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

In the Matter of:	)	
	)	
E-rate Program Amortization Requirement	)	WC Docket No. 19-2
	)	
Modernizing the E-rate Program for Schools and Libraries	)	WC Docket No. 13-184
	)	

REPLY COMMENTS OF FUNDS FOR LEARNING, LLC ON PROPOSED RULEMAKING REGARDING THE E-RATE PROGRAM AMORTIZATION REQUIREMENT (WC Dockets 19-2 and 13-184; FCC 19-5)

Funds For Learning, LLC, ("FFL"), submits these Replies to Comments in response to the FCC's Public Notice released January 31, 2019, regarding a Notice of Proposed Rulemaking and Order regarding the elimination of the Universal Service Fund's E-rate program requirement that non-recurring charges of $500,00 or more for special construction projects be amortized over three or more years.

I. FUNDS FOR LEARNING SUPPORTS ELIMINATION OF THE AMORTIZATION RULE

There is broad support within the E-rate community for elimination of the Category One amortization rule. The Comments submitted to the FCC in support of this change are consistent with the feedback that we have received from the E-rate community, and the Comments generally align with our own thinking on the matter: FFL firmly supports elimination of the Category One amortization rule.

The Comments submitted on the record highlight the many benefits of permanently removing the amortization requirement:

- "This rule, when in effect prior to its temporary suspension in 2014, undermined the efficiency and utility of the E-Rate program for schools and libraries and failed to accomplish its intended purpose."[1]
- "Permanent removal of the Amortization Order is also another step toward program simplicity which was the third goal of the Modernization effort."[2]
- "Eliminating the amortization requirement will also enable more efficient use of limited E-rate support

[1] Comments of the NTCA−The Rural Broadband Association at p.1, available at https://ecfsapi.fcc.gov/file/1031871287238/03.18.19_NTCA_Comments_re-E-Rate_Amortization_NPRM_Docket_19-2_and_13-184.pdf.
[2] Comments of the American Library Association (ALA) at p.1, available at https://ecfsapi.fcc.gov/file/10318128235947/ALA%20comments%20E-Rate%20Program%20Amortization%20Requirement%2003182019.pdf.

funds by allowing applicants and the E-rate mechanism to pay less over time."[3]

- "Requiring service providers to recover their costs over several years could discourage broadband providers from submitting bids for E-rate services, which would reduce competition and undermine the goal of promoting greater broadband deployment, especially in rural markets."[4]

Having noted our support for elimination of the amortization rule, there are four specific areas of comments to which FFL would like to respond:

(1) the negative impact amortization would have on programs that provide state matching funds;
(2) the adverse consequences of the NTCA's "guardrails" proposal;
(3) the need for transparent cost-effectiveness standards; and
(4) the current abuse by USAC of the cardinal change rule to nullify local decision-making.

II. STATE PROGRAMS WOULD BE HINDERED BY RETURN OF THE AMORTIZATION RULE

It is an unfortunate truth that significant disparities exist when it comes to the accessibility of broadband Internet connections. Despite the best efforts and intentions of the Universal Service program, a narrowing, *but persistent* gap remains between various communities within the United States. Universal access to broadband Internet is an ideal for which we are striving still.

State governments are keenly aware of this need and many of them support initiatives intended to close the gap. The FCC should do all that it can to cooperate with these state-level programs to encourage investment in broadband connectivity. One strong, yet simple step is eliminating the E-rate amortization rule. In its Comments, SECA astutely observes the following:

> Freedom from a requirement to amortize large-dollar network projects has been a critical factor in the success of state matching programs from the beginning. State funding for these programs typically requires enabling legislation and budgeting over a limited timeframe, and a state-approval process tied to the E-rate funding cycle. Amortized E-rate funding, combined with a requirement to obtain ongoing E-rate commitments, would have vastly complicated, if not eliminated, the FCC's state matching provision. SECA believes that reinstatement of amortization would cripple the FCC's state matching initiative.[5]

