

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

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| In the Matter of |) | |
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| E-Rate Program Amortization Requirements |) | WC Docket No. 19-2 |
| |) | |
| Modernizing the E-Rate Program for Schools and Libraries |) | WC Docket No. 13-184 |
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REPLY COMMENTS OF USTELECOM

USTelecom – The Broadband Association¹ respectfully submits these reply comments in response to the Commission’s Notice of Proposed Rulemaking NPRM² requesting comment on Schools and Libraries (“E-Rate”) Universal Service Fund (“USF”) program’s amortization rule. USTelecom submits that, were the Commission to move forward with its proposal to amend existing amortization that would apply to fiber-buildout special construction projects, it should also institute appropriate “guardrails” to ensure that the E-rate program does not provide subsidies for redundant networks in areas where there are comparable, competitive networks. Among other things, should the Commission move forward with its proposed reform of the existing special construction amortization rules for fiber-construction projects, such reform should only apply to applicants situated in target areas where fiber-overbuild is unlikely.

¹USTelecom is the nation’s leading trade association representing service providers and suppliers for the broadband innovation industry. Its diverse member base ranges from large publicly traded communications corporations to small companies and cooperatives – all providing advanced communications and broadband services to hundreds of millions of customers around the world.

² *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, Notice of Proposed Rulemaking, FCC 19-5 (rel. Jan. 31, 2019) (*NPRM*).

I. The Commission should release aggregate data of E-rate projects funding overbuild networks and institute appropriate “guardrails” to ensure that the E-rate program does not provide subsidies for redundant networks.

As other commenters have noted,³ current rules applicable to special construction projects, as reformed in the 2014 Second Modernization Order, allow for support of fiber-buildout in any areas including urban and suburban areas that likely have multiple competitive fiber networks.⁴ As such, E-rate fiber-construction rules stemming from these 2014 rules fail to meet long standing USF principles to target USF support to areas lacking comparable, competitive networks. The Commission should address this by releasing aggregate data of E-rate projects funding overbuild networks since the 2014 *Second Modernization Order* was adopted, and instituting “guardrails” that ensure E-rate funds cannot be used to support overbuild networks.

In 2014, then Commissioner Ajit Pai noted his concern that there were no safeguards in the *Second Modernization Order* to ensure that the money spent in the E-Rate program would be used to close the fiber gap, but instead could be spent to support buildout in urban and suburban networks already having multiple competing networks, stating, “[t]he nation’s largest urban school districts could easily soak up all the new funding to overbuild existing fiber networks. We’ve seen this movie before—Eagle-Net, anyone? The Order’s philosophy brings to mind sage words from John Hurt’s character in Contact: “First rule in government spending: Why build one when you can have two at twice the price?”⁵

Commissioner O’Rielly offered similar concerns stating that as a result of the Second Modernization Order “funding will be provided to all comers and we’ll cross our fingers that it finds its

³ See Comments of NTCA- The Rural Broadband Association, WC Dockets 19-2 and 13-184, (Mar. 18, 2019); Comments of Central Texas Telephone Coop., Peoples Telephone Coop., and Telcom Communications, WC Dockets 19-2 and 13-184 (Mar. 18, 2019).

⁴ See *In the Matter of Modernizing the E-Rate Program for Schools and Libraries*, Second Report and Order and Order on Reconsideration, WC Docket No. 13-184, *Connect America Fund*, WC Docket No. 10-90, 29 FCC Rcd 15538 (Dec. 11, 2014) (*Second Modernization Order*).

