

**DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184.

In America's northernmost library, up in Barrow, Alaska, I saw last summer how broadband can connect a community that no road reaches. In an 8th-grade classroom in a predominantly Hispanic school in Los Angeles, I saw the promise of the interconnected classroom come to life. In a library in South Dakota, in schools in Kansas, I saw the potential of next-generation technologies to empower small communities and give rural Americans the opportunities found in our nation's largest cities.

Students and teachers, parents and school boards, librarians and library patrons: They were promised E-Rate modernization. They deserve a student-centered E-Rate program. They need real reform. And what does the FCC give them? The status quo.

Whether you call it a DisconnectED initiative, E-Rate 1.2, or just 158 pages endorsing more of the same, the FCC has forfeited this opportunity for real, bipartisan reform of the E-Rate program. This is disappointing. Real reform would have meaningfully simplified the application process. It would have ended the unfair treatment of small, rural schools and libraries. It would have let local communities set their own education-technology priorities. Instead of slapping a plan together at the last minute after being called out by Republicans and Democrats alike for numbers that didn't come close to adding up, the Commission could have kept its promises, rather than breaking them as it does today.

Let's start with one point of apparently universal agreement: The E-Rate application process must be, as the *Order* puts it, "fast, simple, and efficient."¹ And yet the rhetoric doesn't match the reality.

Will schools and libraries generally still have to fill out a 17-page application to receive funding? Yes. Will they still have to follow specialized procurement rules in addition to state and local rules? Yes. Will they still have to sign a contract before knowing whether funding is even available? Yes. Will they still have to wait months after applying to receive any commitment of funding? Yes. And will schools still have to decide how to spend E-Rate funds up to a year before the school year begins? Yes. As Kevin Bacon put it in *A Few Good Men*, "These are the facts of the case. And they are undisputed."²

So what *does* the *Order* do to streamline the bureaucracy? Very little. There is the token stab at trimming a few pages from the initial application for applicants with multi-year contracts—but only for five-year contracts that give applicants little flexibility to adjust terms to changing needs.³ There is some scaling back of E-Rate's procurement rules—but only for a subset of services that are subject to change every year or two.⁴ And there's the elimination of the technology planning requirement—but no one has had to comply with that requirement for the last two years.⁵

In fact, the *Order adds* to the paperwork. Applicants will now be required to keep records for ten years.⁶ So if the applicant cannot prove that its initial application passed the 28-day-rule,⁷ the price-is-the-primary-factor rule,⁸ the 30-percent-ineligibility rule,⁹ the brand new preferred-contracts-must-be-

¹ *Order* at para. 55.

² Captain Jack Ross, *A Few Good Men* (Columbia Pictures Corp. et al. 1992).

³ *Order* at para. 189.

⁴ *Id.* at paras. 168, 197.

⁵ *Id.* at para. 195.

⁶ *Id.*, Appendix A, Rule 54.516(a)(1).

⁷ *Id.*, Appendix A, Rule 54.503(c)(4).

⁸ *Id.*, Appendix A, Rules 54.503(c)(2)(ii)(B), 54.511(a).

⁹ *Id.*, Appendix A, Rules 54.504(b).

considered rule,¹⁰ the brand new within-scope rule for multi-year contracts,¹¹ or any one of the myriad other “rules” that have crept into E-Rate’s specialized procurement process, a school or library may be stuck with a multi-million dollar bill from the government a decade after the fact.

This assumes, of course, that a school or library gets funding in the first place. To apply, schools and libraries will be required to calculate up to three separate funding discounts and a five-year internal-connections budget. These numbers, in turn, aren’t based on a school’s own conditions but the aggregate statistics of its district and the percentage of the district’s physical buildings in rural areas. Consultants and surveyors are sure to delight in this new work.

