



January 24, 2018

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW,
Room TW-A325
Washington, DC 20554

Re: Modernizing the E-rate Program for Schools and Libraries, WC Docket No. 13-184
Connect America Fund, WC Docket No. 10-90
Ex Parte Submission

Dear Secretary Dortch:

The Schools, Health & Libraries Broadband (SHLB) Coalition is writing to share our experiences, observations and recommendations to improve the processing of applications that include fiber special construction charges in the E-rate program.

SHLB lauded the FCC's 2014 E-rate Modernization Orders that equalized the eligibility rules for dark and lit leased fiber services and allowed for applicant self-construction of facilities when this option is most cost effective. By following the lead from the Rural Health Care Universal Service Program, the FCC recognized that a wider variety of broadband funding options would help facilitate broadband connectivity to students and library patrons throughout the country and drive down the cost of these services. These policies fit squarely within SHLB's core mission "to promote government policies and programs that enable schools, libraries, health care providers, other anchor institutions and their communities to obtain open, affordable, high-speed broadband connections to the Internet."¹

We also share the Commission's desire to ensure that E-rate funds are used prudently, and to take measures to prevent waste, fraud and abuse. Being responsible stewards of this resource not only safeguards universal service contributions but also helps to ensure public trust in the integrity and continued success of the program.

During the first year of the new regulations, FY 2016, the procedures and guidance for how to apply for fiber projects were not yet finalized when applicants began issuing RFPs and posting Form 470s. Important clarifications continued to be issued throughout the funding year and frequently after the procurements had been conducted. Unfortunately, more than half of the special construction projects in FY 2016 were denied or withdrawn. Many other requests were subjected to lengthy reviews that substantially delayed funding decisions and the availability of broadband to schools and libraries.

In response to questions and concerns raised by program participants, the FCC and USAC staff took concerted efforts that led to some improvement in the processing of FY 2017 applications, which we appreciated. Our members also found helpful the clarifications issued last fall concerning the cost

¹ Indeed, in an effort to inform the FCC during its deliberations that led to the December 2014 Modernization Order, SHLB submitted a cost study that quantified the cost of connecting all schools and libraries with fiber.

allocation requirements of additional fiber strands that some providers may opt to install for future projects.

As of today, however, a sizeable collection of FY 2017 fiber special construction requests are still in review and have not yet been finalized.² For those that have received FCDLs, some applications were denied with confusing explanations and some were denied without any explanation at all. The lack of clarity about the reasons for denial create an impression that decisions are being made on an ad hoc basis, or that the reviewers are using criteria for evaluating applications that are not made available to applicants beforehand. It is imperative for the standard of review and explanations of funding denials to be sufficiently detailed so that program participants are informed of the program requirements. It is apparent from the high denial rate and the long time needed for application review that more public outreach and education is needed so that program participants are informed of the program requirements.

SHLB respectfully submits the following list of recommendations for improving the fiber application and review process and we look forward to meeting with the Wireline Competition Bureau staff and Administrator's staff to discuss these experiences and recommendations. These recommendations will benefit not just applicants but will reduce administrative costs by decreasing the time and effort needed to review applications. Our hope is that with more explicit guidance, more applicants will be better informed about which projects may qualify for funding and will be able to successfully apply for funding. At the same time, they will be better educated about projects that do not meet the Commission's standards and will not waste their own resources—and those of the Administrator and the FCC—in submitting projects that will not be funded.

1. Clarification of the Standard for Review of Special Construction Funding Requests for Fiber:

Consistent with E-rate rules that govern all funding requests, applicants who seek funding for leased lit, dark or self-provisioned fiber must demonstrate that they have chosen the most cost-effective solution. We are aware of numerous instances, however, where the applicant has submitted documentation to establish that its selected project and vendor was the most cost-effective — and often was also the lowest-cost project — but USAC nonetheless denied its request for funding without an explanation. In cases where the applicant has conducted a valid competitive bidding process, USAC and the Commission should — as they do with other eligible services — defer to the cost-effectiveness analysis of the school or library applicant during the competitive bidding process, pursuant to the *Tennessee Order*.³ If there are additional requirements that are unique to fiber special construction requests, such as specific factors that must be included in the total cost of ownership review, the specific inputs to this analytical framework must be disseminated in writing.

² As of January 1, 2018, however, a third of FY 2017 fiber special construction requests were still pending, which means that less than six months in the funding year will be able to complete any projects that are on hold because they are contingent on receipt of E-rate approved funding. Source: <http://opendata.usac.org>.

³ *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 Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13734, 13742 ¶ 10 (1999) (*Tennessee Order*) (“[E]ven in those instances when schools do not have established competitive bid procurement processes, the Administrator generally need not make a separate finding that a school has selected the most cost-effective bid. Such a finding is not generally necessary because a school has an incentive to select the most cost-effective bid, even apart from any procurement requirements, because it must pay its pro rata share of the cost of the services requested. Absent evidence to the contrary in a particular case, we believe that this incentive is generally sufficient to support a conclusion that a school has selected the most cost-effective bid for requested services.”).

