

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**COMMENTS OF THE
SCHOOLS, HEALTH & LIBRARIES BROADBAND (SHLB) COALITION**

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The Schools, Health & Libraries Broadband Coalition (“SHLB Coalition” or “SHLB”) respectfully submits these comments in response to the Federal Communications Commission’s Public Notice regarding oppositions and comments to petitions for reconsideration of the Commission’s Second E-rate Modernization Order.¹ The SHLB Coalition is a broad-based coalition of organizations that share the goal of promoting open, affordable, high-capacity broadband for anchor institutions and their communities. High capacity broadband is the key infrastructure that libraries, K-12 schools, community colleges, colleges and universities, health clinics, public media and other anchor institutions need for the 21st century. Enhancing the broadband capabilities of these community anchor institutions is especially important to the most vulnerable segments of our population – those in rural areas, low-income consumers, disabled and elderly persons, students, minorities, and many other disadvantaged members of our society.

SHLB commends the Commission for the many bold steps taken in the *Second Modernization Order* to encourage the deployment of affordable high-capacity broadband to schools and libraries. SHLB therefore opposes the petition of Cox Communications, Inc. (“Cox”) seeking to overturn the new E-rate rules that provide schools and libraries with more competitive options to obtain needed high-

¹ See *Petitions for Reconsideration of Action in Rulemaking Proceeding*, Public Notice, WC Docket Nos. 13-184 and 10-90, Report No. 2017 (Apr. 8, 2015); *Modernizing the E-rate Program for Schools and Libraries; Connect America Fund*, WC Docket Nos. 13-184 and 10-90, Second Report and Order and Order on Reconsideration, 29 FCC Rcd. 15538 (2014) (“*Second Modernization Order*”).

capacity broadband, and that provide additional E-rate funds where states or tribal governments provide high-capacity broadband funding (“Cox Petition”). SHLB also opposes the petition of WTA – Advocates for Rural Broadband, NTCA – The Rural Broadband Association, and the National Exchange Carriers Association, Inc (“WTA, et al.” or “WTA”) seeking reconsideration and/or clarification of new Connect America Fund (“CAF”) rules designed to ensure schools and libraries located in areas served by recipients of CAF support receive competitive bids for high-capacity broadband services (“WTA Petition”). Finally, SHLB supports in part and opposes in part the petition by T-Mobile USA, Inc. (“T-Mobile”) seeking reconsideration and clarification of new E-rate rules addressing the relative cost-effectiveness of providing Internet access to classrooms and libraries through Category One supported wireless broadband services (*e.g.*, LTE) vs. Category Two supported Wi-Fi networks (“T-Mobile Petition”).

I. The Commission Fully Considered and Rejected Cox’s Arguments Against New E-rate Rules Intended to Make It Easier for Schools and Libraries to Obtain Competitively-Priced High Capacity Broadband

The Commission in December 2014 took bold but well-considered steps necessary to bridge the urban-rural broadband connectivity gap and further modernize the E-rate program for the new era of 21st century education and learning. Allowing E-rate to fund capital costs associated with deploying high-capacity broadband – and encouraging states to do the same by providing E-rate match funding – were logical steps to bridge this gap. Yet Cox requests that the Commission either impose burdensome restrictions or cap this new funding, as well as eliminate the up-to 10% additional E-rate match where states also provide funding. Making these changes would do much to restore the unacceptable *status quo* existing before the *Second Modernization Order* and, for that reason alone, should be rejected. In addition, Cox’s petition relies on facts and arguments that were fully considered and rejected by Commission and so do not warrant reconsideration.²

The *Second Modernization Order* established rules allowing schools and libraries in some cases to obtain E-rate support for the capital costs (electronics and special construction charges) associated with obtaining leased dark fiber or constructing new network facilities that would be owned by schools or libraries themselves. Schools and libraries may obtain such funding only where they can show through the competitive bidding process that leasing dark fiber or constructing new facilities is more

² See 47 C.F.R. § 1.429(b).

cost effective than subscribing to services from an existing provider (over a period of time equivalent to the life of the funded asset).³ Although Cox acknowledges the Commission thoroughly addressed arguments opposing these new rules and included significant safeguards⁴ – Cox seeks further “safeguards” without offering new facts or new arguments.

