FUNDING MECHANISMS OF THE "E-RATE" PROGRAM

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT

OF THE

COMMITTEE ON WAYS AND MEANS
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

AUGUST 4, 1998

Serial No. 105–108

Printed for the use of the Committee on Ways and Means

U.S. GOVERNMENT PRINTING OFFICE

63–683 WASHINGTON : 2000

COMMITTEE ON WAYS AND MEANS

BILL ARCHER, Texas, *Chairman*

PHILIP M. CRANE, Illinois
BILL THOMAS, California
E. CLAY SHAW, JR., Florida
NANCY L. JOHNSON, Connecticut
JIM BUNNING, Kentucky
AMO HOUGHTON, New York
WALLY HERGER, California
JIM MCCRERY, Louisiana
DAVE CAMP, Michigan
JIM RAMSTAD, Minnesota
JIM NUSSLE, Iowa
SAM JOHNSON, Texas
JENNIFER DUNN, Washington
MAC COLLINS, Georgia
ROB PORTMAN, Ohio
PHILIP S. ENGLISH, Pennsylvania
JOHN ENSIGN, Nevada
JON CHRISTENSEN, Nebraska
WES WATKINS, Oklahoma
J.D. HAYWORTH, Arizona
JERRY WELLER, Illinois
KENNY HULSHOF, Missouri

CHARLES B. RANGEL, New York
FORTNEY PETE STARK, California
ROBERT T. MATSUI, California
BARBARA B. KENNELLY, Connecticut
WILLIAM J. COYNE, Pennsylvania
SANDER M. LEVIN, Michigan
BENJAMIN L. CARDIN, Maryland
JIM MCDERMOTT, Washington
GERALD D. KLECZKA, Wisconsin
JOHN LEWIS, Georgia
RICHARD E. NEAL, Massachusetts
MICHAEL R. MCNULTY, New York
WILLIAM J. JEFFERSON, Louisiana
JOHN S. TANNER, Tennessee
XAVIER BECERRA, California
KAREN L. THURMAN, Florida

A.L. SINGLETON, *Chief of Staff*
JANICE MAYS, *Minority Chief Counsel*

SUBCOMMITTEE ON OVERSIGHT

NANCY L. JOHNSON, Connecticut, *Chairman*

ROB PORTMAN, Ohio
JIM RAMSTAD, Minnesota
JENNIFER DUNN, Washington
PHILIP S. ENGLISH, Pennsylvania
WES WATKINS, Oklahoma
JERRY WELLER, Illinois
KENNY HULSHOF, Missouri

WILLIAM J. COYNE, Pennsylvania
GERALD D. KLECZKA, Wisconsin
MICHAEL R. MCNULTY, New York
JOHN S. TANNER, Tennessee
KAREN L. THURMAN, Florida

Pursuant to clause 2(e)(4) of Rule XI of the Rules of the House, public hearing records of the Committee on Ways and Means are also published in electronic form. **The printed hearing record remains the official version.** Because electronic submissions are used to prepare both printed and electronic versions of the hearing record, the process of converting between various electronic formats may introduce unintentional errors or omissions. Such occurrences are inherent in the current publication process and should diminish as the process is further refined.

CONTENTS

	Page
Advisory of July 24, 1998, announcing the hearing	2

WITNESSES

Federal Communications Commission:	
Hon. Harold Furchtgott-Roth, Commissioner	48
Christopher J. Wright, General Counsel	65
Blumenauer, Hon. Earl, a Representative in Congress from the State of Oregon	14
Tauzin, Hon, W.J. (Billy), a Representative in Congress from the State of Louisiana	10
Weller, Hon. Jerry, a Representative in Congress from the State of Illinois	8

SUBMISSION FOR THE RECORD

American Association of Educational Service Agencies; American Association of School Administrators; American Federation of Teachers; American Library Association; American Vocational Association; Consortium for School Networking; Council of Chief State School Officers; International Society for Technology in Education; National Association of Elementary School Principals; National Education Association; National Education Knowledge Industry Association; National Grange; National Rural Education Association; and National School Boards Association, joint letter	84

FUNDING MECHANISMS OF THE E-RATE PROGRAM

TUESDAY, AUGUST 4, 1998

HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
SUBCOMMITTEE ON OVERSIGHT,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:10 a.m., in room 1100, Longworth House Office Building, Hon. Nancy Johnson (Chairman of the Subcommittee) presiding.

