

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Modernizing the E-rate Program for Schools) WC Docket No. 13-184
and Libraries)
)

To: The Commission

**PETITION FOR RECONSIDERATION OF
COX COMMUNICATIONS, INC.**

Cox Communications, Inc. (“Cox”) hereby petitions the Commission to partially reconsider certain decisions in the *Second E-rate Reform Order*¹ and thereby establish additional safeguards to better protect the E-rate Program to the benefit of unserved schools and libraries.² Specifically, the Commission should adopt safeguards to ensure that the expanded E-rate support for new broadband projects³ does not undercut available funding for rural schools and libraries and should reconsider its decision to provide additional E-rate support to match state support – a decision that currently has the effect of potentially eliminating any applicant contribution for special construction costs.⁴

¹ *Modernizing the E-rate Program for Schools and Libraries*, WC Docket No. 13-184, Second Report and Order and Order on Reconsideration, 29 FCC Rcd 15538, 15555 (2014) (“*Second E-rate Reform Order*”).

² 47 C.F.R. § 1.429.

³ This Petition urges adoption of additional safeguards on the expanded funding for new fiber projects, whether leased or owned by applicants, including self-construction. Such projects generally involve large, up-front construction costs, initial equipment costs, and ongoing maintenance and replacement costs for plant and equipment and, therefore, require a longer term view of cost-effectiveness when compared to finished services. References to “dark fiber projects” or “construction of broadband facilities” herein refer to both leased and owned facility-construction fiber projects unless otherwise stated.

⁴ *Second E-rate Reform Order*, 29 FCC Rcd at 15559 ¶¶ 55 *et seq.*

The Commission made many positive reforms to the E-rate program in 2014, including providing support for efficiently managed Wi-Fi products⁵ and streamlining the application process.⁶ At the same time, a few of the decisions in the *Second E-rate Reform Order* did not apply proven safeguards to ensure efficient spending, contrary to the Commission’s stated goal of maximizing cost-effectiveness⁷ and “closing the rural connectivity gap.”⁸ As Chairman Wheeler has pointed out, the connectivity gap “is worst in rural America.”⁹ Unless the Commission takes steps to ensure that E-rate funding flows to the rural schools that need it most, the Commission cannot be sure that E-rate will succeed in closing the connectivity gap – even with the significant increase in the E-rate funding cap.

Cox therefore requests that the Commission (1) impose additional safeguards on special construction costs associated with dark fiber and self-construction projects, including limiting funding to cases where finished services are not available or capping such support at \$200 million per year, and (2) not provide additional E-rate support to match state funding, as this may eliminate any applicant contribution for such projects. Cox also requests that the Commission clarify that, in evaluating the cost-effectiveness of dark fiber and self-construction projects, the Universal Service Administrative Company (“USAC”) is to ensure that applicants conduct an apples-to-apples comparison of their real costs versus purchasing provider-offered finished services. The comparison should take into account all of the costs associated with the project,

⁵ *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, 8918 ¶¶ 123 *et seq.* (2014) (“*First E-rate Reform Order*”).

⁶ *Id.* at 8891 ¶ 55.

⁷ *Id.* at 8890 ¶ 50.

⁸ *Id.* at 15543 ¶ 12.

⁹ Letter from Tom Wheeler, FCC, to Sen. Amy Klobuchar (Jan. 23, 2015).

including the costs associated with activating, maintaining and managing high-speed broadband connections.

I. THE COMMISSION SHOULD BETTER PROTECT THE AVAILABILITY OF FUNDING FOR UNSERVED SCHOOLS AND LIBRARIES BY PLACING ADDITIONAL SAFEGUARDS ON NEW CONSTRUCTION IN AREAS ALREADY SERVED WITH HIGH-SPEED BROADBAND

In light of the significant concerns expressed in the record about the need for safeguards for construction of broadband facilities, Cox commends the Commission for adopting a number of important measures. These precautions include the requirements that dark fiber and self-construction projects be demonstrated to be the most cost-effective option after competitive bidding, that such facilities be built and used in the same funding year, and that applicants secure all resources necessary to make effective use of the services they purchase.¹⁰