⁵ See *Id.* at 15636-7, Dissenting Statement of Commissioner Ajit Pai.

way to the right places. I hope that GAO will have the opportunity to review the impact of these new rules because I fear that these decisions will lead to untold waste of funding,” and particularly noting his concern “about the self-provisioning [of fiber build-out] option, which could lead to overbuilding, and could ultimately jeopardize service to the community at large.”⁶

In 2017, Commissioner O’Rielly observed again that the Second E-rate Modernization Order “rejected recommendations on the record that the option [that E-rate funding for networks constructed by applicants] not be permitted in areas where broadband is already available[.]” and noted that “[we] continue to hear concerns that universal service funds are being wasted by E-rate applicants overbuilding existing networks in whole or in part.”⁷

Those concerns remain concerns remain relevant today. Following the 2014 E-rate reform, significant new government subsidies have been earmarked to support fiber expansion.⁸ And yet, we still lack an understanding of where these subsidies have been targeted and whether or not they are in fact helping to close the fiber gap or simply support fiber overbuild in urban and suburban areas that already have multiple competing fiber networks. Given this data gap, USTelecom welcomes efforts from Commissioner O’Rielly to obtain data to inform this important policy debate.⁹

Until this data gap is resolved, a clear picture of the extent to which E-rate funds are being used to overbuild fiber networks will remain unknown. That said, an examination of the public record one USAC’s website offers ample examples of E-rate applications and in some cases funding commitments targeted for projects that would overbuild fiber networks where there current exist at least one

⁶ See *Id.* at 15641, Dissenting Statement of Commissioner Michael O’Rielly.

⁷ See Letter of Mike O’Rielly, Commissioner, Federal Communications Commission to Chris Henderson, CEO, Universal Service Administrative Co. (Feb. 9, 2017) (*Feb. 2017 O’Rielly USAC Letter*).

⁸ The Commission estimates that USAC committed a total of \$411.6 million for funding requests requiring amortization. See *NPRM* at 7. Additionally, over the past three years states have offered more than \$48 million to support E-rate fiber-buildout projects. See Funds For Learning: Your E-Rates Guide Blog by John Harrington (Mar. 22, 2019) <https://www.fundsforlearning.com/blog/2019/03/states-match-48-million-for-broadband> (last viewed Mar. 28, 2019).

⁹ See *Feb. 2017 O’Rielly USAC Letter* and Letter of Mike O’Rielly, Commissioner, Federal Communications Commission to Radha Sekar, CEO, Universal Service Administrative Co. (Mar. 7, 2019).

competitive fiber network currently exists. Indeed, given that some of these fiber construction projects are led by urban school districts, it is likely that many of these projects would overbuild in areas with multiple competitive fiber options.

The following E-rate-related projects are but a few examples where school districts in urban, or suburban areas are seeking funding to support fiber construction despite the existence of competitive fiber options serving the school district. Importantly, all but two of these school districts is eligible for an E-rate discount rate of 90%. In some of these cases, the applicant was able to or hopes to leverage state support and the associated E-rate match resulting in discount rates for the applicant of 100% or 95% and no skin in the game. In other words, not only is the program subsidizing overbuilding, but it is also often providing *additional* subsidies for new builds over existing infrastructure without any check on cost effectiveness. One USTelecom member with existing infrastructure in the area that would be served by the E-rate funded network was told: “[w]ith the build out cost virtually free, the monthly recurring costs with the selected vendor are more cost effective.”

- Grosse Pointe School District, MI, submitted an E-rate application in funding year 2018 for one-time special construction charges of approximately \$667,000 to support a self-provisioned fiber network;
- Beaumont Independent School District, TX, serving the city of Beaumont, TX, submitted an E-rate application in funding year 2018 for one-time special construction charges of approximately \$3.7 million to support a fiber-buildout project;
- San Antonio School District, TX, submitted an E-rate application in funding year 2018 for one-time special construction charges of approximately \$6.2 million to support a fiber-buildout project;
- Ector County School District, TX, serving the city of Odessa, TX, submitted an E-rate application in funding year 2018 for one-time special construction charges of approximately \$6.3 million to support a comprehensive fiber WAN construction project.