We agree with SECA that an amortization requirement would have a chilling effect on state programs intended to broaden Internet access. FFL's own analysis indicates that there is a growing level of participation in state matching fund programs. A total of $48.25 million in matching funds has been reported on applications from state's with approved matching programs during the past three funding years. Of the total amount, $32.36 million was submitted in FY2018.[6]

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[3] Comments Of Illinois Department Of Innovation And Technology (DoIT) at p.5, available at https://ecfsapi.fcc.gov/file/10315078896542/Illinois%20DoIT%20Comments%20on%20FCC%20Amortization%20NPRM.pdf.
[4] Comments of the Schools, Health & Libraries Broadband (SHLB) Coalition at p.1, available at https://ecfsapi.fcc.gov/file/1031960055080/SHLB%20Amortization%20Comments%20-%20March%2018%202019%20-%20Final.pdf
[5] Comments of the State E-rate Coordinators' Alliance (SECA) at p. 5-6, available at https://ecfsapi.fcc.gov/file/103140390005904/SECA%20NRC%20Amortization%20Comments.pdf
[6] See *States Match $48 Million for Broadband*, FundsForLearning.com, https://www.fundsforlearning.com/blog/2019/03/states-match-48-million-for-broadband (March 22, 2019).

State Matching Funds Reported on E-rate Applications			
FY2016	FY2017	FY2018	**Total**
$2,919,756	$12,976,837	$32,355,246	**$48,251,839**

Without the state matching funds and additional E-rate discounts, the applicant out-of-pocket expense for these projects would have been nearly five-and-a-half times more expensive.[7] Requiring amortization would take away most, if not all, of the state matching funds. This would slow down the progress being made in states and increase the cost paid by applicants to receive Internet access.

III. THE FCC REJECTED ONCE AND SHOULD REJECT AGAIN NTCA'S SUGGESTION THAT THE COMMISSION SUBJECT SCHOOLS AND LIBRARIES TO MORE PROCUREMENT-RELATED REQUIREMENTS.

In its comments, NTCA contends that the FCC needs to adopt "guardrails" and "safeguards" to protect the financial integrity of the E-rate and other USF programs and to guard against redundant fiber connections.[8] On the surface, this sounds reasonable. But NTCA is repackaging a proposal that it offered to the FCC once before, which the FCC considered and, for good reason, rejected. NCTA's so-called "safeguards" are as follows:

> These safeguards should include:
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> (1) a public challenge process that requires an E-Rate applicant (including consortia) seeking funding for any physical outside plant infrastructure construction to demonstrate that they have sought out existing providers or access to existing network facilities and that no such facilities are in fact available to support broadband services that are needed in the reasonably foreseeable future to meet E-Rate program speed targets;
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> (2) a 30-day period in which an existing provider can demonstrate that its network facilities are capable of connecting via fiber, within 60 days, the school or library in question with broadband services meeting the target speed. (Emphasis added for comparison purposes.)[9]

The Texas Carriers make a similar request:

> Specifically, the Companies propose that the Commission adopt amendments that incorporate a public challenge process that requires an E-Rate applicant (including consortia) seeking funding for special construction fiber projects, whether for self-provisioned networks or networks owned by a commercial provider, to confirm that no existing fiber facilities exist.[10]

These are arguments that the FCC has already addressed. When the FCC considered NTCA's proposal the first time, this is what it found and concluded:

> 46. . . . For its part, expressing concern about overbuilding, NTCA has argued that self-construction should only be allowed where an applicant has sought broadband services from existing providers and networks, and connectivity is not available from those providers and their networks; the existing provider is given the opportunity to demonstrate that it can provide the broadband service at target speeds within 180 days; there is a meaningful matching funds requirement; applicants are prohibited from using revenue from excess capacity as a source of matching funds; and applicants demonstrate that they have selected the option that

[7] *Id.*
[8] *See* Comments of NTCA.
[9] *Id* at p. 7.
[10] Comments of Central Texas Telephone Cooperative, Inc., Peoples Telephone Cooperative, Inc., and Totelcom Communications, LLC at p. 3, available at https://ecfsapi.fcc.gov/file/10318395205960/Comments%20to%20eRate%20NPRM%203.18.19.pdf.

will be most cost-effective over the life of the asset. (Emphasis added for comparison purposes).

