

**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
)	
Schools and libraries Universal Service Support Mechanism)	CC Docket No. 02-6
)	

**COMMENTS
OF
NTCA THE RURAL BROADBAND ASSOCIATION**

November 3, 2016

Table of Contents

I.	INTRODUCTION & SUMMARY.....	1
II.	THE COMMISSION SHOULD DECLINE TO GRANT THE PETITIONS; IT SHOULD INSTEAD WORK TO ENSURE THAT ALL FOUR UNIVERSAL SERVICE PROGRAMS ARE PROPERLY FUNCTIONING AND COORDINATED TO MAKE HIGH QUALITY AND AFFORDABLE BROADBAND AVAILABLE TO EVERY END USER, SCHOOL AND LIBRARY AND RURAL HEALTH CARE FACILITY	3
III.	GRANT OF THE PETITIONS WOULD RUN COUNTER TO THE CLEAR AND EXPRESS LANGUAGE CONTAINED IN SECTION 254(H) OF THE ACT	7
IV.	AT THE VERY LEAST, FULL COMMISSION CONSIDERATION OF THE PETITIONS MUST TAKE PLACE, AS THEY RAISE NOVEL QUESTIONS OF LAW AND POLICY THAT CANNOT BE DECIDED BY THE WIRELINE COMPETITION BUREAU PURSUANT TO DELEGATED AUTHORITY	10
V.	CONCLUSION.....	13

**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
)	
Schools and libraries Universal Service Support Mechanism)	CC Docket No. 02-6
)	

**COMMENTS
OF
NTCA THE RURAL BROADBAND ASSOCIATION**

I. INTRODUCTION & SUMMARY

NTCA–The Rural Broadband Association (“NTCA”)¹ hereby submits these comments in response to the September 19, 2016 Public Notice² released by the Wireline Competition Bureau (“Bureau”) in the above-captioned proceedings. The Public Notice seeks comment on separate petitions filed by Microsoft Corporation, *et al.*, (“Microsoft Petition”)³ and the Boulder Valley School District and the Samuelson-Glushko Technology Law & Policy Clinic (“Boulder

¹ 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.

² Wireline Competition Bureau Seeks Comment on Petitions Regarding Off-Campus Use of Existing E-rate Supported Connectivity, CC Docket No. 02-6, WC Docket Nos. 10-90 and 13-184, Public Notice, DA 16-1051 (rel. Sep. 19, 2016) (“Public Notice”).

³ Joint Petition for Clarification or, in the Alternative, Waiver, of Microsoft Corporation, *et. al.*, WC Docket No. 13-184 (fil. Jun. 7, 2016) (“Microsoft Petition”).

Valley Petition”)⁴ (collectively “Petitions” or “Petitioners”). The Petitions seeks “clarification” or waivers of existing Federal Communications Commission (“Commission”) rules to extend the Universal Service Fund (“USF”) Schools and Libraries Program (“E-rate”) support of telecommunications facilities to residential settings.

As an initial matter, NTCA and the small community-based broadband providers that it represents support the underlying policy goals that the Petitions seek to further. NTCA and its members share the commitment evidenced by these Petitions to filling “the homework gap” and enabling affordable access to robust services at home, at work, and in schools and libraries – in short, throughout *the entire community*. The very good intentions contained within the Petitions are goals that NTCA members strive to achieve every day not only for community anchor institutions and the neighborhoods immediately surrounding them, but also for the outlying wide swaths of rural America where students may ride school buses for hours to and from home “out in the country.”

Unfortunately, at least in areas where High-Cost USF support enables deployment and ongoing operation of existing networks, grant of the Petitions would blur, if not obliterate, the distinction between the High-Cost and E-rate programs and turn each into separate initiatives that, while under the same USF umbrella, actually compete with one another to support access in rural communities. Put another way, in rural areas specifically, grant of the Petitions would attempt to solve with E-rate funds problems that Congress intended the High-Cost program to

⁴ Petition for Waiver, on behalf of Boulder Valley School District, Samuelson-Glushko Technology Law & Policy Clinic, WC Docket No. 13-184, WC Docket No. 10-90 (submitted May 16, 2016) (“BVSD Petition”).

tackle, thereby undermining the operations and effectiveness – and even the integrity – of both programs.

The Bureau should also decline to grant the Petitions as doing so would run counter to the definition of an “educational purpose” as contained in Section 254(h) of the Communications Act, as amended by the Telecommunications Act of 1996 (“the Act”), as well as previous Commission clarifications of that term. The Commission has consistently defined that term to include a link to a place of instruction.