USTelecom previously expressed similar concerns about the risk that E-rate funding would be used to overbuild networks as a result of the proposed reform of special construction rules, and proposed that special construction charges for fiber-buildout should only be allowed where there are no comparable, competitive options. In our 2013 comments in this proceeding we stated that, “support for owned fiber should be limited to schools and libraries in areas that do not already have commercially-deployed fiber. This is similar to the approach the Commission took with respect to the Connect American Fund (CAF), which provides support only in areas lacking an unsubsidized competitor.”¹⁰ In 2014, we noted that “given the widespread access to fiber by the nation’s schools, it is unclear whether any additional support through the kind of “deployment fund” described in the notice is necessary. At most, USTelecom believes that the Commission would only need to commit a limited amount of E-rate funds to a narrow range of schools that do not have any or have inadequate high-speed broadband connections under E-rate program’s existing system. The Commission should therefore quantify the limited number of schools and libraries falling into this category and target support to them. There are various ways for the Commission to complete this process. The Commission could encourage schools and libraries that believe that they do not have adequate (or any) broadband facilities under the existing system to self-identify. Following review and confirmation of such identification by the Commission, an assessment process should be established and administered to identify the schools and libraries with the most acute needs for broadband upgrades.”¹¹

This position is consistent with USF principles supported by USTelecom in multiple related proceedings – specifically that the fund should not support overbuild where there are unsubsidized competitors. Indeed, USTelecom has recently strongly advocated for a proposed solution to this problem which involves creating a database of all broadband serviceable locations in the United States and then

¹⁰ See Reply Comments of the United States Telecom Association, WC Docket No. 13-184, (Nov. 8, 2013) at 6.

¹¹ See Comments of the United States Telecom Association, WC Docket No. 13-184, (Apr. 7, 2014) at 4-5.

asking carriers to identify which of those locations they serve. This database will enable the Commission to more accurately identify which areas are served and which are not, as well as obtain accurate information about overlap.¹² USTelecom believes the creation of such a database is an important first step of determining the geolocation of all underlying reported service locations so as to be able to tell not only where there is service but also what other locations there are in that census block that are not receiving service.

To address these concerns, USTelecom agrees with NTCA that the Commission should do “a surgical reform of the special construction rules adopted in 2014 to implement a process by which applications for such projects will be reviewed to prevent the deployment of redundant E-Rate funded networks.”¹³ However, USTelecom disagrees with NTCA’s narrow proposal to limit overbuild protections to only subsidized networks. In particular, NTCA argues that E-rate support for special construction should not be allowed in areas “where a provider leveraging the High-Cost USF program is already delivering high-speed broadband services over existing networks.”¹⁴ By contrast and consistent with long-standing USF principles, USTelecom believes that the E-rate program should not offer support for special construction projects for fiber-buildout in areas where there exist comparable, competitive networks – whether these have been built with USF or other government support or not.

II. Were the Commission to reform the E-rate special construction amortization rules for fiber-buildout projects, it should do so only in targeted areas lacking comparable, competitive networks

The Commission can and should address the risk of the E-rate program funding fiber overbuild networks in this proceeding. Specifically, if the Commission moves forward with its proposal to reform special construction amortization rules as they apply to fiber-buildout projects, it should do so only in areas lacking in part or in whole comparable, competitive networks.

¹² See Letter of B. Lynn Follansbee, VP–Law & Policy, USTelecom to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-10, CC Docket 10-90 (Mar. 21, 2019).

¹³ See Comments of NTCA- The Rural Broadband Association, WC Dockets 19-2 and 13-184, (Mar. 18, 2019) at 5.

¹⁴ See *Id.*

To do so, the Commission should consider NTCA’s proposal to reform the E-rate competitive rules by implementing a public challenge process for applicants seeking special construction funding for outside plant infrastructure so that the applicants have to show 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.¹⁵

Alternatively, the Commission should consider implementing a simpler process by amending the three-year amortization rules for special construction projects supporting fiber-buildout only in areas deemed to be rural according to current E-rate rules. Such a rule would prioritize special construction where it is needed most – rural areas – and prevent wasteful overbuilding where it would be most likely. Whatever the approach, the Commission’s rules must do a better job of avoiding undermining private investment, especially where schools have reduced incentives to be price-conscious.

¹⁵ *See Id* at 7.

III. Conclusion

USTelecom applauds the Commission for seeking ways to streamline and encourage additional efficiencies in the elements of the E-Rate raised in this NPRM. Given the record, the Commission should take the necessary actions in the E-Rate program in order to make them consistent with the Commission's broader policy goals for incentivizing next-generation broadband deployment and ensuring universal service.

Respectfully submitted,

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