

**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

REPLY COMMENTS OF INCOMPAS

Christopher L. Shipley
INCOMPAS
1200 G Street NW
Suite 350
Washington, D.C. 20005
(202) 872-5746

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INCOMPAS, by its undersigned counsel, hereby submits these reply comments 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

While the Texas Carriers’ petition for rulemaking concerns itself with the purported “wasteful and inefficient use of governmental funds”² that occurs when competitive providers challenge incumbents to provide E-rate services, the opposition shows that it is, in fact, the petitioners’ proposal that will ultimately harm and burden the E-rate program. The record in this proceeding overwhelmingly demonstrates that the Texas Carriers have not met their burden of showing that a rulemaking is necessary and that the concerns expressed about the competitive

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”).

² *Id.* at 3.

bidding process of the E-rate program would be better resolved through the existing structures established in the *E-Rate Modernization Order*.³ Indeed, a number of filings opposing the petition note the significant savings in Texas and throughout the U.S. that competitive providers participating in the E-rate program have provided.⁴ Furthermore, the record indicates that it is the petitioners' public challenge and right-of-first refusal proposals that would impede the competition in the program that is driving increased broadband speeds, better service, and cheaper pricing for schools and libraries.

Competition may be inconvenient to the incumbents, but it is important to recognize this request for what it is: an anticompetitive and protectionist proposal that will entrench incumbent providers and make it difficult for E-rate applicants to select any vendor other than their existing provider. Removing competitive options from the E-rate program will lead to schools and libraries paying higher prices for broadband service, which will harm the E-rate recipients, the Universal Service Fund ("USF"), and local taxpayers. Accordingly, the Commission should summarily deny the Petition so that neither the agency nor the industry's resources are wasted any further on the Texas Carriers' unsubstantiated and uncorroborated claims.

Below, INCOMPAS addresses arguments and proposals made in response to the Petition, including:

- The high-cost and E-rate program serve different purposes, and the Petitioners' assertions that this funding is duplicative is undercut by the record.

³ *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 (2014) ("*E-rate Modernization Order*")

⁴ See Comments of the Benton Foundation, RM-11841, *et al.* (filed July 1, 2019), at 6 ("Benton Comments"); Comments of EducationSuperHighway, RM-11841, *et al.* (filed July 1, 2019), at 7 ("EducationSuperHighway Comments"); Comments of Education Service Center – Region 11, RM-11841, *et al.* (filed July 1, 2019), at 2 ("ESC Region 11 Comments").

- The Commission should reject the proposals offered by incumbents and their trade associations that are even more anti-competitive and onerous than those proposed by the Petitioners.
- There are sufficient opportunities for incumbents to participate in the E-rate program. Indeed, the record shows that they have the advantage. The Commission need not provide them the anticompetitive and protectionist policies they seek.

II. THE HIGH-COST AND E-RATE PROGRAM SERVE DIFFERENT PURPOSES, AND THE PETITIONERS' ASSERTIONS THAT THIS FUNDING IS DUPLICATIVE IS UNDERCUT BY THE RECORD.

Though they share a similar goal, the High-Cost and E-rate programs serve fundamentally different purposes in meeting the agency's universal service requirements. The Petition's assumption that funding for the High-Cost and E-rate programs are duplicative has not been demonstrated by the Texas Carriers' or supporters of the Petition and is belied by the functions of the two distinct programs as well as by statements in the record.⁵

First, the High-Cost Program is intended to ensure the universal availability of voice and broadband services and to bring networks to areas where "there would otherwise not be a business case to do so."⁶ However, where a carrier has received High-Cost funding, it does not

⁵ See Comments of Uniti Fiber, RM-11841, *et al.* (filed July 1, 2019), at 4-6 ("Uniti Fiber Comments") (describing how the Petition's arguments that support from the High-Cost and E-rate programs could be leveraged to construct a duplicative fiber connection to a school or library "mischaracterizes the unique purpose of the USF program and wrongly conflates funds provided through the High-Cost program as providing funding for specific connections to a school or library"); *see also* Comments of the State E-rate Coordinators' Alliance, RM-11841, *et al.* (filed July 1, 2019), at 2-5 ("SECA Comments").