Cox continues to believe, however, that, consistent with FCC precedent, additional safeguards are necessary to ensure that E-rate funding meets the needs of *all* applicants, particularly those without access to high-speed broadband connections. Thus, it is important that funds are not wasted inadvertently on special construction for dark fiber and self-construction projects, and other costs associated with such projects, to fill broadband needs that could be met more efficiently by existing facilities. The primary safeguard adopted in the *Second E-rate Reform Order* was a requirement that dark fiber and self-construction projects must be shown through competitive bidding to be the most cost-effective option (*i.e.*, more cost-effective than purchasing a finished service or lit fiber).¹¹ While this is an important safeguard, it is inadequate on its own to protect against long-term inefficient spending and to ensure the E-rate Program is

¹⁰ *Second E-rate Reform Order*, 29 FCC Rcd at 15557-58 ¶¶ 47-50.

¹¹ *Id.* The Commission also required USAC to report to the Bureau if E-rate commitments for special construction charges resulting from the rules we adopt today exceed ten percent of the total E-rate cap for any given funding year. While that is a good step, it does not go far enough to protect the Fund, and appears to be limited to self-construction projects that take advantage of state match funds. *Id.* at 15544 ¶ 15.

not drained. Cox therefore asks the Commission to reconsider the requirements for E-rate funding for the special construction costs associated with these projects and adopt Cox's proposal that E-rate support for such projects be limited "to schools and libraries that lack access to high-speed broadband today."¹²

Adopting Cox's proposal would help ensure that schools that already have access to high-speed broadband do not receive support for construction and other associated costs that could drain the Universal Service Fund ("Fund") and limit the number of schools and libraries that receive funding. Without this safeguard, the E-rate program could fund higher priority schools in areas with existing facilities while stranding lower priority schools that lack broadband access today and truly need the support. The Commission recognized that large, up-front payments associated with new infrastructure could burden the Fund and thus decided to be cautious in approaching flexible spending for special construction charges.¹³ Yet, the Commission can still do more to protect the Fund and should now apply the appropriate level of caution to such up-front charges.

Another concern with dark fiber and self-construction projects is that they effectively commit schools and libraries to using those facilities for an extended period of years.

¹² Letter from L. Charles Keller, counsel to Cox, to Marlene H. Dortch, FCC, WC Docket No. 13-184 (filed Dec. 4, 2014) ("Cox E-rate Ex Parte") at 1-2. *See also, e.g.*, AT&T Comments, WC Docket No. 13-184 (filed Apr. 7, 2014) at 5-6; NTCA Comments, WC Docket No. 13-184 (filed Apr. 7, 2014) at 3 n.8.

¹³ By suspending, but not eliminating, USACs amortization policy, the Commission recognized the importance of "balancing the immediate needs of some E-rate applicants against the needs of all the applicants." *Second E-rate Reform Order*, 29 FCC Rcd at 15547 ¶¶ 21. (citing to *Request for Review by Brooklyn Public Library, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, 15 FCC Rcd 18598, 18606 ¶ 19 ("*Brooklyn Order*") ("Specifically, we are concerned that, by authorizing unrestricted up-front payments for multiple years of telecommunications service when there is significant infrastructure build-out, we could create a critical drain upon the universal service fund, and reach the annual spending caps relatively quickly.").

Meanwhile, the price of broadband services in the competitive broadband marketplace, particularly for higher capacity services, is falling rapidly year over year and will continue to do so, whereas the costs of leased and owned facilities will not.¹⁴ Thus, even if leased or owned new construction facilities appear to be more cost-effective in the year that the applicant proposes to build them, they likely no longer will be cost-effective even a year or two down the road. At that point it will be too late, however, as the applicant and the Fund will have sunk significant up front E-rate funding into the facilities.

The Commission declined to adopt a safeguard to address this concern in the *Second E-rate Reform Order*, concluding that existing providers' finished service prices "should almost always be able to offer the most competitive pricing" but that "having self-construction as an option for all schools and libraries will help drive competition."¹⁵ As discussed above, however, given the falling prices of commercial broadband services, a decision to invest a large amount of E-rate funding to build out broadband networks may rapidly become less cost-effective as the commercial price falls. Yet the applicant – and, perhaps more importantly, the E-rate program – will be saddled with the more-expensive network for many years to come. Thus, the Commission's prediction in the *Second E-rate Reform Order* that the cost-effectiveness standard, taken alone, would provide a sufficient safeguard is incorrect.

