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

In the Matter of	)	
	)	
Modernizing the E-rate Program for Schools and Libraries	)	WC Docket No. 13-184
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	

Reply to Oppositions to the Petition for Reconsideration and/or Clarification of WTA – Advocates for Rural Broadband, NTCA–The Rural Broadband Association, and the National Exchange Carrier Association, Inc.

I. INTRODUCTION

Pursuant to Section 1.429 of the Commission's rules, WTA-Advocates for Rural Broadband ("WTA"),[1] NTCA–The Rural Broadband Association ("NTCA"),[2] and the National Exchange Carrier Association, Inc. ("NECA")[3] (collectively, "Rural Associations") respectfully submit this Reply to Oppositions to the Rural Associations' Petition for Reconsideration and/or Clarification filed in the above-captioned proceeding on March 6, 2015.[4] The Rural

[1] WTA – Advocates for Rural Broadband is a trade association representing more than 280 rural telecommunications providers offering voice, broadband and video services in rural America. WTA members serve some of the most rural and hard-to-serve communities in the country and are providers of last resort to those communities.

[2] NTCA represents nearly 900 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service local exchange carriers and broadband providers, and many of its members provide wireless, cable, satellite, and long distance and other competitive services to their communities.

[3] NECA is responsible for preparation of interstate access tariffs and administration of related revenue pools, and collection of certain high-cost loop data. *See generally*, 47 C.F.R. §§ 69.600 et seq.; MTS and WATS Market Structure, CC Docket No.78-72, Phase I, Third Report and Order, 93 FCC 2d 241 (1983).

[4] WTA, NTCA, NECA ("Rural Associations") Petition for Reconsideration and/or Clarification, WC Docket No. 13-184 (fil. Mar. 6, 2015) ("Petition").

Associations' Petition sought reconsideration of certain aspects of the E-rate Modernization *Second Report and Order* released by the Commission on December 19, 2014.[5]

Specifically, the Rural Associations seek reconsideration of the rule adopted in the *Second Report and Order* imposing an obligation on high-cost support recipients to bid to provide fixed broadband to anchor institutions at yet-to-be-determined national reasonable comparability benchmark(s)—and certify that they have done so as a condition of receiving support. Because the proper notice and comment procedures required by administrative law were not followed in this proceeding, the Rural Associations respectfully request that the Commission reconsider and properly release the proposed requirement for public comment. If the Commission does not reconsider adoption of the bidding requirement, it should, at a minimum, clarify the procedures to be used by the Wireline Competition Bureau ("Bureau") to establish the reasonable comparability benchmark for providing such services and the timing of this new obligation.

II. THE COMMISSION SHOULD IMMEDIATELY INITIATE A PROCEEDING SEEKING COMMENT ON A METHODOLOGY TO ADOPT A REASONABLE COMPARABILITY BENCHMARK FOR THE E-RATE MECHANISM.

Neither the record in the E-rate Modernization proceeding (WC Docket No. 13-184) nor the record compiled in response to Notices of Proposed Rulemaking released in the Connect America Fund Proceeding (WC Docket No. 10-90) support imposing an entirely new and mandatory bidding requirement on recipients of high-cost support. The questions posed by the Commission in those proceedings—even when combined with statements expressing the

[5] In the Matter of Modernizing the E-rate Program for Schools and Libraries, FCC 14-189, Second Report and Order and Order on Reconsideration, WC Docket No. 13-184 (rel. Dec. 19, 2014) ("*Second Report and Order*").

"expectation that eligible telecommunications carriers would offer broadband to community anchor institutions"[6]—cannot suffice to provide adequate notice in keeping with the requirements of the Administrative Procedure Act ("APA")[7] of the Commission's intent to adopt a substantive requirement of this scope.

The Rural Associations' members are committed to providing robust, affordable broadband services to the schools, libraries, and other community anchor institutions ("CAIs") in the rural communities they serve. RLECs have a vested interest in the long-term success of the E-rate mechanism, as the schools, libraries, and other CAIs (and their students and patrons) are part of the community in which RLEC owners, managers, directors, and employees reside. These CAIs are also some of the RLECs' largest customers. The Rural Associations have also repeatedly expressed support for greater coordination between the high-cost and E-rate mechanisms, as each mechanism is an important "piece of the puzzle" for assuring all rural Americans have access to high-quality and affordable advanced services, whether at home or at school or their local library.