⁶ See Comments of WTA-Advocates for Rural Broadband, RM-11841, *et al.* (filed July 1, 2019), at 2 ("WTA Comments").

guarantee that broadband networks have been deployed to schools, libraries, or other anchor institutions in the area served. As a condition for program funding, High-Cost providers must offer service at rates that “are reasonably comparable for voice as well as broadband service, between urban and rural, insular, and high cost areas.”⁷ But not every location in a high-cost area is served by broadband. Presumably, High-Cost providers offer these services at “market” rates where they do offer service, but there is no guarantee that schools and libraries are receiving broadband service.

In contrast, the E-rate program is specifically intended to subsidize schools and libraries “to ensure affordable access to and use of” services provided by telecommunications carriers.⁸ In other words, E-rate subsidizes the price of broadband service so that schools and libraries are able to obtain affordable broadband service, often at rates that are significantly less than the market rates offered by High-Cost providers.⁹

Second, the High-Cost program’s subsidies are primarily intended to ensure residential consumers have access to broadband. Under the *USF/ICC Transformation Order*, the Commission required High-Cost providers to offer broadband service at 4/1 Mbps, and then subsequently increased the speed requirements to 10/1 Mbps in 2014, reflecting the agency’s

⁷ See *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, at para. 55 (2011) (“*USF/ICC Transformation Order*”); *aff’d sub nom., In re: FCC 11- 161*, 753 F.3d 1015 (10th Cir. 2014).

⁸ 47 U.S.C. § 254(h)(1)(B).

⁹ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, at para. 465 (1997).

perspective of residential needs.¹⁰ Recently, the Commission received assurances from Connect America Fund Phase II auction winners that half of the locations served by the program will get download speeds of at least 100 Mbps maintaining that program's link to residential broadband service.¹¹ In general, most locations covered by the High-Cost program will get speeds that mirror broadband Internet access services ("BIAS") in other parts of the country. However, the High-Cost program is not intended to cover the enterprise level of service that schools and libraries require in order to meet the needs of the students, teachers, administrators, and researchers, and there is no guarantee that every school and library in these areas will be served with the broadband speeds needed to meet their requirements.¹² In contrast, the record reflects that through E-rate's competitive bidding process, some schools and libraries have seen their bandwidth increase to 10 Gbps as their monthly average costs per Mbps decrease.¹³

Third, and as noted above, there is no guarantee that any High-Cost funding has been or will be used to support broadband facilities to a particular school or library.¹⁴ In fact, all broadband build-out obligations for fixed broadband are conditioned on not spending the funds

¹⁰ See *USF/ICC Transformation Order* at para. 94 (establishing a 4/1 Mbps standard); see also *Connect America Fund, ETC Annual Reports and Certifications, Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks*, WC Docket No. 10-90, 14-58, 14-192, Report and Order, FCC 14-190 (rel. Dec. 11, 2014) (requiring companies receiving Connect America funding for fixed broadband to serve consumers with speeds of at least 10 Mbps for downloads and 1 Mbps for uploads)

¹¹ John Eggerton, *FCC Announces Second Wave of Rural Broadband Funds*, MULTICHANNEL NEWS (June 10, 2019), <https://www.multichannel.com/news/fcc-announces-second-wave-of-rural-broadband-funds>.

¹² See SECA Comments at 3.

¹³ See ESC Region 11 Comments at 2; see also EducationSuperHighway Comments at 7.

¹⁴ See SECA Comments at 3.

to serve customers in rural areas already served by an unsubsidized competitor.¹⁵ Also, as noted in the record, construction of fiber is often necessary because schools and libraries need last-mile or middle mile fiber facilities that connect them to the larger network(s).¹⁶ Thus, it is critical that the E-rate program continue to support fiber builds through competitive bidding which is driving the lowest-cost, better service option for schools and libraries.

III. THE PROPOSALS OFFERED BY INCUMBENTS ARE EVEN MORE ANTI-COMPETITIVE AND ONEROUS THAN THOSE PROPOSED BY THE PETITIONERS.

As part of a proposed rulemaking, the Texas Carriers have proposed two changes to the E-rate competitive bidding requirements that would add significant delays to an already lengthy vendor selection process.¹⁷ The first would amend 47 C.F.R. § 54.303 to require a 60-day public challenge process during which time applications by schools and libraries proposing new fiber builds could be reviewed by incumbent providers in order to demonstrate that its network facilities already connect to that location. Special construction funding would be denied if an incumbent was able to prove through the challenge process that they already had fiber networks in place. This would then trigger an additional 120-day delay in which the school or library's selected service provider would be required to negotiate "the terms, conditions, and reasonable, market based price of a fiber lease agreement."