Cox claims that because broadband rates generally decline over time, a cost-comparison between a long-term capital investment and subscribing to equivalent services cannot accurately determine whether long-term investments are more efficient.⁵ While SHLB agrees broadband pricing generally declines (though less so in rural areas), SHLB disagrees that this precludes effective long-term cost-comparisons. Cox and other service providers will always have advance notice through publication of the Form 470 whether a school or library is considering long-term investments as a possible broadband solution. Cox will thus have ample opportunity to reflect any expected decline in broadband rates for subscription services in their own bids. For example, Cox might offer a particular monthly recurring rate assuming a five-year service commitment, but then offer an optional five-year extension with even lower rates. The applicant would then take these lower rates over a ten-year term into consideration as it evaluated longer-term investment options.

While future prices may decline in some markets, individual schools and libraries, particularly those in rural areas, may be susceptible to price increases in areas where there is little to no competition or in areas where consolidation of broadband providers occurs.⁶ Allowing schools and libraries to own their own fiber networks provides greater certainty and predictability for schools or libraries as to what their broadband costs will be over an extended period of time. And there are clear benefits to the E-rate program as well: while the up-front costs for such project will impose short-term demands on the E-rate program, this will be offset to a large degree by corresponding reductions in recurring demand for E-rate funding. Comments submitted in this proceeding indicate that capital construction of fiber can, at times, significantly increase capacity and *reduce* school and library costs.⁷ That is, schools or libraries

³ See *Second Modernization Order*, 29 FCC Rcd at 15553, 15557; see also 47 C.F.R. § 54.503(c)(iii)-(vi).

⁴ *Cox Petition* at 4 (“The Commission recognized that . . . payment associated with new infrastructure could burden the Fund and thus decided to be cautious . . .”).

⁵ *Cox Petition* at 4-5.

⁶ “Comcast/TWC Unraveling Could Spawn M&A Flurry, Analysts Say,” *Communications Daily* headline, April 27, 2015.

⁷ See, for example, The Quilt filing in the E-rate Docket, April 21, 2014, slide 35, showing that Merit upgraded the bandwidth at some schools and libraries from 3 Mbps to 1 Gbps and *reduced* the operating cost by over 50%.

that successfully implement long-term broadband solutions *will need less E-rate support for high-capacity broadband for an extended period of time*. This impact cannot be ignored.⁸

Cox's call to restrict new infrastructure spending "to schools and libraries that lack access to high-speed broadband today" would remove a valuable competitive option (dark fiber) that could provide significant cost savings for schools and libraries. The cost of high-capacity broadband was an issue the Commission sought to address, as well as access.⁹ The competitive bidding process should be allowed to work as intended and will provide the protections necessary to ensure wise use of limited E-rate funds. Furthermore, Cox's proposal fails to recognize that even those schools and libraries that have a broadband connection today often need to increase their bandwidth substantially to address growing demand. For instance, under Cox's line of argument, a school or library with an existing 50 Mbps connection that needs a 1 Gbps connection in the future would be precluded from considering a dark fiber solution because it already has (an unsatisfactory level of) high-speed broadband today.

There is similarly no need for a \$200 million cap on infrastructure spending within E-rate. Such a cap would introduce uncertainty into the funding process and might discourage schools and libraries from pursuing a dark fiber solution even in cases where it would lead to significant cost savings. The Commission's rules should err on the side of encouraging – not discouraging – broadband capital investment. In response to concerns about infrastructure funding growth, the Commission already committed to a sunset of the amortization waiver after three years. Many of the new investment rules will not take effect until 2016. The time to evaluate whether infrastructure spending is excessive will be later – after the new rules have been effective for a period, not before they have even become operational.

