Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Petition to Prohibit Use of E-Rate Funds to Build Fiber Networks in Areas Where Fiber Networks Already Exist	)	RM-11841
	)	
Modernizing the E-Rate Program for Schools and Libraries	)	WC Docket No. 13-184

To: The Commission

COMMENTS OF
NEW AMERICA'S OPEN TECHNOLOGY INSTITUTE, ACCESS HUMBOLDT, NATIONAL CONSUMER LAW CENTER, ON BEHALF OF ITS LOW-INCOME CLIENTS, NEXT CENTURY CITIES, PUBLIC KNOWLEDGE, AND UNITED CHURCH OF CHRIST, OC INC.

July 1, 2019

I. Introduction & Summary

New America's Open Technology Institute (OTI), Access Humboldt, National Consumer Law Center, on behalf of its low-income clients, Next Century Cities, Public Knowledge, and United Church of Christ, OC Inc. (together, "Commenters") respectfully submit these comments in response to the Federal Communications Commission's (Commission) Public Notice.[1] Commenters strongly urge the Commission to reject the Petition for Rulemaking submitted by Central Texas Telephone Cooperative, Inc., Peoples Telephone Cooperative, Inc., and Totelcom Communications, LLC ("Petitioners").[2] The Petition makes several arguments, all of which indicate that the Commission should open a rulemaking proceeding to prohibit USF funding from ever going to the same area. Specifically, the Petition argues for adding the following requirement to Section 54.502 of the Commission's rules: "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 fiberat reasonable market-based prices."[3] To make that determination, the Petitioners advocate for a 60-day challenge period for each E-Rate special construction recipient.[4] Petitioners substantiate their claim on one specific anecdote in Texas where there is potential for Commission funding to go to a competitor that was also partially funded by USF.

As an initial matter, the Commission should consider funding both unserved and underserved areas. Preventing funding from going to the same area would disqualify certain

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[1] Public Notice, RM-11841; CC Docket No. 02-6; WC Docket No. 13-184 (May 30, 2019), https://docs.fcc.gov/public/attachments/DA-19-493A1.pdf.
[2] Petition for Rulemaking of Central Texas Telephone Cooperative, Inc., Peoples Telephone Cooperative, Inc., and Totelcom Communications, LLC (May 22, 2019), https://ecfsapi.fcc.gov/file/10522043215849/Petition%20for%20Rulemaking%20Part%2054%205.22.pdf ("Petition").
[3] Petition at Exhibit I.
[4] Petition at 4.

areas from receiving *any* E-Rate funding once that area received USF funding. This result would limit competition in the E-Rate program, undermine the goals of the USF, contravene the public interest, and significantly harm students, schools, and libraries.[5] Strong competition in the program fosters affordable broadband prices for schools and libraries.

The Homework Gap affects millions of American students who lack broadband access at home, and are therefore unable to complete homework assignments (which often require internet connections) and further their education with online resources. The E-Rate program combats the Homework Gap by providing affordable broadband service to qualifying schools and libraries, institutions that serve broader communities and can provide low-income Americans with a place to learn and seek career opportunities.

Precluding use of USF funds for the construction of fiber networks in areas that are already served, or to extend existing networks, would dramatically harm competition in the E-Rate program and give incumbents increased negotiating power to raise prices. Competition is a significant factor in the E-Rate program remaining affordable for rural schools and libraries, and this request—even if well-intentioned—threatens to foreclose the ability of any competitive provider to enter a market already served by one large provider. The Petitioners' proposal will harm rural areas in particular, where there are likely fewer competitors in place currently.

In this case, a rulemaking is not the right way to address the situation. Petitioners argue that in one particular situation, USF funds may be used to build competing services, and then propose a sweeping rule change to address that one issue. The Petition lacks a fulsome explanation of that situation and does not make the case for its drastic response.

[5] Petition at 4.

Moreover, the Commission has already addressed the Petitioners' concerns. In the 2014 modernization orders, the Commission imposed a host of policies that provided safeguards to ensure E-Rate funds would be used in a cost-effective manner. It is therefore unnecessary for the Commission to take any further action.