INCOMPAS has previously described how these proposals, 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

¹⁵ See *USF/ICC Transformation Order* at para. 103.

¹⁶ See *Uniti Comments* at 7.

¹⁷ *Petition* at 4-5.

broadband services; and (4) would likely compel schools and libraries to select the incumbent provider to receive E-rate funding in a timely fashion.¹⁸ However, rather than dismissing the Texas Carriers’ public challenge and right of first refusal proposals, several participants double down on proposed rule changes that would harm competition and impair the ability of the competitive bidding process to deliver fiscal responsibility and accountability to the program.

In its comments, USTelecom argues that the Petition ignores the “plight” of incumbent providers who have existing facilities but who do not win an E-rate competitive bid process.¹⁹ USTelecom claims there is no “check on cost effectiveness” for projects that include funding to build additional facilities.²⁰ The association then proposes the same cumbersome and anti-competitive post-application process not just where federal funds may have been previously used to support some facilities via the High-Cost program, but where *any* facilities exist.²¹ The Commission should reject USTelecom’s proposal from any further consideration. The actual check on cost effectiveness is the well-established Commission rule requiring competitive bidding as well as the state and local bidding requirements. In addition, pursuant to the *Second E-Rate Modernization Order*, applicants are required to consider the cost effectiveness to the program of fiber construction, not just that the applicant would pay less for broadband service.²²

¹⁸ See Comments of INCOMPAS, RM-11841, *et al.* (filed July 1, 2019), at 11-13.

¹⁹ Comments of USTelecom—The Broadband Association, RM-11841, *et al.* (filed July 1, 2019), at 5 (“USTelecom Comments”).

²⁰ *Id.* at 6.

²¹ *Id.*

²² See *Modernizing the E-rate Program for Schools and Libraries, Connect America Fund*, WC Docket Nos. 13-184, 10-90, Second Report and Order and Order on Reconsideration, FCC 14-189, at para. 39 (2014) (“*Second E-rate Modernization Order*”).

It should also be noted that “overbuilding” does not reduce the pool of funds available to schools and libraries that actually need fiber broadband competition.²³ As USTelecom is well-aware, demand in the E-rate program has been below the cap for several years, and no applicant that has applied for funding has been turned away due to the program’s budget cap.²⁴

Similarly, both NTCA and Wes-Tex offer proposals that would lock in opportunities for incumbents to win E-rate contracts with limited to no participation in a competitive bidding process. NTCA proposes “limited safeguards” in which an application for new construction triggers a 30-day review that would allow an incumbent to “match the price found in the application for construction of a new connection.”²⁵ NTCA’s proposal, though narrower in scope than the petitioners, actually creates additional problems as it provides any incumbent with facilities in place or which may be in the process of being constructed with the opportunity to match the winning bid without participating in the competitive bidding process. Competitive providers dedicate significant resources to preparing and submitting bids for E-rate contracts, but under NTCA’s proposal, incumbents would not need to bid at all. Providers with existing connections would face one less obstacle than competitive providers as they would not have to engage in that process while still having every chance to win the contract during the challenge process after seeing the competitive bidders’ pricing—a completely unreasonable and unfair advantage. NTCA’s proposal should be rejected from any further Commission consideration.

²³ See USTelecom Comments at 4; see also WTA Comments at 4.

²⁴ See *Universal Service Contribution Methodology*, WC Docket No. 06-122, Notice of Proposed Rulemaking, FCC 19-46, at 5, para. 11 (rel. May 31, 2019).

²⁵ Comments of NTCA—The Rural Broadband Association, RM-11841, *et al.* (filed July 1, 2019), at 9 (“NTCA Comments”).

