

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

In the Matters of	)	
<b>Petition for Rulemaking of Central Texas Telephone Cooperative, Inc., et al.</b>	)	RM-11841
	)	
<b>Modernizing the E-Rate Program for Schools and Libraries</b>	)	WC Docket No. 13-184
	)	
<b>Schools and Libraries Universal Service Support Mechanism</b>	)	CC Docket No. 02-6
	)	

**COMMENTS OF UNITI FIBER**

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Dated: July 1, 2019

## **EXECUTIVE SUMMARY**

Uniti Fiber respectfully submits these comments in opposition to the petition for rulemaking (“Petition”) filed by a group of Texas carriers (“Petitioners”). Uniti Fiber is a major E-Rate service provider to schools and libraries primarily in Alabama, Florida, Louisiana, and Mississippi that provides a wide range of services to hundreds of school districts and library systems. Uniti Fiber utilizes the E-Rate program not only to serve individual schools and libraries, but to push fiber broadband infrastructure to other nearby communities.

The Petition threatens not only the direct benefits the E-Rate program provides to schools and libraries themselves, but also the indirect benefits that the program brings to local communities. It is a base attempt to prevent rural schools and libraries from obtaining broadband from competitive service providers, and in so doing would result in a significant expansion of the costs that rural schools and libraries would pay to obtain broadband. Worse, it would prevent competitive fiber providers from using economies of scale to lower the costs of deployment to rural communities at large.

The Petitioners fail to justify the need for initiating a rulemaking. They wrongly assume E-Rate special construction support duplicates High Cost support. Moreover, adopting Petitioners’ proposal would result in High Cost supported carriers having funding priority over more cost-effective E-Rate service providers. Further, Wide Area Networks (“WANs”) and large consortium bids affect all carriers similarly and do not uniquely disadvantage incumbent carriers, like the Petitioners. Finally, implementing the proposed rule changes will cause significant additional delays in providing funding necessary to build broadband to eligible schools and libraries, hitting hardest those institutions located in rural areas with fewer competitive options. For these reasons, the petition for rulemaking should be denied.

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**COMMENTS OF UNITI FIBER**

Uniti Fiber<sup>1</sup> respectfully submits these comments in opposition to the petition for rulemaking (“Petition”) filed by a group of Texas carriers (Central Texas Telephone Cooperative, Inc., Peoples Telephone Cooperative, Inc., and Totelcom Communications, LLC (collectively, “Petitioners”)).<sup>2</sup> Uniti Fiber is a major E-Rate service provider to schools and libraries primarily in Alabama, Florida, Louisiana, and Mississippi. The company currently provides a wide range of services to 214 school districts and library systems. Uniti Fiber utilizes the E-Rate program not only to serve individual schools and libraries, many of which are in rural areas, but to push fiber broadband infrastructure to other nearby communities. Many E-rate providers, like Uniti Fiber, leverage indirect benefits of E-rate deployments by using the “anchor institution” investments to guide additional asset deployments throughout the community.

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<sup>1</sup> “Uniti Fiber” refers to a group of companies commonly owned by Uniti Group Inc. that provide telecommunications and other services in various parts of the U.S. It is comprised of Southern Light, LLC, Uniti Fiber LLC, Hunt Telecommunications, Inc., Information Transport Solutions, Inc., and certain other affiliated service providers.

<sup>2</sup> *Petition for Rulemaking of Central Texas Telephone Cooperative, Inc. et al.*, RM-11841, WC Docket Nos. 02-6, 13-184, [link](#) (filed May 22, 2019) (*Petition*).

The Petition threatens not only the direct benefits to the schools and libraries themselves, but the indirect benefits that the program brings to local communities. It is a misguided attempt to prevent rural schools and libraries from obtaining broadband from competitive service providers, and in so doing would result in a significant expansion of the costs that rural schools and libraries would pay to obtain broadband. Worse, it would prevent competitive fiber providers from using economies of scale to lower the costs of deployment to rural communities at large. Stated simply, Petitioners propose rule changes that would entrench incumbent providers as dominant E-rate service providers and significantly impair competition for E-rate contracts.

