

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	RM-11841
Petition for Rulemaking to Amend and Modernize)	
Part 54 of the Commission’s Rules to Prevent)	CC Docket No. 02-6
Waste in the Universal Service Fund E-rate)	
Program)	WC Docket No. 13-184

OPPOSITION TO PETITION FOR RULEMAKING

INCOMPAS, by its undersigned counsel, hereby submits this opposition to the petition by Central Texas Telephone Cooperative, Inc., Peoples Telephone Cooperative, Inc. and Totelcom Communications, LLC (“Texas Carriers”) urging the Federal Communications Commission (“Commission” or “FCC”) to initiate a rulemaking that would amend the competitive bidding requirements of the schools and libraries universal service support mechanism (“E-rate program”).¹

I. INTRODUCTION & SUMMARY

INCOMPAS, the Internet and competitive networks association, is the preeminent national industry association for providers of Internet services and competitive communications networks. We represent companies that provide competitive residential broadband Internet access service (“BIAS”), as well as other mass-market services, such as video programming distribution and voice services in urban, suburban, and rural areas. Our members include small fiber providers that are building more fiber than and are offering services that are competitive to

¹ Petition for Rulemaking of Central Texas Telephone Cooperative, Inc. *et al.*, RM-11841; CC Docket No. 02-6; WC Docket No. 13-184 (filed May 22, 2019) (“Petition”).

large incumbents. We also represent companies that are providing business broadband services to schools, libraries, hospitals and clinics, and businesses of all sizes. We have wireless and satellite members that are offering services to residential and business customers. Finally, we represent transit and backbone providers that carry broadband and Internet traffic, and online content and video distributors (“OVDs”) that offer various content and communications services and video programming over BIAS to consumers.

As advocates for competition policy and vendors in the schools and libraries program, INCOMPAS has serious reservations about the Texas Carriers’ proposal and the impact that it could have on E-rate and the Universal Service Fund (“USF”). In its opposition, INCOMPAS contends that the petitioners’ filing is deficient in that it fails to provide sufficient facts and data to justify Commission consideration. Further, as INCOMPAS describes below, changes to the E-rate program’s competitive bidding requirements are unnecessary, given the current state of competition and given that Commission rules require applicants to select the “most cost-effective service offering” using price as the primary factor and following state and local competitive bidding rules. Additionally, INCOMPAS describes how the proposal would significantly distort the competitive process, result in higher prices, add significant delay for applicants trying to upgrade their broadband services, and likely compel schools and libraries to select the incumbent provider to receive E-rate funding in a timely fashion. INCOMPAS urges the Commission to deny the petition.

II. PETITIONER HAS FAILED TO MEET THE REQUIREMENT OF PROVIDING SUFFICIENT FACTS AND DATA TO SUPPORT A PETITION FOR RULEMAKING.

In order to petition the Commission to amend a rule or regulation, an interested party is required to “set forth the text or substance of the proposed rule, amendment, or rule to be

repealed, together with *all facts, views, arguments and data* deemed to support the action requested, and shall indicate how the interests of petitioner will be affected.”² Petitions that fail to meet the Commission’s requirements “may be denied or dismissed without prejudice to the petitioner.”³ The Texas Carriers’ petition to amend the competitive bidding requirements of the E-rate program fails to meet the regulatory burden necessary for its consideration as it omits information that is material to the Commission’s examination of whether a rulemaking would be appropriate in this instance.

Rather than provide a detailed accounting of the facts and circumstances that led the petitioner to conclude that a comprehensive overhaul of the E-rate program’s requirements is justified, the petition contains one paragraph of vague and unsupported evidence that, at most, raises additional questions about the Request for Proposal (“RFP”) process (or processes) that is the basis of their complaint. It does not justify an entire rulemaking, and as we explain further below, does not adequately support the major amendment of the E-rate rules requested.

