the *NPRM*. In addition to the proposals set forth in the *NPRM*, the Commission should also implement further measures to eliminate fraud and waste within the E-Rate program, as discussed *infra*.

I. BACKGROUND

The Rural Companies and their wholly-owned subsidiaries provide voice, high speed broadband via fiber and fixed wireless, and other communications services throughout rural portions of Michigan, Texas, and Arizona. Each has successfully built broadband infrastructure, including fiber connections, to schools in their areas with the assistance of the Universal Service Fund's E-Rate and High Cost Programs. The Rural Companies fully support the E-Rate program, which has been successful in bringing high speed broadband connectivity to the nation's schools and libraries. However, the Rural Companies have previously consulted with FCC staff and other industry stakeholders regarding their concerns regarding potential waste and inefficiencies withing the E-Rate Program, and made various filings to that effect. Indeed, on May 22, 2019, CTTC, Peoples, and Totalcom (collectively, the "Texas Carriers") filed a Petition for Rulemaking asking that the FCC initiate a proceeding and change its rules to prohibit or discourage the use of E-Rate money to overbuild existing federally-subsidized fiber networks.³ In it, the Texas Carriers expressed their concern about the use of region-based consortia groups that have issued Requests for Proposals ("RFPs") through the E-Rate program, for the construction of Wide Area Networks ("WANs") to provide broadband service to each school

³ See *Petition for Rulemaking to Amend and Modernize Part 54 of the Commission's Rules to Prevent Waste in the Universal Service Fund E-Rate Program*, RM-11841; CC Docket No. 02-6, WC Docket No. 13-184 (filed May 22, 2019) ("Texas Carriers 2019 Petition").

within the region, even though many of those schools are *already* served by fiber, that was previously constructed using Universal Service Fund (“USF”) funds.⁴ Valley Telephone expressed support for the Texas Carriers 2019 Petition through its own comments, stating that it had also experienced the same overbuilding issues in Arizona with regard to the E-Rate program.⁵ Similarly, on July 1, 2019, BCTC submitted an *Ex Parte* letter to the Commission in support of the Petition filed by the Texas Carriers, urging the Commission to adopt safeguards that would discourage overbuilding of existing federally supported fiber networks.⁶ Additionally, on March 10, 2020, Totalcom submitted an *Ex Parte* Letter to the Commission outlining instances of needless overspending in portions of Texas and proposing changes to the RFP process that would yield more cost effective, fair and open results.⁷ Consequently, the Rural Companies welcome the revamping of the E-Rate Program bidding process and wholly support the proposals contained in the *NPRM*, as well as the Commission’s efforts to “protect against waste, fraud, and abuse and ensure that funds are properly disbursed and used for appropriate purposes.”⁸

II. DISCUSSION

The Commission has acknowledged the presence of fraud and waste in the E-Rate bidding process for nearly a decade, and has sought comment on how to increase transparency and provide for more accountability. In a *NPRM* in 2013, the Commission sought comment on

⁴ See Texas Carriers 2019 Petition at 2.

⁵ See *Comments of Valley Telephone Cooperative, Inc.*, RM-11841, CC Docket No. 02-6, WC Docket No. 13-184 (filed July 1, 2019) (“Valley Comments”).

⁶ See Letter to Marlene H. Dortch, Secretary, from David Stoll, General Manager and CEO of BCTC (July 1, 2019) (“BCTC *Ex Parte* Letter”).

⁷ See Letter to Marlene H. Dortch, Secretary, from Donald L. Herman, Jr. and Clare L. Andonov, Counsel to Totalcom (March 10, 2020) (“Totalcom *Ex Parte* Letter”).