Finally, the Petitions raise substantial questions – of statutory authority as well as the very purposes of the E-rate program – that are novel and therefore beyond mere “clarifications” or waivers of existing rules and definitions by the Bureau. Existing precedent and guidelines cannot serve as a guide for Bureau consideration of the issues discussed herein, and thus the Petitions should be considered by the full Commission pursuant to a Notice of Proposed Rulemaking (“NPRM”) conducted pursuant to the Administrative Procedure Act (“APA”).

II. THE COMMISSION SHOULD DECLINE TO GRANT THE PETITIONS; IT SHOULD INSTEAD WORK TO ENSURE THAT ALL FOUR UNIVERSAL SERVICE PROGRAMS ARE PROPERLY FUNCTIONING AND COORDINATED TO MAKE HIGH QUALITY AND AFFORDABLE BROADBAND AVAILABLE TO EVERY END USER, SCHOOL AND LIBRARY AND RURAL HEALTH CARE FACILITY

As an initial matter, it must be said that NTCA and the small community-based broadband providers that it represents support the underlying policy goals that the Petitions seek to further. Broadband Internet access service is no longer a luxury item. It is in fact a necessity of daily life, enabling full participation in our economy by every American and full participation in the learning process by students of all ages. With children and grandchildren

being educated in their local schools, NTCA members' owners, managers, and employees take seriously their responsibility to ensure that each school and library has the best possible broadband connection. They also take seriously their responsibility to ensure that the underlying network that makes possible the high quality connection to a school or library is as robust as possible, and affordable as well, thus ensuring that each student has access to an affordable broadband connection at home.⁵

Indeed, NTCA members share the interest of the Petitioners in maximizing affordable access to quality voice and broadband services. NTCA and its members understand and promote the proposition that robust broadband networks underpin vital community functions of economic development, health care, public safety, utilities, and *education*. NTCA's Smart Rural CommunitySM initiative includes recognition awards for outstanding achievement in these regards, as well grants and educational programming to support the furtherance of these ideas among rural broadband providers and other local leaders. By way of example, Consolidated Telecommunications Company of Brainerd, Minnesota, worked with Independent School District 181 and four other community organizations to construct a 10 gigabit fiber ring around the Brainerd and Baxter communities, connecting, *inter alia*, all area schools and government buildings. This collaborative undertaking has improved local educational opportunities for many students. Additionally, Peoples Rural Telephone Cooperative ("PRTC") of McKee,

⁵ See, Comments on NTCA–The Rural Broadband Association, WC Docket No. 13-184 (fil. Sep. 16, 2013), pp. 12-13. In comments filed in September 2013, NTCA discussed a survey of its membership with respect to members' efforts to deploy robust broadband connections to schools and libraries. Two-hundred and twenty companies, serving multiple study areas across 38 states, responded to the survey. Of the 1,208 K-12 schools identified by NTCA members as located within their serving areas, 907 (75%) of those are already connected by Fiber-to-the-Premises ("FTTP"). Of those connected schools, NTCA members reported offering maximum speeds of 912 Mbps (mean) and 100 Mbps (median), while the average speed purchased is 128 Mbps (mean) and 20 Mbps (median).

Tennessee, worked with the Owsley Schools Snow Bound Project to launch a pilot program aimed at reducing the impact of winter weather on education by enabling access to the Kentucky Virtual High School for high school courses and other online learning opportunities. PRTC also partners with Jackson County Schools and the public library. Polar Communications, of Park River, North Dakota, worked with Mayville State University to create the first “laptop university” in the United States. Polar fiber supports a network that enables 1,000 students to connect nationwide. Each of these companies has been recognized with a Showcase award in the Smart Rural CommunitySM program.

It must not be overlooked, however, that the High-Cost USF program is critical to such success in availability *and* adoption in rural areas. The High-Cost USF program is of course what makes the underlying network available to serve residents, businesses, schools and libraries in rural America. The High-Cost USF program promotes broadband deployment in some of the nation’s costliest to serve rural areas, where lack of density, difficult terrain, and weather-shortened construction seasons are among the many significant barriers to the provision of high-quality, reasonably comparable broadband service. But what is almost always overlooked is how the High-Cost USF program functions as much more than a simple “deployment” or “availability” program; this program in fact both stimulates deployment *in the first instance* by helping to solve the business case for providers and *then* facilitates ongoing customer (residential, business, school, library, and health care facility) use of networks in high-cost areas. It does so by ensuring that consumers’ and schools’ and libraries’ rates on those networks, once built, will in rural areas be reasonably comparable to those in urban areas,

in turn ensuring that broadband networks in these areas will be useful and sustainable over the long term.

