Before the
Federal Communications Commission
Washington, DC 20054

In the Matter of:

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

Comments of the American Library Association

The American Library Association (ALA) is the foremost national organization providing resources to inspire library and information professionals to transform their communities through essential programs and services. For more than 140 years, ALA has been the trusted voice for academic, public, school, government and special libraries, advocating for the profession and the library's role in enhancing learning and ensuring access to information for all. ALA represents the nation's 120,000 libraries, which includes 16,557 public library locations. We appreciate the opportunity to comment on the above-referenced proceeding.

The ALA does not see a need for the Commission to issue a rulemaking notice on using E-rate funds to help support the procurement of fiber services. We believe the current rules are more than sufficient to ensure the proper bidding, evaluation and selection of such services under circumstances described by the petitioners. Our comments below provide more substantive information to support our position and are divided into three areas:

1. The issues articulated in the petitioners' request have already been addressed by the Commission.
2. The proposed solutions to the issues in the petition are unworkable.
3. Issues with consortium applications can be addressed within the framework of current E-rate rules.

1. The issues articulated in the petitioners' request have already been addressed by the Commission.

The petitioners' request for more E-rate rules and regulations regarding fiber build-outs are not needed because this request was already made by service providers and rejected by the Commission in its second E-rate Modernization Order released in December 2014.[1] Below are two examples.

Example #1: Petitioners want to require applicants seeking fiber to post their special construction project requests on the USAC website. Once this is done, a 60-day "challenge period" then opens, allowing more time for existing providers to document that they can provide fiber broadband service to the applicant.[2] Allowing additional time was proposed by some parties during the E-rate Modernization process but it was subsequently rejected by the Commission in its December 2014 Order which states, "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."[3] In addition, the 2014 Order required applicants seeking fiber construction to request responses from providers for any other existing fiber-based service on their form 470.[4] All providers—including those proposing new fiber to the applicant and those who already have fiber—have the same 28-day minimal period to respond to an applicant's form 470. The petitioners' request for extra time appears to be little more than an effort to skew the competitive bidding process to their advantage. Furthermore, the additional requested 60 days fall after the applicant submits form 471 and thus is totally outside the established form 470 bidding time frame. It would needlessly complicate the program, which is contrary to the Commission's stated

[1] *Second Report and Order and Order on Reconsideration*. (https://docs.fcc.gov/public/attachments/FCC-14-189A1.pdf.) Released December 19, 2014. See generally, paragraphs 43-54 and more specifically paragraph 51.
[2] Comments of Central Texas Telephone Cooperative, Inc., Peoples Telephone Cooperative, Inc., and Totelcom Communications, LLC. See page 4. May 22, 2019. (Petitioners.) (https://ecfsapi.fcc.gov/file/10318395205960/Comments%20to%20eRate%20NPRM%203.18.19.pdf.)
[3] *Second Report and Order*, para. 48.
[4] *Ibid*, para. 48.

third goal for the E-rate program, "To make the E-rate application process and other E-rate processes fast, simple and efficient."[5] Further, this process is unworkable, as we explain below.

Example #2: The petitioners want rules developed that declare a library or school may only use E-rate funds for special construction for new fiber only in cases in which fiber does not already exist. This, too, was addressed by the Commission in its December 2014 Modernization Order where it declined "to limit the self-construction option to applicants without broadband…."[6] While the Commission agreed with petitioners[7] that existing USF-supported fiber will usually be the most cost-effective option for service, it also noted in 2014 that there are situations where libraries and schools that now have broadband (i.e. fiber) may be able to obtain less expensive fiber by using the self-construction option.[8] Acquiring less expensive fiber is an important factor because it reinforces a core E-rate rule that applicants select the most cost effective service for fiber or any other E-rate supported service. In adhering to this rule, libraries and schools are required to determine cost-effectiveness based on the total cost of ownership over the expected life of the fiber. If the cost of applicant ownership of the fiber or leasing it from a different provider is less expensive than the cost of using the current provider's existing fiber network, then, according to the Commission's own rules, the applicant is able to get E-rate funding for fiber ownership or leasing it from a different provider. Removing this option could result in applicants paying more for services from the existing provider and thus using more E-rate dollars, which is neither cost effective for the applicant nor the E-rate program.

2. The proposed solution to the supposed issues in the petition is unworkable.

We very much believe the petitioners' proposed solution to what they term fiber "overbuilds" is both unneeded and unworkable. Implementing these proposed requirements will only add considerable complexity and confusion to the program. Below we note several examples of this.

---

[5] Modernizing the E-rate Program for Schools and Libraries. *Report and Order and Further Notice of Proposed Rulemaking*. Para. 6. Released July 23, 2014.

[6] *Second Report and Order,* para. 53.

[7] Petitioners, page 3. This is a critical factor to note because while the petitioners focus on "overbuilding" here they also acknowledge that the incumbent provider does not always offer the lowest cost fiber service. In such cases the installation of another fiber service (what the providers' term "overbuild") *is* the most cost-efficient method of acquiring service and thus saves E-rate funding.

[8] *Second Report and Order,* para. 53.