47. We agree with many of the concerns expressed by commenters, particularly those aimed at ensuring that self-construction is only undertaken when it is the most cost-effective option, but we do not agree with all of the limitations on self-construction suggested by commenters. Therefore, we adopt safeguards ensuring that applicants seek E-rate support for self-construction only when it is the most cost- effective option, and requiring that they actually use the self-constructed facilities, but do not adopt many of the other limitations on self-construction suggested by commenters.

51. We do not adopt NTCA's proposals that we give existing providers a separate opportunity to demonstrate that they are able to provide service at the targeted speeds, because to do so would interfere with the competitive bidding process, which is the E-rate program's primary tool for ensuring schools and libraries select the most cost-effective option. Moreover, because E-rate applicants' requests for bids are publicly available, providers all have an equal opportunity to bid to provide E-rate services, and we expect that where there are existing providers and networks capable of providing service at the targeted speeds, they will be well situated to offer very competitive pricing through the competitive bidding process. (Emphasis added).[11]

Like its old proposal, NTCA's "new" proposal, is an attempt to place additional, unnecessary restrictions on how schools and libraries procure E-rate-supported broadband in the competitive marketplace for those services. NTCA designed both of its proposals, the old one and the "new" one, to force applicants to use broadband providers with local facilities, without regard for cost and competition. Each proposal, regardless of how it is presented, short-circuits the competitive bidding process.

NTCA's proposal suggests that the very *presence* of fiber guarantees a cost-effective solution, regardless of how expensive it may be for a school or library. Under the existing regulations, applicants seeking a self-provisioned network are required to consider proposals for leased facilities. Yet, perversely, the NTCA proposal would prevent applicants from considering a self-provisioned network if fiber is present – no matter the monthly price of the fiber network – and, instead, would mandate that applicants select their incumbent carrier.

Adopting NTCA's proposal would lead to a host of troublesome questions:

- If an applicant is required to use an incumbent service provider, are they then exempt from the FCC Form 470 competitive bidding process?
- Is the FCC's cost-effectiveness requirement waived if there is only a single leased fiber solution available to an applicant? If so, are there other circumstances under which the cost-effectiveness requirement can be waived or ignored?
- If fiber is available at some, but not all, locations, would an applicant be prohibited from standardizing its services and/or using a single solution provider?

When the FCC considered NTCA's proposal the first time, it was quick to recognize the many issues associated with it. In the *Second E-rate Modernization Order*, the FCC wasted no time rejecting the NTCA's proposal to give existing providers a separate opportunity to demonstrate to applicants their ability to provide service at the targeted

[11] *Second Report and Order and Order on Reconsideration* (2014) at paras. 46-47, 51, available at https://www.fcc.gov/document/fcc-releases-order-modernizing-e-rate-21st-century-connectivity (*Second Report and Order and Order on Reconsideration*).

speeds, because allowing providers to do that, the FCC made clear, would interfere with the competitive bidding process. The FCC explained that "because E-rate applicants' requests for bids are publicly available, providers all have an equal opportunity to bid to provide E-rate services, and we expect that where there are existing providers and networks capable of providing service at the targeted speeds, they will be well situated to offer very competitive pricing through the competitive bidding process."[12]

And while the FCC shared NTCA's concern about the possibility that E-rate applicants might overbuild or duplicate certain fiber connectivity, it shut down completely the attempts by NTCA and others to impose more limitation on self-constructions than what it decided would be necessary and appropriate for this purpose. It decided to do this, the FCC explained, because of the confidence it had in the rules already on the books and the new ones it had just adopted to ensure that E-rate funds would not be used to subsidize anything but the most cost-effective options that applicants had. In this proceeding, neither NTCA, Texas Carriers, nor any other commenter has provided any substantial evidence to show that the FCC's confidence in this instance had been misplaced. Accordingly, the FCC should reject NTCA's proposal to adopt additional "safeguards."