A review of the public data shows that USAC has denied applications that purportedly have costs that exceed industry standards and that are not considered to be reasonable.⁴ In numerous instances, these denials have been issued without first notifying the applicants of the intention to deny and providing the basis for this tentative conclusion. Applicants should have the opportunity to address USAC's specific concerns during the PIA review process. This approach is standard procedure for all other funding requests that may be denied, and there should be no exception for fiber funding requests. Given the voluminous documentation that applicants must submit in support of fiber requests, the prospect of a reviewer's misinterpretation or misunderstanding of the data is understandable. Such situations could be easily remedied if there is communication with the applicant prior to the issuance of the funding decision.

- 2. Clarification Regarding Cost-Based Information from Vendors:** Unbeknownst to an applicant, a vendor may respond to an E-rate RFP with a proposal that includes the vendor's installation of additional facilities that will be used to provide service to non-E-rate customers. Historically the E-rate program has relied on competitive bidding to ensure the reasonableness of prices and applicants have not been interrogated about the cost components of a winning bid. Apparently, however, under the new special construction rules, USAC is sending additional questionnaires to verify proper cost allocations, and that seek vendor cost data underlying their bid prices.

Many applicants have no idea of their carrier's underlying costs. Furthermore, applicants have no leverage to compel the cooperation of vendors and the production of the vendor's cost information to USAC. When vendors have not provided the required information, applicants have not been informed and have been penalized with funding denials. This result is unfair to applicants who have otherwise complied with all of the Commission's rules and USAC's procedures to submit valid applications.

To resolve these concerns, we encourage USAC to publish a **Special Construction Documentation Checklist** similar to the checklist published by the Administrator for audit preparedness. Such a checklist would enable applicants to prepare procurement documents to ensure that they collect the required information and to ensure that their bid evaluations are conducted in compliance with E-rate rules and expectations. In particular, the cost information required of vendors to be submitted should be included in the checklist. Applicants can then opt to make this a requirement in their RFPs and, in turn, collect the required information from the successful bidder so that this information is available to be submitted to USAC during PIA review. Vendors would also be made aware upfront that such information is a requirement of their bid response and they can then choose whether to participate in the procurement.⁵

- 3. Streamlined Procedure for Protection of Proprietary Cost Information.** While USAC has identified a rule citation that applicants and service providers may use to request confidential

⁴ USAC denied several applications by stating that "FCC Rules require applicants to select a cost effective fiber solution. The special construction charges related to this FRN have been deemed as outside of the expected industry range of special construction charges. This FRN is denied due to an overall Cost Effectiveness Review that determined that the request's cost was not reasonable."

⁵ We understand that bidders may have concerns about preserving the confidentiality of proprietary cost data. Applicants may need to determine whether state law protections can be extended to bidders' submission of cost data in response to a RFP, or whether the RFP will condition the contract award to the successful bidder by mandating that the bidder will agree to share such information in the future if and when USAC requests such data.

treatment, such a request does not ensure that carriers' proprietary cost information data is protected from public view. Should USAC continue to require the submission of vendors' underlying cost data, we urge the Commission to grant a protective order establishing a presumption of confidential treatment for carrier data provided as part of the review process. It would also be helpful for the Commission and USAC to establish a standard process for vendors to follow when submitting their cost information.

4. Modifications to PIA Review Process: We recommend that the intensity of PIA reviews should be reduced and streamlined when the following two situations arise because we believe that there is little if any risk of non-compliance with program rules:

- A. USAC should presume that the installation of 12 fiber strands is the most cost-effective manner of deploying fiber, regardless of the fact that the E-rate program participant may use fewer than 12 fibers. Strand counts between 2 and 12 would be treated as ancillary or *de minimis* and not be subjected to the excess-strand cost allocation requirement for either the actual fiber or the related installation costs. SHLB's membership includes the nation's largest dark fiber providers and they have attested that the industry standard is a minimum of 12 strands, and that fiber manufacturers do not normally make a 2-strand outside rated cable. A 2-strand cable would require a special order, would be much costlier, and would take longer to manufacturer/install. 12-strand is the industry standard and, by default, should be considered the most cost-effective fiber installation to each site.
- B. Where schools and libraries may apply for Category 1 leased dark or self-provisioned fiber for building to building connections on the same campus, USAC should not subject these requests to the full range of fiber special construction inquiries. These connections were previously considered to be Priority 2-funded internal connections, but since Modernization, they are classified as Category 1 service and must be requested as such. These connections are typically very short distances (a few hundred feet) and do not attract the interest of lit fiber providers. While schools and libraries are delighted to not have to use their Category 2 budgets for these connections, they are dismayed at the level of reviews for these simple, cost effective connections.