E-rate applicants, like the region-based consortia groups mentioned by the petitioners, have many considerations when selecting a broadband provider. The Texas Carriers’ petition does not provide the requisite information to determine whether the Commission’s competitive bidding requirements, in this instance, failed to select “the most cost-effective offering.”⁴ For example:

- The petition does not indicate which RFP or RFPs it is referring to.

² 47 C.F.R. § 1.401(c) (emphasis added).

³ 47 C.F.R. § 1.401(e).

⁴ 47 C.F.R. § 54.503(c)(2).

- The petition does not indicate whether the petitioners availed themselves of the opportunity to participate in the RFP or provide indicia as to why the companies did not bid for a portion of the RFP issued by the consortia group as allowed by the Commission in its 2014 *E-rate Modernization Order*.⁵
- The petition fails to provide a basic analysis of the current prices the Texas Carriers charge schools and libraries for the use of their fiber connections.
- The petition fails to include any analysis of the application of the providers that did respond to the consortia’s RFP to support their assertion that these applicants “did not propose the most cost-effective solutions.”
- The petition does not define the term “overbuild” or provide information on the scope of the winning bidders’ project.
- The petition does not provide any analysis as to the scope of the alleged issue (Texas only or rural areas only, for example), and therefore fails to provide any supporting data for the asserted harm to the E-rate program.
- The petition does not provide a total cost of ownership analysis or examine district-level changes to service levels or standards that the applicant had to consider when selecting a broadband provider.
- The petition indicates that the existing fiber connections were “at least partially subsidized by USF” without providing additional information about their funding source or the percentage that was covered by the USF. Furthermore, the petitioners do not indicate which USF program—E-rate, Rural Healthcare Program, or the high-cost program—to which they are referring.

In the absence of this information, it is nearly impossible to determine whether the decision to select a new provider of broadband service was justified on the facts or if a policy imbalance exists that would require the Commission to consider amending its competitive bidding requirements. Even if petitioners provide that data and even if every assertion made is accurate, petitioners must still show how what may be isolated incidents would justify a rulemaking as

⁵ *Modernizing the E-rate Programs for Schools and Libraries*, WC Docket No. 13-184, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870, 8943 (2014) (“*E-rate Modernization Order*”) (reminding stakeholders that consortium may invite vendors to bid on services to a subset of consortia members).

opposed to, for example, some action by Universal Service Administrative Company (“USAC”) or the Commission with respect to a particular funding request.

Similarly, petitioners indicate that they have “consulted with FCC staff and other industry stakeholders regarding its concerns.”⁶ However, the *ex parte* letters filed by the Texas Carriers provide only limited data on the rate of fiber connections to schools in Texas. They offer no additional insight or facts into the circumstances surrounding the selection of competitors to serve the broadband needs of the schools and libraries of the region-based consortium.⁷ The petitioners also assert that the “use of E-rate funds to overbuild existing networks is not just happening in Texas, but is happening in other states as well” without providing any factual basis for that statement.⁸

The Commission’s rule requiring that petitioners provide the facts and data necessary is to ensure that neither the Commission’s nor other interested parties’ resources are wasted on unsupported requests. Here, Petitioners’ allegations are wholly deficient, uncorroborated and do not provide sufficient information for comment, much less for the Commission to initiate an entire rulemaking. Because the Texas Carriers’ petition fails to provide “all facts . . . and data deemed to support the action requested,” the petition should be summarily denied.

⁶ Petition at 2.

⁷ See Letter from Donald L. Herman and Clare C. Liedquist, Counsel to Central Texas Telephone Cooperative, Inc., Peoples Telephone Cooperative, Inc. and Totelcom Communications, LLC to Marlene H. Dortch, Secretary, FCC, WC Docket 13-184 (filed Nov. 19, 2018) (expressing concern about the use of USF for fiber overbuild and producing a report from the Texas Governor’s Office on school fiber connections).