With that said, the Rural Associations urge the Commission to "take a step back" and conduct a thorough analysis of relevant data and the proper scope, operation, and impact of any requirement to bid at yet-to-be-determined reasonable comparability benchmark(s) adopted for the E-rate mechanism. This should occur in the context of a full and properly conducted rulemaking proceeding that will allow interested parties to provide input on the many

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6 *Id.* ¶ 61, (citing *Connect America Fund et al*., WC Docket Nos. 10-90 *et al*., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17700-01 (2011) *pets. for review denied sub nom. In re FC*C 11-161, 753 F.3d 1015 (10th Cir. 2014) ("*USF/ICC Transformation Order*")).

7 5 U.S.C. § 551, *et seq*.

complicated issues that arise from imposition of such a requirement.[8]

Contrary to claims by the Schools, Health and Libraries Broadband Coalition ("SHLBC") and the American Library Association ("ALA"), adequate notice of this new requirement was not provided either in proceedings leading up to the *Second Report and Order* or in WC Docket No 10-90. Indeed, it is worth noting in this regard that while ALA claims in its opposition that adequate notice of the requirement was given, ALA expresses many of the same questions posed by the Rural Associations' Petition, including "how will Commission staff develop the national benchmark on broadband speed and costs"[9] and "will the benchmark be wholly based on urban/suburban rates, will there be regional benchmarks, etc. – are questions that [E-rate] applicants have, as well."[10] ALA joins the Rural Associations' in asking the Commission to seek additional comment on these issues from providers and applicants alike.[11]

Although an agency need not provide the particulars or each possible formulation of a proposed rule, courts have recognized on numerous occasions that "notice is inadequate where an issue was only addressed in the most general terms in the initial proposal."[12] In this regard,

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8 *See*, comments of the United States Telecom Association, WC Docket No. 13-184 (fil. Apr. 29, 2015), p. 7 ("USTelecom agrees that before applying these obligations to recipients of high-cost support, the Commission should commence a proceeding to determine the new methodology for calculating the reasonable comparability benchmark and how the bidding and benchmark requirement will be implemented within existing E-Rate rules.").

9 Opposition comments of the American Library Association, WC Docket No. 13-184 (fil. April 29, 2015), p. 3.

10 *Id*.

11 *Id*. (stating that "we ask that the Commission direct FCC staff to seek outside input from both the provider and applicant communities on creating the benchmark(s).").

12 *American Medical Association v. US*, 887 F.2d 760 (7th Cir. 1989). *See also, AFL-CIO v. Donovan*, 757 F.2d 330, 339 (D.C. Cir. 1985); *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1106 (4th Cir.1985); *Kollett v. Harris*, 619 F.2d 134, 144 & n. 13 (1st Cir.1980).

SHLBC argues that "the CAF sections of the *Second Modernization Order* are 'properly viewed as a further step in the ongoing [CAF] rulemaking.'"[13] But there is no mention in that Order of the Commission's intent to impose additional bidding obligations on high-cost support recipients specifically in the E-rate context or a "national reasonable comparability benchmark" that would take into account broadband rates charged to the tens of thousands of schools and libraries all across the nation. Moreover, it is patently impermissible and inappropriate as a matter of administrative process to view an order in the above-referenced docket (WC Docket No. 13-184) as "a further step" in *another* proceeding (WC Docket No. 10-90) in which the instant order was *not* issued.[14]

SHLBC also points to the Commission's professed "expectation" that high-cost support recipients "would provide higher bandwidth offerings to community anchor institutions in high-cost areas at rates that are reasonably comparable to comparable offerings to community anchor institutions in urban areas"[15] and the 2014 CAF NPRM's inquiry on "how best to ensure" that this expectation is fulfilled.[16] But these broad statements – again, in another docket – were hardly adequate to alert high-cost support recipients that the Commission intended to adopt a rule

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13 Comments of the Schools, Health & Libraries (SHLB) Coalition, p. 7 (citing *AT&T Corp. v. FCC*, 113 F.3d 225, 229 (D.C. Cir. 1997).

14 Concerns regarding lack of adequate notice under the APA are not resolved by the belated addition of a reference to WC Docket No. 10-90 to the heading of the *Second Report and Order* in WC Docket No. 13-184. In any event, it cannot be fairly argued that the bidding requirement imposed under the *Second Report and Order* is a logical outgrowth of any proposal or combination of proposals in either proceeding.

15 *USF/ICC Transformation Order*, fn. 164.

