

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Modernizing the E-rate Program for Schools and Libraries)	WC Docket No. 13-184
)	
In the Matter of)	WC Docket No. 10-90
)	
Connect America Fund)	

**COMMENTS OF CENTURYLINK
ON PETITION FOR RECONSIDERATION
OF COX COMMUNICATIONS**

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I. INTRODUCTION AND SUMMARY

The Commission’s December 2014 Order on E-rate reform¹ prompted several petitions for reconsideration.² CenturyLink addresses here the petition that is most important to the Commission’s broadband deployment and education goals: that of Cox Communications.³

Cox asks the Commission to reconsider the Order and adopt important measures to better protect the Universal Service Fund to the benefit of unserved schools and libraries, to ensure E-rate support is spent where it is genuinely needed, and to ensure efficient and effective use of limited E-rate funds. These measures include: requiring dark fiber and self-construction projects to be demonstrated to be the most cost effective option after fair and open competitive bidding; capping the amount of E-rate funding allocated for these purposes; requiring that such facilities

¹ *Modernizing the E-Rate Program for Schools and Libraries*, Second Report and Order and Order on Reconsideration, FCC 14-189, 29 FCC Rcd 15538 (2014) (“*Second E-rate Reform Order*” or “*Order*”).

² *Petitions for Reconsideration of Action in Rulemaking Proceeding*, Public Notice, 80 Fed. Reg. 19941 (Apr. 14, 2015).

³ Petition for Reconsideration of Cox Communications, Inc. (filed Mar. 6, 2015) (“*Cox Petition*”).

be built and used in the same funding year; and requiring that applicants secure all resources necessary to make effective use of the facilities or services they purchase. CenturyLink agrees with Cox that the rulemaking fell short and adding safeguards more consistent with those adopted in the *Healthcare Connect Fund Order* would greatly improve the public spending protections in the much larger E-rate fund.

II. THE COMMISSION SHOULD ADOPT REASONABLE SAFEGUARDS FOR DARK FIBER AND SELF-PROVISIONING.

Allowing use of E-rate funds for self-provisioning is a dramatic and controversial change in program policy.⁴ CenturyLink believes the Commission is mistaken to presume that the Commission has statutory authority to fund dark fiber and self-construction, when the statute authorizes only “discounts” on “telecommunications services” provided by “carriers.”⁵ But at least when the Commission adopted a similarly controversial policy in the much smaller Rural Healthcare program, the Commission adopted safeguards against diverting limited USF dollars to dark fiber or self-provisioning.⁶ As Cox’s petition explains, in the *Second E-rate Reform Order*, the Commission erred by opening E-rate funds to dark fiber and self-provisioning, while failing to adopt sufficient safeguards.

Many parties cautioned that funding for dark fiber and self-provisioning in E-rate is demonstrably a bad idea.⁷ As a general rule, building, operating, managing, and maintaining networks for schools and libraries is very difficult, made even more so by the growing demand

⁴ In these comments, CenturyLink uses the term “self-provisioning” to include fiber projects owned or leased by applicants, including dark fiber and self-construction. Cox Petition at 1 n.3.

⁵ See, e.g., Further Comments of CenturyLink (filed Apr. 7, 2014) at 7-8 (explaining limits of Commission authority under 47 U.S.C. § 254(h)(1)(B)).

⁶ *Rural Health Care Support Mechanism*, Report and Order, 27 FCC Rcd 16678 (2012) (“*Rural Health Care Order*”).

⁷ CenturyLink Further Comments at 8-10.

for bandwidth and the highly dynamic nature of broadband usage and applications.⁸ Although there are some exceptions, as a group, publicly operated broadband systems have a poor track record for both cost and performance. It is worth noting that commercial enterprises that certainly could afford to build their own networks – banks, airlines, major retailers, and others – but almost invariably do not. They know their success depends on using their expertise to succeed in their mission and using the expertise of others for matters not related to their core mission. Therefore, most commercial enterprises understand they will succeed when they secure finished services from commercial providers. Self-provisioning can only very rarely be cost-effective. Additionally, public-owned or -operated facilities undermine market competition and broadband investment by leading to overbuilding of existing capacity and introducing nonmarket pricing by publicly subsidized entities.

In the E-rate proceeding, the record includes many concerns about the need for safeguards if any E-rate funding is to be directed to construction of broadband facilities. The Order itself acknowledged the importance of safeguards to minimize risks of waste, and it even noted the Rural Health Care program’s adoption of safeguards as a model. But the *Second E-rate Reform Order* did not follow this precedent and unreasonably failed to adopt adequate safeguards. As Cox explains, “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” today.⁹

To its credit, the Commission incorporated important initial safeguards in the Order. They include (1) allowing E-rate support for self-construction only when it “demonstrated to be the most cost-effective option after competitive bidding” and requiring sufficient detail in FCC

⁸ Cox Petition at 1 n.3.