⁸ See Letter from Donald L. Herman and Clare C. Liedquist, Counsel to Central Texas Telephone Cooperative, Inc., Peoples Telephone Cooperative, Inc. and Totelcom Communications, LLC to Marlene H. Dortch, Secretary, FCC, WC Docket 13-184 (filed June 18, 2019).

III. NO CHANGES TO E-RATE COMPETITIVE BIDDING RULES ARE NECESSARY AT THIS TIME.

In addition to being factually incomplete, the Texas Carriers' petition is unnecessary because the E-rate program is best served by maintaining competitive providers access to the bidding process and reaffirming the safeguards that the Commission put into place in 2014 that already allow smaller providers to respond to applicant bids. This combination has helped the applicants to the E-rate program get the services that their schools and libraries need while keeping the overall program under its budget cap.⁹ The Texas Carriers' proposal, if adopted, would harm the pro-competition policies that the Commission has championed and would ensure that the program and applicants are incapable of getting the best value for their broadband connections.

a. Competition Ensures That E-rate Applicants Receive The Services That Best Meet Their Needs

As an initial matter, INCOMPAS shares the Commission's goal of encouraging robust competition in the E-rate program and ensuring that, as vendors, all broadband providers enjoy the same opportunity to compete for program funding through a robust competitive bidding process. As the Commission is aware, in a competitive communications marketplace, generally, consumers will be better off and providers will be more inclined to invest in and deploy next generation networks. Robust participation in the E-rate program means that providers will compete to produce the lowest price for the E-rate fund and local taxpayers. Furthermore, applicants can use the competitive bidding process to achieve better service for schools and libraries and ensure that their selected provider can deliver higher speeds and bandwidth as

⁹ See *Universal Service Contribution Methodology*, WC Docket No. 06-122, Notice of Proposed Rulemaking, FCC 19-46 (rel. May 31, 2019), at ¶ 6 (finding that in funding year 2018, the demand for actual support was \$1.29 billion under the program cap).

demand increases. A competitive E-rate program ensures that schools, libraries, and consortia continue to receive E-rate supported services that best meet their needs.

Fortunately, there is significant competition in the E-rate program that has resulted in lower prices and increased bandwidth for program participants. It should be noted that petitioners' arguments appear to be predicated on the false premise that an E-rate applicant's selection of a competitive provider's proposal where fiber has already been installed by the incumbent LEC would always constitute a "new build." This is a false presumption, as competitors—be they cable companies, competitive fiber providers, or electric co-ops—may have already invested in fiber networks in the area or have access to significant fiber resources. In some instances, competitors are seeking E-rate funding for last-mile builds that would connect to their broader fiber networks. These networks, if they can provide lower prices, higher speeds, or superior quality, stand to benefit from E-rate applicants that are price-sensitive and are looking for ways to save money.

In at least some instances, E-rate applicants are receiving bids for broadband services from incumbents, which have presumably built fiber connections to schools and libraries using E-rate or high-cost program funding, at higher prices than those offered by competitors. In the competitive bidding process, school districts, libraries, and consortia generally have an incentive to select a low or the lowest-cost bidder as these applicants are responsible for the non-discount share of broadband service.¹⁰ E-rate applicants may find it less expensive for both themselves

¹⁰ See *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Request for Review by Integrated Systems and Internet Solutions, Inc., of the Decision of the Universal Service Administrator, Request for Review by Education Networks of America of the Decision of the Universal Service Administrator, Federal-State Joint Board on Universal Service, Changes to the Board of* (continued...)

and the program to build new connections with lower monthly recurring fees than to pay incumbent's exorbitant, monopoly prices. The selection of competitive providers that offer lower prices can lead to important cost savings for these applicants. These schools and libraries can then use these savings for other critical resources for students and patrons.

