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FCC's School Bus Wi-Fi Subsidy Lacks Statutory Support

by

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On December 20, 2023, a lawsuit, [Molak v. FCC](#), was filed in the Court of Appeals for the Fifth Circuit that challenges the FCC's October 2023 order directing that the Universal Service Fund's E-Rate program subsidize installing Wi-Fi equipment on school buses. The Commission's decision to use the E-Rate program to spend tens of millions of taxpayer dollars for Wi-Fi on school buses most likely is unlawful because it exceeds the agency's statutory authority.

Section 254(h) of the Communications Act authorizes Universal Service subsidy support for telecommunications services to schools, libraries, and classrooms. But school buses are not schools, libraries, or classrooms. And electronic devices such as WiFi equipment are not telecommunications services. Moreover, aside from exceeding its statutory authority, the Commission's action is the kind of unlawful spending that illustrates why reforms are needed to curb waste and make the Universal Service system more fiscally responsible.

Under the American Rescue Plan Act of 2021 (ARPA), Congress appropriated \$7.171 billion to the FCC to distribute money from the Emergency Connectivity Fund (ECF) to schools and libraries for the purchase of eligible equipment and advanced telecommunications and information services. Section 7402 of the ARPA expressly authorized subsidies for supporting "eligible equipment" and advanced telecommunications and information services for use by

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students, school staff, and library goers “at locations that include locations other than the school” and “other than the library.” The Commission dedicated about \$58.2 million via the ECF program for the purchase of Wi-Fi hotspots and broadband services for school buses to provide off-campus broadband connectivity. It estimates that “the cost of providing Wi-Fi for school buses is on average \$1,840 per school bus per year” under the ECF program. But the ECF program authorization will sunset at the end of June 2024.

In an attempt to get around the lapse of statutory authority for spending money on Wi-Fi for school buses, the Commission’s October 2023 order claims newfound authority for continued spending through the E-Rate program. The purpose of the E-Rate program is to enhance access to advanced telecommunications and information services for public and nonprofit schools and libraries. The E-Rate program is part of the Universal Service system, and it is funded through line-item surcharges – currently 34.6% – placed on the monthly bills of American consumers of voice services. Section 254 of the Communications Act is the source of the agency’s authority for the E-Rate program. Yet the Commission’s authority under Section 254 is more limited than the temporary authority that Congress granted the Commission under the ARPA.

Section 254(h)(1)(B) authorizes the Commission to provide subsidy support to telecommunications carriers for “services to elementary schools, secondary schools, and libraries for educational purposes.” And Section 254(h)(2)(A) directs the Commission to adopt competitively neutral rules to enhance “access to advanced telecommunications and information services for all public nonprofit elementary and secondary school classrooms, health care providers, and libraries.” The obvious point is that school buses are not schools or libraries. Moreover, Wi-Fi devices are not services. Thus, even if school buses were the same things as schools, classrooms, or libraries – and they are not –the Commission’s authority to subsidize such equipment is dubious.

Notably, Section 254(h) lacks the ARPA’s language about supporting “eligible equipment” and services “at locations that include locations other than the school” and “other than the library. Indeed, Section 7402 of the ARPA specifically references Section 254(h). A comparative reading of both provisions demonstrates that Congress’s intent under ARPA was only to expand subsidy support temporarily beyond the confines of schools, classrooms, and libraries. Had Congress wanted to make a permanent change to Section 254(h), it could have done so. But it didn’t.

Aside from likely exceeding the agency’s statutory authority, however well-intentioned, the rationality and arbitrariness of the Commission’s October 2023 order is suspect. The Commission claims that subsidizing Wi-Fi hotspots on school buses “is integral, immediate, and proximate to the education of students,” and it finds that Wi-Fi on those buses “will be primarily for educational purposes.” But in his dissent from the order, Commissioner Brendan Carr explained the Commission “lack[s] an accounting of the number of students that have been connected or the ways in which these connections have been used” and that the agency has no studies measuring the impact of such funding on academic performances. According to Commissioner Carr, neither does the U.S. Department of Education track how the money is spent or how funding Wi-Fi-enabled school buses impacts student learning.

This lack of accounting and data calls into serious question the Commission’s purported findings that the supposed educational benefits of subsidizing Wi-Fi on buses outweigh the costs and that Wi-Fi funding will serve primarily educational purposes. By seeking to solve the supposed “homework gap” without reliable standards or studies, the Commission hasn’t done its own homework.

Tens of millions of taxpayer dollars already likely have been wasted on school bus Wi-Fi spending. If the Commission’s order stands, it likely will lead to tens of millions more being wastefully spent each year. Expending the American people’s dollars on new ventures that are likely to include substantial waste is wrong, especially given the Universal Service system’s broken fiscal condition. As Free State Foundation scholars have explained in several [public comments](#), [Perspectives from FSF Scholars papers](#), and [other writings](#), reforming the Universal Service system’s contribution regime and reining in unaccountable overspending should be a priority of the FCC.

Moreover, as dissenting Commissioner Nathan Simington stated, “anyone who has ever ridden a school bus should be skeptical that any significant proportion of children will sit quietly and do homework on their laptops instead of socializing with their friends on the bus and browsing social media on their phones.” Many people with commonsense experience are likely to agree. Also, many parents wish to keep their school-age children off Internet-connected devices and entirely off social media, especially in unsupervised environments like school buses. Reflecting a similar outlook, Senator Ted Cruz responded to the Commission’s order by introducing the [Eyes on the Board Act](#) – S.3074 – on October 18, 2023. The bill provides that “a school that receives covered support may not allow access to a social media platform to students on any supported service, device, or network.”

The petition for review in [Molak v. FCC](#) challenging the lawfulness of the agency’s order at the Fifth Circuit Court of Appeals will put the Commission’s interpretation of Section 254 to the test. However well-intentioned it might be, it appears the Commission’s order allowing Wi-Fi subsidy support for school buses likely exceeds the agency’s statutory authority.

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Further Readings

Randolph J. May, “[Communications Law and Policy Priorities for 2024](#),” *FSF Blog* (January 11, 2024).

[Public Comments of the Free State Foundation](#) – in Response to Universal Service Fund Working Group Request for Comment (August 25, 2023).

Andrew Long, “[Broadband: Billions at Risk of Wasteful Duplication](#),” *Perspectives from FSF Scholars*, Vol. 18, No. 29 (July 13, 2023).

Andrew Long, “[Wasteful Duplication by Design: A Case Study on Overlapping Federal Broadband Subsidies](#),” *Perspectives from FSF Scholars*, Vol. 18, No. 29 (May 8, 2023).

Andrew Long, “[Absent Oversight, the Broadband Funding Faucet Likely Will Overflow](#),” *Perspectives from FSF Scholars*, Vol. 17, No. 58 (November 10, 2022).

Seth L. Cooper, “[The FCC’s USF Report: Unprecedented Broadband Funding Requires Fundamental Universal Service Reforms](#)” *Perspectives from FSF Scholars*, Vol. 17, No. 42 (August 26, 2022).

Seth L. Cooper, “[Congress Should Consider Expanding Universal Service Contributions: FCC Poses a Potential Answer to USF’s Financial Problems](#),” *Perspectives from FSF Scholars*, Vol. 17, No. 41 (August 23, 2022).

[FSF Reply Comments – Report on the Future of the Universal Service Fund](#), WC Docket No. 21-476 (March 17, 2022).

[FSF Comments – Report on the Future of the Universal Service Fund](#), WC Docket No. 21-476 (February 17, 2022).