⁹ *Id.* at 3.

Form 470 “so that cost-effectiveness can be evaluated based on the total cost of ownership over the useful life of the facility,” (2) requiring “the facilities [to be] built and used within the same funding year,” subject to limited exceptions, and (3) requiring that applicants secure the resources necessary to make effective use of their purchased services.¹⁰ But given the record in this proceeding, the Order failed to go far enough. Granting Cox’s petition for reconsideration to add further, reasonable safeguards would remedy that error, improve the rulemaking, and ultimately better serve the Commission’s goals for the E-rate program.

A. The Commission should limit self-provisioning to applicants that lack access to high speed broadband today.

The Commission should limit funding for self-provisioning projects to schools and libraries that genuinely lack access to high speed broadband today. This safeguard would help “protect against long-term inefficient spending” that could drain the USF and limit the ability to meet goals for broadband ability in America’s schools and libraries.¹¹ It would also help ensure that E-rate funds are not misapplied to construction costs for higher priority schools in areas that have high-capacity broadband facilities today, “while stranding lower priority schools that lack broadband access today and truly need the support” and limiting the number of schools and libraries that can receive E-rate support from the fund.¹²

Given the manifest risks associated with funding of self-provisioning, the Order needed to include this safeguard. As written, the Order could misdirect funding for building of duplicate facilities in areas that have high capacity services available through existing facilities or through established providers willing to build on very competitive terms. The Commission itself

¹⁰ *Second E-rate Reform Order* at ¶¶ 47-50.

¹¹ Cox Petition at 3-4.

¹² *Id.* at 4.

recognized that existing providers' finished service prices "should almost always be able to offer the most competitive pricing."¹³ Commercial service is nearly universally available, and pricing is declining – especially for high capacity services. Commercial providers, moreover, utilize shared network. Because the great majority of school and library buildings – even in rural communities -- are usually close to existing fiber splice points or fiber-fed central offices, special construction costs are typically low. Where fiber can also be used to serve other commercial customers in the community, the cost of construction for a school or library may be nothing at all.¹⁴

In contrast, as the Commission recognized, that new infrastructure requires up-front payments that could burden applicant and the E-rate fund for years. The Commission has previously voiced its "concern" that "by authorizing unrestricted up-front payments for multiple years of telecommunications service where 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."¹⁵

Moreover, as Cox points out, leased or owned facilities will not benefit from price declines as commercial Ethernet-grade services continue to expand.¹⁶ Thus, even if leased or owned newly constructed facilities might appear more cost effective in the year an applicant proposes to secure or build them, they will not be cost effective even a year or two down the road. At that point, however, it would be too late; the E-rate program will have sunk significant up-front program funds into those inefficient facilities. While the Order claims the potential for

¹³ Order at ¶ 53.

¹⁴ CenturyLink Further Comments at 8-9.

¹⁵ *Request for Review by Brooklyn Public Library*, Order, 15 FCC Rcd 18598, 18606 ¶ 19, cited in *Second E-rate Reform Order* at ¶ 21.

¹⁶ Cox Petition at 5 & n.14.

applicants' self-provisioning will somehow actually reinforce competition and pressure prices lower, funding self-provisioning would lock up resources for years, denying the E-rate applicants any future benefits of competition.

B. The Commission should adopt a competitive bidding safeguard.

One way to address the lack of adequate safeguards, as Cox explains, is simply to confirm that all applicants must conduct a meaningful competitive bid.¹⁷ Competitive bidding has always been a foundation of E-rate procurement. Allowing any applicant to forego competitive bidding invites inefficiency and waste, as well as potential fraud and abuse.

Cox suggests an easy way to monitor and ensure cost effectiveness is simply to look at projects that receive no competitive bids.¹⁸ That requirement is a great first step, but is inadequate without reviewing the procurement itself.

A poorly designed request for proposal may lead to no bids, despite ready availability of cost-effective commercial services. For example, applicants could receive no bids because of faulty assumptions or inadvertent problems with the solicitation, which can be remedied with a rebid.

More seriously, an applicant could deliberately design its request for proposal, project requirements, and/or evaluation criteria in order either to ensure it receives no bids or to ensure that no party can be considered a valid bidder.¹⁹ Bidders may be forced to decline to bid, may need to file an "exceptions bid," or may have their bids deemed noncompliant. Creating a sham RFP intentionally designed to justify self-provisioning is an abuse of the program; unfortunately,

¹⁷ Cox Petition at 6.

¹⁸ *Id.* at 5-6.

