September 12, 2014

Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, DC 20554

Re: ***Report and Order and Further Notice of Proposed Rulemaking***
WC Docket No.13-184

Dear Secretary Dortch,

Unite Private Networks, LLC ("UPN") and Southern Light Fiber ("SLF") submit this filing to respond to the Commission's Public Notice requesting comment on issues raised in the Report and Order and Further Notice of Proposed Rulemaking[1]. UPN and SLF attach to this letter their responses to certain questions raised in the Report and Order and FNPRM and identifies each response by the corresponding numbered paragraph in the FNPRM including Paragraphs 267, 203-204, 271 and Appendix F, 272-278, 293-295, and the Staff Report.

UPN and SLF applaud the Commission's continued efforts to modernize and reform the E-rate program to ensure all participants meet the long-term goals of 10 Gbps broadband per 1000 students. UPN and SLF have included comments to support prudent long-term decisions for the USAC and the Applicants through the following: 1) providing more time and better processes to transition from one Service Provider to another, especially when a new network must be built; 2) defining implications and recommending actions related to the easing of the signed contract requirement; 3) encouraging new entrants into the marketplace to meet these long-term goals by enabling them to choose varied contract terms (up to 20 years) under the new streamlined multi-year contract process; 4) grandfathering all contracts that were in place before the proposed rulings to be compliant; 5) remaining competitively neutral to all Service Providers by **not** providing an additional 5% discount to consortia; and 6) providing individual Applicants information about consortium options, while assuring that Applicants have equal opportunity for funding both as

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[1] *Modernizing the E-rate Program for Schools and Libraries,* WC Docket No. 13-184, FCC 14-99, Report and Order and Further Notice of Proposed Rulemaking (rel. July 23, 2014) (*E-rate Modernization Report and Order* or "FNPRM").

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consortium participants and as individual Applicants in order to allow Applicants the ability to choose the financial and purchasing options that best meet their needs.

In general, we commend the Commission's efforts to provide additional transparency and streamline the rules. However, maintaining flexibility for individual Applicant decision-making remains critical. The Commission must remain competitively neutral, even when it comes to consortia. It is also imperative for the Commission to recognize that build costs for new fiber networks to meet the Commission's long-term goals are continuing to trend upward. As such, it is important to allow for longer term contracts to spread out the investment costs and include these contract into the streamlined funding commitment plan to decrease administrative burdens on Applicants. This will continue to encourage more schools to reach the Commission's bandwidth goals and encourage service providers to make the long term investments needed for new fiber. Including long term contracts into the streamlined process will enable easier budgeting for the Applicants and the Commission and put E-rate funds to work building broadband connections for our nations' students while also maintaining the overall health of the fund.

Please direct any questions related to this submission to the undersigned.

Sincerely,

Kevin Anderson
Chief Executive Officer

Enclosure

cc (via email): Lisa Hone
Charles Tyler
Best Copy and Printing, Inc.

1. Paragraph 267: Furthermore, as we consider next steps to further modernize the E-rate program, we invite comment on additional improvements to the E-rate program. In particular, we seek comment on additional steps we can take to further the goals we adopt in the accompanying Report.[647] To encourage the deployment of whole networks, are there additional changes to the E-rate program that we should adopt to meet the connectivity needs of schools and libraries? Are there other ways we can foster cost-effective purchasing throughout the program? Are there more changes that we can make to further improve the application process or to otherwise improve the administration of the program? Are there other data that we can and should collect in furtherance of our goals for the E-rate program?

RESPONSE: In order to facilitate the connectivity needs for schools and libraries when they make a change from one WAN Service Provider to another, it would be helpful if the process for these transitions was spelled out more clearly on the web site. This would assist Applicants and Service Providers to complete smooth transitions and avoid lengthy Program Integrity Assurance ("PIA") reviews. Specifically, we recommend the following changes or clarifications:

