

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matters of)	
)	
Texas Carriers' Petition to Prohibit Use of)	RM-11841
E-Rate Fund to Build Fiber Networks Where)	
Fiber Networks Already Exist)	
)	
Schools and Libraries Universal Service)	CC Docket No. 02-6
Support Mechanism)	
)	
Modernizing the E-Rate Program for Schools)	WC Docket No. 13-184
and Libraries)	

COMMENTS OF THE BENTON FOUNDATION

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COMMENTS OF THE BENTON FOUNDATION

The Benton Foundation¹ (Benton) respectfully submits these comments in response to the Public Notice by the Wireline Competition Bureau released on May 30, 2019 regarding the Texas Carriers' E-Rate Petition.²

Summary and Introduction

Benton opposes the petitioners' request to initiate a rulemaking. As our comments demonstrate, adoption of the proposed rule would harm competition and consumers. The E-rate program uses federal dollars to support the provision of broadband to schools and libraries. The proposed rule would require E-Rate

¹ Benton, a non-profit, operating foundation, believes that communication policy - rooted in the values of access, equity, and diversity - has the power to deliver new opportunities and strengthen communities to bridge our divides. Our goal is to bring open, affordable, high-capacity and competitive broadband to all people in the U.S. to ensure a thriving democracy.

² Public Notice, DA 19-493 (May 30, 2019).

participants to pay more than is required by mandating less competition than is available.

First, the proposed rule contemplates circumstances in which the most cost-effective solution is the “special construction” of fiber, rather than use of an incumbent network. But the petitioners’ would bar the most cost-effective solution in order to protect their own interests, which would force the E-Rate program to pay more than it needs to pay. That is the outcome that would be wasteful.

Second, the petition calls on the Commission to “discourage overbuilding.” There’s a better word for the construction of new networks than “overbuilding.” The word is “competition.” “Overbuilding” is an engineering concept; competition is an economic concept that helps consumers by shifting the focus from counting broadband networks to counting the dollars that consumers save (or schools and the E-rate program save) when they have competitive choices.

The Commission previously considered and rejected these same requests in 2014 as a part of its E-Rate Modernization Order.³ There are no new laws, facts, or substance that merit a new rulemaking, nor is there a need for new safeguards. The rules the Commission already has in place prohibit duplicative service and ensure that the most cost-effective solution is awarded through an open and fair competitive bidding process. As a result, the E-Rate program, and the special construction provisions in particular, have been enormously successful -- driven by a competitive bidding process that ensures schools can benefit from the most cost-effective options for enabling students to benefit from high-speed learning options. Thus Benton opposes the

³ *Modernizing the E-rate Program for Schools and Libraries* (Report and Order & Further Notice of Proposed Rulemaking), 29 FCCRcd 8870 (2014).

petitioners' request for rulemaking, and urges dismissal of the petition as meritless and unworthy of consideration so soon after the matter was recently reviewed by the Commission.

I. E-Rate Modernization Rules Have Proven To Be Enormously Successful, And Are Essential For Meeting Growing Bandwidth Goals.

As Benton explained in a previous filing, E-Rate modernization rules have produced enormous gains.⁴ More than 35 million students have gained access to high-speed broadband in their schools since 2013 and ninety-eight percent of public schools now meet the FCC's interim internet access goal of 100 kbps per student. While impressive, there is still more to do to ensure that every student is able to take advantage of high-speed, digital learning options. Over 1,300 schools, with 2.3 million students, still need access to the fiber-optic cables that deliver today's broadband capacity, speed, and performance, and as of 2018, only 28% of school districts have achieved the FCC's ultimate goal of 1 Gbps per 1,000 students (or 1 Mbps per student).⁵ To achieve the FCC's established short-term and long-term speed goals, special construction projects are often necessary for provisioning or building the fiber networks necessary for schools to achieve these speed goals. Special-construction options have not only proven critical in bringing fiber to schools while also significantly reducing costs for the E-Rate

⁴ Benton E-Rate White Paper."Improving the Administration of E-Rate: Ensuring All Schoolchildren Get the High-Speed Broadband Connections They Need," by Jonathan Sallet on behalf of Benton Foundation & EducationSuperHighway (March 2019)("E-Rate White Paper"), available at <https://www.benton.org/sites/default/files/E-RateWhitePaper.pdf>

⁵ EducationSuperHighway, 2018 State of the States Report, at 20 (Oct. 2018)(2018 State of the States Report), available at <https://s3-us-west-1.amazonaws.com/esh-sots-pdfs/2018%20State%20of%20the%20States.pdf>

program, but they are essential for enabling schools to meet the FCC’s short- and long-term speed goals. There simply is no reason to devote scarce agency and stakeholder resources to change something that is working so well and is so essential for our children's learning future.