II. The E-Rate Program Fights the Homework Gap and is Working Well in its Current Form

The E-Rate program is arguably the Commission's most effective weapon against the "Homework Gap," which afflicts millions of American students who struggle to complete assignments due to poor broadband access. E-Rate provides vital connectivity for these students by catalyzing high-speed broadband deployment and maintenance at libraries and schools across the United States.

Recent research demonstrates that the Homework Gap is a persistent problem. Eighteen percent of students in the United States—approximately 3 million children—do not have access to broadband at home, according to an Associated Press estimate.[6] Rural areas are hit particularly hard; for example, a recent survey found that at least 25 percent of students in Tennessee lack broadband access at home, and that survey found that the rural areas were hit hardest.[7]

[6] Michael Melia et al., "AP: 3 million US students don't have home internet," Associated Press (June 10, 2019), https://apnews.com/7f263b8f7d3a43d6be014f860d5e4132.

[7] Meghan Mangrum, "The 'homework gap': At least 1/4 of Tennessee students lack home internet, even more in rural districts," Chattanooga Times Free Press (June 17, 2019), https://www.timesfreepress.com/news/local/story/2019/jun/17/homework-gap-least-14-tennessee-students-lack/496811/ ("This is not a new problem, said Jason Bell, a Polk County Schools administrator and board member of the Tennessee Rural Education Association. 'That's just what we do in rural districts, we just adapt to things,' Bell said. 'We are a rural district that struggles with funding sometimes. So what happens is we have to adapt to those things and our teachers have to adapt. To me, just thinking about rural access and connectivity, it's not just a school problem, it's a community problem.'").

For students on the wrong side of the Homework Gap, lack of broadband access is a significant obstacle to learning. Seventeen percent of teenagers surveyed by the Pew Research Center said that they often or sometimes are unable to complete homework because they do not have a computer or reliable internet connection.[8] Students who lack home broadband access also score lower in reading on the National Assessment of Educational Progress.[9]

High-speed broadband is also crucial to the development of personalized and next-generation teaching methods; in a 2017 survey, 80 percent of public school teachers in Alexandria, Virginia said that students frequently use internet-connected devices as an alternative to routine instruction methods and to personalize teaching experiences.[10]

The Commission's work in promoting broadband deployment and access at schools and libraries is a significant part of the effort to bridge the Homework Gap. Since the Commission's 2014 modernizations of E-Rate, the program has made great strides in bringing affordable broadband services to more schools and libraries.[11] The Commission released two reports since 2017 that show the program is flourishing. The Commission should continue building upon these successes e rather than eliminate competition and choice in a program that is working.[12]

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[8] Monica Anderson and Andrew Perrin, Nearly one-in-five teens can't always finish their homework because of the digital divide, Pew Research Center (Oct. 26, 2018), http://www.pewresearch.org/facttank/2018/10/26/nearly-one-in-five-teens-cant-always-finish-their-homework-because-of-the-digitaldivide/.

[9] *Id.*

[10] Lindsey Tepe and Chris Ritzo, "Measuring Broadband in Alexandria City Schools," New America (June 6, 2017), https://www.newamerica.org/in-depth/measuring-broadband-alexandrias-schools/iiiteacher-survey-and-discussions/.

[11] EducationSuperHighway, "2018 State of the States" (Oct. 2018), https://s3-us-west-1.amazonaws.com/esh-sots-pdfs/2018%20State%20of%20the%20States.pdf

[12] Jon Wilkins, "E-Rate Modernization Progress Report" (Jan. 18, 2017), https://blogs.edweek.org/edweek/DigitalEducation/FCC_Jan27ErateReport_DOC-343099A1.pdf ("Commission E-Rate Staff Report"); Report, WC Docket No. 13-184 (Feb. 11, 2019), https://docs.fcc.gov/public/attachments/DA-19-71A1.pdf.

