

Congress of the United States
Washington, DC 20515

September 26, 2023

The Honorable Anna Gomez
Commissioner
Federal Communications Commission
45 L Street, N.E.
Washington, DC 20554

Dear Commissioner Gomez,

We write to express our strong opposition to a plan circulated by Chairwoman Jessica Rosenworcel to expand the Federal Communication Commission’s (FCC or the Commission) E-Rate program.¹ This plan would not only violate federal law but also duplicate programs across the federal government, directly contradicting FCC commissioners’ repeated commitments to streamlining federal broadband funding.² Indeed, Commissioner Nathan Simington says this plan “would eviscerate Congress’ restrictions on E-Rate and make a mockery of the law.”³ Instead of expanding the FCC’s authority beyond current statutory and budgetary constraints, the FCC should address the E-Rate program’s existing problems and follow the law as written.

Section 254 of the Communications Act of 1934 provides that E-Rate funds may only be used “to enhance . . . access to advanced telecommunications and information services for . . . school classrooms . . . and libraries.”⁴ The law is clear: the Commission’s E-Rate authority is explicitly confined to classrooms and libraries. As such, the Commission has consistently recognized that “off-campus use of eligible services, even if used for an educational purpose, is ineligible for support.”⁵ Congress has acted in accordance with this understanding: Congress has

¹ *Chairwoman Rosenworcel Announces ‘Learn Without Limits’ Initiative*, FCC, Press Release (June 26, 2023), <https://docs.fcc.gov/public/attachments/DOC-394625A1.pdf>.

² In June 2021, Chairwoman Rosenworcel stated that she was “proud” of an agreement among the FCC, the National Telecommunications and Information Administration, and the U.S. Department of Agriculture to strengthen the interagency coordination of federal broadband funding. *FCC, NTIA, and USDA Announce Interagency Agreement to Coordinate Broadband Funding Deployment*, FCC, Press Release (June 25, 2021), <https://docs.fcc.gov/public/attachments/DOC-373592A1.pdf>. One year later, when that agreement was extended to the Department of the Treasury, Chairwoman Rosenworcel claimed the agencies were “working together like never before” to “collaborate more efficiently” on funding efforts. *FCC, NTIA, USDA and Treasury Announce Interagency Agreement to Collaborate on Federal Broadband Funding*, FCC, Press Release (May 12, 2022), <https://docs.fcc.gov/public/attachments/DOC-383280A1.pdf>. Commissioners Starks and Carr have also recently acknowledged the need to streamline broadband programs spread across federal agencies. *See* Federal Communications Commission Nominations: Hearing Before the Senate Committee on Commerce, Science and Transportation, 118th Cong. (June 22, 2023) (responses of Commissioners Starks and Carr to Sen. Young).

³ Letter from FCC Commissioner Nathan Simington to Chair McMorris Rodgers and Ranking Member Cruz (on file with Committee) (August 8, 2023).

⁴ 47 U.S.C. § 254(h)(2).

⁵ *See, e.g., Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Order, DA 22-1313 (WCB 2022); *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Order, DA 21-1602 (WCB 2021); *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Order, DA 20-1091,

previously considered extending support beyond classrooms to school buses and to student homes,⁶ but the only law passed to do so did not amend the Communications Act or the E-Rate program. It instead created a temporary, COVID-era program known as the Emergency Connectivity Fund, which provided funding for “locations other than the school” or “locations other than the library.”⁷ In other words, Congress has continuously maintained the structure of the E-Rate program as originally established and deliberately limited its scope to school classrooms and libraries. The Commission has no authority to expand this scope without congressional direction.