And what approach does the *Order* take to reducing the backlog of E-Rate appeals? Far from making the application process simpler, it layers onto our rules exceptions that have qualifications that themselves have exceptions—with everything to be ironed out at some indeterminate point in the future.¹² To be sure, the *Order* will reduce *the FCC’s* backlog by mandating that applicants go back to the Universal Service Administrative Company (USAC) if they think USAC has erred.¹³ But this is just window dressing. Stripping schools and libraries of their procedural rights doesn’t do them any service. And adding yet another step to the process won’t expedite action.

By doubling down on complexity, the *Order’s* approach also will exacerbate the rural-urban E-Rate gap. Small and rural schools and libraries cannot afford to hire the consultants that help large, urban school districts navigate the E-Rate process. That’s why so many rural schools and libraries simply don’t participate in the E-Rate program today. *That* is a real digital divide—and the *Order* doesn’t even try to address it.

But don’t take my word for it. Just this week, Cortney Buffington, the executive director of the Kansas Research and Education Network, wrote me: “The fact of the matter is that the truly needy schools and libraries in our state suffer because of the complexity and cost associated with the e-rate program. . . . [O]ur members cannot afford for us to carry upwards of 2–3 years of accounts payable waiting for payments from the Federal Government. Nor can we afford to efficiently navigate the consortium application process without driving up costs, or finding ways to game the system to make up for it.”¹⁴

Moreover, the *Order* keeps in place for priority one services E-Rate’s inequitable funding approach that gives many large, urban districts 90 percent discounts without limit. The more you spend, the more you get. It’s no wonder that, as the current program stands, a handful of urban schools walk away with the lion’s share of funding while students attending other schools that need funding are deprived year after year. Indeed, the District of Columbia gets the second-most E-Rate funding each year on a per student basis (\$139.97)—about three times the national average (\$44.28)—yet not one school or library in our nation’s capital can credibly be called rural. Once again, those inside the Beltway win while rural America is left behind.

¹⁰ *Id.* at para. 174.

¹¹ *Id.* at para. 189.

¹² For example, the *Order* promises to fund the broadband needs of all schools, except that mobile broadband service doesn’t count—with the qualifier that it does if an applicant can “demonstrate to the Commission and USAC that individual data plans are the most cost-effective option for their situation by submitting the cost comparison information upon request.” *Id.* at para. 146. And are mobile broadband services category one or category two services? The *Order* doesn’t say, leaving applicants to guess which discount matrix will apply and whether it affects their category two budget.

¹³ *See id.*, Appendix A, Rule 54.719(a).

¹⁴ *See also* SECA NPRM Reply Comments at 3–4 (“The single biggest complaint and concern of applicants is the timeliness of their receipt of their funding commitment decisions letters.”).

The *Order*'s new budgets for internal connections only make it worse. The poorest rural and remote schools and libraries will have the same per-student budgets as their urban brethren, even though their broadband prices are higher, their tax bases are lower, qualified labor is harder for them to find, and competition is less prevalent in rural areas. And anyone who has been to the Alaska bush can tell you that Wi-Fi routers don't cost the same everywhere in the country. When you have to take a plane to get to the closest Wal-Mart, you get used to \$10-a-gallon milk.

The *Order* also displays a curious disregard for the priorities of the local school boards, principals, teachers, parents, and librarians that E-Rate supports with funding. Instead of letting local communities set their own priorities, the *Order* reflects a Washington-knows-best mindset. It retains the priority system, with the FCC determining what gets funded each year (or week!) depending on the political winds. Just days ago, it looked like Wi-Fi was the priority and funding for Internet connectivity came in second. Today, Internet connectivity nudges back into the lead. Last year, mobile data services were given priority. Now, no longer. Indeed, managed Wi-Fi will now be eligible for E-Rate funding—but applicants better hope that they qualify for funding in the first two years since that eligibility has a built-in sunset.

Here's the thing. The FCC has no business micromanaging the technology priorities of our local schools and libraries. We simply aren't equipped to tell every library that it needs to buy these Ethernet wires or those Wi-Fi routers. We cannot assess the relative value of web hosting or caching servers or a larger broadband pipe to a school's academic achievement. And because every school and every library has its own unique needs, its own budget constraints, its own infrastructure with its own lifecycle, we should have the humility to recognize that local schools and libraries might be in a better position than officials in Washington, DC to set their own priorities. Some have called this notion "radical." I call it common sense.