Example #1: After the applicant submits a form 471 for special construction fiber, the petitioners proposed 60-day "challenge period" then opens. As part of this process, the challenger will submit information to USAC showing that it already provides fiber to the applicant.[9] This proposal raises several questions. The most obvious are: Why didn't the current fiber provider submit a response to the applicant's form 470? Why does it need extra time to respond? What follow-up will USAC be required to do to ensure it has received accurate information from the challenger? We assume it will do this just like it routinely does follow-up inquires as part of its regular application review procedures.[10] Will the applicant then be able to refute any challenge? Again, we think it necessary to have this opportunity. These questions are not just examples of the added complexity of the petitioners' request but also show that it could take considerable time, well beyond the 60 days, to address follow-up inquiries and appeals.

Example #2: According to the petition, if a challenger successfully documents that fiber already exists, the challenger and applicant then have 120 days to negotiate "in good faith the terms, conditions and reasonable, market-based price of a fiber lease agreement."[11] We see many issues and questions on this process. Will the long-standing rule that cost be the prime factor in selecting a provider still apply? Can the provider initially selected via the regular 470 process challenge the challenger's challenge? And what entity will determine if the negotiations are done in a "good faith" manner or if the challenger is offering "reasonable market-based prices"? We assume if the applicant doesn't think the challenger is negotiating in such a manner that there will be a process to address these concerns; like appealing to USAC or the FCC?"[12]
A required 60-day challenge period followed by up to a 120-day contract negotiation period could mean any fiber funding decision is needlessly delayed by six months. Added to this is the extra time needed to address the related issues we reference above, like appeals. As a result,

[9] Petitioners, page iii.
[10] We note that every E-rate application undergoes detailed review by USAC's Program Integrity Assurance (PIA) unit.
[11] Petitioners, page iii.
[12] Neither the Commission (or USAC) normally get involved with issues of contract negotiations but the petitioners are proposing to incorporate language on good faith negotiations and pricing in their draft changes to program regulations (see 54.502 (a)(1)). Considering the Commission is responsible for enforcing its own regulations, this will require its involvement in contract issues in some situations.

some fiber application decisions will likely be delayed well over eight months beyond a funding decision made under the current rules and well beyond the Commission's own rule deadline to have all workable applications funded by September 1.

We also note that a 60-day "challenge period" will not be permitted under many local or state procurement regulations. Once a bid process closes there generally is no way to reopen it unless the applicant receives no viable responses. Opening a "challenge period" also gives the challenger pricing and other important information from the initial provider the library selected on its form 471. Being privy to this information is a major violation of the Commission's own rules to maintain an open and neutral competitive bidding process.

3. Issues with consortium applications can be addressed within the framework of the current E-rate rules.

The Commission has properly recognized the benefit of consortium applications, which can aggregate demand to get the best, lowest cost service for consortium members and, in fact, prioritized consortia as a means for making the program more efficient and cost-effective.[13] However, the petitioners have concerns that smaller carriers often do not provide service to all members of a large consortium, especially one with scores of applicants covering thousands of square miles. [14] This is true, but nothing prevents a provider from forming its own consortium to respond to a consortium application. In fact, this is often done in various regions within states and even statewide where smaller carriers form a cooperative endeavor to then submit a single bid response to a consortium's form 470. In such situations one member of the provider's consortium often serves as the prime provider and files the bid response to the 470 consortium application.[15] If, for whatever reason, the providers are unable to form a consortium, creating more consortium regulations that applicants need to address is not the answer.

---

[13] *Report And Order And Further Notice of Proposed Rulemaking*, para. 168. Released July 23 2014.
[14] Petitioners, page 2.
[15] A provider consortium of over fifty local exchange carriers provides statewide broadband and internet service for Wisconsin's BadgerNet network. But none of these sixty carriers provide service statewide. Over 95% of the state's 384 public libraries use BadgerNet for their transport. See https://det.wi.gov/pages/badgernet.aspx.

Some consortium applications prefer to select a single vendor who can provide service to all members of the consortium. In other instances, the consortium is willing to accept bids from carriers who can only provide service to a subset of consortium members. Specifically, in the case of the Texas providers now petitioning, the form 470 submitted by at least one consortium allowed for responses from smaller providers who could provide services to just some consortium members. We suggest the Commission inquire further of the petitioners why some of them did not submit a response to the consortium's form 470.[16]

In conclusion, the current E-rate rules and regulations on bidding and provider selection are more than sufficient to address the petitioners' concerns. Granting providers extra time to challenge an applicant's fiber request is simply a repetition of the request they made during the 2013-2014 E-rate Modernization process. Their request was not compelling then; and it is not compelling now. Therefore, we encourage the Commission not to open an unnecessary proceeding on this issue.

Respectfully submitted,

/s/ Marijke Visser
Associate Director of Public Policy and Senior Policy Advocate, ALA

/s/ Ellen Satterwhite
Fellow, ALA Office for Information Technology Policy

/s/ Alan Inouye
Director of Public Policy, ALA

[16] Many small carriers—*including the three petitioners*—are recipients of Universal Service High Cost funds. Per paragraph 66 in the December 2014 Modernization Order, these carriers are already required to bid on applicants' form 470s for broadband connectivity within the E-rate regulation's 28 day minimal response time frame. Considering this, we find it unpersuasive that carriers need an additional 60 days to respond.