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**FCC Can't Subsidize Wi-Fi Use Away From Schools and Libraries**

**by**

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On July 29, 2024, the FCC released an [order](#) to subsidize Wi-Fi hotspots to students, school staff, and library patrons when they are away from schools and libraries. On August 15, FCC Chairwoman Jessica Rosenworcel was in Los Angeles to celebrate the Commission's vote, [declaring](#) "hotspot connectivity is the next step towards modernizing the E-Rate program to ensure students and library patrons have access to the connectivity." It's questionable whether extending "hotspot" connectivity off-premises makes policy sense as an educational matter. In any event, Section 254(h) of the Communications Act, on which the Commission relies, doesn't allow this. It authorizes universal service subsidies only to or for "schools," "classrooms," and "libraries."

Subsidies for off-premises Wi-Fi use – potentially anywhere in the world – are not included in the statute. The Commission's decision to spend taxpayer dollars without an overall budget cap for off-premises Wi-Fi use is unlawful. This is another example where Chairwoman Rosenworcel should have directed her desire for a change in policy, however well-intentioned, to Congress.

The Commission’s attempt to evade Section 254(h)’s limits will face a strong legal challenge. Following the Supreme Court’s June 2024 decision in [Loper Bright Enterprises v. Raimondo](#) to overturn the “Chevron doctrine,” the Commission cannot rely on agency interpretations of ambiguous statutes as a source of power. Perhaps closer study by the Commission may reveal conditions under which targeted off-premises Wi-Fi subsidies could enable some students to access schoolwork – without overspending and wasting money. But only Congress has the power to make such a spending decision. The agency’s power grab is an example of the need for reforms to make the universal service system more politically accountable and less wasteful.

[Section 254\(h\)](#) of the Telecommunications Act of 1996 is the source of authority for the E-Rate program for enhancing access to advanced telecommunications and information services for public and nonprofit schools and libraries. E-Rate is a part of the universal service system. Thus, it is funded through the universal service line-item surcharges – currently [34.4%](#) ! – added to the monthly bills of American consumers of voice services.

In its [June 2024 order](#), the Commission decided “to permit schools and libraries to receive E-Rate support for Wi-Fi hotspots and services to be used off-premises by students, school staff, and library patrons.” The agency claims its decision is intended to address “digital inequity that leaves some students, school staff, and library patrons unable to fully participate in school work or access library resources.” In particular, the Commission maintains that off-premises Wi-Fi use by students is intended to address a manifestation of the “digital divide” it calls the “homework gap” whereby students in disadvantaged communities are unable to access supplemental educational materials and complete homework assignments.

The Commission’s asserted legal authority for its order is Section 254(h)(1)(B) and (2)(A). Section 254(h)(1)(B) states: “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 ... 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.” And Section 254(h)(2)(A) provides that “[t]he Commission shall 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, health care providers, and libraries.”

Those wordy statutory provisions plainly require services or access to services “to” or “for” both “schools” and “libraries.” But the Commission subverts the statutory provisions by claiming they mean that school and library campuses don’t matter so long as the Commission claims the subsidies serve an “educational purpose.” Notably, the Commission’s order contains no limit or cap on the overall amount of money – funds collected from voice consumers who pay the USF tax each month – that could be spent on off-premises Wi-Fi use.

If Congress had wanted to authorize Wi-Fi subsidies to locations other than schools or libraries it easily could have done so. Congress did precisely that when it passed the American Rescue Plan Act of 2021 (ARPA). Section 7402 of the ARPA authorized subsidy support “at locations that include locations other than the school” and “other than the library.” The FCC dedicated about

\$58.2 million via the Emergency Connectivity Fund (ECF) for Wi-Fi hotspots and broadband services to provide off-campus connectivity.

When Congress passed the ARPA and the ECF program was established, broadband subsidies for off-premises use were rationalized in the context of draconian lockdown orders and government-enforced school closures that prevented school children from receiving any in-person education. Those restrictions have since been removed, and the Commission's authority under the ARPA to subsidize off-premises Wi-Fi use expired in June 2024.