III. The Proposed Changes Would Harm Competition and Raise Prices, Particularly for Rural Americans

The ability of schools and libraries to choose competitive providers, particularly in rural parts of the country, is crucial to the efficiency of the E-Rate program. If the Commission were to prohibit funds toward providers building further in areas where fiber networks already exist, schools and libraries in that area would be forced to buy from the incumbent in that region.[13] Without pressure from competitors, the incumbent would be able to charge higher prices for its services both directly to schools and to competitive providers who resell to schools, raising prices across the board. Absent strong competition in the market, the E-Rate program will have to expend more funds to address the higher prices or risk fewer schools and libraries being able to actually participate in the program. A 2017 survey found that some Virginia school divisions where there may be only one provider paid more for internet access than counterparts in other locations where multiple providers exist.[14]

The Petitioners argue that the Commission's rules for E-Rate should stipulate that "funding will not be approved for any special construction costs associated with laying new fiber infrastructure to any portion of the proposed network where it is demonstrated that fiber already exists."[15] The argument against "overbuilding" is in truth an argument against competition, as the policies requested by the Petitioners would merely cement and increase the negotiating power of incumbent networks against schools and libraries seeking E-Rate funding.

[13] Many geographic markets are served by only one ISP. *See* H. Trostle and Christopher Mitchell, "Profiles of Monopoly: Big Cable and Telecom," Institute for Local Self-Reliance (July 2018), https://ilsr.org/wp-content/uploads/2018/07/profiles-of-monopoly-2018.pdf.

[14] Virginia Department of Education, "2017 Broadband Connectivity Capability Survey" (June 2018), http://www.doe.virginia.gov/support/technology/edtech_plan/infrastructure_program/full-klip-report-2017.pdf.

[15] Petition at 4.

The Commission has acknowledged the importance of flexibility in how it disburses E-Rate funding to catalyze competition and tailor the program to the needs of a wide variety of schools and libraries. In the second E-Rate modernization order in 2014, the Commission argued that its reforms—which included flexibility of funding for special construction projects, self-construction, and treating lit and dark fiber equally—would "allow applicants more flexibility to pursue the most cost-effective option for connecting schools and library buildings" *and* predicted that the incentives would "likely have the greatest effect on broadband availability and affordability in rural and high-cost areas."[16] Later, in a 2017 report that detailed the progress made following those 2014 reforms, Commission staff noted, "The benefits of these reforms extend beyond new high- speed broadband connections for applicants that lease dark fiber or self- provision their own network. Competitive fiber options have the potential to improve cost effective purchasing for all E- rate applicants, including those that ultimately select a leased lit service."[17]

The Petitioners argue that using USF funds to build networks in areas already served by fiber is "likely not the most cost-efficient method to acquire service."[18] In reality, improving competition in the E-Rate market would help ensure schools and libraries to afford broadband services that meet their needs.[19] The purpose of E-Rate is to make broadband more affordable for

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[16] Second Report and Order and Order on Reconsideration, WC Docket No. 13-184, WC Docket No. 10-90 (Dec. 11, 2014) ("Second E-Rate Modernization Order ") ¶ 14 ("These actions will result in increased high-speed broadband connections to schools and libraries in all areas in furtherance of the E-rate program's Internet access and WAN/last-mile goals and are consistent with section 254 of the Act, which, inter alia, directs the Commission to 'enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services' for schools and libraries.").
[17] Commission E-Rate Staff Report.
[18] Petition at 3.
[19] A 2016 report from Analysis Group found that as the number of competitors increases in a given market, prices for monthly standard broadband tend to decline. If a market goes from one to two providers for gigabit internet, the standard monthly price for gigabit internet declines by approximately 34 to 37 percent. Dan Mahoney and Greg Rafert, "Broadband Competition Helps to Drive Lower Prices and Faster Download Speeds for U.S. Residential Customers," Analysis Group (Nov. 2016),

qualifying schools and libraries. Accordingly, allowing funds to go toward competitive options in served areas is not "inefficient"—it actually achieves the goals of the program. Further, E-Rate broadband prices are actually going down. According to EducationSuperHighway, the median cost of K-12 broadband access has fallen 85 percent over the past five years, from $22.00 per Mbps in 2013 to $3.26 per Mbps in 2018.[20] Further, the cost of broadband has fallen below the $3 per Mbps threshold in 34 states.[21]

Cementing monopoly power is not sound policy. Instead, the Commission should be promoting competition, which benefits all broadband users by keeping prices down and, in the end, ensuring that E-Rate funds are being used in the most cost-effective manner.