Wes-Tex, even more stringently, argues that if fiber currently exists to a school, that school should not be eligible for special construction via E-rate.²⁶ This would mean that schools and libraries would be subject to whatever monthly rate the existing provider would want to charge. Further, there is no guarantee the existing fiber or broadband service will be sufficient to meet the applicant’s needs. For instance, school districts often require dedicated fiber facilities for their Wide Area Networks (“WAN”) so as to reduce the possibility of over-subscription and provide an extra layer of security for the protection of their sensitive information transmitted over the fiber facilities. Without the in-depth review of proposed solutions that school districts undertake during the competitive review process, a school district would have no way of knowing whether existing fiber facilities are sufficient to offer dedicated WAN facilities. And, despite Wes-Tex’s assertions that E-rate funds should be “redirected to other educational facilities that do not have fiber optic connectivity,” that is not how the program operates.²⁷

Each of these flawed proposals seeks unwarranted protection for incumbents that have every opportunity to participate in the program’s competitive bidding process. Indeed, where *any provider*, including an incumbent with alleged subsidized facilities, is participating in a competitive bidding process for an E-rate project—they are in the best position to offer the lowest price option, yet the record shows that they are not doing so in some cases. The Commission’s response should be not be to protect those providers. Rather, the Commission should be praising the competitive market that is driving down costs and delivering more robust broadband service to critical anchor institutions, and incumbents should be responding to the

²⁶ See Comments of Wes-Tex Telephone Cooperative, Inc., RM-11841, *et al.* (filed July 1, 2019), at 1 (“Wes-Tex Comments”).

²⁷ *Id.*

competitive pressure by charging competitive rates rather than running to the regulator to ask for anticompetitive and protectionist policies. In other words, instead of granting incumbents special privileges, the Commission should encourage these companies to engage in the competitive bidding process for E-rate projects, and it should enforce its requirement to do so in those providers' geographic territories where those providers receive high-cost funding.²⁸

IV. AS NOTED BY OTHER COMMENTERS, THE TEXAS CARRIERS' PETITION IS ANTI-COMPETITIVE AND PROTECTIONIST AND NOT NECESSARY TO PREVENT, WASTE, FRAUD AND ABUSE.

INCOMPAS maintains that the Texas Carriers' petition is unnecessary because the E-rate program and applicants are best served by encouraging *all* potential providers to participate in the bidding process and educating vendors on the safeguards established in the 2014 *E-Rate Modernization Order*.²⁹ Rather than engage in the competitive bidding process, the petitioners are seeking "protectionist" rule changes that would impede price competition and "unfairly provide[] a second opportunity for providers to respond to, challenge, and outbid competitors."³⁰ Rather than allow petitioners to take the proverbial "second bite at the apple"³¹ and burden applicants with unreasonable delays, the record reflects that the Commission should deny the petition as competitive providers are succeeding in competitive bidding situations because they

²⁸ 47 C.F.R. § 54.309(b).

²⁹ See *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*").

³⁰ Comments of the School of Superintendents Association / Association of Educational Service Agencies, RM-11841, *et al.* (filed July 1, 2019), at 3-4 ("AASA/AESA Comments").

³¹ Uniti Comments at 9.

are providing higher broadband speeds, better customers service, and lower prices than incumbents—even those with existing fiber connections to the schools and libraries.

Prior to the *E-rate Modernization Orders*, the main type of WAN offered by most service providers was leased lit fiber. In modernizing the program, the Commission rightfully recognized the need to equalize the treatment of lit and dark fiber and to provide more flexible payment options for applicants so that they could fully reap the benefits of the modernization. This, in turn, meant that service providers needed to look at the marketplace and expand their service offerings to respond to the needs of applicants. Our members report that some incumbent providers have taken this step to be more flexible and responsive to RFP requirements. Others that are unwilling to adapt to meet the demands of customers are now seeing the impact on their business. Instead of requesting a rulemaking to change the program that is successfully connecting these critical anchor institutions to better services at more affordable rates, the Petitioners would be better served identifying and retooling their business strategies that would allow them to be competitive in this dynamic and important program.

Benton Foundation reports that since 2015 the cost of bandwidth in Texas has decreased by 75% due, in part, “to the option of utilizing special construction to obtain the most cost-effective” solution.³² In turn, region-based consortia have seen the average cost per megabit decrease as their average bandwidth increases, sometimes as much as ten times what it was previously.³³ Because of these facts on the ground, it is clear that the current competitive bidding rules are sufficient to protect the program against waste, fraud, and abuse. Furthermore, no new facts were submitted that would undermine the Commission’s findings from the *Second*

³² See Benton Foundation Comments at 6.

³³ See EducationSuperHighway Comments at 6, ESC Region 11 Comments at 2.

E-rate Modernization Order requiring applicants to consider the cost effectiveness to the program of fiber construction, in addition to broadband service costs.