- **For new fiber builds, service providers should have a 12 to 24 month window, depending upon the size of the Applicant's District, between signing the contract and completing the installation of the network. This will allow Applicants and Service Providers to work together to determine the specific transition date and avoid some instances of duplicate funding requests. It is difficult to pin down an exact cut-over date with fiber builds due to local permitting requirements and construction issues that come up that are outside of a Service Provider's control. Flexibility is sometimes needed at the last minute, which makes pinpointing an exact date for PIA reviews challenging. If Applicants plan ahead, such as suggested in the next bullet, this problem can be averted. However, Applicants don't always plan ahead. This leads to instances where Applicants must file funding requests for two separate vendors that overlap in one funding year. While we understand the FCC's need to reduce overlapping funding request, applicants and service providers need a way to deal with this transition that is easy and efficient.**
- **USAC should encourage Applicants to plan ahead of their contract expirations to allow themselves time to bid and contract with vendors 12 to 24 months prior to the expiration of their current contract. This will help Applicants avoid paying higher monthly charges to their current Service Provider for a short term contract that extends the agreement while the new provider is completing installation. Ideally, Applicants would want to have time for the new network to be up and running before the old network is disconnected. Explaining this process more specifically on the web site will assist Applicants during the planning and installation processes as well.**
- **USAC should clarify on the web site how Applicants can use the Form 470 from the previous year for the coming year when USAC is in the process of updating Forms. As outlined in the USAC newsletter dated August 8, 2014, this should be researchable and spelled out in more detail on the web site.**

2. Paragraphs 203 and 204: With reference to paragraphs 203 and 204 in the Report and Reform Order released July 23, 2014, regarding Easing the Signed Contract Requirement, we have the following comments:

RESPONSE: This rule change could have far reaching negative implications, including but not limited to: difficulty completing PIA Review responses, denial of funding for lack of an underlying agreement, and an uptake in appeals to USAC and the Commission to clarify contractual issues. These issues are more specifically addressed as follows:

- ***No "legally binding" Agreement between the parties*** **- Some states' procurement laws and/or School Districts' board policies require Board approval, as evidenced by a signature from a School Board member, in order for the contract to be considered legally binding. An email from an IT Director or a Purchasing Director awarding the business to the Service Provider would not meet this standard. Easing the contract requirements could cause confusion for Applicants who may think they still have a "legally binding" agreement because they have followed E-rate requirements. This could be more problematic for smaller schools or libraries that have limited staff to handle these legal questions. In addition, it is problematic for smaller Service Providers who would need to track each state's regulations to determine how contracting authority is defined or given to municipal entities. The previous requirement of having a signed contract eliminates the necessity for this additional work or this ambiguity.**
- ***Denial of funding because it is determined that there is no "legally binding" Agreement after work is already done*** **- At the time of completing their orders and accepting service, Applicants' internal procedures often require that they send out standard purchase orders containing terms and conditions not specifically stated in their 470 or corresponding RFP, if one is issued. In the absence of a fully executed contract, Applicants may deem those terms and conditions to be applicable - whereas the Service Provider may not be willing to accommodate certain conditions, such as those that limit the remedies available to them at law. Since this process is done after the Form 471 is filed, it could cause potential conflicts between Applicants and Service Providers that could ultimately result in a determination that there was no legally binding agreement between the parties at the time the Form 471 was filed, which could then result in a loss of funding for the Applicant.**
- ***Conflicting terms in the RFP and Bid documents need to be clarified*** **- Oftentimes, RFPs and bidding documents contain conflicting terms and conditions - or bids contain numerous options that can be exercised at the discretion of the Applicant. Without a fully executed contract where these terms are negotiated to the satisfaction of both parties, miscommunication and misunderstandings will be unavoidable. How will USAC and/or the Commission resolve such misunderstandings?**
- ***Delays in processing Funding Requests due to lengthy PIA Review*** **- The easing of the contract requirement is likely to cause delays in processing the approvals of many E-Rate applications and negatively impact the new goal of issuing funding decisions by September 1. If a simple email stating the acceptance of the offer suffices for E-rate purposes, this may result in a circumstance where the parties don't actually have a "legally binding" Agreement, as noted above. Due to this ambiguity, we believe that Applicants and Service Providers may have difficulty completing PIA Review responses to the satisfaction of the Reviewer and more than one round of PIA Review questions may be needed to process the funding request.**
- ***Past history shows that easing this requirement results in an uptake in Appeals to the FCC and to USAC*** **- Several years ago, when this rule was not enforced as stringently, there were times that amendments were needed between the parties to clarify the terms and conditions for certain service offerings. This resulted in the Schools and Libraries Division ("SLD") finding that the changes were outside of the original nature of the offer/acceptance and resulting contractual relationship. As a result, the SLD denied certain funding requests and many of them were appealed to the FCC for further**

determinations. We believe that easing the requirements could once again open the door for additional issues, which will likely result in an increase in appeals for denied funding. We believe that additional information gathering is needed in this area before the implementation of any ease in contractual requirements is put into effect.