⁸ *NPRM* at ¶ 2.

the “[t]ransparency of prices being bid for E-Rate Supported services,” and whether the Commission should “consider making bid responses public or at least accessible to other E-rate applicants.”⁹ In a 2014 *Report and Order*, the Commission required publication of prices for goods and services purchased by applicants, but declined to require public disclosure of other pricing information, including available pricing from services providers or bid responses.¹⁰ Since then, issues of fraud in the E-Rate program have only increased, and have been identified in several government reports, including a 2017 Officer of Inspector General (“OIG”) Report to Congress,¹¹ a 2019 FCC Agency Financial Report,¹² a 2020 OIG Report to Congress,¹³ and a 2020 GAO Report,¹⁴ among others.

Indeed, the Rural Companies themselves have become aware and been the victim of biased bidding practices. For example, in three separate instances, each of the Texas Carriers were essentially precluded from participating in consortium RFPs due to the vast area covered by the RFP, short time frame to submit bids, lack of meaningful notice and the RFP’s preference for a single provider. Those consortium RFPs included schools to which the Texas Carriers already had fiber and were providing services. The result of each RFP was that the selected bidder

⁹ *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Notice of Proposed Rulemaking, 28 FCC Rcd 11304, 11355, ¶¶194-95, 298 (2013).

¹⁰ *NPRM* at ¶ 7 (citing *Modernizing the E-Rate Program for Schools and Libraries*), WC Docket No. 13-184, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870, 8938, ¶ 165 (2014).

¹¹ Federal Communications Commission, Office of Inspector General, Semiannual Report to Congress, October 1, 2016-March 31, 2017, http://transition.fcc.gov/oig/FCC_OIG_SAR_03312017.pdf.

¹² Federal Communications Commission, *Agency Financial Report: Fiscal Year 2019* (Nov. 19, 2019), <http://docs.fcc.gov/public/attachments/DOC-360844A1.pdf>.

¹³ Federal Communications Commission, Office of Inspector General, Semiannual Report to Congress, April 1, 2020 – September 30, 2020, http://www.fcc.gov/sites/default/files/fcc_oig_sar_09302020.pdf.

¹⁴ GAO, *Telecommunications: FCC Should Take Action to Better Manage Persistent Fraud Risks in the E-Rate Program*, GAO-20-606 (Sept. 16, 2020).

requested and received millions of dollars in special construction costs through the E-Rate fund to deploy duplicative fiber to those same schools.

In another instance, Valley submitted a bid to a consortium that was less than half the price of the bidder that was selected (\$382,036 versus \$782,015) for the same services. Valley was able to price its bid lower because Valley already had fiber to most of the schools within the consortium. However, the consortium selected the more expensive option, which Valley only learned about after submitting a public records request. While the school argued that the selected bidder had better references and quality of service measurements, when Valley reviewed the matrices, it was clear that both categories were not accurately evaluated.

Similarly, notwithstanding the fact that BCTC was the incumbent provider and had an existing fiber-optic facility from its central office to a local school district, BCTC was not selected as the service provider for an RFP for an educational consortium (that included that school district) despite requiring very little in construction costs. The selected entity, on the other hand, offered lower speeds (300 Mbps versus BCTC's 1 Gbps) and required over \$500,000 in special construction costs in order to deploy a duplicative fiber connection to the school district.¹⁵ The results in all of these instances were projects that were inappropriate, not cost-effective, and wasteful. The Rural Companies, and the FCC itself, are aware that these are not isolated incidents, and that real reforms need to be made to the E-Rate bidding process to promote efficiency and prevent fraud.

With this current *NPRM*, the Commission has an opportunity to make real changes to the E-Rate program, and ensure that the finite fund is being administered fairly and cost effectively. As discussed *infra*, the Rural Companies agree with the proposals set forth in the *NPRM*, and

¹⁵ BCTC *Ex Parte* Letter at 2.

urge the Commission to adopt its proposals and to take additional steps to eradicate fraud, waste and abuse in the E-Rate program once and for all.

A. The Rural Companies support the competitive bidding portal, and encourage the Commission to promulgate additional rules to promote fairness and prevent waste in the bidding process.