16 Connect America Fund, WC Docket No. 10-90, *et al*., Report and Order, Declaratory Ruling, Memorandum Opinion and Order, Seventh Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 14-54 (rel. Jun. 10, 2014) (*"2014 CAF NPRM"*), ¶ 159.

that makes high cost support contingent on the provision of broadband services *specifically* to eligible schools and libraries in high-cost areas at some reasonably comparable benchmark rate. The same statements from the *USF/ICC Transformation Order* and the *2014 CAF NPRM* could just as well support the conclusion that the Commission was considering taking a fresh look at the high cost or E-rate mechanism budgets to enable reasonable comparability. Or, perhaps, those statements could be read as the Commission intending to address finally the fact that RLECs cannot, under rules that were in place then and remain in place today, actually offer "higher bandwidth offerings to community anchor institutions in high-cost areas at rates that are reasonably comparable to comparable offerings to community anchor institutions in urban areas" unless the community anchor institution also buys plain old telephone service from the RLEC.[17] Certainly, it cannot be said that a general inquiry into how to meet the needs of anchor institutions for greater bandwidth could possibly be interpreted as a proposal to adopt the specific bidding requirement at issue here. Indeed, both provisions cited by SHLBC focus as much, if not more, on the appropriate speed targets for schools and libraries,[18] an issue the Rural Associations addressed in comments.

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[17] *See, e.g.*, Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC, WC Docket No. 10-90 (fil. Apr. 21, 2015).

[18] *See 2014 CAF NPRM* ¶ 159, ("The Commission *did not have a record before it at the time to specify what specific speeds are appropriate for anchor institutions*. We seek to develop the record more fully, and thus invite comment on how best to ensure that this expectation is fulfilled by ETCs, with specific reference to institutions and the charges, terms, and conditions of service provided to those institutions.") (emphasis added). *See also, USF/ICC Transformation Order*, fn 164 ("There is nothing in this order that requires a carrier to provide broadband service to a community anchor institution at a certain rate, but we acknowledge that community anchor institutions generally require more bandwidth than a residential customer, and expect that ETCs would provide higher bandwidth offerings to community anchor institutions in high-cost areas at rates that are reasonably comparable to comparable offerings to community anchor institutions in urban areas.")

SHLBC also points to a line of DC Circuit cases stating that an agency "is not required to adopt a final rule that is identical to the proposed rule, "because "[i]f that were the case, [the Commission] could learn from the comments on its proposals only at the peril of subjecting itself to rulemaking without end."[19] However, the Rural Associations do not seek "rulemaking without end." Rather, the Rural Associations simply seek the opportunity to address the many complicated implementation issues identified in their petition *prior to* adoption of the specific rule. As things now stand, many questions remain unanswered as to the nature and scope of the obligations imposed by the *Second Report and Order*. The Rural Associations' members are unable to fully assess the impact of the obligation on their businesses. Moreover, as noted in the Petition, Forms 470 requesting service for funding year 2016 could be posted as early as July 1, 2015, and remain active for as few as 28 days.[20] Therefore, high-cost support recipients could be obligated within as little time as the next two months to bid in response to Form 470 submissions before knowing at what rates they are required to offer E-rate supported services and without any detail regarding how such rates will be calculated, thereby risking receipt of critical universal service support if they fail to comply.

As a result of this lack of notice, parties had no opportunity to discuss the nature of the requirement or how the reasonable comparability benchmark will be determined. It remains unclear whether there will be a single "one size fits all" national benchmark or whether the Commission intends to develop multiple benchmarks for different regions of the country or for

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19 *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 952-53 (D.C. Cir. 2004); *First American Discount Corp. v. Commodity Futures Trading Comm'n*, 222 F.3d 1008, 1015 (D.C. Cir. 2000).

20 *See*, 47 C.F.R. § 54.503(c)(4) (requiring schools and libraries to wait at least four weeks after posting a Form 470 with the Administrator before selecting and making commitments with service providers).

areas in different population density bands. How the benchmark(s) will take into account the fact that distance, school and library sizes, network costs and middle mile expenses vary significantly among potential E-rate projects is also an unexamined, yet critical issue. Similarly, how the benchmark(s) account for the differences in regional and state-wide consortia purchasing as compared to contracts between a service provider and a single school or school district must be considered. Adopting a requirement to bid without establishing the parameters of such bids clearly puts the cart before the horse. That order should be righted via the Rural Associations' petition for reconsideration before RLECs are tasked with compliance with the new obligation and penalized for non-compliance.

III. CONCLUSION.

Contrary to claims by ALA and SHLBC, the Rural Associations and their members were not provided with adequate notice of the Commission's intent to impose a new mandatory bidding requirement on RLECs at nationally benchmarked rates. The Commission should accordingly reconsider the E-rate Modernization *Second Report and Order* in this respect and seek focused comment on the implications of such a requirement. At a minimum, the Commission should clarify that benchmarks must reflect the actual costs of providing E-rate services in rural areas, and be adopted by the Bureau only after interested parties have a reasonable opportunity to examine relevant data and suggest alternative approaches. The

Commission should also clarify that bidding requirements will not take effect until such proceedings are completed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Rural Associations' Reply was served this 11th day of May, 2015 by electronic filing and e-mail to the persons listed below.

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