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Federal Communications Commission
445 12th St. S.W.
Washington, DC 20554

RE: RM-11841; CC Docket No. 02-6; WC Docket No. 13-184

The Center for Democracy and Technology (CDT) is a non-profit advocacy organization working to promote democratic values online and in new, existing, and emerging technologies. CDT respectfully submits these comments in response to the request for public comment from the Federal Communications Commission (FCC) on a potential rule-making proceeding to ban the use of E-rate funds for constructing additional fiber networks when one fiber network is already in place.

At CDT, we believe in the power of the internet, and we seek policy outcomes that keep the internet open and innovative. From our perspective as an advocate for the open, competitive internet, this proposal by incumbent broadband providers to block funds from ever being used to support new entry under any circumstances raises serious concerns and is unlikely to be in the public's interest.

The E-rate program has helped bring broadband to America's schools and libraries. Almost all school districts now have broadband connections, albeit with varying levels of quality and price. (There are, however, still more than two million students to connect, according to a recent report.¹)

The petition at issue here is a request from three existing broadband providers that the FCC initiate a rule-making proceeding to "prohibit the use of universal service funds for special construction of fiber networks that overbuild existing fiber networks."² As an initial matter, we urge the Commission to view any request from companies to stop competitors from entering their territory with skepticism. When there is no alternative provider, a broadband provider has little incentive to provide its best prices and quality. But when there is the possibility that a school will shift its business to a new entrant, the incumbent faces competitive pressure to provide high quality services at low prices. As the Supreme Court wrote, "the heart of our national economic policy long has been faith in the value of competition."³

The facts at issue here should raise the FCC's skepticism dial even more.

¹ <http://stateofthestates.educationsuperhighway.org>

² <https://docs.fcc.gov/public/attachments/DA-19-493A1.pdf>

³ *Standard Oil Co v. FTC* 340 US 231, 248 (1951).

- First, the E-rate program already has protections against wasteful spending. Under the program, a school district that is seeking a subsidy must request proposals for the service (here, broadband access) in a competitive process and select the most cost-effective one. Given that requirement, building a second fiber network through the E-rate program would happen only when it was more cost effective to deploy that second network and provide service through it than to keep paying the incumbent provider for service.⁴ Put differently, the proposed ban on ever subsidizing a second fiber network to a school or library could lead to the government requiring a school to select or maintain service with the less cost-effective incumbent. Such a ban would cost taxpayers more while simultaneously squelching competition and protecting incumbent monopolists.
- Second, while one might reasonably prioritize connecting all students over building secondary fiber networks to schools that are already connected, there are funds available to do both. The program has excess funds. It was directed to fund all eligible projects last year and still projected a surplus.⁵
- Third, as noted above, approximately 98 percent of the school districts in America now have broadband service. A total ban on the use of E-rate funds for building second fiber network would mean that very few E-rate dollars would go towards fiber builds. This may well discourage companies that might have built fiber networks in many areas (both unserved and served by one provider) from entering the market, gaining scale, and challenging the existing incumbents.

This attempt to insulate existing providers from competition is particularly troubling when it comes to our schools and libraries, which play important roles in educating children and the public, providing access to news, and informing our public debates. Our schools and libraries play a key role in the free flow of ideas in our democracy. CDT has advocated for free expression and an open internet for decades and has a keen interest in protecting democratic values and creating an educated citizenry.

Consider a rural school district that is frustrated with its existing broadband provider. That district might be paying very high prices for poor service. But because there is no competitor, the district is stuck paying the incumbent's high price for low quality service. Worse, imagine that the broadband provider vertically integrates with other vendors, like educational technology companies or record-keeping managers, and requires the school to use its affiliated companies as a condition of receiving broadband service. Or what if the broadband provider shaped what news or programming might reach a particular school? In these scenarios, the school may be better served by having the option to switch providers.

⁴ For example, a competing fiber network provider might already have built a fiber network to a nearby building, making it relatively easy and inexpensive to continue that network to the school. Or a second fiber network provider might have access to dark fiber that has already been deployed but not yet activated.

⁵ <https://docs.fcc.gov/public/attachments/DA-18-861A1.pdf>



These concerns are more than hypothetical; some have happened already. Service providers have been found overcharging school districts, resulting in FCC investigations and fines.⁶ And for years, leaders have raised concerns about possible viewpoint bias in our educational system. A rule that made it harder for schools to switch to another provider should they find themselves harmed by high quality-adjusted prices and biases in content delivery would raise significant concerns from both competition and civil society perspectives.

Chairman Ajit Pai has raised concerns about using public funds for projects that provide a second fiber network to the same location. We agree that the FCC should avoid wasteful spending on duplicative networks. But given the requirement that schools employ a competitive bidding process and select the most cost-effective proposal, concerns about building wasteful redundant networks are misplaced. In addition, in the absence of regulations on the rates and service levels provided to schools and libraries, competition from such second fiber networks can be a powerful force that benefits students and the public.

The petition at issue here is clear about its request: a prohibition on *ever* using E-rate funds to build a fiber network where the incumbent already got a subsidy to build one, regardless of the incumbent's performance or pricing or other factual circumstances. That would be a sweeping ban that could harm schools, students, the public, and taxpayers.

We would be happy to provide any additional information if it would be helpful to the Commission, and we appreciate the opportunity to provide these comments.

Sincerely,

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⁶ See, e.g., <https://www.fcc.gov/document/fcc-fine-att-106k-overcharging-fl-schools-and-e-rate-program>; <https://www.fcc.gov/document/fcc-settles-e-rate-investigation-verizon>; <https://arstechnica.com/tech-policy/2016/08/att-fights-for-right-to-charge-some-schools-more-for-phone-service/>; <https://www.fiercetelecom.com/telecom/verizon-fcc-settle-e-rate-investigation-for-17m>