With respect to the concept of universal service more generally, each of the four individual and vital programs that make up the USF fill specific and discrete needs, such as enabling utilization of the most modern IP-enabled teaching capabilities by our nation's rural schools, furthering the creation of new businesses and keeping consumers in rural areas connected, ensuring that libraries can fill discrete broadband availability gaps as well as other services, and delivering life-saving and cost-saving health care services to rural Americans. These individual but interconnected programs target support in a manner that can and should be complementary in achieving broader universal service objectives. Careful coordination is essential to ensure they achieve their objectives in concert, rather than competing and conflicting with one another in the deployment of redundant networks or the "cream-skimming" of certain customers or neighborhoods to the detriment of those that live in outlying areas and the High-Cost USF program that enables service to those outlying, most rural consumers. At bottom, it would be particularly troubling to allow for funding of networks via E-Rate to the very same locations where the High-Cost program already supports networks in place.

NTCA does not dispute that gaps remain to be filled and additional work needs to be done. As the Petitions demonstrate, there remain rural areas of the nation where geography, topography, or a lack of a business case limit the availability of high quality broadband to residences, those with students among them. Yet filling these gaps can and should be done through careful coordination of the four USF programs as created by Congress, rather than by

haphazard grant of one-off petitions that may open the door to conflicts among the programs and deployment of redundant networks that are *both* funded using USF dollars. Thus, with respect specifically to the questions presented by the instant Petitions, the key to filling such gaps is an efficient and cost-effective use of E-rate funds in a manner carefully coordinated with the other USF programs and that leverages existing broadband network facilities. While well-intentioned, grant of the Petitions would blur, if not obliterate, the distinction between the High-Cost and E-rate programs and turn each into competing initiatives to enable access in rural communities. Put another way, grant of the Petitions would attempt to solve with E-rate funds problems that Congress intended the High-Cost and Lifeline programs (to the extent service is available yet not quite within reach of a low-income consumer) to tackle. Granting one-off waiver petitions is not the proper means to promote coordinated efforts to overcome such challenges.

III. GRANT OF THE PETITIONS WOULD RUN COUNTER TO THE CLEAR AND EXPRESS LANGUAGE CONTAINED IN SECTION 254(H) OF THE ACT

As noted in Section II, *supra*, the structure of the four discrete but ultimately interconnected universal programs created by Section 254 of the Act was clearly and purposefully set forth by Congress. Each program at its core serves a fundamental purpose but does so in different ways.

Nothing makes this more clear than the plain language contained in Section 254(h) of the Act that delineates the outer bounds of the purposes for which E-rate funding can be utilized. Section 254(h)(1)(B) states in relevant part that:

All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3), provide such services to elementary schools, secondary

schools, and libraries *for educational purposes* at rates less than the amounts charged for similar services to other parties.⁶

As the language makes clear and unmistakable, the services provided to schools and libraries pursuant to the Act are to be utilized by those institutions for “educational purposes.” This statutory requirement has long been strictly adhered to by the Commission; as the Public Notice points to, while the definition of “educational purpose” has been clarified over the nearly two decade life of the E-rate program, the touchstone has always been that “the purpose for which support is provided [is] for educational purposes *in a place of instruction.*”⁷ Orders issued in 2003 and 2010 clarifying the definition of “educational purpose” – while authorizing the use of E-rate supported services by school and library staff and by members of the community after normal school hours – in every case maintained the requirement that the use of such facilities was tied to *a place of instruction.*⁸ These Orders did not address nor authorize the extension of E-rate supported services or facilities to *a residential setting.*

⁶ 47 U.S.C. § 254(h)(1)(B) (emphasis added).

⁷ See, Public Notice, fns 4-6 (citing nearly two decades of Commission commitment to the principle of “educational purpose” being ultimately tied to “a place of instruction.”).

⁸ See, Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Second Report and Order and Further Notice of Proposed Rulemaking, FCC 03-101 (rel. Apr. 30, 2003) (“*2003 Second Report and Order*”), ¶ 17 (clarifying that “educational purposes” includes “services to be used by support staff not involved in instructional activities” and stating that “activities that are integral, immediate, and proximate to the education of students, or in the case of libraries, integral, immediate, and proximate to the provision of library services to library patrons, qualify as educational purposes under this program.”). The *2003 Second Report and Order* went on to state that certain off-premises uses of E-rate supported services would be considered “activities that are integral, immediate, and proximate to the education of students.” Examples of such uses included “a school bus driver’s use of wireless telecommunications services while delivering children to and from school [or] the use by teachers or other school staff of wireless telecommunications service while accompanying students on a field trip or sporting event.” *Id.*, fn. 28. Interestingly, the *2003 Second Report and Order* stated that “[w]e find that our clarification is consistent with *statutory mandates* that the purpose for which support is