IV. THE FCC SHOULD DIRECT USAC TO STOP APPLYING AN UNPUBLISHED STANDARD OF "COST EFFECTIVENESS" TO ADMINISTRATIVELY ABROGATE AND DELAY FUNDING FOR MULTI-MILLION DOLLAR, MISSION CRITICAL, FIBER COMMUNICATIONS CONTRACTS PROCURED IN FULL COMPLIANCE WITH PROGRAM RULES.

The Benton Foundation (Benton) and EducationSuperHighway (ESH) insist that "[i]t is time for the Commission to step in and instruct USAC how to run a sound and timely review process."[13] We could not possibly agree more.

For years we have been highlighting examples of USAC improperly developing and applying its own standards of application review, second-guessing perfectly legitimate contracting decisions, and delaying the application review process for ridiculously long periods of time -- frequently with no explanation and, in many cases, we eventually learned, without good cause. We have clearly reached a tipping point, as USAC's processing of applications for fiber network funding in the wake of the E-rate Modernization Orders has been nothing short of an unmitigated disaster. We are not alone in this lament, as Benton and ESH in their Comments make abundantly clear:

> Use of undisclosed criteria focused on special construction applications looks to be the creation of policy, not the application of established standards. It is not simple, timely or efficient for USAC to take 245 days to process a typical fiber application nor does it meet USAC's mandate to force almost 20% of applicants to reapply after experiencing a delay in processing or after having their applications denied. The program's principles and goals cannot be effectively carried out in the absence of clear, timely, and effective management of the program. It is time for the Commission to step in and instruct USAC how to run a sound and timely review process.[14]
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> . . . Case-by-case review will not confront the systemic errors in USAC processes soon enough or comprehensively enough. The Commission should instruct USAC on how it must now comply with the law and how it must employ processes that fairly evaluate special construction, and all other, E-rate applications. Accordingly, the Commission should tell USAC to:

[12] *Id* at para. 51.
[13] Comments of the Benton Foundation and Education SuperHighway at p. 3, available at https://www.fcc.gov/ecfs/filing/103111144424197.
[14] *Id* at p.9.

- Disclose the basis for its cost-effectiveness reviews, including any economic models that are used as any part of the process of review,
- Set forth in any order finding that the cost-effectiveness standard has not been met the precise and specific bases for its conclusion,
- Suspend the use of any or all questionnaires to delay or deny E-rate applications until the substance of those questionnaires has been subject to a public notice-and-comment process including the process of the Paperwork Reduction Act to the extent that it applies. USAC should also be instructed that the suspension of such questionnaires must not be allowed itself to cause delay in the review of E-rate applications.
- Immediately publish all examples of what USAC has previously considered to be a cardinal change.[15]

On this, the entire E-rate community is of one mind: what it wants is for the FCC to take a stand, to demand once and for all that:

1. USAC do what the FCC directed it to to do years ago in paragraph 126 of its *Second E-rate Modernization Order* – namely, "*share information with applicants and vendors about its approach to cost-effectiveness reviews*"; [16] and

2. The Wireline Competition Bureau and the Office of the Managing Director do what the FCC directed them to do years ago in the same paragraph – namely, "*oversee USAC's interpretation and application of cost effectiveness to ensure alignment with the program goals we have set, with particular emphasis on ensuring the cost effectiveness of the new methods of supporting category one and category two services provided in the E-rate Modernization Order as well as this Order."* [17]

The full paragraph 126 of the *Second E-rate Modernization Order*, "*Maximizing the cost-effectiveness of E-rate supported purchases,*" reads as follows:

> 126. *Maximizing the cost-effectiveness of E-rate supported purchases*. As part of its performance management system, USAC should analyze how its administration of the program can further the goal of maximizing the cost-effectiveness of E-rate supported purchases. For example, USAC should analyze its approach to cost-effectiveness reviews, and find ways to share information with applicants and vendors about its approach to such reviews, in order to encourage cost-effective purchasing by applicants. We direct the Bureau and OMD to oversee USAC's interpretation and application of cost effectiveness to ensure alignment with the program goals we have set, with particular emphasis on ensuring the cost effectiveness of the new methods of supporting category one and category two services provided in the E-rate Modernization Order as well as this Order.