- **All of the outcomes noted above are counter-intuitive to the goals identified in the *E-rate Modernization Report and Order*[1].**
- **Because a signed contract is always best to clarify all terms and conditions between the parties, we suggest that maintaining the original deadline of having a signed contract by the time the 471 is filed is the most straight forward and simple approach. However, if the FCC believes that the biggest concern is the time to complete the contract, then we recommend a 15 or 30 day window after the Form 471 filing deadline for completion of contract signatures. This would provide the additional flexibility that the FCC wants to provide Applicants, but also removes the uncertainty and ambiguity of no signed contract and removes the possibility of misunderstandings and legal issues noted in this section.**

3. Paragraph 271: As part of our continuing efforts to promote cost-effective purchasing, we propose to limit E-rate support to eligible services purchased under contracts of no more than five years, including voluntary extensions. We propose to exempt from this requirement contracts that require large capital investments to install new facilities expected to have a useful life of 20 years or more. Currently, our rules do not specify a maximum length for contracts for E-rate supported services, but as the Commission explained in the *E-rate Modernization NPRM* we seek to balance the advantages that longer term contracts give applicants against the opportunity that shorter term contracts give applicants to take advantage of rapidly falling prices in a dynamic marketplace.[657]

Per Appendix F: **"Section D:** *Maximum term for multi-year contracts*. Our requirement that contracts for E-rate supported services not exceed five years, which an exception permitting contracts for deployment of new fiber to schools or libraries to not exceed ten years, could increase reporting requirements for some applicants by requiring them to negotiate contracts more frequently than they otherwise would. Our interest in promoting cost-effective purchasing justifies this additional burden".

RESPONSE:

- **How will the FCC and USAC know which contracts require fiber builds? Just because the District does not request a large upfront payment does not mean that there is not a large capital investment that must be made to install new fiber facilities. The current 470/471 process does not provide this information in any way for a judgment to be made about which contracts should be subject to the exception. Many of our customers have chosen 10 year contracts and enabled us to spread the significant investment of a fiber build over the life of the contract to provide a cost effective monthly recurring charge and no nonrecurring charge. The Commission must detail how the exception process will be implemented.**
- **Further, because the useful life of fiber to provide high-speed bandwidth options to School Districts/Libraries is 20 years or more, limiting the term of Agreements for this type of service to only 5 or 10 years, including extensions, would limit the advantage Service Providers can give to School Districts/Libraries by spreading investment costs over longer lengths of time.**

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[1] *Modernizing the E-rate Program for Schools and Libraries,* WC Docket No. 13-184, FCC 14-99, Report and Order and Further Notice of Proposed Rulemaking (rel. July 23, 2014) (*E-rate Modernization Report and Order*).

- **This limitation also assumes that investment costs for fiber network builds will continually decrease over time or will be associated with one-time fees. However, in some areas, utility poles are overcrowded and aerial installation of fiber is not feasible, which increases the upfront investment costs to install fiber underground. Furthermore, due to increasing regulatory constraints by municipalities and state public service commissions, fees associated with right-of-way usage have drastically increased in recent years. Pole attachment fees from municipalities and/or other utility companies have also increased and continue to trend upward. Please see our comments under Paragraph 272 below for additional information.**
- **Allowing contract terms that fully utilize the life cycle of fiber of 20 years or more under varied contract terms accomplishes four goals that the Commission addresses in the *E-rate Modernization Report and Order*: 1) reduces the administrative burden that would be borne by School Districts/Libraries to initiate a competitive bidding process and/or change network vendors; 2) allows School Districts/Libraries to take advantage of spreading regulatory and up-front costs over the life of a contract in the form of smaller monthly or annual payments; 3) helps bolster the health of the Universal Service Fund and spread desperately needed financial resources to more Schools/Libraries each year by avoiding large up-front costs and/or large monthly payments; and 4) locks in long term pricing that can't be increased as regulatory compliance costs increase over the life of a contract.**

4. **Paragraph 272:** In the *E-rate Modernization NPRM*, the Commission sought comment on whether it should limit the maximum term (including voluntary extensions) of multi-year contracts that applicants may enter into for E-rate-supported services to three years.[658] We agree with those commenters who argue that a three-year maximum contract length does not adequately balance the needs of applicants against the benefits of regular contract negotiations. Some commenters suggested that five years was the right length for E-rate supported contracts.[659] However, the record is not particularly robust on how a five-year maximum contract length would affect schools' and libraries' ability to purchase from state master contracts, which often exceed five years, or to enter into contracts that seek to spread the cost of infrastructure builds over many years. Therefore, we invite commenters to revisit the issue of maximum contract length, and we seek comment on the benefits and drawbacks of our new proposal.