Likewise, using E-Rate to subsidize *devices* like hotspots conflicts with Congress’ mandate to ensure access to “*services*.”⁸ Expanding E-Rate to fund equipment like Wi-Fi hotspots would break with the statute and longstanding precedent that Universal Service Fund (USF) dollars, which fund the E-Rate program, may only be used to fund services and not consumer devices. The bipartisan members of Congress who created the USF included this limitation for good reason. A host of consumer devices could be used to access voice and broadband services, ranging from hotspots to cell phones, laptops, tablets, home routers, and more. By ignoring this limit, the FCC would strip the Communications Act of a coherent, limiting principle for how these federal funds may be spent, which could dramatically expand USF costs when USF fees are already at record levels.⁹ Here again, Congress’ actions confirm the USF’s limited scope: when Congress authorized the FCC to subsidize consumer devices in the Emergency Broadband Benefit program, and its successor, the Affordable Connectivity Program (ACP), Congress restricted what devices would be eligible for support, the contribution expected from consumers, and the limits of that support.¹⁰

Beyond these legal challenges, the Rosenworcel plan opens the door to wasteful, duplicative spending.¹¹ By transforming E-Rate into a consumer broadband subsidy program, the FCC would duplicate other taxpayer-funded programs, like the \$14.2 billion ACP and the Lifeline program, which provide monthly subsidies for broadband service. Unlike ACP, however, E-Rate is not directly funded by Congress and lacks congressionally mandated safeguards, such as consumer

para. 16 (WCB 2020); *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Order, DA 19-1249 (WCB 2019); *Wireline Competition Bureau Seeks Comment on Draft Eligible Services List for Schools and Libraries Universal Service Program*, CC Docket No. 02-6, GN Docket No. 09-51, WC Docket No. 13-184, Public Notice, DA 14-1130 (WCB 2014); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, paras. 429-30, 450-63 (1997) (repeatedly noting Congress’s decision to extend support to “classrooms”); *see also* 47 CFR § 54.504(e) (detailing the requirement to cost-allocate ineligible services from funding requests).

⁶ *See, e.g.*, LIFT America Act, H.R. 1848, 117th Cong. § 13301 (2021).

⁷ American Rescue Plan Act, Pub. Law No. 117-2 § 7402(a)(1)–(2) (2021).

⁸ 47 U.S.C. § 254 makes no reference to “devices” or “equipment” but only to “the *services* that are supported by Federal universal service support mechanisms” and “*services* for all public and nonprofit elementary and secondary school classrooms ... and libraries.” § 254(a)(1), (a)(2), (c)(1), (h)(2) (emphases added).

⁹ The USF fee has also been referred to as a regressive tax by lawmakers, economists, and telecommunications experts. *See, e.g.*, *Administrative Taxation: The FCC’s Universal Service Tax*, Hearing before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives (Feb. 26, 1998) (Statement by Chairman George Gekas and Testimony by James Glassman, American Enterprise Institute; Grover Norquist, Americans for Tax Reform; and John Berthoud, National Taxpayers Union); Professor Jerry Hausman, *Taxation by Telecommunications Regulation: The Economics of E-Rate*, AEI Press (1998).

¹⁰ Consolidated Appropriations Act, 2021, Pub. Law No. 116-260 § 904(b)(5) (2020); Infrastructure Investment and Jobs Act, Pub. Law No. 117-58 § 60502 (2021).

¹¹ *See* Simington, *supra* note 3 (“[E]ven if [the E-Rate proposals] were lawful, they would still be duplicative of other federal programs and unlikely to benefit students and teachers.”).

eligibility criteria, processes for verifying eligibility, rules for what can be subsidized and by how much, and topline authorized spending.¹² In other words, the FCC would turn E-Rate into a second ACP, but without ACP's statutory authority or guardrails.

Perhaps even more concerning, expanding E-Rate spending beyond school classrooms and libraries into the broader community creates new potential for wasteful, subsidized overbuilding. The E-Rate program already subsidizes broadband deployment to schools and libraries, which has resulted in multiple examples of subsidized overbuilding.¹³ By expanding E-Rate support to off-campus connectivity, the plan appears to open the door to funding broadband buildout to homes, even in cases where the community is already served by an existing broadband provider. This use of taxpayer dollars to compete with private businesses is inappropriate and inefficient, and could duplicate existing federal programs, such as the \$42.45 billion Broadband Equity, Access, and Deployment program (BEAD).

Given the FCC's record of skyrocketing USF spending, there is no telling how much USF fees could increase to pay for this dramatic, unlawful expansion of E-Rate. Unlike congressionally funded programs like ACP or BEAD, the FCC's USF avoids the appropriations process, hides who contributes, and adds fees to the phone bills of American families.