The Commission's order to support off-premises Wi-Fi hotspots with universal service money appears to be the agency's latest attempt to effectively regain its expired temporary authority under the ARPA. The Commission's proposal echoes the Commission's October 2023 *School Bus Wi-Fi Declaratory Ruling*, which approved E-Rate subsidies for Wi-Fi equipment on school buses based on specious legal reasoning and contrary to the limiting language of Section 254. That agency ruling is now subject to a legal challenge in the Fifth Circuit, and it is the subject of my February 2024 *Perspectives from FSF Scholars*, "[FCC's School Bus Wi-Fi Subsidy Lacks Statutory Support](#)." If the Commission adopts its off-premises Wi-Fi use proposal, the agency can expect another strong legal challenge.

Importantly, the Commission can no longer rely on "Chevron deference" to claim expansive powers by arguing that statutory provisions are ambiguous and providing an agency interpretation of the law that accords with the Commission's policy preferences. The Supreme Court's June 2024 decision in *Loper Bright Enterprises v. Raimondo* overturned the "Chevron doctrine." As a result, courts will be far more likely to hold the Commission to the terms of Section 254 regarding service "to" and "for" schools and libraries than to accept an agency rationale that overly expands or inverts the limiting language contained in the statute.

Aside from a lack of legal authority, the FCC's decision to subsidize off-premises Wi-Fi is beset by some significant public policy problems. In his dissenting statement, FCC Commissioner Brendan Carr reasonably questioned the potential for financial waste due to the lack of an overall cap on spending. And Commissioner Nathan Simington rightly raised the likelihood of children accessing the Internet for non-educational purposes and in locations where adult supervision is absent. Congress is the rightful authority to weigh those policy concerns and others in deciding whether to authorize subsidies for Wi-Fi use away from schools and libraries.

Indeed, if the "homework gap" is ever to be a justifiable subject for consideration of authorizing subsidies, the problem would require a closer assessment of current data on the extent of its existence and the costs and benefits, including especially the educational costs and benefits, of addressing it. This assessment should include setting a budget cap, safeguards, and other criteria for disbursing funds. The Commission's order cites disparate media articles and comments in its proceeding regarding the "homework gap." But nothing approaches a systematic study identifying areas where the gap is most pronounced or identifying how subsidies can best be targeted to the problem while avoiding waste and abuse. The creation of new subsidies should be a last resort, particularly when programs like the Lifeline Program as well as private market provider programs for low-income persons to access broadband are already available.

If more closely studied and combined with safeguards against wasteful overspending conditions, it's possible targeted subsidies for off-premises Wi-Fi use can help some students access schoolwork. However, that policy judgment belongs to Congress, and the Commission's July 29 order unlawfully usurps congressional authority.

The agency's action provides yet another example of why Congress needs to reform the universal service system. As explained in more detail in my August 9 *Perspectives from FSF Scholars*, "[Court Ruling on USF's Unconstitutionality Should Spur Reform in Congress](#)," the system needs to be modernized and made much more accountable to the public and less wasteful with precious taxpayer dollars.

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### **Further Readings**

Seth L. Cooper, "[Court Ruling on USF's Unconstitutionality Should Spur Reform in Congress](#)," *Perspectives from FSF Scholars*, Vol. 19, No. 28 (August 9, 2024).

Seth L. Cooper, "[Fifth Circuit Rules USF Contribution Scheme Violates Legislative Vesting Clause](#)," *Perspectives from FSF Scholars*, Vol. 19, No. 26 (August 5, 2024).

Seth L. Cooper, "[FCC's School Bus Wi-Fi Subsidy Lacks Statutory Support](#)," *Perspectives from FSF Scholars*, Vol. 19, No. 4 (February 1, 2024).

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).

Randolph J. May, "[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).