II. The Texas Carriers’ Proposal Is Anti-Competitive.

As noted above, what the petitioners call “overbuilding” is more correctly described as “competition.”⁶ Where new, competitive offerings, enabled by the E-Rate’s special-construction provisions, have proven to be more cost-effective than the existing services, the E-Rate program and ratepayers have saved money over the long term.

The Commission has rightfully rejected limitations on competition for special-construction projects because they would limit a school’s choice to purchase more affordable broadband service. The Commission could have limited special construction projects as proposed previously by NTCA, but declined to do so, saying:

We do not adopt NTCA’s proposals that would 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.⁷

The Petitioners argue, however, that “in establishing the current rules, the Commission likely did not contemplate that there would only be a few bids in the RFP process or that those few bids may require overbuilding of existing fiber networks.”

⁶ See Benton Foundation Senior Fellow Jonathan Sallet's March 20, 2019 remarks at the Federal Trade Commission's hearing on Consumer Protection Issues in U.S. Broadband Markets. (“[W]hat some call “overbuilding,” the FTC should call by a more familiar term: “Competition.”), available at <https://www.benton.org/blog/three-important-points-broadband-competition>

⁷ *Modernizing the E-rate Program for Schools and Libraries* (Second Report and Order on Reconsideration), 29 FCCRcd 15538, 15558 (2014), para. 51.

However, NTCA explicitly raised overbuilding concerns on several occasions⁸ in the context of the E-Rate Modernization proceeding that the Commission rejected, as noted above, indicating 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”⁹

Indeed as explained in Benton’s E-Rate White Paper:

[C]ompetition is a critical component of America’s broadband future. One of the issues discussed ... is the importance of recognizing the competitive bidding process schools and libraries undertake so they can receive the benefits of the best broadband facilities at the most cost-effective terms. Sometimes that process will result in new fiber construction rather than merely subscribing to an existing service but, of course, that is a fundamental promise of competition – to introduce new and better ways of doing things.¹⁰

III. The Texas Carriers’ Proposal Is Costly And Wasteful.

While Petitioners say that they want to “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,”¹¹ their petition and proposed solution does nothing to further these goals. Instead the Petitioners undermine these very goals with the potential to waste limited E-Rate resources, leave schools that need high-speed broadband on the wrong side of the

⁸ See, e.g., NTCA ex parte notice, Docket 13-184 (November 21, 2014).

⁹ *Modernizing the E-rate Program for Schools and Libraries* (Second Report and Order on Reconsideration), *supra*, 29 FCCRcd at 15558, para. 51.

¹⁰ E-Rate White Paper, at 6.

¹¹ Petition for Rulemaking, at 6.

digital divide, dramatically raise school costs, increase burdens on school and library applicants, prevent schools from meeting the Commission's broadband-speed targets, and slow the rollout of scalable fiber across the country.

The Texas carriers have raised unspecified concerns about special construction projects in Texas. However, the facts on the ground in Texas demonstrate how important special construction options are for bringing fiber to schools while also significantly reducing costs for the E-Rate program. In 2015, over 1,000 Texas schools lacked scalable, high-speed, fiber-optic connections.¹² Since then, the combination of the E-Rate program's special construction options and the Texas Governor's \$25 million special-construction matching fund has reduced the number of schools without fiber-optic connections to less than 50.¹³ At the same time, providing school districts with the option of utilizing special construction to obtain the most cost-effective option for the E-Rate program has helped lower the cost of bandwidth in Texas, and for the E-Rate program, by 75% over the same period.¹⁴ This success has been repeated across the country and demonstrates the importance of the current special-construction rules, and why the petitioners' proposals are unnecessary and counterproductive. The petitioners' proposal would unnecessarily reverse important gains, drive up costs, and potentially lead to millions of dollars of waste -- all at a time when fiber, special-construction

¹² EducationSuperHighway 2015 State of the States Report (November 19, 2015), available at http://stateofthestates2015.educationsuperhighway.org/assets/sos/full_report-55ba0a64dcae0611b15ba9960429d323e2eadbac5a67a0b369bedbb8cf15ddbb.pdf.

¹³ 2018 State of the States Report.

¹⁴ EducationSuperHighway Amortization, Reply Comments, Docket 19-2, at 4 (April 1, 2019).

projects are a proven means for reducing costs and increasing speeds for schools and libraries.