In addition, to the extent that the Commission has considered a more expanded use of E-rate funds for off-campus uses – as discussed in the Public Notice discussion of the 2011 E-rate Deployed Ubiquitously 2011 Pilot Program – that pilot program was of a scope and purpose far different than that contemplated by the Petitions. The use of E-rate funds for connectivity for netbook for students living in remote areas (in that case to pay for wireless access provided by a service provider) is far different than the use of Internet access eligible for the E-rate discount being extended off-campus and utilized to extend service to a residential setting. The latter in fact blurs if not erases the line between a program intended to function primarily and in the first instance as a discount program and one intended to support or encourage the availability of a community-wide network.

It must also be stated that Petitioners’ assertions that the use of E-rate supported facilities for the purposes requested will not have any cost impact on the E-rate fund – beyond being unsupported assertions – misses the point. Even if true, the fact remains that Congress never intended the use of E-rate funds or discounted services or facilities for the extension of service to residential users. This is particularly true considering that there is no indication that

provided be for educational purposes *in a place of instruction.*” *Id.*, ¶ 20 (emphasis added). In two separate 2010 Orders, the Commission also clarified the definition of “educational purposes” for “community use” of E-rate supported facilities and services during non-school hours. *See*, Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, Order and Notice of Proposed Rulemaking, FCC 10-33 (rel. Feb. 19, 2010) (“*Community Use Order*”), ¶ 7 (adopting a temporary limited waiver to “allow schools the option to open their facilities to the general public to utilize services and facilities supported by E-rate during non-operating hours, such as after school hours, on the weekends, on school holidays, or during the summer months when schools are not in session, for other purposes, such as adult education, job training, digital literacy programs, and online access to governmental services and resources”); *See also*, Schools and Libraries Universal Service Support Mechanism, CC Docket No. 02-6, A National Broadband Plan For Our Future, GN Docket No. 09-51, Sixth Report and Order, FCC 10-175 (rel. Sep. 28, 2010) (“*6th Report and Order*”) ¶ 22 (making permanent the “community use” waiver adopted in the *Community Use Order*).

the use of E-rate supported facilities for the requested purposes would be limited to the use of Internet access solely for educational purposes. Indeed, the fact that it is likely impossible to determine whether service extended to a residential setting via the methods proposed by the Petitions is used solely for educational purposes demonstrates the wisdom of Congress in creating separate programs with separate uses of support. In the end, nothing in Section 254(h) indicates any intent to utilize E-rate support for the provision of broadband Internet access service in a residential setting.

IV. AT THE VERY LEAST, FULL COMMISSION CONSIDERATION OF THE PETITIONS MUST TAKE PLACE, AS THEY RAISE NOVEL QUESTIONS OF LAW AND POLICY THAT CANNOT BE DECIDED BY THE WIRELINE COMPETITION BUREAU PURSUANT TO DELEGATED AUTHORITY

As noted in Sections II and III, *supra*, the Petitions raise substantial questions with respect to public policy and statutory authority that are novel and go beyond mere “clarifications” or waivers of existing rules and definitions. In fact, at least in rural areas, grant of the Petitions would represent a fundamental reconsideration (and erosion) of the very distinct roles of the four discrete USF programs. In light of this procedural posture, and the fact that existing precedent and guidelines cannot serve as a guide for Wireline Competition Bureau consideration of the issues discussed herein, the Petitions should be considered by the full Commission pursuant to a NPRM conducted pursuant to the APA.

As Petitioners correctly note, the Commission’s rules grant the Wireline Competition Bureau the delegated authority to perform certain actions. This delegated authority is limited, however, and requires full Commission consideration of wireline matters to the extent the question at issue concerns “applications or requests which present novel questions of fact, law or policy which cannot be resolved under outstanding

precedents and guidelines.”⁹ As discussed in detail above, the Petitions at issue herein contemplate a use of E-rate supported services and facilities that is simply without precedent in the two decade history of the program. The Petitions each seek to extend the use of E-rate supported facilities to a residential setting in a manner that runs counter to Section 254(h) specifically and to the very structure of the four discrete USF programs more generally. One cannot reasonably argue that such a fundamental rethinking of the E-rate program is not a “novel question of fact, law, or policy” that should be undertaken by the full Commission via a formal rulemaking process.