[The advisory announcing the hearing follows:]

ADVISORY

FROM THE COMMITTEE ON WAYS AND MEANS

SUBCOMMITTEE ON OVERSIGHT

FOR IMMEDIATE RELEASE
July 24, 1998
No. OV-20

CONTACT: (202) 225-7601

Johnson Announces Hearing on the Funding Mechanisms of the "E-Rate" Program

Congresswoman Nancy L. Johnson (R-CT), Chairman, Subcommittee on Oversight of the Committee on Ways and Means, today announced that the Subcommittee will hold a hearing on the funding mechanisms of the "e-rate" program, which provides advanced telecommunications services to schools and libraries at a discount. **The hearing will take place on Tuesday, August 4, 1998, in the main Committee hearing room, 1100 Longworth House Office Building, beginning at 10:00 a.m.**

Testimony at this hearing will be from invited witnesses only. Invited witnesses include Representative W.J. "Billy" Tauzin (R-LA), Chairman of the Subcommittee on Telecommunications, Trade, and Consumer Protections, Committee on Commerce; and William E. Kennard, Chairman, and Harold Furchtgott-Roth, Commissioner, both of the Federal Communications Commission (FCC). However, any individual or organization not scheduled for an oral appearance may submit a written statement for consideration by the Committee and for inclusion in the printed record of the hearing.

BACKGROUND:

In section 254 of the Telecommunications Act of 1996, Congress provided for direct "contributions" by telecommunications providers in support of "universal service," i.e., the concept that telecommunications services should be widely available within the United States. Section 254(h) specifically added a program to provide advanced telecommunications services to schools and libraries at a discount, which established the so-called "e-rate" program.

In response to section 254(h), the FCC created an annual fund, capped at $2.25 billion to pay for the "e-rate" program financed by contributions to the fund by telecommunications providers. The FCC also established the Schools and Libraries Corporation (SLC), an independent not-for-profit corporation, to administer this program.

The funds collected will be distributed to schools and libraries by the SLC in the following manner. Schools and libraries will apply to the SLC for discounts on services. The SLC will determine the percentage discounts, ranging from 20 percent to 90 percent, for each application related to indicators of "economic disadvantage" and "high rates." Economic disadvantage will be determined by eligibility for the national school lunch program, and schools and libraries will be classified as high cost if they are in rural areas and low cost if they are in urban areas. Once the rate of discount is determined by the SLC, the schools and libraries will apply the discounts not only to telecommunications services, but also for information services and internal connections. Service providers will either offset the discounts granted to schools and libraries against their obligations to contribute to the "e-rate" fund or receive reimbursements from the "e-rate" fund.

All telecommunications providers -- local exchange carriers, long distance providers, paging service providers, wireless telecommunications providers -- must contribute to the "e-rate" fund based on their revenues from telecommunications services. However, it appears that some telecommunications providers that pay into the "e-rate" fund will not receive any direct benefit from the fund (i.e., paging companies pay into the fund but may not be able to provide paging services to schools and libraries and thus could not receive any benefit) while some

(MORE)

service providers who do not pay into the fund can be reimbursed for services provided to schools and libraries (i.e., service providers who provide internal connections will often be companies who do not pay into the fund).

Beginning on January 1, 1998, some telecommunications providers began passing on the cost of their contributions to the "e-rate" program to their business customers in the form of higher rates. However, beginning in July 1998, several telecommunications providers began passing on the cost by adding a line item to the bills of residential customers reflecting the cost of the contributions.

As a result of the increased rates on consumers in the past six to eight months, the "e-rate" program has received considerable scrutiny by the media, "think tanks," academics and public officials concerning whether the FCC has exceeded its authority by imposing what amounts to a new Federal tax. Several telecommunications providers have challenged the "e-rate" program in Federal court on the grounds that it is an unlawful tax, and this view has been supported by at least one FCC Commissioner.

In announcing the hearing, Chairman Johnson stated: "While I believe that connecting the nation's schools to the Internet is a valuable objective that must be accomplished, I am concerned that the "e-rate" program may be essentially an open-ended tax on American consumers that has been imposed by an independent agency rather than by Congress. Taxation is a legislative function that cannot be delegated. It is the duty of the Oversight Subcommittee to look into this matter to determine whether or not the "e-rate" program is indeed a tax imposed without the authority of Congress."