As a result, at least for the time being, it is crucial that the Commission limit E-rate funding for special construction costs associated with dark fiber and self-construction projects to

¹⁴ For example, CoSN and EducationSuperHighway project that Internet access costs will decline between 4 percent and 15 percent per year in each of the next five years, and WAN costs will decline between 3 percent and 15 percent over the same period but that leased and owned dark fiber prices will have "minimal to no decline." "Bringing Everyone Up to Speed: Analysis of Costs to Upgrade and Maintain WAN and Internet Access Connections for All K-12 Public Schools," at 13 (Service Pricing), attachment to Letter from Evan Marwell, EducationSuperHighway, to Marlene Dortch, FCC, WC Docket No. 13-184 (filed Oct. 17, 2014).

¹⁵ *Second E-rate Reform Order*, 29 FCC Rcd at 15559 ¶ 53.

instances where finished services are not available. This rule will be easy to implement in the competitive bidding process: As Cox has explained, applicants readily can demonstrate the unavailability of finished services by seeking bids for a finished service and not receiving any.¹⁶

If the Commission nevertheless continues to decline to impose such a restriction, Cox urges the agency to establish a budget for new infrastructure projects that would ensure enough funding remains available to finance recurring costs. Consistent with Cox's prior advocacy, the Commission should commit no more than \$200 million per year to such projects.¹⁷ Even with that cap, this would be *twice* the amount committed to the Rural Broadband Experiments. The budget should be designed to ensure that funding for these projects does not interfere with current and projected demand for recurring services as well as funding committed to Wi-Fi.

II. TO MAXIMIZE THE EFFICIENCY OF THE PROGRAM AND ENSURE FISCAL RESPONSIBILITY, THE COMMISSION SHOULD NOT PROVIDE AN EXEMPTION FOR SPECIAL CONSTRUCTION PROJECTS FROM THE APPLICANT CONTRIBUTION REQUIREMENT FOR E-RATE SERVICES

The Commission should reconsider its decision to provide additional E-rate support through an increase in the applicant's discount percentage of up to 10 percentage points to match state funding for special construction projects.¹⁸ As Cox previously has observed, "[i]f state funds and E-rate matching funds are used to pay the entire service costs, the Commission will eliminate an important safeguard that helps ensure schools and libraries make cost effective choices."¹⁹ The Commission itself has recognized that requiring a contribution from USF recipients

¹⁶ Cox E-rate Ex Parte at 1.

¹⁷ *Id.* at 2.

¹⁸ *Second E-rate Reform Order*, 29 FCC Rcd at 15560-61 ¶ 56.

¹⁹ Cox E-rate Ex Parte at 2. *See also, e.g.*, NTCA Comments, WC Docket No. 13-184 (filed Apr.7, 2014) at 3 n. 8.

provide[s] incentives for [funding recipients] to choose the most cost-effective form of connectivity, design their networks efficiently, and refrain from purchasing unneeded capacity. Vendors will also have an incentive to offer services at competitive prices, knowing that [funding recipients] will be unwilling to increase unnecessarily their out-of-pocket expenses.²⁰

In the *E-rate Reform Notice* in this proceeding, the Commission cited a 2013 Funds for Learning study showing that “applicants with higher discount rates ... planned to spend significantly more per-student in pre-discount dollars,” and that the highest-discount applicants spent more than twice as much as their peers.²¹

In light of these types of concerns, the Commission specifically sought comment in the *E-rate Reform Notice* on increasing applicants’ matching requirements in part “to encourage applicants to make more efficient and smarter choices.”²² And, for this reason, the Commission decreased the maximum discount percentage on internal connections by 10 percentage points, stating that it “expect[s] that requiring higher matches will lead applicants that have been eligible for 90 percent discounts for priority two services to pursue lower prices for eligible category two services more aggressively.”²³

With regard to special construction charges, however, the Commission took the opposite approach by providing additional E-rate funding to match state support for special construction of facilities, effectively eliminating the existing requirement that all schools must contribute at least some amount for such projects. The Commission also made payment options for special construction more flexible by suspending the USAC policy of requiring amortization of non-

²⁰ *Rural Health Care Support Mechanism*, WC Docket No. 02-60, Report and Order, 27 FCC Rcd 16678, 27 FCC Rcd at 16716 ¶ 82..