Speaking of priorities, one of the main objectives of the *Order* was supposed to be closing the Wi-Fi gap. The *Order* promised over \$5 billion for Wi-Fi over the next five years, funding that would be predictable and consistent so that schools and libraries could plan for the future. But as the commander of the U.S.S. Enterprise told Tom Cruise in *Top Gun*, "Son, your ego is writing checks that your body can't cash."¹⁵

As congressional leaders in the House and Senate recognized, the numbers for the Wi-Fi plan just didn't add up and would have blown a \$2.7 billion hole in E-Rate's budget, slashing funds for Internet connectivity. I thank Chairman Rockefeller, Chairman Upton, Chairman Walden, Senator Thune, and Senator Markey for their leadership on this issue. I also thank Commissioner Rosenworcel for her efforts. While we have good-faith disagreement on some issues related to E-Rate, we have a common understanding of arithmetic.

And so the Wi-Fi plan has been scaled back: The plan will last two years, not five. It will end automatically instead of continuing in perpetuity. Priority one services will still have first priority and priority two services will still have second priority (although I concede the *Order*'s groundbreaking innovation of changing the nomenclature to "category one" and "category two"). And the \$1 billion per year funding target for Wi-Fi is nothing more than the traditional carry-forward of unallocated E-Rate funds from prior years, with somewhat better marketing.¹⁶

¹⁵ Stinger, *Top Gun* (Paramount Pictures 1986).

¹⁶ See *Order* at para. 78 ("[W]e direct USAC to shift funds targeted for category two services to meet all eligible requests for category one services, in any funding year in which demand for category one services exceeds available funds."); *id.* at para. 81 ("In the event that requests for category one services are less than the available funding and demand for category two services is higher than the \$1 billion target for category two services at the close of the funding year window, the Bureau . . . may redirect the excess funding to category two services in the same funding year.").

That's not real reform, and it leaves a lot of broken promises. The purported 75-percent bump in Wi-Fi funding for rural schools and libraries?¹⁷ It's closer to 0 percent. The 60-percent increase for urban applicants?¹⁸ It's been slashed too. And because the *Order* allows applicants to receive five years of funding even though this is now only a two-year plan—a curious decision to say the least—the same schools and libraries at the front of the line that have been getting internal-connections funding over the last five years are likely to get the lion's share of the money.¹⁹ And so the number of students newly seeing the impact of Wi-Fi funding isn't the promised 43.6 million.²⁰ It's probably closer to zero. That recent FCC chart showing state-by-state numbers of additional schools and libraries that are likely to get new Wi-Fi funding over the next five years as a result of the *Order*? Let's just say that it's no longer operative.

Even these scraps depend on accounting gimmickry. Since February, there's been the repeated refrain that the FCC “will invest an additional \$2 billion over the next two years to support broadband networks.”²¹ But the last public accounting of unused funds in the E-Rate account said that only \$600 million was available, with \$200 million needed this year just to meet demand for priority one services.²² That leaves us \$1.6 billion short. Where will that money come from? The only place it can: the \$4.7 billion in committed funds in the E-Rate account. So schools and libraries should be prepared for more broken promises, as the FCC will have every reason to come after money we've already committed to pay for promises the *Order* is just now making.

So what's next? I doubt the recent scramble to claim fiscal responsibility is anything more than a passing fad. After all, the *Order* avoids the chief cause of waste in the current program—discount rates of up to 90 percent with no budgets for big spenders. It adopts connectivity targets that are based on speculation, not science, and proposes to “size future funding needs” based on these goals, regardless of their impact on student achievement.²³ And several outside parties have already told me they've been promised a post-election increase in the E-Rate budget. They even told me the specific month it was coming: December. The story was remarkably consistent.