FOCUS OF THE HEARING:

The focus of the hearing is to examine the funding mechanisms of the "e-rate" program as implemented by the FCC and the SLC to determine the extent to which it involves a revenue or tax matter and whether the program was properly authorized.

DETAILS FOR SUBMISSION OF WRITTEN COMMENTS:

Any person or organization wishing to submit a written statement for the printed record of the hearing should *submit six (6) single-spaced copies of their statement, along with an IBM compatible 3.5-inch diskette in WordPerfect 5.1 format, with their name, address, and hearing date noted on a label*, by the close of business, Tuesday, August 18, 1998, to A.L. Singleton, Chief of Staff, Committee on Ways and Means, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C. 20515. If those filing written statements wish to have their statements distributed to the press and interested public at the hearing, they may deliver 200 additional copies for this purpose to the Subcommittee on Oversight office, room 1136 Longworth House Office Building, at least one hour before the hearing begins.

FORMATTING REQUIREMENTS:

Each statement presented for printing to the Committee by a witness, any written statement or exhibit submitted for the printed record or any written comments in response to a request for written comments must conform to the guidelines listed below. Any statement or exhibit not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All statements and any accompanying exhibits for printing must be submitted on an IBM compatible 3.5-inch diskette in WordPerfect 5.1 format, typed in single space and may not exceed a total of 10 pages including attachments. **Witnesses are advised that the Committee will rely on electronic submissions for printing the official hearing record.**

2. Copies of whole documents submitted as exhibit material will not be accepted for printing. Instead, exhibit material should be referenced and quoted or paraphrased. All exhibit material not meeting these specifications will be maintained in the Committee files for review and use by the Committee.

3. A witness appearing at a public hearing, or submitting a statement for the record of a public hearing, or submitting written comments in response to a published request for comments by the Committee, must include on his statement or submission a list of all clients, persons, or organizations on whose behalf the witness appears.

4. A supplemental sheet must accompany each statement listing the name, company, address, telephone and fax numbers where the witness or the designated representative may be reached. This supplemental sheet will not be included in the printed record.

The above restrictions and limitations apply only to material being submitted for printing. Statements and exhibits or supplementary material submitted solely for distribution to the Members, the press, and the public during the course of a public hearing may be submitted in other forms.

Note: All Committee advisories and news releases are available on the World Wide Web at "http://www.house.gov/ways_means/".

(MORE)

The Committee seeks to make its facilities accessible to persons with disabilities. If you are in need of special accommodations, please call 202-225-1721 or 202-226-3411 TTD/TTY in advance of the event (four business days notice is requested). Questions with regard to special accommodation needs in general (including availability of Committee materials in alternative formats) may be directed to the Committee as noted above.

*****

Chairman JOHNSON of Connecticut. Good morning, and welcome.

Today, the United States is the most technologically advanced country in the world, and it's our responsibility to assure that continued technological strength. Since our children are our future, we must ensure that they are given every opportunity to thrive in the technology-driven global economy.

As Congress has acknowledged, the best chance to teach the most children the needed technical skills is to reach them in primary and secondary schools. Congress recognized this when we passed a provision in the Telecommunications Act of 1996 which provides advanced telecommunications services, at discount, to schools and libraries so that they can bring the most current technology to their communities, at affordable prices. This provision is now known as the e-rate program. Every school, in rich districts and in poor, in cities and in remote rural areas, should have access to the Internet and to the other services that will increase the technical skills of its students. I support the goals of the e-rate program, and I believe that everyone on the subcommittee supports that program's goals.

We are not here today to discuss the e-rate program's purpose or goals. Rather, we are here to discuss how the e-rate program is funded. We are focusing on this narrow issue because it, separate and independent from the e-rate program, has very significant implications for us as policymakers, as members of Congress that have struggled hard to balance the budget, and as many members who oppose tax increases.

When the drafters of the Constitution established the three branches of government, they carefully delineated the duties and powers of each branch. Congress, and Congress alone, was entrusted with the power to levy taxes. Congress should not and cannot delegate the authority to levy taxes.

