

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

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

**REPLY COMMENTS OF THE  
CITY OF SAN ANTONIO, TEXAS**

The City of San Antonio (“City” or “San Antonio”) files these comments in reply to the opening comments filed in response to the *NPRM* in the above-captioned proceeding.<sup>1</sup>

San Antonio is the nation’s seventh-largest city and owns and operates 26 public libraries across the City that are available to its approximately 1.3 million residents.<sup>2</sup> Among other things, San Antonio’s public libraries make broadband Internet access available to City residents. For many of San Antonio’s residents, the broadband Internet access provided at public libraries is the primary, if not only, means to gain the Internet access they need to improve their education, find jobs, and participate in the booming online economy.

**INTRODUCTION AND SUMMARY**

Because of the importance of promoting universal broadband Internet access and to help to ensure that the less fortunate are not left behind, San Antonio applauds the goals of the Commission’s *NPRM*. To fulfill its mission, the current E-rate program needs revision to focus

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<sup>1</sup> Modernizing the E-Rate Program for Schools and Libraries, 78 Fed. Reg. 51,598 (proposed Aug. 20, 2013), 28 FCC Rcd. 11,304 (2013) (“*NPRM*”).

<sup>2</sup> *San Antonio Public Library Services Prepare Parents and Students for Back-to-School*, City of San Antonio (Sept. 1, 2013), <http://www.sanantonio.gov/DotGov/FullArticle/TabId/882/ArtMID/2621/ArticleID/1012/San-Antonio-Public-Library-services-prepare-parents-and-students-for-back-to-school.aspx>.

more on broadband availability and affordability and, in particular, access to “next generation” broadband—*i.e.*, broadband with speeds in the range of 500 Mbps to 1 Gbps and above. Those speeds are what will be required for students and for the library-using public to participate in the enormous educational and economic benefits that broadband offers.

San Antonio is pleased that many commenters share this sentiment.<sup>3</sup> In these reply comments, the City draws the Commission’s attention to four issues, the proper resolution of which will be critical to achieving the Commission’s goals in this proceeding.

**1. The Commission Should Eliminate the Priority 1/Priority 2 Distinction.**

The *NPRM* (§§ 146-47) sought comment on whether to eliminate the E-rate rules’ current distinction between “Priority 1” services and “Priority 2” internal connections. Several commenters urged the Commission to eliminate that distinction.<sup>4</sup>

San Antonio agrees. One of the most significant obstacles to making next-generation broadband Internet access available to libraries is the cost of internal connections capable of providing such broadband service. Yet, under the current Priority 1/Priority 2 distinction, most Priority 2 requests are left unfunded. Eliminating the distinction, in contrast, would give the City “the flexibility to focus E-rate funding on those portions of [its] network where upgrades are most needed -- whether connection to [its libraries] or internal connections [within its libraries].” *NPRM* § 146.

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<sup>3</sup> *See, e.g.*, NATOA Comments at 1 & 3-6; NCTA Comments at 1 & 6-8; City of Boston Comments at 5; Comcast Comments at 10-11 & 14-15; Kentucky Department for Libraries and Archives Comments at 3; Philadelphia Comments at 2.

<sup>4</sup> *E.g.*, City of Boston Comments at 5; NCTA Comments at 14; Mass. Dept. of Telecommunications and Cable Comments at 5-6; Comcast Comments at 21-23; Kentucky Dept. for Libraries and Archives Comments at 4.

**2. The Commission Should Provide E-Rate Support for Electronics and Special Construction Charges to Light Dark Fiber.**

The *NPRM* (§§ 71-72) proposes to extend its Priority 1 support of dark fiber to include the modulating electronics required to light dark fiber and to “special construction charges” for dark fiber beyond the E-rate support-receiving entity’s property line. Several commenters supported this proposal,<sup>5</sup> and so does San Antonio.

The Commission’s goal should be to promote options for libraries and schools that enable them to use E-rate program funds to obtain next-generation, high-capacity broadband for the least cost. In many cases, this may mean procuring dark fiber capacity from utilities, municipalities, consortia, and other non-traditional carriers that have installed backbone or anchor institution fiber networks. Denying E-rate support for the electronics and construction needed to light that dark fiber capacity, however, may create among schools and libraries the perverse incentive to forego this lower-cost, higher-capacity broadband option in favor of more expensive, lower-capacity options provided by carriers, because the latter option is currently eligible for E-rate support while the former is not. As NATOA observed, there are

communities that have built fiber connections to their schools and libraries over time and now provide services to the schools and libraries among other public entities. Many of these communities have found that the operational costs of serving the schools and libraries are a small fraction of what they would be were the fiber not available; indeed, many of them decline to utilize the E-rate program because their operating costs are so low that E-rate is not of benefit.