The Petitioners fail to justify the need for initiating a rulemaking. They wrongly assume E-Rate special construction support duplicates High Cost support. Additionally, grant of the Petitioners' proposal would result in prioritizing funding for High Cost supported carriers over more cost-effective E-Rate service providers. Further, Wide Area Networks ("WANs") and large consortium bids affect all carriers similarly and do not uniquely disadvantage incumbent carriers, like the Petitioners. Finally, implementing the proposed rule changes will cause significant additional delays in providing funding necessary to build broadband to eligible schools and libraries, hitting hardest those institutions located in rural areas with fewer competitive options. For these reasons, the petition for rulemaking should be denied.

## **I. Background**

On May 30, 2019, the Wireline Competition Bureau ("WCB" or "Bureau") of the Federal Communications Commission ("FCC" or "Commission") released a public notice seeking comment on the Petition.<sup>3</sup> In their Petition, the Texas carriers "urge the Commission to initiate a

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<sup>3</sup> *Wireline Competition Bureau Seeks Comment on Texas Carriers' Petition to Prohibit Use of E-Rate Funds to Build Fiber Networks in Areas Where Fiber Networks Already Exist*, RM-11841, WC Docket Nos. 02-6, 13-184, Public Notice, FCC 19-493, [link](#) (WCB 2019) (*Comment PN*).

rulemaking proceeding to consider amending Part 54 of the Commission Rules, specifically with respect to the Universal Service Fund (“USF”) Schools and Libraries Program (“E-Rate”) competitive bidding requirements, to include safeguards which would discourage overbuilding of existing federally supported fiber networks.”<sup>4</sup> The Petitioners ask the Commission to “adopt rules that prohibit the use of universal service funds for special construction of fiber networks that overbuild existing fiber networks.”<sup>5</sup> The Petition proposes two specific rule changes.<sup>6</sup>

#### Section 54.502

(a)(1) 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.

#### Section 54.503

(d) *Posting of FCC Form 471 Special Construction Exhibits for Challenge Period.*

(1) In submitting their completed FCC Form 471s, applicants that request special construction costs for fiber shall also submit a 471 Special Construction Exhibit summarizing their proposed fiber buildout plans that require reimbursement for upfront special construction costs. This FCC Form 471 Special Construction Exhibit shall include, at a minimum, the following information:

- (i) A list of the schools or libraries that shall be connected to the newly laid fiber; and
- (ii) A map depicting the proposed fiber lines.

(2) The Administrator shall post each FCC Form 471 Special Construction Exhibit that it receives from an applicant on its Web site designated for the purpose of allowing broadband carriers, as well as state and local entities, the opportunity to challenge the need for these proposed new fiber facilities.

(3) After posting on the Administrator's Web site an FCC Form 471 Special Construction Exhibit, the Administrator shall wait at least sixty (60) calendar days before approving the special construction costs. During this 60-day period, broadband carriers, as well as state and local entities, shall have the opportunity to challenge the need for these proposed new fiber facilities. Challengers shall submit information to the Administrator to show that fiber already exists in the applicable locations.

(4) If it is shown that fiber already exists, the selected service provider and the existing fiber owner shall have a one hundred and twenty (120) day period to negotiate in good faith

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<sup>4</sup> *Petition* at 1.

<sup>5</sup> *Id.* at 4.

<sup>6</sup> *Id.* at Exhibit 1, pages i-iii.

the terms, conditions and reasonable, market based price of a fiber lease agreement.

(5) The Administrator shall consider any information submitted during this challenge period before approving those special construction costs pursuant to Section 54.502(a)(1).

The Petitioners' proposed rule changes would give carriers with existing fiber assets the ability to challenge any proposed overbuilding of their networks within special construction requests in the E-Rate program.<sup>7</sup> Currently, the E-Rate program would allow a carrier to use funding to overbuild another carriers network so long as the selected carrier submitted the most cost-effective bid in the E-Rate competitive bidding process.<sup>8</sup>

## **II. Petitioners Wrongly Assume E-Rate Special Construction Support Duplicates High Cost Support**

Petitioners generalize and offer no specifics in how “a single rural school or library could end up with two fiber connections that were previously constructed using USF Funds.” Petitioners groundlessly claim that support from “High Cost or other USF Programs” could be used to establish facilities to connect a school or library, then later the same school or library could receive funding from E-Rate to construct a “duplicative” fiber connection. This argument mischaracterizes the unique purposes of the USF programs and wrongly conflates funds provided through the High Cost program as providing funding for specific connections to a school or library.