Cox's argument that applicants cannot be expected to make responsible procurement decisions in cases where there is no applicant share because of state or tribal support combined with the additional E-rate match funding is also flawed. *See Cox Petition* at 8. Cox first ignores that states and tribal governments can already pay the full undiscounted share of costs in such projects, and already

leading to significant savings to the schools and libraries and to the E-rate program (available at <http://apps.fcc.gov/ecfs/document/view?id=7521098821>).

⁸ *Cf.* THE OMAHA PLAN: A WHITE PAPER TO THE STATE MEMBERS OF THE FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE, at 7-8 (2011) ("The problem associated with the Schools and Libraries program is that the states and their school systems leased facilities from the incumbent carriers that were needed to extend the existing networks into the school systems rather than constructing their own facilities.").

⁹ *See, e.g.*, 29 FCC Rcd 15549, ¶ 30.

have a strong incentive to assure funds they commit to such investments are used wisely.¹⁰ Secondly, the Commission recognized substantial record evidence that these additional investments were needed – and expressed its own commitment to monitor special construction expenditures in this category and consider increasing the match if it later proves necessary.¹¹ Finally, the Commission implemented safeguards by providing additional match funding only to special construction projects that meet E-rate’s high-capacity benchmarks, and preventing applicants from obtaining additional funding for fifteen years.¹² Cox offers no new arguments warranting FCC reconsideration of these steps.

Cox also requests the Commission clarify the cost-comparison requirements for new construction – specifically the expected useful life of the facility to be constructed. SHLB addresses cost-comparison principles generally in Section III below, asking the Commission to clarify that USAC should defer to any reasonable, objectively-based method employed by applicants. With respect to self-construction specifically, SHLB notes that by barring recipients of added E-rate match funding from receiving further such funding for fifteen years,¹³ the Commission has implicitly recognized a fifteen-year facility useful life standard for the fiber.

Finally, underlying all of Cox’s requests is a concern that infrastructure funding will grow excessively under the new rules. But real-world experience with the similar (though in key respects more liberal) infrastructure funding rules in the Healthcare Connect Fund (“HCF”)¹⁴ strongly suggest these concerns are overstated. The new HCF rules have been in effect for two years and fears there would be rapid growth in infrastructure funding have not been realized.¹⁵

II. The Commission Provided Sufficient Notice in the CAF Docket of the New E-rate Bidding Requirements

WTA, et al. seeks reconsideration of the *Second Modernization Order* in WC Docket No. 13-184 (“Docket 13-184”). See *WTA Petition* at 1. However, the actual rule they challenge “imposing an obligation on high-cost support recipients to bid to provide fixed broadband at yet-to-be determined

¹⁰ See *id.* at 15562, ¶ 59

¹¹ See *id.* at 15561, ¶ 56.

¹² See *id.* at 15562, ¶ 59.

¹³ *Id.*

¹⁴ See, e.g., 47 C.F.R. § 54.633(d) (allowing future revenues from excess capacity as a source of match funding).

¹⁵ See Rural Health Care Funding Information, USAC Website, <http://www.usac.org/rhc/healthcare-connect/funding-information/default.aspx> (\$30 million in funding commitments in FY 2013 to HCF consortia for up-front payments which includes but is not limited to infrastructure spending). (Last visited Apr. 24, 2015.)

national reasonable comparability benchmark(s)” is set forth in new sections 54.308(b) and 54.309(b) of the high-cost program rules promulgated as part of the Commission’s ongoing CAF rulemaking in WC Docket No. 10-90 (“Docket 10-90”). *Id.* at 2.¹⁶ The fact that the rules were promulgated in Docket 10-90, not Docket 13-184, undermines WTA’s claim that the Commission violated the notice requirement of section 553(b) of the Administrative Procedure Act (“APA”)¹⁷ when it adopted sections 54.308(b) and 54.309(b). *See WTA Petition* at 5-8.