So mark my words: Any talk of fiscal responsibility will be short-lived. In five months, maybe six, we'll be back at this table discussing how much to increase Americans' phone bills. Universal service contribution rates have jumped 60 percent under this Administration. What's a few billion dollars more?

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One year ago, then-Chairwoman Clyburn brought the Commission together to begin the process of reinvigorating, revitalizing, and revamping E-Rate. I enthusiastically supported that Notice of Proposed Rulemaking because it held out the promise of a better E-Rate program, one centered on

¹⁷ FCC, *Modernizing E-Rate: Providing 21st Century Wi-Fi Networks for Schools and Libraries Across America* at 5 (July 1, 2014) (*Modernizing E-Rate June 2014 Report*), available at <http://go.usa.gov/XpeT>.

¹⁸ *Id.*

¹⁹ Indeed, schools and libraries with the highest discounts (the 90% applicants) requested almost \$1.7 billion in P2 funding this past year, see Letter from Mel Blackwell, Vice President, USAC, to Julie Veach, Chief, WCB, FCC, CC Docket No. 02-6 (April 17, 2014)—enough to consume almost all the funding made available under the *Order*'s reframed Wi-Fi plan in a single year.

²⁰ *Modernizing E-Rate June 2014 Report* at 8.

²¹ FCC, *FCC to Invest Additional \$2 Billion in High-Speed Internet in Schools and Libraries* (Feb. 3, 2013), available at <http://go.usa.gov/XptY>.

²² *Wireline Competition Bureau Announces Carry-Forward of Unused Schools and Libraries Universal Service Funds for Funding Year 2014*, CC Docket No. 02-6, Public Notice, DA 14-609 (May 2, 2014), available at <http://go.usa.gov/XptQ>.

²³ *Order* at para. 266.

students and not bureaucrats. That document was backed by a bipartisan, unanimous vote. As I said back then, and I as believe today, “When it comes to our children’s education, we should not be afraid of the hard choices. We should not tinker around the edges. We should shoot for the moon. And we should aim to win.”²⁴

We should have adopted a student-centered E-Rate program. A one-page application. A funding commitment process that would last no more than a week. A 50 percent bump in funding for rural and remote schools and libraries, rather than the 0–10 percent offered by the *Order*. An end to the outdated priority system, allowing local communities make their own decisions. An increase in funding by up to \$1 billion each year for next-generation services, all without raising fees a dime.

What disappoints me most is not that the Chairman’s office rejected my own longstanding proposal, nor that it rejected the compromises I offered working within the *Order*’s framework, nor that it rejected all of these belatedly.

No, what disappoints me most is being told that further simplifying the application process and giving applicants additional flexibility were “non-negotiable.” That reducing incentives for waste and fraud was a “red line” that could not be crossed. That increasing the equity of the program for rural schools and libraries apparently violated a “bedrock principle.” And that having the money to meet our promises was too “radical” an idea, at least when proposed by a Republican.

It is unfortunate that take-it-or-leave-it, party-line votes have become the new normal for high-profile Commission items. Making it worse, the final draft of this item was not provided to me until 10:13 a.m., 17 minutes before this meeting. Needless to say, I did not have a chance to carefully review the revised item upon which we are now voting. I was able to notice, however, that the pre-discount cost of the Wi-Fi plan increased by \$300 million overnight. This is not good process.

And it is devastating substance for America’s teachers, librarians, parents, students, and library patrons, many of whom I’ve met over the past several months, and all of whom believe, as I said almost one year ago, that “E-Rate is a program worth fighting for.”²⁵ After the band packs up and goes home, and after the happy headlines fade, they are the ones who will have to wait years more for 21st-century digital opportunities—for real E-Rate reform.

For all of these reasons, I dissent.

²⁴ *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Notice of Proposed Rulemaking, 28 FCC Rcd 11304, 11477 (Statement of Commissioner Ajit Pai).

²⁵ Remarks of Commissioner Ajit Pai, “Connecting the American Classroom: A Student-Centered E-Rate Program,” American Enterprise Institute (July 16, 2013), *available at* <http://go.usa.gov/jbD3>.