IV. The Petition Lacks Sufficient Evidence and Analysis

The petitioners have failed to offer sufficient evidence to justify their request.[22] The Commission should hold any request to limit USF funds to a high evidentiary burden—particularly when the request risks substantial harm to students and rural areas. However even with the adequate context to the anecdotes the Petitioners provide, a rulemaking proceeding is an inappropriate avenue to seek remedy, as the Petitioners seek broad, sweeping changes to E-Rate that could bring harmful consequences to the health of the program.

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http://webcache.googleusercontent.com/search?q=cache:ZBcScrCX41gJ:www.analysisgroup.com/uploadedFiles/Content/Insights/Publishing/Broadband_Competition_Report_November_2016.pdf+&cd=2&hl=en&ct=clnk&gl=us.

[20] EducationSuperHighway, "2018 State of the States" (Oct. 2018), https://s3-us-west-1.amazonaws.com/esh-sots-pdfs/2018%20State%20of%20the%20States.pdf at 8.

[21] *Id.* at 10 (In 2015, only 9 states had lowered the cost of broadband below the $3 per Mbps threshold).

[22] Petition at 4 ("The Companies propose that the Commission adopt rules that prohibit the use of universal service funds for special construction of fiber networks that overbuild existing fiber networks.").

The crux of the Petitioners' argument is that region-based consortia groups in Texas want to build Wide Area Networks for schools that already have access to fiber, and that in doing so they request costly special construction costs for networks to schools already served by fiber, and that therefore the current Commission rules to ensure cost-effective use of E-Rate funds is insufficient.[23] But this argument is unsupported by compelling or robust evidence. The Petitioners argue that the regions requested by the consortia groups included hundreds of schools and covered thousands of miles, and therefore only larger service providers have so far been able to respond to these specific RFPs.[24] In making their argument, the petitioners cite a single letter from November 2018 stating that the petitioners "expressed concerns that recently approved universal service fund ("USF") projects in the E-Rate program will result in fiber overbuild, a potential waste to the USF. Mr. Steele explained that a recent report from the Texas Governor's office shows that 97% of schools are already connected to fiber. The real problem the majority of schools are facing now, explained Mr. Steele, is not fiber connection."[25] This ex parte provided no further proof of harm nor any reasoned argument for why this prohibition is necessary, and also completely ignored the issues that libraries—a crucial factor in providing broadband services to students and communities—in the state face.

The only quantitative evidence offered by Petitioners is contradicted by federal data. Petitioners cite a few anecdotal cases of providers allegedly seeking "special construction costs"

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[23] *Id.* at 2.
[24] *Id.* ("Smaller providers that are already serving individual schools within the region, via their USF-supported fiber networks, were unable to respond to the RFPs due to the sheer size of the requested WANs. Accordingly, only a few providers actually responded to the RFPs and the providers that responded did not necessarily propose the most cost-effective solutions.").
[25] Central Texas Telephone Cooperative, Inc., Peoples Telephone Cooperative, Inc. and Totelcom Communications, LLC Notice of Ex Parte, WC Docket No. 13-184 (Nov. 19, 2018), https://ecfsapi.fcc.gov/file/1119188289346/O'Rielly%20Ex%20Parte%20Notice%202018.11.15.pdf

of more than $100 million dollars.[26] However, USAC data suggests this might not be as widespread a problem as the Petitioners attempt to argue. USAC figures indicate that USF funding rarely goes to consortia requests. In 2018, 18.19 percent of E-Rate's fundings ($397.4 million) went to consortia applicants;[27] so far in 2019, only 2.59 percent of E-Rate's funding ($24.3 million) went to consortia applicants.[28] Further, as noted in the record, the ability for self-provisioned networks is popular among E-Rate applicants due to its ability to bring down the price per megabit.[29]

This anecdote, which the Petitioners failed to back up with any meaningful context, does not justify a prohibition of E-Rate funds for existing fiber networks. The Petitioners baselessly assert that this anecdote indicates that extensions of existing fiber networks could be cost ineffective and therefore suggest the Commission specify that they violate the Commission's rules requiring consortia to consider all bids "with price being the primary factor, and the bid selected… be for the most cost-effective service offering."[30] This example does not support a blanket prohibition of funding for all competitive networks. Nothing in the petition proves that E-Rate-funded competitive networks are cost-ineffective.