WTA challenges new rules requiring “all recipients of high-cost support that are subject to broadband performance obligations to serve fixed locations” upon reasonable request “to offer broadband service in response to a posted FCC Form 470 to eligible schools and libraries at rates reasonably comparable to rates charged to schools and libraries in urban areas for similar services.”¹⁸ WTA contends that neither the initial notice of proposed rulemaking (“NPRM”) in Docket 13-184¹⁹ nor the further notice of proposed rulemaking (“FNPRM”)²⁰ provided notice that the Commission was considering such a requirement. *See WTA Petition* at 7. That may or may not be the case, but the Commission met the APA’s notice requirement in Docket 10-90.

The Commission “satisfies the [APA’s] notice requirement, and need not conduct a further round of public comment, as long as its final rule is a ‘logical outgrowth’ of the rule it originally proposed.”²¹ The Commission’s final rule “qualifies as the logical outgrowth of its NPRM ‘if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.’”²² For the purposes of the logical outgrowth test, the CAF sections of the *Second Modernization Order* are “properly viewed as a further step in the ongoing [CAF] rulemaking.”²³ In its first order in the CAF rulemaking in 2011, the Commission adopted the requirement that, “[u]pon receipt of a reasonable request for service,” rate-of-

¹⁶ *Second Modernization Order*, 29 FCC Rcd at 15606; *see also id.* at 15538, 15562 (specifying that section II.C of the Order, which adopted rules ensuring affordable broadband service to schools and libraries in high-cost areas, was issued in Docket 10-90).

¹⁷ 5 U.S.C. § 553(b).

¹⁸ *Second Modernization Order*, 29 FCC Rcd at 15565 (¶ 67), 15562 (¶ 60); *id.* at 15606.

¹⁹ *Modernizing the E-rate Program for Schools and Libraries*, 28 FCC Rcd 11304 (2013).

²⁰ *Modernizing the E-rate Program for Schools and Libraries*, 29 FCC Rcd 8870 (2014).

²¹ *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 952-53 (D.C. Cir. 2004).

²² *CSX Transportation, Inc. v. Surface Transportation Bd.*, 584 F.3d 1076, 1079-80 (D.C. Cir. 2009) (quoting *Northeast Maryland*, 358 F.3d at 952).

²³ *See AT&T Corp. v. FCC*, 113 F.3d 225, 229 (D.C. Cir. 1997).

return carriers that receive high-cost support “must deploy broadband to the requesting customer within a reasonable amount of time.”²⁴ Furthermore, high-cost support recipients must offer broadband at rural rates that “fall within a reasonable range of urban rates for reasonably comparable broadband services.”²⁵ Thus, as of 2011, rate-of-return carriers that receive high-cost support were required to provide broadband service upon the reasonable request of schools and libraries in high-cost areas, and do so within a reasonable time and at rates that were reasonably comparable to the broadband rates charged to schools and libraries in urban areas. However, that requirement was not codified in the Commission’s rules for its high-cost program.²⁶

In the *CAF Order*, the Commission expressed the expectation that high-cost support recipients “would provide higher bandwidth offerings to community anchor institutions” – including eligible schools and libraries – “in high-cost areas at rates that are reasonably comparable to comparable offerings to community anchor institutions in urban areas.”²⁷ Subsequently, the Commission issued a FNPRM in Docket 10-90 that invited comment “on how best to ensure that this expectation is fulfilled by [high-cost support recipients], with specific references to institutions and the charges, terms, and conditions of service provided to those institutions.”²⁸ The *CAF FNPRM* was more than adequate to alert the public, and especially high-cost support recipients, of the possibility that the Commission could adopt rules for the high-cost program that would codify its *CAF Order* obligations and expectations with regard to the provision of broadband *specifically* to eligible schools and libraries in high-cost areas.