In the *NPRM*, the Commission set out three broad proposals to “enhance program integrity and administrative efficiency” with regard to the E-rate program.¹⁶ The first would “require service providers to submit bids responsive to FCC Forms 470 through a bid portal managed by USAC, rather than by sending bids directly to the applicant,”¹⁷ essentially enabling USAC to oversee the competitive bidding process. The Rural Companies unequivocally support USAC’s increased involvement in the E-Rate program and the premise of a central bidding portal, and believe that increased transparency in the bidding process will ensure the cost effectiveness of the proposed services and reduce waste. The Rural Companies appreciate the Commission’s efforts to promote accountability through a bidding portal and believe that this is a very positive first step in increasing transparency and reducing fraud in the E-Rate program. The Rural Companies also believe that more reforms will need to be implemented to fully eradicate fraud and waste, and ensure that the bidding process is fair for all, particularly smaller service providers. These proposals are discussed below.

1. The Commission should require that applicants file FCC Forms 470 and RFPs in every zip code in which service is being requested.

Though a bidding portal will increase oversight of the bidding process, the Rural Companies urge the Commission to take further steps to make the bidding process fair and open to smaller carriers, starting with the posting of the FCC Form 470 itself, which starts the bidding

¹⁶ *NPRM* at ¶ 10.

¹⁷ *Id.* at ¶ 12.

process. The Commission has stated that the “FCC Form 470 must specify and provide a description of the eligible services with sufficient detail to enable potential service providers to submit responsive bids for such requested eligible services.”¹⁸ However, the current E-Rate competitive bidding processes allow for RFPs to be posted for a single zip code, as opposed to including all zip codes that the proposed services cover. This is problematic because service providers frequently search posted FCC Forms 470 and associated RFPs by zip code, especially in large states like Michigan, Texas, and Arizona, where searching by state or applicant type may produce an onerous number of results. Thus, when regional consortia, who serve hundreds of schools across multiple counties, post a region-wide RFP under a single zip code, many service providers who would otherwise bid on the project are not notified.¹⁹ Requiring applicants to list every zip code that the proposed services may cover will increase the number of bids and result in a more competitive, cost-effective solution.²⁰ To that end, the portal should also send an automatic notification to service providers if an RFP has a zip code within their operating area.

¹⁸ *Id.* at ¶ 4.

¹⁹ As described in the Totelcom *Ex Parte* Letter, all three Texas Carriers encountered this barrier when they did not submit bids for RFPs because the regional consortia posted under zip codes that are 80 to 130 miles away from the school districts they serve. Had the individual zip codes of each school district been posted, the Texas Carriers would have bid on the project. *See* Totelcom *Ex Parte* Letter at 1.

²⁰ In 2017, Region 14 of Texas issued a Form 470 and RFP requesting bids for fiber optic services to 41 independent school districts (“ISDs”), including 4 ISDs that Totelcom already served. However, Totelcom was unaware of the RFP because the Form 470 was filed using the zip code of the Regional Educational Service Center, which was more than 70 miles away from Totelcom’s service area and the schools Totelcom served at the time. Had an RFP been filed for zip codes within Totelcom’s service area, Totelcom would have submitted a bid for the four ISDs it served, and would have potentially partnered with other local carriers to submit a joint bid for the entire region. Instead, the provider selected for Region 14’s RFP was a larger national provider with no existing fiber to a vast majority, if not all, of the ISDs. The selected provider ultimately requested and was awarded special construction costs, in excess of seventeen million dollars, to lay new fiber to some schools that already have fiber connections. *See* Totelcom *Ex Parte* Letter at 2-3.

2. The Commission should include safeguards that would discourage overbuilding of existing federally supported fiber networks.