RESPONSE:

- **Shorter contracts give an unfair advantage to legacy networks which often have bandwidth limitations and limit the competitive options available to school districts and libraries because new Service Providers have to re-coup their investment costs over a shorter period of time.**
- **Longer term contracts (10 to 20 years in length) allow new entrants designing and building new fiber networks to amortize significant investment costs over a longer term period, allowing lower annual costs for Applicants. This shifts the burden from the Applicant to the Service Providers to pay any significant construction costs upfront. In addition, this spreads the USAC funds out more equitably over time rather than paying large upfront construction costs for certain Applicants on a shorter cycle.**
- **The assumption that market prices are falling may be the case for Internet services and possibly some legacy WAN services at lower bandwidths. On the other hand, the costs to build fiber connections to all Applicant sites is not falling. For instance, the construction labor market prices have continued to increase over time and fiber networks have become more expensive to build due to more congested poles and public right of way. Many municipalities are increasingly charging significant permitting and right of way fees to**

Service Providers. Some municipalities are even building their own fiber based networks and are concerned about Service Providers competing with them so they make it very difficult to obtain right of way permitting and licenses needed. Many electric utility providers have increased permitting and pole attachment fees for aerial fiber construction and placed moratoriums on any new aerial construction. These marketplace changes for new fiber construction negate those assumptions.

- **The majority of Unite Private Networks School District customers have 10 year contracts and affordable monthly rates with no upfront construction costs. By limiting the streamlined multi-year contract process to only those contracts that are 5 years or less in length, the Commission provides a disincentive for Schools/Libraries to enter into contracts with alternative providers that can offer very high bandwidth at affordable rates on longer term contracts. We recommend Applicants have the choice to pick the contract length that best meets their needs and that the multi-year contract streamlined process be enabled for contracts that are longer than 5 years as well, especially with the stated FCC goals of 10 Gigabit services.**
- **How will USAC be able to identify which Funding Requests include a fiber build or not? Relying on the criteria of whether a request for an upfront payment is part of the funding request does not produce fair results. Additional clarification is needed on the Form 471 for Applicants to make this identification.**

5. Paragraph 273: On the issue of whether five years strikes the right balance, we seek comment on whether there are particular E-rate supported services for which we should require shorter maximum contract lengths because the price of such services is so dynamic or for other reasons. We seek comment on what such services might be, and why we should require all contracts for such services to be less than five years, and how much less. Are there services for which we should allow longer maximum contract lengths? What might such services be and why should we allow longer maximum contract lengths for such services? How long should the maximum contract length be for such services?

RESPONSE:

- **USAC should not dictate what the maximum contract length should be for fiber builds that provide bandwidth that meet the Applicant's current WAN needs, are scalable to meet the Applicant's future needs, and are consistent with the Commission's goals as stated in the *E-rate Modernization Report and Order*.**
- **The 5 year limitation tends to support legacy providers and discourages new entrants into the market to build fiber and provide the 10 Gigabit bandwidth that Applicants need and that meets the Commissions goals for connectivity.**
- **The model which evenly spreads monthly payments over a longer term contract, such as 10 to 20 years, encourages distributing the most funding to a larger number of Applicants by funding a smaller portion each year rather than large payments upfront. This promotes the long term health of the fund because the funds are distributed more evenly over a longer period of time. In addition, this helps with budget planning for the Applicants, avoiding spikes of upfront payments and shifting the capital burden to Service Providers.**

6. Paragraph 274: *State and other master contracts.* We believe that limiting most contracts for E-rate supported services to five years generally strikes the right balance between the interests described above. However, we seek comment on how this approach will affect schools' and libraries' current procurement processes, and in particular how it will affect their ability to purchase from state or other master contracts, service agreements, or joint purchasing agreements. Some commenters have expressed concern that the maximum length of a contract for E-rate supported services should be determined by – or at least should not conflict with – state and local procurement decisions and laws.[666] As a practical matter, no commenter has offered an example of a state law that would require service contracts to extend beyond five years and the record demonstrates that many of these state and local procurement laws do not allow contracts beyond five years.[667] If a state has a requirement that would conflict with a maximum duration that we set, we seek comment on whether we should grant applicants in that state a waiver of this rule or select a longer duration, consistent with the laws and rules in all states. Are there other reasons that we should allow E-rate applicants to purchase E-rate supported services using state and other master contracts, service agreements or joint purchasing agreements with terms that are longer than five years?