The Commission should not be fooled by petitioners who have framed an issue as “overbuilding” but whose proposal would allow them to escape the E-Rate’s rigorous competitive bidding process. The consequence of this would be “over-charging.”

IV. The Texas Carriers’ Proposal Would Lead To Burdensome And Unconscionable Broadband Delays.

Students today already wait too long for their assignments to download. And schools have to wait too long for approval of their special construction fiber projects. However the petitioners propose to exacerbate these problems by adding a 60-day challenge period, and an additional 120-day negotiation process to extend the already lengthy process by up to 180 days. As Benton has noted previously, it is not simple, timely, or efficient for the Universal Service Administrative Company (USAC) to take 245 days to process a typical fiber application¹⁵ Adding on an additional 180 days to a nearly year-long review process is simply unconscionable -- especially in view of the fact that in many parts of the country where these networks are needed construction seasons are limited because of winter weather. These delays would extend the process so long as to make it impossible for special construction projects to be completed in the funding years for which they were applied.

Adding an additional six months to an already extensive and exhaustive review process does nothing to improve the efficiency of the program and only further delays the benefits of high-speed broadband connectivity for educators and students. As Chairman Pai has previously indicated, “bureaucratic red tape should not stand in the

¹⁵ E-Rate White Paper, at 7.

way of high-speed Internet being delivered to rural classrooms.”¹⁶ Instead the Chairman says he expects “additional improvements to other aspects of E-Rate administration... to make it easier for schools and libraries to apply for and receive funding without enduring unnecessary delays or denials.”¹⁷ But this proposal goes in exactly the wrong direction by mandating additional delays for an already lengthy process.

While these Texas phone companies want to limit school fiber-construction projects and slow down vital projects in Texas, Texas Governor Greg Abbot has explained why these projects are essential, and their delay, problematic. In 2018, Governor Abbot and the Texas Commissioner of Education requested that processing of E-Rate, special-construction projects be done in a “*quick and timely manner*.”¹⁸ That’s because Governor Abbot recognizes the importance of E-Rate special construction projects to broader state goals. He understands that: “Learning is no longer limited by bricks and mortar – it is being expanded exponentially by bytes and bandwidth.”¹⁹ Governor Abbott explains, “Texas has made incredible progress connecting our students with high-speed internet and preparing them to meet future workforce needs, but our work is not yet done. Every child deserves access to quality education, and thanks to technology in the classroom, that opportunity is being made available to all

¹⁶ Letter from Chairman Pai to Senator Tester, at p. 1 (May 10, 2018).

¹⁷ *Id.*

¹⁸ Letter from Greg Abbott, Governor of Texas, and Mike Morath, Texas Commissioner of Education, to Catriona Ayer, Acting Vice President, Schools and Libraries Division, USAC (March 15, 2018), available at https://tea.texas.gov/Academics/Learning_Support_and_Programs/Technology_Planning/Classroom_Connectivity/Texas_State_Match_Fund_FAQ/#question5.

¹⁹ Texas Governor Abbott Press release (October 2, 2018), available at <https://gov.texas.gov/news/post/governor-abbott-and-educationsuperhighway-announce-milestone-in-effort-to-improve-high-speed-internet-access-across-texas-schools>

Texas students.”²⁰ To achieve these goals for Texas students, the state of Texas allocated \$25 million for an E-Rate, state-matching fund for special-construction projects -- which leverages the E-Rate’s special construction rules to enable a total of \$250 million in broadband investment across and throughout the state of Texas. As the Governor’s office explains, over 450 districts stand to benefit from the state’s investment to match E-Rate funding, enabling 99% of Texas schools to be connected to fiber.²¹ As a result of the Governor’s schools investment initiative that leverages E-Rate special construction, the Governor expects an additional 2.6 million Texas students will have the connectivity they need to take advantage of innovative learning opportunities.²²

The Texas telephone companies would, by contrast, require the FCC to second guess Texas state priorities, impede Texas Education Agency goals, slow down approvals, and undermine a market-based, competitive bidding process. But as Chairman Pai has previously pointed out about the E-Rate:

The FCC has no business micromanaging the technology priorities of our local schools and libraries...because every school and every library has its own unique needs, its own budget constraints, its own infrastructure with its own lifecycle, we should have the humility to recognize that local schools and libraries might be in a better position than officials in Washington, DC to set their own priorities. Some have called this notion “radical.” I call it common sense²³

It is indeed common sense to reject the petitioners’ proposal. It’s simply unfair to our nation’s students to exacerbate the already-troubling homework gap by creating a new,

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Modernizing the E-rate Program for Schools and Libraries* (Report and Order & Further Notice of Proposed Rulemaking), *supra*, 29 FCCRcd at 9041 (Commissioner Pai, dissenting).

regulatorily-induced delay that would further prevent students from taking full advantage of digital learning speeds in the classroom.