Notwithstanding the fact that Section 54.511 of the FCC rules requires that applicants select the bid that is the most “cost-effective service offering,”²¹ the current RFP system for the E-Rate program has been replete with waste, particularly with regard to service providers requesting special construction costs to build fiber where fiber already exists. The Rural Companies are aware of several instances where E-Rate funds have been used to overbuild or build duplicative networks to existing fiber networks that were previously constructed using USF funds. This is particularly an issue when regional based consortia groups issue RFPs for the construction of WANs to provide broadband services to schools or libraries within a region that covers thousands of square miles, even though some of those schools or libraries are already connected via smaller providers via USF-supported fiber network. Nothing in the current rules prohibits the selected provider from seeking these special construction costs of a duplicative fiber network, nor do the rules require the selected provider to negotiate the leasing of existing fiber.

Indeed, under the current rules, USAC does not track which schools and libraries have existing fiber and which schools and libraries need it. In a letter from Radha Sekar, CEO of USAC, to FCC Commissioner Michael O’Rielly on April 1, 2019, Ms. Sekar acknowledged that USAC did not track this information, stating: “we do not have sufficient data to determine whether E-rate funded projects duplicate another provider’s networks.”²² The Digital

²¹ 47 CFR § 54.511.

²² Letter from Radha Sekar to Commissioner Michael O’Rielly (Apr. 1, 2019).

Opportunity Data Collection (“DODC”)²³ adopted by the Commission to create a more granular broadband map, could provide an ample opportunity for USAC to obtain this information, and is a first step in accurate broadband mapping, which ultimately can lead to more efficient use of E-Rate funds. Accordingly, once this mapping is complete, the Commission should incorporate that resource into its rules regarding special construction, to prevent duplicative networks.

Accordingly, the Rural Companies urge the Commission to address this blatant waste and inefficiency as part of its overhaul of the E-Rate program with regard to special construction projects.²⁴ Indeed, if all bids are being submitted via a central bidding portal, as the Commission is suggesting, and which the Rural Companies fully support, oversight, and prevention of, overbuilding fiber networks could be streamlined.

B. The Rural Companies urge the Commission to extend the RFP and holding period in cases of special construction and RFPs covering more than 50 miles.

The *NPRM* seeks comment on requiring applicants to wait a specified amount of time before they can access bids submitted in response to their FCC Form 470 service requests.²⁵

Specifically, in the 2017 OIG Report, the OIG recommended that USAC hold service provider

²³ See *Establishing the Digital Opportunity Data Collection*, WC Docket No. 19-195, Modernizing the FCC Form 477 Data Program, WC Docket No. 11-10, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 19-79 (rel. Aug. 6, 2019).

²⁴ See Texas Carriers 2019 Petition at 4, Exhibit 1 (asking the Commission to add the following sentence to Section 54.502(a)(1) of the Commission’s Rules: “Category One services shall not include special construction costs for the construction of fiber where it has been demonstrated that fiber already exists, unless the existing fiber owner is unwilling to negotiate in good faith to lease that fiber at reasonable market-based prices” and to add a paragraph to Section 54.503 of the Commission’s rules requiring more detailed information, and a 60 day challenge period, when applicants request special construction costs); Valley Comments at 5 (stating that Valley is concerned about the use of E-Rate funds to overbuild existing networks that have been previously constructed using other USF or other government funds); BCTC *Ex Parte* Letter at 3 (stating that BCTC is “concerned about the use of E-Rate funds to overbuild or build duplicate networks to existing fiber networks”).

²⁵ *NPRM* at ¶ 16.

bids in a bid repository for a “28-day bidding window” to ensure that service providers were competing on a “level playing field,” and not receiving information about previously submitted bids.²⁶ This 28 day window also coincides with the current competitive bidding rules which stipulate that service providers only have 28 days from the posting date to respond to an RFP before the applicant may select a provider.²⁷

The Rural Companies fully support the proposal contained in the *NPRM* that applicants should have to wait 28 days before accessing bids, and urge the Commission to extend the RFP and related holding period in two instances. First, the Rural Companies suggest that the Commission give service providers additional time to respond to RFPs that cover more than 50 miles. Small service providers may be equipped to serve schools within their own rural service areas, but in order to serve the entire area of an RFP would need to partner with other service providers to form a group bid.²⁸ Under the current 28 day rule, service providers simply do not have sufficient time to coordinate and form the partnerships necessary to form such a group. As a result, the current competitive bidding rules do not provide an equal opportunity to bid, and existing, local participants are disadvantaged.