RESPONSE:

- **For those states that allow contracts over 5 years, USAC should allow those Applicants to choose longer term contracts for services that meet the bandwidth goals and are cost effective in the bidding process. In most cases, Applicants have internal processes in place (such as Purchasing Procedures and Guidelines) that meet their state requirements. If the Commission were to require a shorter length of a contract than what is allowed by the state, smaller Applicants may have difficulty creating additional internal processes that would meet the Commissions requirements.**
- **This longer term multi-year agreement should be eligible for the streamlined process as well.**
- **Other state or master contracts that are longer than 5 years that support the bandwidth goals should also be eligible for the streamlined processes.**

7. Paragraph 275: ***Alternatives to maximum duration.*** We also seek comment on other ways to achieve our goal of ensuring that schools and libraries can take advantage of falling prices for E-rate supported services while minimizing administrative burdens. For example, would it be sufficient to require that contracts for E-rate supported services include a provision requiring the applicant to renegotiate the contract or otherwise seek lower prices at least once every five years? How could we ensure such renegotiation results in the best possible pricing for E-rate supported services? Alternatively, might we permit longer-term contracts for E-rate services if they include provisions that would help ensure that applicants enjoyed the benefits of declining prices of bandwidth and their likely increasing demand for it? Thus, should we allow a contract that sets a fixed price for an increasing level of bandwidths over the term of the contract, based on applicants' anticipated needs and the rapid declining price of bandwidth?

RESPONSE:

- **Again, as noted above, the assumption that market prices are falling is not accurate as it relates to building new fiber connections to all Applicant sites, as these costs are affected by construction labor market prices that increase over time, increased regulatory requirements from municipal and state agencies, and more congested utility poles.**
- **It is better for the Applicant and the Service Provider to negotiate the price increase at the time the need arises. This enables vendors to take advantage of price decreases in equipment costs that are required in order to provide higher bandwidth on fiber based services at the time the increased bandwidth is needed. When Applicants are ready for an upgrade, they generally want to perform them quickly, easily, and efficiently, without**

much administrative burden. Sometimes the need arises more quickly than the E-Rate cycle requires. As long as Service Providers offer contracts that are scalable and follow Lowest Cost Provider ("LCP") principles in their pricing to Applicants at the time their bandwidth needs require upgrades, Districts should have the flexibility to upgrade at any time during their long term contract, without waiting for another E-Rate cycle. Additional clarification from the FCC or USAC is needed on how upgrades should be handled.

- **Requiring provisions in the contract that contemplate renegotiation of the contract at a certain point in time can be complicated and difficult to implement fairly to both parties. The burden of proof of what is fair pricing at the time is very subjective since a certain investment was made and each deal is custom priced based upon specific geography and School district/Library requirements. If the Service Provider expects to spread all of its costs, including build costs and maintenance costs, over the life of a ten year agreement at LCP pricing and five years into the agreement, the customer gets to renegotiate, how does the Service Provider recoup its original investment? You will find Service Providers pricing agreements that are 10 years at 5 year rates to protect themselves. That defeats the purpose of long term contracts.**

8. <u>Paragraph 276:</u> *New builds.* We also seek comment on our proposal to allow longer contracts for services that require infrastructure build-outs. We recognize that long-term contracts may be the most efficient way to contract for the installation of a new dedicated fiber connection, or other such facility, which is likely to have a useful life of 20 years or more. However, in response to the *E-rate Modernization NPRM*, we received no comments arguing that providers need the flexibility to offer such long-term contracts, or that applicants need the option of long-term contracts to purchase affordable services. We therefore seek focused comment on how to ensure the most effective competition for the provision of new fiber builds, or other such infrastructure projects.

RESPONSE:

- **Based on footnote 160 of the *E-rate Modernization Report and Order*, the Commission must act in a competitively neutral manner. Specifically, the footnote states: 47 U.S.C. § 254(h)(1)(B); see also 47 U.S.C. § 254(h)(1)(B) ("The Commission shall establish competitively neutral rules . . . to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries.")**
- **In order to provide competitive pricing, Service Providers building new fiber to Applicants must have the flexibility of offering longer term contracts, such as the 10 to 15 year contracts that the majority of our customers utilize. This allows Service Providers to spread the investment for building fiber networks over the longer contract to make it affordable for school districts and libraries and to avoid large upfront payments. In the alternative, shorter contract terms require higher monthly or annual payments for Service Providers to recoup their investment costs before the contract term expires. This puts Service Providers seeking to enter into new territory at a competitive disadvantage to incumbent providers, which is contrary to United States Code sections identified above.**