¹⁹ Cost-effectiveness is not the only potential motive for self-provisioning. Some organizations are looking for E-rate funding to address their own financial and political problems.

the Commission can expect to see this practice by some organizations that are determined to tap E-rate funding for their own networks without regard to cost effectiveness.

The Commission must ensure the program does not invite abuse by applicants that have no real interest in cost effectiveness and every interest in building their own facilities at the USF program's expense. Nor should it invite waste of E-rate funds when an applicant unintentionally mishandles a procurement. The Order's assumption that allowing E-rate funding for dark fiber or self-provisioning will automatically enhance competition is unreasonable, and the Commission needs to do more to ensure that any funds for self-provisioning are targeted where they are genuinely needed to advance E-rate program goals.

C. The FCC should cap E-rate funding for dark fiber and self-provisioning projects.

Another critical safeguard for E-rate program spending would be adopting a budget cap for new infrastructure projects, much as the Commission did in the Rural Health Care program.²⁰ CenturyLink supports Cox in this recommendation.

The Order acknowledges the risk “that the cumulative effect of the actions we take in this order to facilitate greater use of E-rate dollars for special construction charges could result in insufficient funds being available for other category one expenses and category two costs.”²¹ But the Order merely directs “USAC to report to the [Wireline Competition Bureau] if E-rate funding 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.”²² And even that reporting

²⁰ Cox Petition at 5-6.

²¹ *Second E-rate Reform Order* at ¶ 15.

²² *Id.*

requirement is unclear. It might be read to apply only to applications involving state matching funds.

If the Commission is to allow E-rate funding to be used for self-provisioning (whether dark fiber or self-construction), it should set an overall cap as Cox suggests. Cox has recommended limiting the allocation to \$200 million annually. This amount, it suggests, would be twice the amount committed to the Rural Broadband Experiments.²³ Actually, a \$200 million cap is far larger. The Rural Broadband Experiments were spread over ten years. Consequently, a \$200 million limit on E-rate self-provisioning would be twenty times as much.²⁴

CenturyLink would recommend a cap at half that amount, at least until the Commission and USAC have had an opportunity to see what types of applications are put forward and how effectively self-provisioning funds would be utilized. This would be particularly important since the Order includes no dollar limit on what amount might be spent on self-provisioning per building or per applicant, despite claiming to require a showing of cost effectiveness. The Commission could then hold a Further Notice of Proposed Rulemaking to evaluate the program's experience and consider whether the allotment should be adjusted.

D. The Commission should require some applicant contribution for special construction.

Cox's petition observes that the Order would allow increase E-rate support by increasing the applicant's discount percentage up to ten percentage points to match state funding for special construction projects.²⁵ The Order is unreasonable by allowing some applicants to make *no*

²³ Cox Petition at 6.

²⁴ The Commission limited the Rural HealthCare Fund to amortizing \$50,000 per year of non-recurring costs per applicant. The program would allow 1,000 of the 3,900 applicants to have the full \$50,000 annual allowance. A similar calculation on \$200 million in E-rate funding could provide 4,000 applicants with a comparable level of support.

²⁵ *Second E-rate Reform Order* at ¶ 56; Cox Petition at 6.

contribution of their own, however modest, to the cost of self-provisioning special construction. If state funds and E-rate matching funds pay for the entire cost of service, the Commission will have removed a long-standing safeguard that helps ensure applicants make efficient and cost-effective choices.

In the *Rural Health Care Order*, the Commission found that requiring a contribution from USF recipients “provides incentives for recipients to choose the most cost-effective form of connectivity, design their networks efficiently, and refrain from purchasing unneeded capacity.”²⁶ The Commission added that vendors would offer services at competitive prices, “knowing that [applicants] will be unwilling to increase unnecessarily their out-of-pocket expenses.”²⁷ The E-rate Further Notice of Proposed Rulemaking had sought comment on lowering discount levels “to encourage applicants to make more efficient and smarter choices” in E-rate supported spending.²⁸ That is why the Commission had decreased the highest discount levels on internal connections to 80% from 90%.²⁹

Consequently, it is odd that the Commission ignored the comparable need for a comparable safeguard for self-provisioning in the far larger E-rate program. In fact, the Order illogically does the opposite. It increases the E-rate discount to match state funding for special construction of facilities, undermining the long-standing protection that every applicant must

²⁶ *Rural Health Care Order* at ¶ 82.

²⁷ *Id.*

²⁸ *Modernizing the E-rate Program for Schools and Libraries*, Notice of Proposed Rulemaking, 28 FCC Rcd 11304, 11337-38 ¶¶ 118-119 (2013). The Further Notice also cited a 2013 Funds for Learning study that found “applicants with higher discount rates ... planned to spend significantly more per-student in pre-discount dollars, and that the highest discount applicants spend more than twice as much as their peers.” *Id.* at 11343 ¶ 136.