V. The Texas Carriers' Proposal Is Regulatorily Duplicative And Administratively Unworkable.

Petitioners say one of their main concerns is that the E-Rate could be used to fund “duplicative networks,” but their proposal would set up a regulatorily duplicative process that is unnecessary. As USAC has pointed out:

E-Rate program rules prohibit duplicative services, which the FCC defines as “services that deliver the same functionality to the same population in the same location during the same period of time.”²⁴

In fact, USAC already uses an effective process to ensure the most cost-effective service is selected in the E-Rate competitive bidding process. USAC engages a review team that conducts a careful review of E-rate requests for self-construction to determine compliance with the E-rate program rules:

“The team ensures that special construction projects meet the following requirements: (1) demonstrate that the self-constructed high speed broadband service is the most cost-effective alternative; (2) the bidder was selected based on a fair and open competitive bid process; (3) build and use the self-constructed services within the same funding year. If the applicant does not satisfy these three requirements, the application is not eligible to receive E-Rate funding for self-constructed network services.”²⁵

If a Texas provider has an existing network that it believes could do the job, it should bid on the project. As the Commission previously concluded “providers all have an equal

²⁴ USAC Letter to Commissioner O’Rielly, at 1-2 (April 1, 2019)(quoting Schools and Libraries Universal Service Support Mechanism (Second Report and Order and Further Notice of Proposed Rulemaking), 18 FCC Rcd 9202, 9209, para. 22 (2003)), available at <https://docs.fcc.gov/public/attachments/DOC-357046A1.pdf>

²⁵ *Id.*, at 1.

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”²⁶

The Texas Carriers say they “are particularly concerned about region-based consortia groups.” However, as the Commission found in its first E-Rate Modernization order, “[c]onsortium purchasing can drive down the prices paid by schools and libraries for E-Rate supported services.”²⁷

The Texas Carriers further propose the development of a broadband “map” for each application. The public, policymakers, and other parts of the universal service fund would also benefit from having better broadband maps. Fortunately, the Commission already has an active proceeding underway that seeks to improve the accuracy and granularity of its broadband maps. Creating a separate broadband mapping process for each applicant is not only burdensome and unnecessary, but redundant.

In response to questions on overbuilding, USAC explains that the Commission’s current broadband maps are insufficient to determine overbuilding:²⁸

Carriers’ deployment data for fiber networks are proprietary information and not publicly available and other publicly available sources, such as study areas codes (SACs) and the National Broadband Map, are not sufficiently detailed to make this determination. For example, SACs often cover very large areas - e.g. almost a third of the state of California is covered by a single SAC - and the National Broadband Map collects data at a census block level.

²⁶ *Modernizing the E-rate Program for Schools and Libraries* (Second Report and Order on Reconsideration), *supra*, 29 FCCRcd at 15558, para. 51.

²⁷ *Modernizing the E-rate Program for Schools and Libraries* (Report and Order & Further Notice of Proposed Rulemaking), *supra*, 29 FCCRcd at 8939, para. 168.

²⁸ USAC Letter to Commissioner O’Rielly, *supra*, at 4.

To the extent that there is a mapping problem, and Benton believes there is one that needs to be addressed, it can and should be dealt with in the Commission's open and ongoing broadband mapping proceeding, once again highlighting that there is no need for the petitioners' particular solution.

Conclusion

The Commission already considered and rejected these very same arguments in 2014. Then, and since, the Commission embraced the pro-competition policies established under the 1996 Telecommunications Act to create a regime that enables critical new network investment, helps schools adopt the most cost-effective broadband options for meeting the Commission's articulated speed goals, and enables students to take full advantage of digital learning opportunities. The Commission's conclusions and resulting E-Rate rules have been proven to be enormously successful. Reversing course as proposed would be costly, anti-competitive, wasteful, burdensome, and counterproductive. The Texas Carriers have failed to cite any change of law, facts, circumstances, or data that support such a foundational reversal of policy, or that support a decision to open an entirely new rulemaking proceeding. The Texas Carriers have also failed to cross the threshold as required by section 1.401 of the Commission's rules which provides that petitions for rulemaking that are "repetitive, frivolous, or which plainly do not warrant consideration by the Commission" may be dismissed.²⁹ Thus, Benton opposes the petitioners' request for rulemaking, and urges dismissal of the petition as meritless.

²⁹ 47 CFR §1.401.

Respectfully submitted,

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