

The Heritage Foundation
214 Massachusetts Ave NE
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October 4, 2024

The Honorable Jessica Rosenworcel
Chairwoman
Federal Communications Commission
45 L Street NE
Washington, DC 20554

**Re: *Addressing the Homework Gap through the E-Rate Program*, WC Docket No. 21-31,
Report and Order and Further Notice of Proposed Rulemaking (July 18, 2024).**

Dear Chairwoman Rosenworcel,

The Heritage Foundation respectfully submits a comment raising concerns that the Federal Communications Commission lacks the statutory authority to implement the proposed rulemaking, *Addressing the Homework Gap through the E-Rate Program*. This expansion of the E-Rate program violates federal law and regulations. We urge the Commission to abandon its efforts and not finalize this rulemaking.

The FCC proposes to permit elementary and secondary schools and libraries to apply for E-Rate funds to purchase Wi-Fi hotspots and services to lend to school students and staff and library patrons for off-premises uses beginning in funding year 2025. This proposal mirrors the pandemic-era Emergency Connectivity Fund, which expired June 30, 2024.

Congress created the Emergency Connectivity Fund and provided \$7.171 billion to the FCC in the American Rescue Plan Act of 2021. Congress authorized the Commission to disburse the funds to elementary and secondary schools and libraries “to reimburse 100 percent of the costs associated with the eligible equipment, advanced telecommunications and information services, or eligible equipment and advanced telecommunications and information services” for off-premises locations. The law defined eligible equipment as Wi-Fi hotspots, modems, routers, devices that combine a modem and router, and connected devices.¹ According to the FCC’s data, \$7.09 billion in program funding was committed during the program duration.²

The primary catalyst for creating this temporary program was the nationwide school closures during the pandemic. Due to government-mandated closures, schools resorted to online, at-home learning, but not all students lived in homes with internet access. By one estimate,

¹ Public Law No: 117-2

² News release, “FCC Announces Over \$5 million in emergency connectivity funding for schools,” Katie Gorscak, FCC, November 1, 2023, <https://docs.fcc.gov/public/attachments/DOC-398178A1.pdf> (accessed October 1, 2024).

It’s unclear if the FCC has remaining funds. The American Rescue Plan Act permitted the FCC to use up to two percent of funds to adopt and implement the program.

roughly 42 million Americans lacked access to broadband.³ In the spring of 2021, when the American Rescue Plan Act became law, 52 percent of public-school students resumed in-person instruction.⁴ By December 2021, 99 percent of public-school students returned.⁵ The program served its purpose, students returned to school, and the public health emergency ended over a year ago.

Neither precedent nor prior demand is sufficient authority or justification to extend this program or “modernize the E-Rate program” as the Commission characterizes it in the further notice of proposed rulemaking (FNPRM). The FCC simply lacks the legal authority. The FNPRM cites Sections 254(c)(1), (c)(3), (h)(1)(B), and (h)(2) of the Communications Act of 1934 as its legal authority to promulgate this rulemaking, and the Commission claims the law “collectively grant[s] the Commission broad and flexible authority to establish rules governing the equipment and services.”⁶ However, the statutory text is clear in what it permits.

Section 254(c)(1) defines universal service as “an evolving level of telecommunications services,” (c)(3) permits special services, (h)(1)(B) directs telecommunications carriers serving a geographic area to “provide such services to elementary schools, secondary schools, and libraries for educational purposes,” and lastly, (h)(2) requires “the Commission to establish competitively neutral rules—to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms...and libraries.”⁷ In short, Section 254 provides that E-Rate discounts may be used for telecommunications and information services for school classrooms and libraries. It does not provide for equipment and devices such as Wi-Fi hotspots in locations outside of classrooms and libraries.

The FCC rationalizes its expansion of the E-Rate program to provide equipment and services outside classrooms and libraries by stating, “neither Congress nor the Commission has defined the term ‘classroom’ or placed any explicit location restrictions on schools or libraries.”⁸ This argument takes great liberty. By this notion, a classroom means anything and everything and classrooms and libraries do not have boundaries. The Commission then acknowledges,

³ Natalie Campisi, “Millions Of Americans Are Still Missing Out On Broadband Access And Leaving Money On The Table—Here’s Why,” *Forbes*, May 26, 2023, <https://www.forbes.com/advisor/personal-finance/millions-lack-broadband-access/#:~:text=Currently%2C%20some%2042%20million%20Americans%20have%20no%20access,according%20to%20Broadband%20Now%2C%20a%20data%20technology%20company> (accessed October 1, 2024).

⁴ National Center for Education Statistics, “U.S. Education in the Time of COVID,” August 2022, p. 1, <https://nces.ed.gov/surveys/annualreports/topical-studies/covid/#:~:text=Spring%202021%20About%20half%20%2852%20percent%29%20of%20public,food%20assistance%20from%20the%20school%20in%20spring%202021> (accessed October 1, 2024).

⁵ Lauren Camera, “Nearly 100% of Students Back to School Full Time and In Person,” *US News*, December 15, 2021, <https://www.usnews.com/news/education-news/articles/2021-12-15/nearly-100-of-students-back-to-school-full-time-and-in-person#:~:text=Ninety-nine%20percent%20of%20public%20school%20fourth-%20and%20eighth-grade,data%20released%20through%20a%20new%20Education%20Department%20portal> (accessed Oct. 1, 2024).

⁶ FCC, WC-Docket No. 21-31, July 29, 2024, para 88, p. 48, <https://docs.fcc.gov/public/attachments/FCC-24-76A1.pdf#:~:text=5%20See%20generally%20Addressing%20the%20Homework%20Gap%20through%20the%20E-Rate> (accessed September 30, 2024).

⁷ 47 U.S.C. § 254

⁸ FCC, WC-Docket No. 21-31, July 29, 2024, para 7, p. 4.

“however, in general, the E-Rate program does not provide support for most off-premises uses of eligible services, and applicants are usually required to cost-allocate the costs of the portion of services used off-premises from their funding requests.” If the FCC’s interpretation does not break the letter of the law, it certainly violates the spirit of the law.

In March 2024, we submitted an ex parte comment to the Notice of Proposed Rulemaking for this docket. We highlighted the Universal Service Fund’s insolvency and noted “Congress has spent over \$150 billion in subsidies to meet the program’s obligations.”⁹ While the FNPRM states that the FCC will prioritize funding for on-premise services before off-premise requests, establishes funding caps, and limits the number of devices a school or library could request, it does not sufficiently demonstrate how this additional expenditure will neither increase the Universal Service Fund fees nor require additional appropriations from Congress.

We concur with the dissenting statements of FCC Commissioners Carr and Simington and echo their conclusions that the proposed rulemaking exceeds the agency’s authority. Thus, the proposed rulemaking would violate federal statute, and we urge the Commission not to finalize its proposal. Instead, we encourage the FCC to turn its attention and resources to address existing problems within the E-Rate program and Universal Service Fund.

Respectfully,
The Heritage Foundation

by:

/s/ Annie Chestnut

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⁹ Annie Chestnut, The Heritage Foundation, Notice of Ex Parte, March 29, 2024, <https://www.fcc.gov/ecfs/search/search-filings/filing/1032982895666> (accessed October 1, 2024).