The Telecommunications Act of 1996 (“Act”) recognizes the need for unique funding streams to support a holistic approach to universal service to ensure every America can access “advanced telecommunications and information services” at “just, reasonable, and affordable rates.”<sup>9</sup> The Act unambiguously provides that schools and libraries shall receive services at rates

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<sup>7</sup> *Id.* at 4.

<sup>8</sup> 47 CFR § 54.503(c)(2).

<sup>9</sup> 47 U.S.C. § 254(b)(1)-(2).

less than the amounts charged for similar services to other parties.<sup>10</sup> Separately, the Act establishes a mandate for Commission to maintain the USF to continue to support the nation’s telecommunications infrastructure in rural, insular, and high-cost areas.<sup>11</sup>

In modernizing the High Cost fund to create the current funding paradigm, the Commission recognized the goals of the High Cost funds were to:

“(1) preserve and advance universal availability of voice service; (2) ensure universal availability of modern networks capable of providing voice and broadband service to homes, businesses, and community anchor institutions; (3) ensure universal availability of modern networks capable of providing advanced mobile voice and broadband service; (4) ensure that rates for broadband services and rates for voice services are reasonably comparable in all regions of the nation; and (5) minimize the universal service contribution burden on consumers and businesses.”<sup>12</sup>

To achieve these goals, the Commission chose to focus spending on deploying broadband-capable infrastructure to areas lacking service at specific Internet speed thresholds,<sup>13</sup> and designed reporting requirements based around locations capable of being served, but not around subscription.<sup>14</sup> Therefore, Petitioners misstate that High Cost funding, regardless of the specific mechanism, supports any specific connection to a “single rural school or library.”<sup>15</sup> High Cost funding supports the construction and maintenance of broadband-capable facilities in particular

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<sup>10</sup> 47 U.S.C § 254(h)(1)(B).

<sup>11</sup> 47 U.S.C. § 254(b)(2), (c)(1).

<sup>12</sup> See *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform—Mobility Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC 17663, 17680, para. 48 (2011) (*USF/ICC Transformation Order and/or FNPRM*), *aff’d In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

<sup>13</sup> *Id.*

<sup>14</sup> *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, 3164, para. 208 (2016) (*citing Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order, 29 FCC Rcd 15644, 15688-89, para. 125 (2014)); 47 CFR § 54.313(e).

<sup>15</sup> *Petition* at 3.



*areas*, but does not direct specific last-mile builds that connect *specific locations*. Further, High Cost funding does not require subscription or connection of these facilities to locations that would result in duplicative payments between High Cost funds and E-Rate special construction funding that specifically supports last-mile connections to a school or library.<sup>16</sup> The USF programs serve unique funding purposes and Petitioners wrongly assume E-Rate special construction funding serves the same purpose as High Cost funding.

### **III. The Petitioners Incorrectly Assert High Cost Supported Carriers Should Have Priority Over Cost-Effective E-Rate Carriers**

The Petitioners simply assume, without any justification, that carriers receiving High Cost support have priority over other forms of support, such as E-Rate funding, simply because there is “fiber” funded by High Cost support in a given area. 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. Adopting such a preference was not considered in the Commission’s recent *USF Budget Cap NPRM* that only requested general comments on the prioritization of the programs based on a variety of factors like cost-effectiveness or rurality of recipients.<sup>17</sup>

As opposed to High Cost support, the E-Rate program is specifically designed to ensure that the institution requesting support obtain service in an efficient and cost-effective manner. The Petition provides no basis for determining that High Cost Support in an *area* should trump *connection-specific* E-Rate funding. A competitive fiber provider could just as simply request the Commission to give priority to E-Rate funding and reduce High Cost support in areas with

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<sup>16</sup> 47 CFR § 54.502(a)(1); see USAC, *Fiber – Summary Overview*, (September 2017) (explaining the types of special construction funding available to schools and libraries through E-Rate).

<sup>17</sup> *Universal Service Contribution Methodology*, WC Docket No. 06-122, Notice of Proposed Rulemaking, FCC 19-46, 8, para. 19 (2019) (*USF Budget Cap NPRM*).

institutions receiving substantial E-Rate support. Of course, both sides of that coin are equally absurd, because the two programs are aimed at addressing different issues.