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[26] Petition at 2.
[27] Universal Service Administrative Company FY 2018 Cumulative National Data, https://data.usac.org/publicreports/SearchCommitments/Search/SearchByYear/2018.
[28] Universal Service Administrative Company FY 2019 Cumulative National Data https://data.usac.org/publicreports/SearchCommitments/Search/SearchByYear.
[29] Funds For Learning Ex Parte, WC Docket No. 13-184, CC Docket No. 02-6, WC Docket No. 06-122 (June 20, 2019), https://ecfsapi.fcc.gov/file/1062093884312/FY2019ApplicantSurvey-MasterCap-TexasCarriers-ExParte2019-06-20.pdf ("We reiterated that there were only 309 applicants in 2019 who requested discounts for self- provisioned networks and that the total amount requested was $60.1 million. We again emphasized that 26% of applicants believe that the option to pursue self-provisioned fiber had lowered their price per megabit - - a drop that is supported by the funding request data itself. We highlighted the fact that a high percentage of applicants believe the current E- rate competitive bidding rules are lowering their expenses.").
[30] Petition at 2-3, fn 3; 47 C.F.R. § 54.503(c)(2).

Even if the Petitioners had provided more detail in presenting their anecdotal evidence of harm, these instances alone do not warrant an entire rulemaking proceeding to prohibit USF funds going toward building networks in areas where fiber already exists. While these instances of harm are certainly worth investigating, particularly because rules are currently in place to ensure the most cost-effective use of USF funds for the E-Rate program, a few reports of possible harms do not warrant sweeping changes to be made to a thriving program. These proposed changes would harm the ability of competitors to enter the E-Rate market and keep prices down, and the Petitioners' relayed occurrences do not warrant such a broad rulemaking.

V. The Commission Already Enacted Policies To Address Petitioners' Concerns

The Commission addressed the petitioners' concerns five years ago, rendering any further action unnecessary. In 2014, the Commission responded to concerns that consortia purchasing would prevent smaller providers from competing, noting that:

> "Consortia do not need to solicit or select a single vendor able to provide service to all members of a consortium. Rather, a consortium may invite vendors to bid on services to a subset of consortia members, and may find that a combination of different service providers offer the most cost-effective solution for consortium members. Even though a larger service provider may enjoy economies of scale and scope, it will not necessarily be able to provide competitively priced service in every area in which a consortium's members are located… While some consortia select a single service provider, many others select a combination of service providers to meet the needs of their consortium members."[31]

This action directly addressed the concerns raised by the Petitioners. Even a consortium representing a large land area does not require a single service provider—and in some cases,

[31] Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 13-184 (July 11, 2014) ¶ 179.

competitive pricing offered by other providers—would more likely address the needs of schools in that consortium.

Furthermore, the Commission adopted safeguards to ensure efficient spending after NTCA expressed fears of "overbuilding," which is another word for "competition."[32] The Commission allows self-construction when it is the most cost-effective option, along with several safeguards, "to ensure that the self-construction option will be available only when it is necessary to enable applicants to access fiber at cost-effective rates," noting that the Commission and USAC had experience in this area due to the large-scale projects run through the Rural Health Care Program.[33] The Petitioners' claim that "special construction costs" was already accounted for when the Commission ordered, "Applicants interested in pursuing self-construction must solicit bids for both service and construction in the same FCC Form 470 and must provide sufficient detail so that cost-effectiveness can be evaluated based on the total cost of ownership over the useful life of the facility for applicants who pursue the self-construction option."[34]

The Commission has already rejected the petition's rationale and enacted policies to address possible harms. Petitioners have not offered any new evidence to suggest that those policies are not working.

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[32] Second Report and Order and Order on Reconsideration, WC Docket No. 13-184, WC Docket No. 10-90 (Dec. 11, 2014) ¶ 46 ("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 will be most cost-effective over the life of the asset.").

[33] *Id.* ¶¶ 47-48.

[34] *Id.*

VI. Conclusion

A robust E-Rate program is crucial to the Commission's efforts to bridge the digital divide and the Homework Gap. The Petitioners' request would greatly diminish the program's ability to carry out this mission, and the Petitioners do not provide enough evidence to prove their request is necessary. Further, the Commission has already addressed concerns about cost efficiency in prior modernization efforts. The Commission should reject this petition and continue working to strengthen E-Rate and close the Homework Gap.

Respectfully submitted,

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