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[B]y allowing better use of dark fiber, the Commission could increase the ability of local, regional, and state network aggregation that will increase efficiency. And since dark fiber may

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<sup>5</sup> *E.g.*, City of Boston Comments at 4; NATOA Comments at 4-5.

be provided by any entity, this proposed change does not favor any provider over another.<sup>6</sup>

The Commission should therefore adopt the *NPRM*'s proposal to make the electronics and special construction charges necessary to light dark fiber eligible for E-rate support.

**3. The Commission Should Permit USAC to Enter into Multi-Year Funding Commitments to Match E-Rate Recipients' Multi-Year Contracts.**

Under current E-rate rules, E-rate funding cannot be approved for multi-year contracts; applicants must instead reapply annually for funding multi-year contracts (*NPRM* ¶ 239). As a result, E-rate applicants are forced to choose between, on the one hand, foregoing the efficiencies and lower costs of multi-year contracts or, on the other hand, gaining these efficiencies and lower costs at the risk of having no assurance that any years of the contract beyond the first year will receive E-rate support.

The *NPRM* (¶¶ 239-243) proposes to eliminate this dilemma by permitting E-rate funding for multi-year contracts for the full term of such contracts, up to a maximum of three years. Commenters for both industry and from the E-rate community supported this proposal.<sup>7</sup> San Antonio supports it as well. By lowering overall E-rate program costs while providing the improved predictability needed to fund next-generation broadband to libraries and schools, gaining the cost and planning efficiencies of longer-term contracts will be a benefit to E-rate recipients and E-rate service and facilities suppliers, as well as to the overall fiscal integrity of the E-rate program itself.

There is some disagreement among commenters concerning whether the maximum period of support for multi-year contracts should be 3 years (NCTA Comments at 14), 4 years

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<sup>6</sup> NATOA Comments at 5.

<sup>7</sup> See, e.g., NCTA Comments at 13-14; American Library Association Comments at 29; City of Philadelphia Comments at 9.

(City of Philadelphia Comments at 9), or 5 years (American Library Association Comments at 29). San Antonio recognizes the tradeoff between the efficiencies of longer-term contracts and the loss of E-rate program funding flexibility that could result from multi-year support of “evergreen” contracts. There is not an objectively “correct” contract duration limit that would achieve the best balancing of this tradeoff, but San Antonio believes that the *NPRM*’s proposed three-year period would be the absolute minimum needed to realize the cost-efficiency and planning benefits of multi-year contracts.

**4. The Commission Should Not, and Cannot, Condition E-Rate Funding on Changes in Local Right-of-Way Permitting Practices.**

While the *NPRM* generally presents positive proposals for improving the E-rate program, it contains one completely misguided question: asking whether the Commission should condition E-rate eligibility on “changes in local permitting practices or other state and local policy changes (e.g., state and local dig-once initiatives) to help reduce new build costs[.]”<sup>8</sup>

As the City of Boston correctly pointed out, the answer to this question is a resounding “no.”<sup>9</sup> Imposing such extraneous conditions on receipt of E-rate funds is beyond the Commission’s statutory authority under 47 U.S.C. § 254, the basis for the Commission’s E-rate program, and it would be beyond the FCC’s Title I ancillary authority as well.<sup>10</sup>

In addition, imposing such coercive conditions on state and local governments, dictating how they must exercise their traditional right-of-way police powers as the “price” for continued receipt of E-rate support, would be unconstitutional. The Commission would be exercising “power akin to undue influence” to compel state and local governments to alter their local right-

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<sup>8</sup> *NPRM* ¶ 164.

<sup>9</sup> City of Boston Comments at 9-10.

<sup>10</sup> See *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

of-way laws and practices in order for their schools and libraries to be eligible for continued receipt of E-rate funds.<sup>11</sup> That would “cross[] the line distinguishing encouragement from coercion,” and thus be unconstitutional.<sup>12</sup>

San Antonio therefore strongly urges the Commission to abandon the *NPRM*'s suggestion that it should, or legally could, condition receipt of E-rate funds on a locality's adoption of Commission-dictated right-of-way or permitting practices.

### CONCLUSION

For the foregoing reasons, the Commission should (1) eliminate the Priority 1/Priority 2 distinction; (2) expand the current E-rate dark fiber rules to support electronics and special construction to light dark fiber; (3) permit USAC to grant multi-year funding commitments based on multi-year contracts; and (4) abandon the idea of conditioning receipt of E-rate funding on a locality's right-of-way and permitting laws or practices.

Respectfully submitted,

*/s/ Tillman L. Lay*

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<sup>11</sup> *Nat'l Fed'n of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (“*Sebelius*”) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

<sup>12</sup> *Sebelius*, 132 S. Ct. at 2603 (quoting *New York v. U.S.*, 505 U.S. 144, 175 (1992)).