The applicants are not the only ones to benefit from controlling the costs of the E-rate program through competition. The program itself benefits from the efficiencies of applicants being able to select a provider that offers a lower monthly price for broadband service. Additionally, the Commission and USAC will be able to use these savings to serve more schools and libraries. Higher prices paid by a school or library not only impact the E-rate program but local taxpayers as well. If schools and libraries are forced to pay higher prices for incumbent fiber, local taxpayers will be asked to cover the difference. If forced to direct tax revenues to more expensive broadband services, school districts and local governments will have fewer resources to cover other needs, such as teacher salaries.

Further, in addition to state and local competitive bidding requirements that applicants are required to follow, the Commission already has sufficient competitive bidding safeguards in place. The Commission's rules require that applicants conduct a fair and open competitive bidding process, give service providers a sufficient amount of time to respond to bid requests, and use price as the primary factor in reviewing all bids.¹¹ No further requirements are necessary to ensure a competitive bidding process that ensures the applicant and the program receive the best value for funding.

Directors of the National Exchange Carrier Association, Inc., CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13734, 13740 at ¶ 7 (1999) (“*Tennessee Order*”).

¹¹ 47 C.F.R. § 54.503.

Participation in the E-rate program requires a willingness by providers to engage in this competitive bidding process. Market realities can sometimes require carriers to operate outside of their traditional network footprint. Even if the service area requested by the region-based consortia in this situation was larger than their traditional footprint, these carriers could have built their own facilities where they currently did not own any, or they could have partnered with other carriers and fiber owners to provide the requested services. Rather than amend the program rules to lock-in incumbents as proposed by petitioners, the Commission must continue to promote the principles of competition so that competitive and incumbent providers alike will have new opportunities to offer their services and fiber to E-rate customers.

b. In Its 2014 E-rate Modernization Order, the Commission Addressed Small Providers' Concerns Related to Consortium Bids

The Texas Carriers' petition, though seeking a general rule against overbuilding, raises specific concerns about how "region-based consortia groups" have selected service providers for the E-rate program that would lay fiber to schools that already have fiber connections "that were at least partially subsidized by USF."¹² However, the Commission has previously examined these concerns and went to considerable effort to "correct misconceptions about consortia applications that appear to have prevented some applicants from joining consortia."¹³

During that proceeding, NTCA—The Rural Broadband Association and WTA—Rural Broadband Advocates noted that an "emphasis on consortia could disadvantage smaller carriers that are best suited to serve a part of the consortium."¹⁴ In the *E-rate Modernization Order*, the

¹² Petition at 2.

¹³ *E-rate Modernization Order* at 8943, ¶ 178.

¹⁴ Reply Comments of National Telephone Cooperative Association and WTA—Rural Broadband Advocates, WC Docket No. 13-184 (filed Sep. 16, 2013), at 16-17. (continued...)

Commission identified several rationales for permitting consortium purchasing including “driv[ing] down the prices paid by schools and libraries for E-rate supported services.”¹⁵

Furthermore, the Commission clarified that consortia are not required to solicit or select a single vendor that could provide service to all members of a consortium. In fact, the Commission noted that incumbent providers that cannot serve an entire region are still allowed to bid for part of a consortia’s RFP.¹⁶ There is no reason to believe, and no facts presented that would indicate, that the Texas Carriers did not have every opportunity to bid in the RFP process for use of their incumbent fiber for at least a portion of the wide area network that the region-based consortia was considering.

IV. INSTEAD OF IMPROVING THE USE OF PROGRAM FUNDS, THE PETITIONERS’ PROPOSAL WOULD LEAD TO INCREASED PROGRAM EXPENDITURES AND A DELAY IN FUNDING COMMITMENTS.

In order to protect incumbent fiber connections, the Texas Carriers propose that the Commission “adopt rules that prohibit the use of universal service funds for special construction of fiber networks that overbuild existing fiber networks.”¹⁷ Specifically, the petitioners’ proposal would amend 47 C.F.R. § 54.503 to require E-rate applicants to post their special construction fiber projects on a website managed by USAC and allow a 60-day public challenge process during which time incumbent providers could confirm its existing fiber connections in the impacted area.¹⁸ In instances where fiber already exists, the applicants’ provider of choice

¹⁵ *E-rate Modernization Order* at 8940, ¶ 168.