²¹ *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Notice of Proposed Rulemaking, 28 FCC Rcd 11304, 11343 ¶ 136 (2013) (“*E-rate Reform Notice*”).

²² *Id.* at 11337-38 ¶¶ 118-119.

²³ *First E-rate Reform Order*, 29 FCC Rcd at 8901 ¶ 84.

recurring category one charges and allowing applicants to pay their non-discounted share of special construction charges over four years rather than one.²⁴

Cox is concerned that eliminating *all* matching requirements for special construction costs will lead to applicants making less efficient decisions because they lack any financial stake in the decision. Since the FCC's match only applies to special construction costs, a service offering that requires special construction costs for dark fiber, lit fiber, or self-construction, compared to a service offering for finished services that does not require special construction, might not be the most cost effective for the E-rate program but would be the most cost-effective for the applicant due to the matching funds.²⁵

Cox therefore urges the Commission to ensure schools and libraries always have a stake in the cost-effectiveness of their decisions and to reconsider providing an increased discount level for special construction charges to match additional state funding.

III. THE COMMISSION SHOULD PROVIDE APPLICANTS WITH CLEAR GUIDANCE ON THE COST-EFFECTIVENESS SHOWING REQUIREMENT FOR NEW CONSTRUCTION

The Commission also should provide additional direction to applicants and USAC regarding the showing that applicants must make to demonstrate that dark fiber construction projects are more cost-effective than purchasing finished services. The *Second E-rate Reform Order* provides no such guidance, noting only that "USAC already has experience in evaluating cost-effectiveness for large-scale projects from the Rural Health Care Program."²⁶ Even if

²⁴ *Second E-rate Reform Order*, 29 FCC Rcd at 15545 ¶ 16.

²⁵ While the FCC's rules would require the applicant to select the most cost effective option this situation creates an unnecessary conflict for applicants. Even without the increased match, the flexible spending mechanisms the Commission adopted will help applicants overcome any cost barriers to special construction projects.

²⁶ *Second E-rate Reform Order*, 29 FCC Rcd at 15557 ¶ 48, citing *Healthcare Connect Order*, 27 FCC Rcd at 16711-17 ¶¶ 69-80.

USAC has such experience, it is of little help to applicants, who must make the determination in the first instance. Moreover, the cited portion of the *Healthcare Connect Order* provides little additional guidance; the only apparent additional detail noted is that “RFPs must provide sufficient detail so that cost-effectiveness can be evaluated over the useful life of the facility.”²⁷

This raises the question of the useful life of self-constructed or dark-fiber projects, which will be an important aspect of any effort to compare the cost-effectiveness of self-constructed facilities to the cost of a finished service. If the costs of these facilities are considered over an unrealistically long period of time, they will appear artificially inexpensive, resulting in a skewed cost-effectiveness analysis. The *Second E-rate Reform Order* indicates that “applicants will receive funding for self-construction for one funding year at a time only.”²⁸ The Commission should clarify how it expects applicants and USAC to handle the useful lives of self-constructed facilities.

The Commission also must ensure that applicants conduct an apples-to-apples comparison of the dark fiber and self-construction projects versus purchasing provider-offered services.²⁹ The Commission appears to endorse the apples-to-apples safeguard but does not clearly provide direction for applicants.³⁰ For example, equipment costs apply not just at the beginning of the project when the dark fiber is lit, but likely will need to be replaced or upgraded before the end of the time period over which the total costs should be calculated. In Cox’s experience, the electronics to light dark fiber have a useful life of approximately five years, while the fiber itself lasts longer. Likewise, providing adequate service levels, maintenance and

²⁷ *Healthcare Connect Order*, 27 FCC Rcd at 16713 ¶ 73.

²⁸ *Second E-rate Reform Order*, 29 FCC Rcd at 15559 ¶ 54.

²⁹ Cox E-rate Ex Parte at 2. *See also, e.g.*, CenturyLink Comments, WC Docket No. 13-184 (filed Apr. 7, 2014) at 7 & n.17.

³⁰ *Second E-rate Reform Order*, 29 FCC Rcd at 15559 FN 73 (citing NCTA NPRM Comments).