#### **IV. If Adopted, the Right of First Refusal Will Severely Limit Timely and Orderly Processing of E-Rate Support While Ignoring Cost-Effective Services**

The proposed right of first refusal proffered by the Petitioners ignores the fact that E-Rate special construction funding must be awarded to the most “cost-effective” provider; whereas, neither legacy nor modelled High Cost funding considers the cost-effectiveness of carriers networks.<sup>18</sup> By requiring selected E-Rate bids to be the most cost-effective solution, the competitive bidding mechanism better positions carriers with existing facilities to construct lower cost bids than a carrier who would need to newly construct facilities to serve the request. Further, Petitioners’ arguments in support of the change fail to recognize the winning bid may already have existing fiber assets in the area. The special construction award could be limited to the specific connection to a school and not the complete construction of a fiber network. In this scenario, the challenge process would only duplicate the competitive bidding process and result in an unnecessary showing of the winning bidders existing assets. The 180-day challenge and negotiation process<sup>19</sup> proposed by Petitioners offers, at best, unnecessary and redundant protections, and at worst a completely unmanageable process established to protect carriers who could have bid on the initial request in the first place.

The E-Rate program also fundamentally changes the “cost” paradigm. The introduction of competition often has the effect of substantially lowering costs and improving services for E-Rate

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<sup>18</sup> 47 CFR § 54.511 (requiring E-Rate funding to be awarded to the most cost-effective bid); *but cf.* 47 CFR §§54.303, 54.306-312 (allocating high cost support through guaranteed rate-of-return of a carriers eligible expenses (legacy high cost support) or through a calculation of support derived from the Connect America Model, which attempts to determine the appropriate costs for a carrier to build a network under certain conditions and network capability assumptions (modelled high cost support)).

<sup>19</sup> 180 days being the combination of the 60-day waiting period proposed in Section 54.503(d)(3), and the 120-day negotiation period proposed in Section 54.503(d)(4).

applicants. As such, the Petition fails to recognize that “market rates” often aren’t good enough, and thus renders meaningless the proposal that incumbent providers “negotiate” access to their networks “in good faith.” For example, before Uniti Fiber earned their E-Rate business, the Archdiocese of New Orleans was paying upwards of \$800 per month for 56 Kbps data circuits. Today, for roughly the same price, Uniti Fiber provides this applicant with a 10 Gigabit connection, which is nearly *180,000x faster*. Without competition, this customer would likely still be paying more for less service. Competitors exist because they *challenge* “market” rates. The Petition’s proposed solution of incumbents negotiating access to their networks at market rates is therefore utterly meaningless. The Commission should be supporting paradigm-shifting market forces, not working to bring back the *status quo ante*.

**V. Wide Area Networks and Large Consortium Bids Affect All Carriers Similarly and Do Not Uniquely Disadvantage Incumbent LECs Like Petitioners**

Petitioners base their requested rule changes on the disadvantage small providers have in responding to Wide Area Networks (“WANs”) requests of large consortia. Specifically, Petitioners use the example of a Texas region-based consortium that included “hundreds of schools and cover thousands of square miles.”<sup>20</sup> Petitioners conclude small providers could not respond due to the “sheer size of the requested WANs.”<sup>21</sup> However, the Commission dispelled this very misconception in the *2014 Modernization Order* by clarifying that a single provider did not have to serve all members of a consortium.<sup>22</sup> Addressing this misconception directly, the Commission stated consortia should make clear in requests for service and consider selecting multiple service

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<sup>20</sup> *Petition* at 2.

<sup>21</sup> *Id.*

<sup>22</sup> *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, 8943, para. 179 (2014) (*2014 Modernization Order*).

providers as “a combination of different service providers [can] offer the most cost-effective solution.”<sup>23</sup> Again, Petitioners mischaracterize the inability of smaller service providers to bid on larger consortia requests, as the Commission requires consortia to consider partial bids.

Setting aside the alleged “inability” to bid on the request, a smaller incumbent provider is not uniquely disadvantaged by large consortia requests. All providers bid on the same request for services. While larger providers may have limited economies of scale regarding procurement and administrative costs, they often will not encompass every area within a consortium’s request.<sup>24</sup> Thus, large or small incumbent providers will often need to construct last-mile connections to some consortium members even within their existing service areas. Arguably, new entrants are more disadvantaged as they would be constructing, reselling, or otherwise provisioning a service solution without existing assets increasing their costs and making their bids less cost-effective.