That being established, we are here to determine whether the e-rate program, as implemented by the FCC, is a fee or a tax, because if it is, indeed, a tax, it has not been levied by Congress, but by an executive branch agency; and, therefore, is illegal.

A fee is a voluntary payment, or benefit conferred, on the payor. And the amount of the fee paid correlates with the benefit received. For example, campers often pay a fee to enter national parks like Yellowstone National Park. If they do not want to pay a fee, they can chose to camp elsewhere. If they do chose to camp there, the fees are designed to approximate the costs of running the park. A tax, on the other hand, is a mandatory charge imposed on the payor for general or specified governmental purposes. I am sure that we all too aware of examples of taxes.

At first blush, I must admit that the charges that the FCC has imposed on telecommunications carriers appear to be taxes. They are mandatory. All telecommunications providers must contribute to the e-rate program, whether they receive benefit from the program or not. You may have seen these charges on your phone bill last month. Also both the Congressional Budget Office and the Office of Management and Budget agree that contributions to the program are general revenues and that disbursements for the program will be general outlays. This sounds like a tax—mandatory contributions, which go directly into the government's coffers.

But I do not want to jump to conclusions. Rather, I want to hear from witnesses so that they can help us understand whether this program is, in fact, a hidden tax.

This determination is important. We, as the representatives of the people, are accountable for the taxes that they pay. Raising taxes is serious business. And as we struggle to balance burden and society's goals, we cannot have the bureaucracy making a mockery of tax cuts by imposing fees that are, in fact, hidden taxes that end up being paid by every one of us.

The goals of the e-rate program are laudable. Finding the funding for the program must be a priority. But we must follow the constitutionally prescribed process.

In 1665, Colbert said, I quote, "the art of taxation consists in so plucking the goose as to obtain the largest amount of feathers with the least possible amount of hissing." We have to set our sights a little higher than simply minimizing the hissing. The Constitution speaks very clearly: tax law is made by Congress. And money bills originate in the House, in the Committee on Ways and Means.

I look forward to hearing from our witnesses today, and I'm pleased to yield to our Ranking Democrat, Mr. Coyne.

Mr. COYNE. Thank you Madam Chairman.

We are here today to conduct an oversight hearing on an issue that is very important to our children's educational future. The issue we are focusing on today is the e-rate program, which is designed to provide our schools and libraries with state-of-the-art telecommunications services.

This program was created in the Telecommunications Act of 1996 as part of the Universal Service Program, which provides low-income consumers and households in rural and high-cost areas with telephone services at affordable prices.

The United States has been able to ensure access to telephone services for all Americans regardless of their location and wealth through this Universal Service Program. The Universal Service Program has been in existence for decades and was codified and expanded in the 1996 Telecommunications Act. The Universal Service Program is a cross-subsidy system by which telecommunications companies contribute to the Universal Service Fund and then draw from the fund as reimbursement for discounts and other subsidies that they have provided to consumers.

The contributions from the telecommunications companies go into a revolving fund which pays back the industry amounts reflecting their Universal Coverage subsidies. The principal expansion of the Universal Service Program in the 1996 Telecommunications Act was the provision to provide public and non-profit elementary and secondary schools, public libraries, and rural health providers with advanced telecommunications services such as the Internet.

Since 1996, over 100,000 schools have applied for the program, which the FCC has announced it will fund at about $2 billion. I am well aware of how important this program is, because many schools and libraries in the district that I represent have applied for the program, and all of them are very pleased about the new educational opportunities they can now offer their students. Soon, if all

goes as planned, Internet access for schools and libraries will be a reality.

The stated purpose of today's hearing is number one, to review funding mechanisms for the e-rate program; and number two, to determine whether it is a tax. If the Ways and Means Committee's jurisdiction has been bypassed, this is a legitimate matter for us to consider here today.

However, I am also aware that there has been a great deal of political rhetoric surrounding the issue. For example, some have called the e-rate program a tax, and named it after our Vice President. I hope we all will focus on the substantive issues and not engage in partisan rhetoric here today. First, the 1996 Telecommunications Act passed by the House by a vote of 414 to 16, a clear bipartisan endorsement. Further, it is my understanding that in May of 1995, when the schools and libraries provision was added to the Senate version of the bill, the House parliamentarian was consulted to determine whether the provision was a tax, for purposes of the House blue slipping it as a revenue measure not originating in the House of Representatives. The Senate bill was not blue slipped by any member of the House at that time. Further, the Senate provision was included in the final conference agreement approved by the House and the Senate.