²⁹ *Second E-rate Reform Order* at ¶ 84.

contribute meaningfully to the cost of such projects. For applicants at the highest discount levels, the applicant's contribution would actually drop to zero.

This step is even more unreasonable, given that the Order has already made special construction financing “more flexible” by “suspending” USAC’s policy that requires amortization of nonrecurring category one charges and allowing applicants to spread payments of the non-discounted portion of special construction charges over four years.³⁰ Cox is rightly concerned that applicants will make less efficient and less cost-effective choices when they lack sufficient “financial stake.”³¹ Additionally, because the “match” applies only to special construction, an offering that requires special construction for self-provisioning (whether dark fiber, lit fiber, or self-construction) may be artificially attractive to an applicant, even though more cost effective finished services are available that require little or no special construction cost. This may artificially incent applicants to self-provision, wasting E-rate funds on unneeded, inefficient duplicate facilities and actually undermining E-rate procurement competition.

E. The Commission should provide cautionary guidance on the cost effectiveness showing for new construction.

CenturyLink also agrees with Cox that the Order provides insufficient direction to USAC and applicants about the showing that must be made to demonstrate that any dark fiber or self-construction projects are more cost effective than available finished commercial services.³² Allowing funding for such self-provisioning marks a dramatic change in the Commission’s E-rate policy, but the Order includes no guidance about cost-effectiveness showing necessary.

³⁰ *Second E-rate Reform Order* at ¶ 16.

³¹ Cox Petition at 8.

³² *Id.* at 8-10.

Instead, the Order simply notes that “USAC already has experience evaluating cost effectiveness for large scale projects like the Rural Health Care program.”³³

It is inconsistent with rulemaking requirements for the Commission to adopt a rule that is such a stark departure from long-standing E-rate policy without setting out more clearly how the rationale by which it is to be evaluated. CenturyLink has full confidence in USAC’s integrity and its extensive experience in E-rate procurement, but everyone, especially applicants, need to understand the requirement. Although the Order cites a portion of the *Rural Health Care Order*, it is insufficient. The *Rural Health Care Order* provides limited guidance itself, and the only apparent additional detail is the otherwise obvious point that “RFPs must provide sufficient detail so that cost-effectiveness can be evaluated over the useful life of the facility.”³⁴

The Commission needs to confirm that the useful life of self-provisioned projects must also be assessed in any comparison to cost of finished services. If the cost of self-provisioned facilities are presumed to be spread “over an unrealistically long period,” of course “they will appear artificially inexpensive, resulting in a skewed cost-effectiveness analysis.”³⁵ Although the Order says “applicants will receive funding for self-construction for one funding year at a time only,”³⁶ it does not explain how the useful lives of self-constructed facilities are to be assessed. The Order elsewhere implies that an “apples to apples” comparison is required between dark fiber or self-constructed facilities and commercial services. The Commission should provide clear direction for applicants as a safeguard against inefficient use of limited E-rate funds.

³³ *Second E-rate Reform Order* at ¶¶ 69-80.

³⁴ *Rural Health Care Order* at ¶ 73. See also *Second E-rate Reform Order* at ¶ 48.

³⁵ Cox Petition at 9.

³⁶ *Second E-rate Reform Order* at ¶ 54.

Applicants must be realistic in assessing the cost effectiveness of self-provisioning, and USAC must be realistic and vigilant in evaluating requests for such funding. This includes a realistic assessment of *all* costs associated with the project, including fiber lighting equipment, ongoing operating costs, maintenance, redundancy and business continuity, repair, equipment replacement schedules and capacity and capability upgrades over time. The Commission should grant Cox’s petition and clarify that the limitation to “allow self-construction only where self construction is demonstrated to be the *most* cost effective option”³⁷ means that self-provisioning projects should be found cost effective only where they are shown to be genuinely less expensive than commercial services.

III. CONCLUSION

The Commission should grant Cox’s petition, as the Order unreasonably failed to adopt appropriate safeguards necessary to protect the E-rate program, despite concerns raised in the record and contrary to prior Commission precedent. To ensure a proper rulemaking under the APA,³⁸ the Commission should modify the order to adopt those safeguards.

Respectfully submitted,

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April 29, 2015

³⁷ *Second E-rate Reform Order* at ¶ 48 (emphasis added).

³⁸ Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551, *et seq.*

CERTIFICATE OF SERVICE

I, Ross Dino, do hereby certify that I have caused the foregoing **COMMENTS OF CENTURYLINK ON PETITION FOR RECONSIDERATION OF COX COMMUNICATIONS** to be served via first-class U.S. Mail, postage prepaid, on the persons identified on the attached list.

/s/ Ross Dino _____

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