¹⁶ *Id.* at 8943, ¶ 179.

¹⁷ Petition at 4.

¹⁸ *Id.* at 4-5.

would have 120 days to negotiate a fiber lease agreement with the incumbent based on a “reasonable, market based price.”¹⁹

As described below, the Texas Carriers’ proposal, if adopted, would have the following effects on the E-rate program: (1) it would significantly distort the competitive process; (2) result in higher prices; (3) add significant delay for applicants trying to upgrade their broadband services; and (4) would likely compel schools and libraries to select the incumbent provider to receive E-rate funding in a timely fashion.

First, the petitioners’ proposal will entrench incumbent providers at the expense of an efficient and competitive E-rate program that is driving better services to schools and libraries. Further, its 60-day public challenge process represents the very definition of an uneven playing field. If incumbents do not have to bid because they can wait for a contract and then require the winning vendor to use its facilities, the E-rate competitive bidding process will suffer from a loss of a potential bidder. The challenge process would allow incumbent carriers to obtain a profit from E-rate-provided services without the expense and effort of participating in an E-rate competitive bidding process. Even worse, the ultimate result is likely to be that E-rate applicants take the safest course of action and select incumbent providers who actually choose to bid, to avoid the prospect of the challenge process.

Second, the proposal would likely raise prices on E-rate supported services as competitors would be required to use the incumbents’ facilities any time there is pre-existing fiber that overlaps a planned network. Incumbents could use the leverage of having a pre-existing fiber connection and the requirement that a selected vendor must lease their fiber to extract larger fees from competitors. In turn, the E-rate program and local taxpayers will pay

¹⁹ *Id.* at 5.

more over time, harming the ability of the program to provider better and more affordable services to schools and libraries.

The petitioners' proposal to require selected vendors to engage in fiber lease negotiations will also disrupt the process by which competitors provide initial price estimates to applicants. A provider is currently selected based, in part, on the price submitted during the RFP process. Instituting a second negotiation with incumbents will upset the carefully agreed to contractual terms between an applicant and the provider as the parties will have to reach a subsequent agreement to lease the incumbent fiber. Furthermore, these negotiations will be fundamentally imbalanced as incumbents will know the price the provider submitted in the RFP process via its Form 471. Incumbents, having this information ahead of time, will have the ability to extract higher, non-competitive fees—cutting into the profit margins of these providers—and disrupting the policy of the E-rate program to be based on a competitive bidding process. The winning vendors, on the other hand, will be required by contract to provide the expected services at the agreed-upon price. They may either stop bidding or increase their prices to cover this inevitable challenge.

Third, a 60-day challenge process followed by a 120-day fiber lease negotiation will significantly delay funding commitments, thus harming the school districts, libraries, and consortia that are trying to upgrade broadband services for their students and library patrons. Requiring a challenge process *after an application is filed* will hold up fiber builds for at least two months and, in all likelihood, longer as USAC conducts an investigation if an incumbent provider challenges a proposed project. Calculating in the fiber lease negotiation, E-rate applicants would face up to a six-month service delay, however, based on general experience

with fiber lease agreements, it is likely that these negotiations will go on much longer than anticipated, putting deployment at risk.

Fourth, to avoid the aforementioned delays and ensure that they receive funding on time, E-rate applicants will likely select an incumbent, even if the incumbent does not provide the most cost-effective service offering. The result would be loss of the competitive benefits in the E-rate program, including lower prices for the E-rate fund and local taxpayers and better service for E-rate applicants.

V. CONCLUSION

For the reasons stated herein, INCOMPAS urges the Commission to deny the Petition.

Respectfully submitted,

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