V. THE FCC SHOULD STOP USAC FROM MISAPPLYING THE CARDINAL CHANGE RULE TO NULLIFY THE RESULTS OF TIME CONSUMING, EXPENSIVE, AND COMPLEX E-RATE PROCUREMENTS THAT HAVE BEEN CONDUCTED IN FULL COMPLIANCE WITH STATE AND LOCAL GOVERNMENT CONTRACTING REQUIREMENTS.

Another area of concern to Benton and ESH is USAC's use or, more accurately put, misuse of the "cardinal change rule" to wreak costly and unnecessary havoc on perfectly legitimate competitive bidding processes nationwide. We agree with their concern. It applies directly to procurement of Category One special construction, as well as all other E-rate related purchasing.

[15] *Id* at p.23.
[16] *Second Report and Order and Order on Reconsideration* at para. 126.
[17] *Id* at para. 126.

The FCC gave the "cardinal change rule" to USAC to use only in the most limited of circumstances – that is, (1) only when state or local rules provide no guidance on the subject of minor versus major changes; and (2) only when an applicant has made a fundamental change to its RFP that is so drastic that the RFP becomes, in effect, a new RFP for an entirely different contract. Instead, USAC has opted to use the rule to interfere with procurements, regardless of whether there are state or local laws that take precedence and even in cases where the changes should not be considered drastic. It is as if USAC has turned itself into a *de facto* National Procurement Review Board with the power to preempt state and local law and to create new, national procurement law.

In its *Healthcare Connect Fund Order*[18], the FCC discussed the cardinal change doctrine and how it should be applied in the context of USF-related contracting. We are including it here in its entirety because it explains quite clearly what it is and what it is not:

> 308. Consistent with existing requirements, HCPs [health care providers] should look to state or local procurement laws to determine whether a proposed contract modification would be considered minor and therefore exempt from state or local competitive bidding processes. If a proposed modification would be exempt from state or local competitive bidding requirements, the applicant likewise would not be required to undertake an additional competitive bidding process in connection with the applicant's request for discounted services under the federal universal service support mechanisms. Similarly, if a proposed modification would have to be rebid under state or local competitive bidding requirements, then the applicant also would be required to comply with the Commission's competitive bidding requirements before entering into an agreement adopting the modification.
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> 309. The *Universal Service Fourth Order on Reconsideration* also addressed instances in which state and local procurement laws are silent or are otherwise inapplicable with respect to whether a proposed contract modification must be rebid under state or local competitive bidding processes. In such cases, the Commission adopted the "cardinal change" doctrine as the standard for determining whether the contract modification requires rebidding. The cardinal change doctrine looks at whether the modified work is essentially the same as that for which the parties contracted. A cardinal change occurs when one party affects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for. In determining whether the modified work is essentially the same as that called for under the original contract, factors considered are the extent of any changes in the type of work, performance period, and cost terms as a result of the modification. Ordinarily a modification falls within the scope of the original co\ntract if potential offerors reasonably could have anticipated the modification under the changes clause of the contract.
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> 310. The cardinal change doctrine recognizes that a modification that exceeds the scope of the original contract harms disappointed bidders because it prevents those bidders from competing for what is essentially a new contract. The Commission adopted the cardinal change doctrine as the test for determining whether a proposed modification will require rebidding of the contract, absent direction on this question from state or local procurement rules, because it believed this standard reasonably applies to contracts for supported services arrived at via competitive bidding. If a proposed modification is not a cardinal change, there is no requirement to undertake the competitive bidding process again. (Emphasis added).[19]

[18] *In the Matter of Rural Health Care Support Mechanism, Report and Order* (2012) at paras. 308-310, https://apps.fcc.gov/edocs_public/attachmatch/FCC-12-150A1.pdf.

[19] *Id* at paras. 308-310.

V. CONCLUSION

For the reasons discussed herein, the Commission should:

- Eliminate the E-rate program's amortization rule;
- Reject the call to add new fiber-related, anti-competitive bidding regulations;
- Direct USAC to publicize its cost-effective standards; and
- Prohibit USAC from misapplying the cardinal change rule to nullify properly bid contracts.

Respectfully submitted,

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