Worse, this expansion neglects E-Rate's deep-seated problems. There is little evidence the program has helped improve learning outcomes or that schools would not be connected without the subsidy.¹⁴ E-Rate primarily benefits large, wealthy school districts, rather than poor rural schools.¹⁵ It is full of waste, fraud, and abuse.¹⁶ It is notorious for overbuilding existing networks.¹⁷ According to the former FCC Inspector General, there is a cottage industry of "consultants who extract a significant amount of money from applicants" by taking advantage of the program's complexity.¹⁸

¹² See Pub. Law No. 117-58 § 60502, *supra* note 10.

¹³ See, e.g., Letter from FCC Commissioner Michael O'Rielly to Universal Service Administrative Company CEO Radha Sekar (March 7, 2019); Letter from FCC Commissioner Michael O'Rielly to Superintendent Jacqui Clay, Cochise County Schools (August 26, 2019).

¹⁴ Jakub Tecza, Scott Wallsten, and Yoojin Lee, *Do Broadband Subsidies for Schools Improve Students' Performance? Evidence from Florida*, Technology Policy Institute (May 5, 2023), <https://techpolicyinstitute.org/publications/broadband/do-broadband-subsidies-for-schools-improve-students-performance-evidence-from-florida/>; Brent Skorup and Raymond Russell, *Technology in Schools: What Does \$27 Billion in E-Rate Spending Accomplish?*, Mercatus Center (July 17, 2017), <https://www.mercatus.org/research/policy-briefs/technology-schools-what-does-27-billion-e-rate-spending-accomplish>.

¹⁵ *Dissenting Statement of Commissioner Ajit Pai on Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184 (FCC 14-99).

¹⁶ See GAO, *FCC Should Take Action to Better Manage Persistent Fraud Risks in the Schools and Libraries Program*, GAO-20-606 (Sept. 16, 2020); *Seven Defendants Sentenced for Defrauding Federal Program That Provided Technology Funding for Rockland County Schools*, Press Release, U.S. Attorney's Office for the Southern District of New York (Feb. 28, 2023), <https://www.justice.gov/usao-sdny/pr/seven-defendants-sentenced-defrauding-federal-program-provided-technology-funding>; *Two Indicted in Connection with a Scheme to Defraud the Federal E-Rate Program*, Press Release, U.S. Attorney's Office for the Western District of Tennessee (Feb. 6, 2019), <https://www.justice.gov/usao-wtdn/pr/two-indicted-connection-scheme-defraud-federal-e-rate-program>.

¹⁷ See O'Rielly, *supra* note 13.

¹⁸ See, e.g., Memorandum Re: Management and Performance Challenges, FCC Inspector General David Hunt (Oct. 14, 2022); Wilson P. Dizard, *E-Rate Ripoffs*, Route Fifty (Apr. 17, 2006), <https://www.route-fifty.com/digital-government/2006/04/e-rate-ripoffs/301028/>; Simington, *supra* note 3 ("I suspect that the primary beneficiaries of these

Additionally, the FCC has an extensive backlog of E-Rate applications and appeals, including some pending cases from two decades ago.¹⁹ The FCC should get E-Rate's house in order before seeking new ways to spend consumers' hard-earned money.

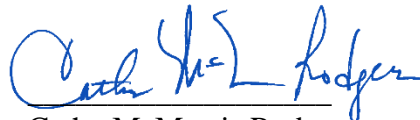
Chairwoman Rosenworcel calls her plan "Learn without Limits," but it really should be called "Spend without Limits." We ask that you reject this unlawful plan to vastly expand the E-Rate program. Instead, the FCC should work with Congress, not ignore the text of section 254, to advance its policy goals.

Thank you for your attention to this request, and we look forward to your response in writing by October 10, 2023.

Sincerely,



Ted Cruz
Ranking Member
Committee on Commerce,
Science, and Transportation



Cathy McMorris Rodgers
Chair
Committee on Energy and Commerce

expansions would be the consultants and regulatory lawyers who make their living navigating E-Rate's byzantine bureaucracy, not students and teachers.").

¹⁹ See Pai, *supra* note 15.