To the extent the e-rate program constitutes a tax, we should assert jurisdiction on a possible amendment to the Commerce Department's appropriation bill that is currently before the House of Representatives, which would block funding for the program.

On the other hand, it is the responsibility of the courts to evaluate whether a new law is constitutional and appropriately delegates authority to the executive branch. The very issue we are discussing today is pending before the 5th circuit court of appeals. The answer will be provided by the court in the very near future.

In the past, the industry has supported this fund and built contributions into its cost base. The contributions to the fund have never been explicitly passed on to the consumer as a line item charge. However, companies are now having to compete for customers in the deregulated world created by the 1996 Telecommunications Act.

To get those customers, they need to advertise a very low cost per minute. They have been aided in this goal by reductions the 1996 Act caused in local access charges. According to the materials I received from the FCC, this reduction is now about one and half cents per minute. This reduction should have more than offset the increased costs of Universal Service, guaranteeing customers rates that were at least a penny a minute less.

For a customer who makes an hour of long distance calls a week, that savings is about $30 per year. Why, then, have phone companies chosen to show the increase in Universal Service as a separate charge and not part of the rate? It's not because their costs have increased. It's because doing that allows them to advertise a lower rate than they actually charge, and, as a bonus, blame it on the government. For example, itemizing the charge allows them to charge the hypothetical customer I was just describing about half a cent more per minute than their advertised rate, increasing the bill by about $15 a year.

I believe today's witnesses will help us better understand whether the phone bills our constituents receive are actually reflecting their phone company's underlying costs. I hope our committee will not be a part to legitimizing any rhetoric which prevents consumers from getting the full benefit of reductions in long distance telephone costs mandated by Congress.

Thank you, Madam Chairman.

Chairman JOHNSON of Connecticut. Thank you, Mr. Coyne. You opening statement was very helpful. Those of us who were very supportive of the Telecommunications Act and of its funding of this function at the time did believe that it would be paid for through the savings that that Act allowed the industry to realize. And I personally believe that that may be why it was never blue slipped. But that is exactly the controversy we are here to look into today, because the long-term implications of the legislative branch allowing the executive branch to develop revenue sources for specific functions is very serious and does compromise our ability to control the tax burden on the people of the Nation and to manage the relationship between revenues and appropriations and the Nation's priorities.

So this is not a hearing about whether or not we support hooking up the libraries and schools. We all clearly do support that. It is a very important, though rather technical hearing, on the means by which we plan to accomplish those goals.

I would like to first recognize Mr. Weller for his testimony, a valued member of this committee and a member of the Oversight Subcommittee.

Mr. Weller.

STATEMENT OF THE HON. JERRY WELLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. WELLER. Well, thank you, madam Chair. And thank you, Mr. Coyne, and members of the Oversight Subcommittee for the opportunity to testify today. And I also want to commend Chair Johnson for her leadership on today's issue. I'm particularly glad to join my colleague, Mr. Tauzin, also my colleague and friend, Mr. Blumenauer today to testify before the Oversight Subcommittee on what I think we all agree on, and that is on an effort to achieve the goal that we all share, which is giving every child access to the Internet through our local schools and libraries, to better prepare them for the economy and job market of the 21st century.

Two years ago, when we passed the Telecommunications Act, in 1996, it included a simple directive: that any telecommunications carrier serving a particular geographic area must make any of its services under the Universal Service Fund available at reduced rates to schools and libraries. Unfortunately, the FCC misinterpreted the Telecommunications Act and now jeopardizes this goal that we all share, which is providing Internet access for all of America's children.

Like you, Madam Chair, I want to work in a bipartisan way to fix this problem.

First, if we look historically, the FCC determined that as much as two and quarter billion dollars per year should be made available to support Universal Service for schools and libraries.

Second, the FCC expanded the scope of what was available for schools and libraries from just discounted rates on the telecommunications services and decided to include Internet access costs and Internet connections, such as wiring.

Third, the FCC created a whole new bureaucracy known as the School and Libraries Corporation to administer the e-rate program without any authorization from Congress to do so.