<u>9. Paragraph 277:</u> The E-rate program currently provides support for special construction charges separate from the charges for recurring services. Does this obviate the need for longer-term contracts? We also seek comment on whether the winner of an initial short term contract would likely face any serious competition over subsequent terms, once it had recovered its capital investment. We seek comment on whether a 20-year contract might be most likely to allow a service provider to amortize its installation costs once over the entire contract, while some indexing or similar arrangement could provide E-rate applicants with the increasing bandwidths they would likely desire over the period at no additional cost above the costs of upgrading the electronics to provide the higher bandwidth.

RESPONSE:

- **The term "special construction charges" is a term coined by the carriers. What does that really mean? It is a term that the carriers refer to where the construction is being built specifically for that Applicant rather than just part of their normal network. It requires the carriers to collect that money upfront. However, not all vendors espouse that model. Many of the new fiber entrants are willing to make the investment upfront in fiber infrastructure for a school district or library, as long as they know they can recoup that investment over the period of a long term contract. So, just providing for special construction charges separate from the charges for recurring services does not obviate the need for longer term contracts. They are two alternative models.**
- **There is nothing that says a 20 year contract is the magic length of time. It could be 7, 10, 15, or 20 years. This would depend upon the investment needed to provide fiber infrastructure in the form of leased services at very high bandwidth, such as 10 Gigabit services. Using this method, each Applicant's service is priced on a custom basis, depending upon the costs and how they can be spread most cost effectively to meet that Applicant's budget and be competitive in that particular marketplace.**
- **Service providers should be able to capture some profit margin over the costs of the equipment to upgrade the electronics to provide higher bandwidth. Stating this generally in the contract language enables school districts and libraries to take advantage of the falling costs of electronics over the longer term contract and allows Service Providers to maintain their profit margin and continue to offer stabilized monthly/annual pricing. By not having to specify a specific dollar amount for the upgrade, this enables the pricing to be competitive in the future rather than committing to a certain amount upfront. Applicants should be able to pay for that upgrade in either a small increase in monthly fees or a one-time cost, whichever is more cost effective for their budget at the time. USAC should not dictate how the Applicant should pay for that, but rather leave that up to negotiations between the Applicant and the Service Provider. As long as all bidders follow the same instructions for upgrade pricing, the Applicants should be able to judge this information fairly.**
- **Too much regulation in this area will result in limited competitive opportunities for Applicants. Different companies approach the marketplace with their unique competitive advantages based upon their creativity, strategies, financial capabilities, and assets. Dictating that everyone should approach the market in the same manner stifles this creativity and choices for Applicants.**

10. Paragraph 278: Assuming that we adopt some restriction on the duration of contracts for E-rate services discussed above, we recognize some existing long-term contracts for E-rate supported services are likely to violate such new restrictions. While we would require all new contracts executed after the effective date of the proposed rule to be in compliance, we seek comment on whether we should grandfather existing E-rate contracts, and if so, for how long a period of time. We also seek comment on whether, if we did not grandfather such contracts, we would have legal authority to require existing long-term contracts to comply with a limitation. Further, we seek comment on whether, if we do have such authority, we should set a date by which parties would be able to amend existing contracts to comply with such a limitation, and if so, how much time we should allow for such amendments.

RESPONSE: We strenuously agree that all contracts that were in compliance before the proposed rulings takes effect should be grandfathered until the contracts are completed for the following reasons:

- **Those contracts were made in good faith at the time of completion and signature.**
- **The Service Providers that entered into those contracts spread their costs over a certain period of time in order to provide the particular monthly rates for those contract terms. Forcing Service Providers to cut short the contracts would require them to increase their monthly costs because they would not have the time and ability to recoup their original investment they expected at that rate of return.**
- **Requiring all Applicants to host new competitive bidding processes for contracts that exceed the term limitations would be administratively and unduly burdensome on them. Many Applicants may have numerous contracts to re-bid, which is a difficult undertaking to manage especially for smaller Applicants. This would be counter-intuitive to the overall goal of the Commission to balance the administrative burden with any possible savings that Applicants may receive during a re-bidding process. In fact, many Applicants will likely need to hire consultants to assist them through the complicated process of hosting numerous competitive bids at one time, which will increase their financial burden for remaining in compliance with E-rate regulations. In contrast, allowing long term contracts to run their course and then requiring Applicants to re-bid them will not change the administrative burden Applicants would have regardless of the rule change.**

11. **<u>Paragraph 293:</u>** For example, to ensure that applicants receive the most cost-effective services possible, should we require applicants to consider services on all master contracts available to them in the bid evaluation process? What would be the advantages and disadvantages of such a rule? How could we ensure that applicants would be aware of the services available to them on master contracts? Would requiring applicants to consider options from all master contracts available to them in their bid evaluations be unduly burdensome for small applicants?