Again, the Petitioners’ requested relief duplicates issues considered by the bidding process. The relief does not solve harms unique to small incumbent providers, like Petitioners, nor are small incumbent providers more disadvantaged by current E-rate competitive bidding processes. The proposed rule changes only ensure incumbent providers can exercise refusal rights when they lose a special construction bid. This second bite at the apple seeks to veto competitive providers from deploying more cost-effective service to a school or library by allowing an incumbent to negotiate for the service following the selection of a competitive provider. The rule changes only promote incumbent providers interests in keeping existing E-Rate contracts and preventing new market entrance from competitive providers.

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

## **VI. Implementing the Proposed Rule Changes Will Cause Further Delays in Providing Funding to Eligible Schools and Libraries**

Petitioners' requested rule changes would cause substantial delays in providing funding to eligible schools and libraries. The requested changes add an additional 180 days when existing incumbent providers could review, challenge, and negotiate following the competitive bidding process. The application process, especially for special construction requests, already can take a full calendar year to receive approval.<sup>25</sup> The Petitioners' process would not begin until the close of competitive bidding (when the applicant files FCC Form 471 selecting a service provider) and add six months before USAC could begin reviewing the FCC Form 471 to issue a funding commitment. Based on our experience, this would result an untenable delay of 12 to 18 months before schools or service providers could invoice for services provide in the funding year.

Such a lengthy process may not be viable considering services must complete construction within the funding year, which runs from July to the following June.<sup>26</sup> USAC typically opens the application filing window in January with a deadline at the end of March.<sup>27</sup> Under the Petitioners' proposed process, an applicant then could be forced to wait and negotiate until the end of September before signing a service agreement with a provider. Following this process, USAC would then need to review the final FCC Form 471 to issue a funding commitment. It often takes months for USAC to issue funding commitments due to the volume of applications it receives. Commonly, three to six months pass prior to receiving such a commitment letter. This could result

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<sup>25</sup> See Benton Foundation White Paper, WC Docket No. 02-6, at 7 (filed March 11, 2019) (describing the delays facing applicants in processing E-Rate funding commitments for special construction projects).

<sup>26</sup> 47 CFR 54.507(b).

<sup>27</sup> See USAC, *E-rate Productivity Center / Funding Year 2019 Filing Window*, (last visited July 1, 2019) (announcing FY2019 filing window of January 16, 2019 to March 27, 2019).

in schools, libraries, and service providers not have committed funding until March with only three months left to complete construction or request a waiver.

In addition to unreasonably delaying funding commitments and viability of constructing services in time, the 60-day challenge process will result in fact specific adjudications to be decided by USAC with possible appeals to the FCC. E-rate already faces a staggering appeals backlog with schools and service providers waiting years for decisions.<sup>28</sup> Increasing the amount of disputes to be resolved in *ad hoc* review would certainly delay finality around funding commitments and increase the burden on USAC and FCC staff to respond to appeals. And of course, it would give incumbent providers significant leverage in adding cost and delay to competitive providers. Incumbents will have significant incentives to challenge competitive builds into their areas, and the explosion of “challenges,” warranted under the proposed new rules or not, that will flow from this process is all but guaranteed to grind the E-Rate program to a halt.

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<sup>28</sup> See *Streamlined Resolution of Requests Related to Actions by the Universal Service Administrative Company*, WC Docket Nos. 02-6, 06-122, Public Notice, DA 19-482, 2-3 (Monthly appeals disposition notice only resolving requests based on settled FCC precedent. This notice resolved more than 80 appeals pending as far back as 2006).

## VII. Conclusion

The Petition fails to present a compelling case to initiate a rulemaking. The Petitioners wrongly assume E-rate special construction support duplicates High Cost support. The Petitioners incorrectly assume High Cost support should have priority over more cost-effective E-Rate support. Further, WANs and large consortium bids affect all carriers similarly and do not uniquely disadvantage incumbent carriers, like the Petitioners. Finally, implementing the proposed rule changes will cause further delays in providing funding to eligible schools and libraries. For these reasons, the petition for rulemaking should be denied.

Respectfully submitted,

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