Additionally, the Commission and the Universal Service Administrative Company (“USAC”) have procedures in place to address outlier cases. If an incumbent submitted a bid that was less expensive than the selected bid, as Barry County Telephone Company and MEI Telecom, Inc. suggests in their joint comments,³⁴ then USAC would conduct a cost-effectiveness review to ensure the competitive bidding rules were followed. It should be reiterated that the E-rate program rules have never required applicants to select the cheapest bid, but rather the “most cost effective” offer. No information was submitted about whether or not the Texas Carriers’ asked USAC to conduct a cost-effectiveness review. INCOMPAS urges the Commission not to alter its competitive bidding requirements with this administrative review process already in place.

The Texas Carriers’ Petition requests not only a 60-day challenge period where they might be able to overturn the award reached in an open and fair competitive bidding process, but also a 120-day period to negotiate with the selected bidder for use of incumbent’s fibers. As evidenced by the record, such negotiations are already happening without the need for the Commission to intervene.³⁵

V. THE PETITIONER AND OTHER INCUMBENTS HAVE AMPLE OPPORTUNITY TO RESPOND TO E-RATE RFPs.

The Petition obfuscates several material facts about whether or not the Texas Carriers’ attempted to participate in the region-based consortia RFP process. As noted in INCOMPAS’

³⁴ See Comments of Barry County Telephone Company and MEI Telecom, Inc., RM-11841, *et al.* (filed July 1, 2019), at 1-2.

³⁵ See Comments of Eastex Telephone Cooperative, Inc., and Nortex Communications, RM-11841, *et al.* (filed July 1, 2019), at 5.

comments, the Commission has clarified that consortia are not required to solicit or select a single vendor that could provide service to all members of a consortium. Further, incumbent providers that cannot serve an entire consortia are still allowed to bid for part of an RFP.

The record confirms that, in most cases, the petitioner and other incumbents have ample opportunity to participate in the competitive bidding process. ESC Region 11 indicates that a quarter of its schools and libraries did not have fiber before it sought bids for fiber in 2016,³⁶ and Region 10 did not limit the RFP to one winning bid, meaning that the Texas Carriers could have bid on that portion of the network with existing fiber connections.³⁷ Regardless, the comments of Uniti Fiber are instructive here as they indicate that incumbents are not uniquely disadvantaged by wide area network (“WAN”) or region-based consortium bids. Uniti Fiber asserts that competitive providers face unique challenges in that they must construct, resell and provision a service solution without existing assets. Incumbents, on the other hand, have existing networks in an area and must determine how to construct last-mile connections to schools and libraries.³⁸ In Texas, the record shows that there is a group—Texas Lone Star Network—under which incumbents could submit a joint RFP bid.³⁹

This request appears to demonstrate that some incumbents are not familiar with or are unwilling to engage in the E-rate competitive bidding process that exists today.⁴⁰ Rather than

³⁶ See ESC Region 11 Comments at 2.

³⁷ See also Comments of the Schools, Health, Libraries and Broadband Coalition, RM-11841, *et al.* (filed July 1, 2019), at 6-7.

³⁸ See Uniti Fiber Comments at 9.

³⁹ See AASA / AESA Comments at 2.

⁴⁰ INCOMPAS members that provide E-rate services have reported several experiences where the incumbent providers have not done their due diligence when it comes to responding to and

launch a rulemaking, INCOMPAS suggests that the Commission, USAC, and/or industry associations conduct further education of the incumbents on the E-rate competitive bidding process.

VI. CONCLUSION

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

Respectfully submitted,

INCOMPAS

/s/ Christopher L. Shipley

Christopher L. Shipley
INCOMPAS
2025 M Street NW
Suite 800
Washington, D.C. 20036
(202) 872-5746

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providing quality and cost effective solutions to E-rate RFPs issued by school districts. One member reported that an incumbent failed to respond to an RFP for WAN services, paving the way for a 20-school applicant to select a provider capable of offering ten times the bandwidth for twenty percent less than their current monthly costs. The member was also selected over an ILEC to provide broadband services to a library district. Our member was able to provide twice the bandwidth for half the price of the incumbent, thereby helping the district keep its administrative costs down and providing sufficient bandwidth for future growth. They noted “[w]e strongly believe that within the current competitive bidding process, each school and library district is able to evaluate the best fitting technology at the right price, therefore making the most sound decision for their current and future technological needs.”