RESPONSE:

- **There should be no limitations set for what Service Providers or opportunities Applicants can consider during their open and competitive bidding processes. Under the Commission's current rules, Applicants must consider all options using the same criteria and the same discount rate. This is the only way for bids to be reviewed in a competitively neutral manner. Any requirement, restriction or limitation that changes this process has the potential to harm the competitive market by giving certain vendors an unfair advantage.**
- **Because price must be evaluated as the most heavily weighted factor, requiring Applicants to consider services on all master contracts could be problematic for them as many master contracts contain terms and conditions that are contrary to Applicants internal procedures and/or Board of Director mandates. Many Applicants do not have the infrastructure to complete a legal review of the terms and conditions contained in available master contracts at the time a Form 470 or RFP is issued. Under E-rate's current evaluation regulations, if an Applicant does not identify specific areas that would be cause for disqualification in a bidding scenario or identify other areas for evaluation that are significant but weighted**

less than price, it would be possible for a master contract that contains provisions that an Applicant can't accept to be selected as the successful bid. In that case, it would likely not be noted until a legal review of the contract was completed at the time the bid was awarded. While Applicants may have the ability to disqualify the master contract after the award and award to the bidder who scored the next highest in the evaluation process, this will add to the administrative burden of Applicants and could dissuade many from obtaining the financial assistance they need to deploy broadband services at the goals set in the *E-rate Modernization Report and Order*.

- **Providing a central repository for Applicants to identify master contracts that may be available to them for each state and allowing them the opportunity to evaluate them for compatibility with their needs and administrative infrastructure could provide Applicants resources and options for vendor selection while not limiting them by requiring that they compare master contracts during their bidding processes.**

12. Paragraph 294: The Education Coalition has proposed a model that would provide an additional 5 percent discount rate for consortia meeting minimum size standards.[681] The Education Coalition's specific proposed requirements for receiving an additional incentive are that the participating entities: (1) serve at least 30 percent of the students in a state, include at least 30 percent of the local education agencies in the state, or be designated as a consortium by the state, (2) document the participation of individual entities, (3) maintain a level of governance, (4) perform large-scale, centralized procurement that results in master contracts, and (5) open participation to all eligible schools and libraries, including public charter schools and private schools.[682] We seek comment on the Educations Coalition's proposal and more generally on the merits of providing an additional 5 percent incentive for consortia.[683]

RESPONSE:

- **As noted above, the Commission must enact regulations that are competitively neutral. Allowing a consortium to receive a larger discount than individual Applicants puts the Service Provider that has been selected by the consortium at a competitive advantage over other Service Providers. For example, if the incumbent provider in the area has a long-term contract with a consortium and the consortium receives an additional 5% discount rate for all of its participants, new providers seeking to offer services in that area would have to have pricing that is at least 5% lower than the incumbent provider in order to win the contract – especially given that price must be the most heavily weighted factor in bid evaluations in order to remain complaint with other Commission regulations. This puts new or smaller providers at a competitive disadvantage, especially in areas where there is not a large margin in the market pricing from one vendor to another.**
- **An additional concern with some consortiums, especially state wide consortiums, is that they often want to select only one provider for the entire state. This eliminates the smaller providers from bidding on these opportunities. If Applicants must consider these consortiums and they are given the extra 5% discount, again this gives the consortium provider a competitive advantage. Some consortiums make their decisions on a per site basis, enabling even smaller competitors to pick the particular sites that they can serve competitively. That provides a better situation then the all or nothing arrangement. But, it is important to give Applicants the choice to look at both consortium offerings, as well as individual vendor offerings.**
- **If consortium do in fact provide better pricing due to their volume, then this should stand on its own without need for further discounts.**

- **For these reasons, we don't believe that additional discount percentage points should be afforded to consortium members over individual Applicants. Applicants will already enjoy reduced administrative burdens through their participation in a Consortium. In addition, the Reform Order has already removed some of the administrative burdens on the Consortiums themselves and prioritized their applications to move more quickly through the process.**