Finally, with probably the most questionable of all the provisions, the FCC determined that the funds supporting the e-rate for schools and libraries should come from an assessment or tax on all telecommunication service providers. This controversial assessment, which is currently facing legal challenges, and as Mr. Coyne pointed out, has commonly become known as the Gore tax.

Here are the problems that we now face.

The FCC has taken unauthorized to create a new, ineffective bureaucracy that has yet to provide any funding to 1,800 schools in Illinois that have applied for help in connecting their students to the Internet.

And two, the FCC has taken the unconstitutional action of imposing an unauthorized tax on telephone usage in order to cover the expenses of this enterprise.

The FCC is incorrect in its contention that the so-called Gore tax is a fee. A fee is a voluntary charge for a service rendered. However, telephone customers are not receiving a service. Thus, if a charge is levied and no direct service is provided, then it is characterized as a tax regardless of whether it shows up on your 1040 Form or your telephone bill. And only Congress can impose a tax under our Constitution. The FCC's actions are now being contest in court.

The result is that many schools across the country that were depending on the e-rate have been left in the cold. Some examples in the district I represent, in the 11th District of Illinois, include Bradley-Bourbonais Community High School, which has applied to get 38 computers connected; Steger High School, in south Cook County, which applied to get 156 classrooms wired; Wilmington School District, which applied to get 123 computers connected and 50 classrooms wired; Joliet's Public Library District, which applied to get 20 computers connected; and La Salle Catholic, which is a grade school, which applied to get 36 computers connected and 14 classrooms wired.

This is only a smattering of examples where the FCC and the SLC have left the hopes and dreams of schools and students hanging in the winds. We cannot let this continue. That's why I'm glad to join with my colleague and friend, Mr. Tauzin, in sponsoring the School and Libraries Internet Access Act of 1998, H.R. 4324.

The School and Library Internet Access Act would save the technology assistance program for over 1,800 schools in Illinois alone by slashing the World War I three percent telephone excise tax, which currently goes to the general revenue fund, to one percent, and earmarking the remaining revenue to fund the important school and library Internet access programs that through block grants to our States. In addition to slashing the current tax, the School and Library Internet Access Act repeals the so-called three percent Gore Tax on telephone customers. Our legislation will save

consumers and estimated $5 billion, while providing $1.7 billion in the first year to equip our schools and libraries with Internet access.

This legislation effectively kills two birds with one stone. First, the legislation preserves and expands funding for this important Internet access assistance program for our schools and libraries and places it appropriately under the jurisdiction of the National Telecommunications and Information Administration. Second, the legislation abolishes the FCC's unconstitutional, what some call the "Gore Tax" funding mechanism and reduces an antiquated World War I tax, which disproportionately impacts the poor and senior citizens.

Let's do it right this time. The FCC and its illegal "Gore Tax" created the problem. However, I support the bipartisan goal of giving every child in school access to the Internet and believe we need to solve this problem by enacting the School and Library Internet Access Act. It is important to the children of Illinois and the 1,800 schools which are pleading for help. It is the right thing to do. Let's work in a bipartisan fashion to get this job done.

Of course, Madam Chair, I ask my colleagues to give the School and Libraries Internet Access Act, which helps solve this problem, favorable consideration in this committee.

Again, thank you, Madam Chair and Mr. Coyne.

Chairman JOHNSON of Connecticut. Thank you, Mr. Weller.

Mr. Tauzin, the cosponsor of H.R. 4324.

STATEMENT OF THE HON. W.J. TAUZIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. TAUZIN. Thank you, Chairman Johnson.

Let me I suppose go right to the heart of this issue. The issue is not whether or not we ought to fund a decent schools and libraries fund or whether we ought to carry out the purposes of the e-rate program thoroughly, completely in America. I think we all agree that it is a good public, national goal to make sure that all the children of America have access to Internet services and, in fact, have access to what will become extraordinary new opportunities in long distance learning. And it's also—the same is true for our libraries and certainly true for rural hospitals in America. That's not the question.

The question, as you correctly pose it, Madam Chairman, is whether or not the e-rate tax itself is a tax or a fee. Is it the fee that the parliamentarian said it was going to be? Or has it become a tax?