As was the case in *Agape Church, Inc. v. FCC*, 738 F.3d 397 (D.C. Cir. 2013), the rules that the Commission finally adopted were not “expressly proposed” in its *CAF FNPRM*.²⁹ The Commission “is not required to adopt a final rule that is identical to the proposed rule.”³⁰ Indeed, “[i]f that were the case, [the Commission] could learn from the comments on its proposals only at the peril of subjecting itself to rulemaking without end.”³¹ Rather, a Commission rule “represents a logical outgrowth where the

²⁴ *Connect America Fund*, 26 FCC Rcd 17663, 17741 (2011) (“CAF Order”), *petitions for review denied sub nom.*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), *petition for cert. filed*, *United States Cellular Corp. v. FCC*, No. 14-610 (U.S. Nov. 25, 2014).

²⁵ *CAF Order*, 26 FCC Rcd at 17708.

²⁶ *See id.* at 18200-13.

²⁷ *Id.* at 17700 n.164.

²⁸ *Connect America Fund*, 29 FCC Rcd 7051, 7107 (2014) (“CAF FNPRM”).

²⁹ 738 F.3d at 412.

³⁰ *Northeast Maryland*, 358 F.3d at 951.

³¹ *First American Discount Corp. v. Commodity Futures Trading Comm’n*, 222 F.3d 1008, 1015 (D.C. Cir. 2000).

NPRM expressly asked for comments on a particular issue or otherwise made clear that the agency was contemplating a particular change.”³²

The Commission expressly invited comment on the issue of how it could best ensure that high-cost support recipients offer broadband to “specific” anchor institutions in high-cost areas at rates that are reasonably comparable to the rates charged to such institutions in urban areas.³³ New sections 54.308(b) and 54.309(b) of the high-cost rules were a logical outgrowth of the Commission’s request for comments on that particular issue. Those rules simply codified the expectations the Commission expressed in the *CAF Order* specifically with respect to the provision of broadband to eligible schools and libraries in high-cost areas by rate-of-return and certain price cap carriers that receive high-cost support.

WTA is correct that an agency “cannot bootstrap notice from a comment.” *WTA Petition* at 6.³⁴ However, comments that address an issue raised in an NPRM and resolved by the adoption of rules “provide evidence that the notice was adequate.”³⁵ Here, several stakeholders provided evidence of the adequacy of the notice afforded by the *CAF NPRM* by filing comments in Docket 10-90 urging the Commission to impose an obligation on the recipients of CAF funding to offer high-speed broadband at affordable rates to eligible schools and libraries in rural areas.³⁶ In fact, the SHLB Coalition itself filed comments in the CAF docket asking the Commission to clarify and enforce the obligation to provide high-capacity broadband to the anchor institutions in the CAF recipients’ service territories.³⁷ Supported by that evidence, the Commission should deny WTA’s request that the new rules be reconsidered and

³² *CSX Transportation*, 584 F.3d at 1081.

³³ *CAF FNPRM*, 29 FCC Rcd at 7107.

³⁴ Quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

³⁵ *Leyse v. Clear Channel Broadcasting, Inc.*, 545 Fed. Appx. 444, 454 (6th Cir. 2013). See *Northeast Maryland*, 358 F.3d at 952; *Appalachian Power Co. v. EPA*, 135 F.3d 791, 816 (D.C. Cir. 1998).

³⁶ See *Second Modernization Order*, 29 FCC Rcd at 15562-63 & nn.137, 142; see also *NTCA Petition* at 4 n.11 (alleging the *Second Modernization Order* erroneously refers to several comments as being filed in Docket 13-184 when they were filed solely in Docket 10-90).