5. SLD Resource for Project Consultation from Project Inception through Application

Submission: The bidding of any type of fiber project that includes special construction costs is a complex, time consuming and nuanced undertaking for all program participants – applicants and service providers alike – and requires sophisticated knowledge of program rules. Projects based on non-compliant or incomplete procurement documents may doom applicants to funding denials that may have been prevented had the applicants been made aware of these defects at a time when they had the opportunity to fix the shortcomings, such as prior to or at the beginning of the procurement process. USAC should make available public-facing subject matter experts whom applicants may contact for informal guidance beginning with the planning phase of their fiber projects.⁶ Guidance from these experts on procurement documents, bid evaluation and answering other related questions will surely improve the quality of the applications. This in turn will enable the SLD's review of submitted applications to be more efficient and should significantly speed up the review process.

⁶ We appreciate USAC's efforts to offer such resources during FY 2016 and to a more limited extent during FY 2017. We envision that this individual or team of individuals would be devoted exclusively to interacting with applicants throughout the course of the procurement and application cycle, and not have to shoulder additional responsibilities.

Such project consultation was afforded to Rural Health Care Program applicants and the E-rate program needs and deserves such resources as well.

- 6. Greater Flexibility Needed for Fiber Construction Deadline:** Due to the lengthy review periods for many of these fiber construction projects, if a project is eventually approved, there may be just a few weeks or months prior to the June 30th end of the funding year in which the fiber must be lit in order to qualify for the special construction funds. Between USAC's delays in approving funding and the nature of the projects themselves, many applicants have found it impossible to meet the June 30th installation deadline. Many applicants are unable to proceed with the installation of the facilities until after funding approval is received, creating an untenable Catch 22 where there is insufficient time to complete the construction once the funding approval is finally obtained. Also, vendors may have to schedule fiber projects months in advance. They cannot suspend all other projects to focus on a just approved school or library fiber project simply because an E-rate deadline is fast approaching.

Although a procedure was announced to allow for the submission of requests to extend the service delivery deadline, review of these requests has been slow and the standard of review appears to be applied stringently. Denial of a service delivery deadline extension request is, in effect, a rescission of funding approval since the applicant will be unable to receive the benefit of the E-rate discount funding when the fiber is not lit within the funding year. We urge the FCC and USAC to automatically approve requests for a 12- month service delivery extension beyond the end of the funding year (without requiring applicants to apply for the extension) and to liberally construe additional extensions that may be necessary to complete the installation and lighting of fiber.

- 7. More Timely Review of Fiber Post-Commitment Modifications:** Similar to the need for more efficient service delivery extension request decisions, all post funding commitment procedures that may require applicants to seek approval of modifications to their approved Form 471 applications for fiber projects and all other funding requests need to be administered more promptly. The long delays that have plagued these reviews over the past two years, since EPC was implemented, prevent applicants from being able to promptly utilize their E-rate supported services and allow for the timely disbursement of program funds. Applicants have waited more than six months to have their Form 486 applications, service substitution requests and SPIN change requests reviewed and approved. Without prompt processing of these requests applicants are often at a standstill and cannot proceed with their much-needed broadband service installation and upgrades, and network and wireless equipment purchases. We understand that the EPC system has been the cause of some delays, but it is unacceptable to blame a three-year-old system for these issues, particularly when Chairman Pai has expressly stated to USAC officials that a manual workaround must be made in such situations.⁷

We appreciate the FCC's and USAC's willingness to consider our views on these important fiber issues and hope that our suggestions receive serious consideration and are implemented as quickly as possible, so the positive impacts will be realized as early as the FY 2018 application reviews.

⁷ Letter of April 18, 2017 from FCC Chairman Pai addressed to USAC Chief Executive Officer "*USAC's Performance as Schools and Libraries Program Administrator*" in which Chairman Pai stated, "USAC must identify alternative options to assist applicants even in the event of IT failures. USAC must work to proactively identify and implement alternative options to assist applicants when EPC fails, consistent with the program's rules. This may mean that USAC manually issues commitments, commitment adjustments, revised funding commitment decision letters, and appeals resolutions outside of the EPC system."

Respectfully submitted,



John Windhausen, Jr.
Executive Director
Schools, Health & Libraries Broadband (SHLB) Coalition
(202) 263-4626
jwindhausen@shlb.org

cc: Radha Sekar, Chief Executive Officer
Universal Service Administrative Company

Catriona Ayer, Acting Vice President
Schools and Libraries Division
Universal Service Administrative Company

Kris Montieth, Bureau Chief
Wireline Competition Bureau

Ryan Palmer, Division Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

Elizabeth Drogula, Deputy Division Chief
Telecommunications Access Policy Division
Wireline Competition Bureau

Brian Boyle
Telecommunications Access Policy Division
Wireline Competition Bureau

Mark Stephens, Managing Director
Office of Managing Director

Jay Schwarz, Wireline Advisor
Office of Chairman Pai