Second, with regard to RFPs that result in a selected bidder requiring special construction costs for new fiber builds, the Rural Companies encourage the Commission to add an additional 60 day holding period to confirm that the requested special construction costs are in fact necessary and the most cost effective option. During this 60 day period, any existing provider would be able to demonstrate that its existing network facilities are already capable of connecting via fiber the school or library in question. The rules should then provide that funding

²⁶ *Id.* at ¶ 15.

²⁷ 47 CFR § 54.503(c)(4).

²⁸ *See* n. 12, *supra*.

will not be approved for any special construction costs associated with laying new fiber infrastructure to any portion of the proposed network where it is demonstrated that fiber already exists and the owner of said existing fiber is willing to lease that fiber at a reasonable price that is less costly than new construction.²⁹ Such safeguards would serve to prevent the overbuilding of existing federally supported fiber networks, and ensure that the bid selected is in fact “the most cost-effective service offering.”³⁰

C. The Rural Companies support the requirement that applicants submit bidding selection documentation, particularly when special construction costs are involved.

Under current rules, E-Rate applicants only submit bidding and contract documentation if requested by USAC or auditors. By contrast, in the Rural Health Care (“RHC”) Program, applicants must submit contract documentation with their funding requests, and “submit documentation to support their certifications that they have selected the most cost-effective option.”³¹ In the *NPRM*, the Commission proposed aligning the competitive bidding requirements of the E-Rate program with RHC Program rules, including requiring applicants to submit documentation demonstrating compliance with competitive bidding rules.³² The Rural Companies unequivocally support the requirement for additional bid documentation. Indeed, as discussed above, some of the Rural Companies have previously lost RFPs, only to later learn through documentation acquired through the Freedom of Information Act that their bid was in fact the most cost effective.

²⁹ See Texas Carriers 2019 Petition, Exhibit 1 (outlining proposed changes to Sections 54.502 and 54.503 of the Commission’s rules), incorporated hereto by reference.

³⁰ 47 C.F.R. § 54.503(c)(2)

³¹ *NPRM* at ¶ 23 (citing 47 C.F.R. § 54.623(a)(2)).

³² *Id.* at ¶ 24.

In addition to bidding documentation set out in the *NPRM*, the Rural Companies encourage the Commission to implement additional requirements when an applicant is seeking special construction costs. Specifically, when approving special construction costs, applicants should provide an accounting of everything that they are building, including the number of strands and a description of how non-warehoused fiber will be used. Additionally, whenever special construction costs are proposed to be allocated, applicants should be required to include the results of their scoring rubric for the bids, so that the public has transparent information regarding whether the project that was selected was, in fact, the most cost effective. Moreover, in order for the competitive bidding process to truly be open and fair, the Commission should take steps to limit any behind-the-scenes coordination, by identifying the names of the consultants who write the proposals and ensure that consultants who design the network for regional consortia are prohibited from any involvement in bidding on the project.

III. CONCLUSION

After years of lobbying for more transparency in the E-Rate bidding process, the Rural Companies greatly appreciate the Commission's proposals toward reform in the E-Rate program, and wholly support those proposals. However, the Rural Companies are concerned that the current rules discourage participation by smaller carriers, and allow for the use of E-Rate funds to overbuild existing networks that have been previously constructed using other USF or other government funds. In order to eliminate or reduce this potentially inefficient and wasteful use of E-Rate funds, the Rural Companies ask the Commission to amend the E-Rate competitive bidding requirements in the manner described above. Such reforms will, in the opinion of the Rural Companies, encourage the most productive use of E-Rate funds while still fulfilling the

mission of the program to provide increased access to high-speed Internet in the nation's schools, libraries and rural health care facilities.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. L. Herman, Jr.', with a long, sweeping flourish extending to the right.

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