13. Paragraph 295: Would applicants be more likely to form consortia if an additional 5 percent discount were available for consortia? Should the discount of consortia be limited to the otherwise-applicable top discount rate, regardless of the additional discount (i.e., top discount of 90 percent for category one purchases and 85 percent for category two purchases)? The Education Coalition contends that high- performing state and large regional consortia have a track record of lowering prices.[684] Should demonstrated effectiveness in lowering prices be a condition of any additional consortium discount? For example, should an additional discount only be available to consortia that show that their pricing is at least 10 percent better than the state average? Would the minimum size thresholds in this proposal ensure that consortia are large enough to receive significant discounts? Would states designate small groups that do not have much bulk buying power as consortia so that they can take advantage of the additional discount? Should we therefore limit or eliminate the separate state designation prong of the Education Coalition proposal? How would the Education Coalition's proposal affect those E-rate participants who, because of their geographic location, receive the best prices from smaller, local service providers? The Education Coalition's proposal would allow libraries to participate in consortia eligible for an additional discount rate, but only if the libraries participate in consortia with schools and school agencies. Are there ways it should be modified to ensure libraries can get the benefits of such consortia? For example, should we require that all such consortia make their prices available to all libraries within the area encompassed by the consortium, and allow libraries to take advantage of these contracts without conducting a separate bidding process? Should there be an alternative approach that allows for consortia made up only of libraries or only of schools? How would this proposal affect schools and libraries on Tribal lands or operated by Tribal Nations? We also seek comment on any administrative challenges that consortia face that were not raised in comments to the *E-rate Modernization NPRM*. What rules can the Commission enact to alleviate those issues?

RESPONSE:

- **As noted above, Applicants already enjoy certain relief from administrative burdens when they participate in a consortium. In addition, at least on its face, participating in a consortium is done to achieve better pricing. Adding an additional reduction in the cost to Applicants who participate in consortia will only cause difficulty in the competitive bidding process.**
- **Consortia participation may be an effective way of driving prices downward for certain products and legacy services. However, it is not effective for services that require a large capital investment - such as new fiber builds. As noted above, Service Providers selected by consortia are generally the larger incumbent providers because they have the infrastructure to service larger geographic areas where consortia select only one vendor. This already limits competition because smaller providers seeking to enter a market must include their investment costs in their pricing structure. Because the number of Service Providers who can cover larger geographic areas with little to no infrastructure build is limited to incumbent providers, requiring consortia participation also limits healthy competition as incumbent providers have no opposition and no incentive to provider lower**

prices. Providing additional discounts as proposed above makes it even more difficult for smaller providers to be competitive.

- **As stated above, if a consortium does in fact provide better pricing due to their volume, then this should stand on its own without need for further discounts. Providing consortia extra discounts is an anti-competitive incentive for consortia to be formed that may or may not truly benefit the Applicant members when it comes to providing new fiber builds.**

<u>14. Staff Report:</u> This section is from the latest staff report: As a starting point for stakeholder feedback, the analysis above highlights several questions that were raised in the Further Notice: 1) What is the outlook between 2015-2019 for demand growth in category one broadband services? 2) How will that growth vary as between last-mile and Internet access? 3) What are the most important drivers of that growth, and in particular what are the likeliest scenarios for the relationship between volume and price paid by schools and libraries? We appreciate and look forward to the comments of all stakeholders on this analysis and the questions it raises, and to synthesis of this and other information into their comprehensive recommendations regarding E-rate's longer term budget.

RESPONSE:

- **From our perspective, only fiber will be able to meet the ever-increasing future bandwidth demands. This means that many areas have little or no higher bandwidth option, unless new fiber is built and installed in their area. For Service Providers entering new markets, there is a fixed cost component to all fiber builds for both WAN ("last-mile") and Internet installations. Once the base investment is made by the Service Provider, increases in bandwidth can be achieved with minimal increases in costs to the Service Provider, which results in minimal increases in charges to Applicants. Higher volume commitments from a consortium (meaning delivery of service to numerous locations across a large geographical area) will not automatically lead to lower monthly or recurring charges for Applicants for new fiber WANs because the fiber WAN infrastructure cost borne by the Service Provider is a direct, local cost associated with delivery to each individual school or library facility location. Service Providers' fiber WAN costs are more impacted by distances (between school sites), remoteness of the Applicant sites, and local municipal or utility requirements (onerous Right of Way or pole access fees) than they are by the amount of bandwidth on the network. These costs are what drive pricing available to Applicants in any given marketplace.**