As to the assertion that existing precedent can resolve the issue, therefore bringing grant of the Petitions within the delegated authority of the Bureau, Petitioner BVSD’s reliance¹⁰ on the *Alaska Order*¹¹ is misplaced. Indeed, substantial differences in the underlying facts and the unique circumstances under which it was granted render the *Alaska Order* inapposite as to disposition of the instant Petitions. For one, the *Alaska Order* was granted for a community in which no local provider even existed at the time. That very fact served as the basis for one of several conditions, as the waiver was specifically limited to Alaskan communities where no local provider existed.¹² No such limitation is proposed here. Moreover, the Order was granted for Alaskan communities that the Commission has

⁹ 47 C.F.R. § 0.291 (a)(2).

¹⁰ BVSD Petition, pp. 9-10.

¹¹ Petition of the State of Alaska for Waiver for the Utilization of Schools and Libraries Internet Point-of-Presence in Rural Remote *Alaska Villages Where No Local Access Exists and Request for Declaratory Ruling*, Order, CC Docket No. 96-45, FCC 01-350 (Dec. 3, 2001) (“*Alaska Order*”).

¹² *Alaska Order*, ¶ 13 (“The first condition limits application of the waiver to communities in Alaska where there is no local or toll-free dial-up Internet access.”).

always viewed as unique in the challenges faced and therefore requiring unique public policy approaches.¹³ In short, nothing in the *Alaska Order* can serve as a guide to the Wireline Competition Bureau in considering the numerous questions of law, policy, and fact contemplated by the Petitions, and thus only the full Commission can decide the important questions each raise.

It must also be noted that previous clarifications of the definition of “educational purpose” have been considered and granted by the full Commission. As discussed in more detail above, the *2003 Second Report and Order* clarifying the definition of “educational purposes” to include school and library staff use of supported services for purposes consistent with their educational purpose and the two separate Orders issued in 2010 enabling the use of E-rate supported facilities by the general public during non-school hours not only maintained the connection to a place of instruction, but were considered and adopted by the *full Commission*. So too was the *Alaska Order* considered by the *full Commission*. Most importantly, each Order contemplated a set of facts and a use of E-rate supported facilities vastly different than that proposed by the Petitions. This demonstrates that the Commission has consistently been careful and deliberative in its consideration of the definition of “educational purposes” and the facts under which E-rate funds would be used. Each Order included conditions on the use of funds to maintain the integrity of the E-

¹³ See, Connect America Fund, WC Docket No. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 16-115 (rel. Aug. 31, 2016) (“Alaska USF Plan”), ¶ 5 (stating that “Alaskan rate-of-return carriers face unique circumstances including Alaska’s large size, varied terrain, harsh climate, isolated populations, shortened construction season, and lack of access to infrastructure [and that] not only do Alaskan rate-of-return carriers face conditions that are unique to the state, unlike challenges in the Lower 48, the circumstances and challenges can also vary widely from carrier to carrier depending on where their service areas are located within Alaska”).

rate fund.¹⁴ In short, it is clear that the Commission has long taken seriously its responsibility to maintain the integrity of the USF consistent with the purposes of the four programs as set forth in the statute. It should do so here and the Wireline Competition Bureau should decline to grant the Petitions.

V. CONCLUSION

For all of the reasons set forth above, the Wireline Competition Bureau should decline to grant the Petitions. To the extent that the subject matter presented by the Petitions raises very important public policy and statutory interpretation questions, such matters should properly be addressed by the full Commission through appropriate notice-and-comment rulemaking procedures.

¹⁴ See, *2003 Second Report and Order*, ¶ 21 (stating that “discounts will only be awarded to support activities that have a defined nexus to education, or, in the case of libraries, to the delivery of library services to library patrons”); *Community Use Order*, ¶¶ 11-13 (stating that schools and libraries utilizing the temporary waiver “shall not seek funding for more services than necessary under the E-rate program to serve their current student population,” making clear that “any community usage of E-rate funded services at a school facility is limited to non-operating hours” and reiterating that “schools’ discounted services or network capacity may not be sold, resold, or transferred by such user in consideration for money or any other thing of value.”) (internal citations and quotations omitted); *6th Report and Order*, ¶¶ 24-26 (making permanent the “community use” waiver adopted in the *Community Use Order* and extending the same conditions).

Respectfully submitted,



By: /s/ Michael R. Romano
Michael R. Romano
Senior Vice President –
Industry Affairs & Business Development
mromano@ntca.org

By: /s/ Brian J. Ford
Brian J. Ford
Senior Regulatory Counsel
bford@ntca.org

4121 Wilson Boulevard, Suite 1000
Arlington, VA 22203
703-351-2000 (Tel)