³⁷ See Joint Comments of the SHLB Coalition and SECA, available at <http://apps.fcc.gov/ecfs/document/view?id=7521752624> (“First, the recipients of Connect America Fund (CAF) funding should be required to serve anchor institutions. The current language suggests CAF recipient companies should confer with community anchor institutions when engaging in network design of CAF-supported infrastructure, but this does not provide any enforceable obligation on behalf of these customers. The Commission should go further and mandate that anchor institutions are included in the service obligation of CAF recipients.”).

subjected to a further round of public comment. *See WTA Petition* at 2. If for no other reason, the “public interest in expedition and finality” warrants that disposition.³⁸

III. Regarding T-Mobile’s Petition, the Commission Should Not Consider Mobile Broadband Presumptively Duplicative and Should Respect the Schools’ and Libraries’ Cost Comparisons If “Reasonable.”

The SHLB Coalition has been a long-time advocate for increasing E-rate options for schools and libraries seeking to enhance their broadband capabilities. We are pleased that the Commission has recognized that schools and libraries should have the flexibility to choose between fixed and mobile broadband offerings, and to choose between Wireless Local Area Network (WLAN) (Category 2) or mobile broadband services (Category 1) when evaluating their broadband needs. For that reason, SHLB agrees with T-Mobile that mobile broadband should not be considered presumptively duplicative in cases where schools and libraries have a supported WLAN. T-Mobile offers examples of older structures in dense urban areas where it may indeed be more cost effective to supplement an existing WLAN with mobile broadband rather than upgrading the WLAN itself. Providing schools and libraries with reasonable discretion to determine their own needs without having to rebut unwarranted presumptions of waste will speed the application process without sacrificing program integrity.

Regarding cost-effectiveness comparisons generally, the Commission should confirm that applicants should benefit from a “reasonableness” standard in evaluating the methodologies employed by applicants. A reasonable cost comparison method is one based upon objective, verifiable criteria. Under such a standard, if there is more than one reasonable method of performing a cost comparison, USAC must defer to the applicant’s chosen methodology. USAC should be instructed that it should not substitute its judgment for the applicant’s judgment except in cases where the applicant engages in a clearly unreasonable cost-effectiveness evaluation. Failure to recognize such a clear standard allows USAC to reject or delay approval of applicant-chosen methodologies without explanation. This is frustrating to applicants and causes considerable delay.

SHLB also agrees with T-Mobile that the Commission should clarify that any new standards for evaluating the relative cost-effectiveness of mobile broadband represent substantive new rules and

³⁸ *Action Alliance of Senior Citizens of Philadelphia v. Bowen*, 846 F.2d 1449, 1455-56 (D.C. Cir. 1988), cert. denied, 502 U.S. 938 (1991).

therefore should not be applied retroactively to funding years prior to the effective date of the *Second Modernization Order*.

SHLB supports these clarifications because SHLB favors steps that will increase the availability of cost effective, high-capacity broadband to as many schools, libraries, students and learners as possible. Whether or not the Commission grants one or more of T-Mobile's requests, however, SHLB **opposes** T-Mobile's request to reconsider the increase in the E-rate cap. The need for increased funding is strongly supported by evidence submitted in the record, and there is no need for the Commission to backtrack on this important decision that will increase the availability of affordable high-speed broadband connections for schools and libraries across the country.

VII. Conclusion

SHLB opposes the *Cox Petition* in its entirety as Cox raises no new arguments and offers no further reason to reverse much needed E-rate reforms before they have even been tried. SHLB opposed the *WTA Petition* because the Commission provided sufficient notice in the Connect America Fund proceeding for the new rules obligating certain high-cost support recipients to bid to provide fixed broadband services in response to request for such services in a posted FCC Form 470. SHLB generally favors policies that increase high-speed broadband options for schools and libraries and so agrees with T-Mobile that there should be no presumption that mobile broadband solutions are duplicative where a WLAN is in place. SHLB also suggests the Commission clarify that USAC evaluate applicants' cost-comparison methods using a reasonableness standard. SHLB **opposes** *T-Mobile Petition* insofar as it seeks to reverse the increase in the E-rate cap.

Respectfully Submitted,



John Windhausen, Jr.
Executive Director
Schools, Health & Libraries Broadband (SHLB) Coalition
jwindhausen@shlb.org
(202) 256-9616

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