To the quick: the 5th circuit is going to decide this. But I think we can decide it rather quickly, too. The courts have pretty well determined what is a fee and what is a tax. Now you have great expertise in taxation. We've seen fees at the Commerce Committee. A fee is simply a collection of a charge for which there is a nexus in service. Someone pays and gets a benefit for it directly.

A tax is something where you don't have a direct benefit. You generally are putting in money for the good of other people in our society.

This qualifies. This e-rate quickly qualifies as a tax, and the question is how do we get from here to there? The answer is that

the Commerce Committee and other committees who worked on the Telecommunications bill, and your committee included, intended, I think, very quickly to make sure that the FCC administered a properly discounted service plan to make sure that the monthly charges to the schools and libraries of America were discounted charges, that is, charges that could be afforded by the schools and libraries and rural hospitals in the same sense that we intended in the Universal Service fee collection system that charges on a monthly basis to rural individuals or poor individuals in our society would be discounted. That is, the rest of us would subsidize the connection of telephone service to those individuals so that our telephone would be more valuable to us. Everybody would be on the same system; and, therefore, poor and rural people would not be left out of service on a monthly basis for telephone service.

What the FCC did in interpreting that provision to include a capacity to levy a tax on telephone users for the purpose of construction grants to schools and libraries goes way beyond the intent of Congress. And as you pointed out, Madam Chairwoman, I think it calls into question the powers of the executive side of our government. It is the power of Congress to levy a tax for the purpose of providing a construction grant program. And it is the purview of Congress to decide the level of that tax and then also to oversee the spending of that program.

Here's what the FCC did. It levied its tax, and it set up corporations to administer the spending of the money after it collected the tax, and decided then that these corporations would decide, in fact, administer a grant program to schools and libraries in America—corporations that are not subject to congressional oversight. So, in effect, it avoided the constitutional separation of powers. It avoided the oversight of Congress through its Ways and Means Committee, and its appropriation process in working this program through.

The bill that Jerry and I and others have filed does several things at one time.

One, it legitimizes the program. It takes out of question, the question of whether or not we ought to properly fund this program with a properly funded tax. It funds it properly with a tax we are already collecting since 1914, a tax that was imposed—three percent on telephones—that was imposed in 1914 to fund World War I. If my history serves me right, that war is over. We can find a new purpose for that tax.

Our bill repeals that tax over time, but leaves in place one-third of it, the one cent, that will properly fund the schools and libraries program. And then secondly, we repeal clearly any authority the FCC thinks it has to levy a so-called e-rate tax on telephone users. It repeals two taxes at the same time, sunsets the balance of the 1914 tax, leaving enough in place, $1.7 billion a year—in fact, escalating to $2.1 billion in this last year, enough in place over five years for us to carry out the program properly under congressional supervision with a tax that's clearly authorized without corporations that have been called into legal question by our own GAO.

I submit to you that this is a plan that's a win-win for all of us. It gives great tax relief to Americans, repeals the e-rate tax, repeals two-thirds of an old tax, provides a funding mechanism for schools and libraries that is legally and properly funded, and sub-

jects it all to the proper legislative oversight of this committee and the Appropriations Committee, and other education committees of Congress, as well as the Commerce Committee in its oversight of the NTIA. I suggest to you this is a good approach. It solves a lot of problems at one time, and gets rid of any legal questions about the sanctity of this program.

[The prepared statement follows:]

Statement of Hon. W.J. "Billy" Tauzin, a Representative in Congress from the State of Louisiana, and Chairman, Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce

Madam Chair and members of the Subcommittee, I am pleased to have the opportunity to present testimony today with respect to funding mechanisms for the so-called "e-rate" program which provides advanced telecommunications services to schools, libraries and health care facilities at a discount.

I believe we have an opportunity to be both creative in our efforts to sustain this important program, and to provide every American family with a measure of tax relief in the process.

This Committee is wise to look at the issues involved with the current scheme which the Federal Communications Commission (FCC) has authored to provide support for "e-rate." It is clear that important constitutional issues are being raised regarding the characterization of the contributions system now being implemented by the FCC. Under that system, all telecommunications providers, including local exchange carriers, long distance providers, paging service providers, wireless providers, and others, must contribute to the "e-rate" fund based on their revenues from telecommunications services. Questions of constitutional law arise from the fact that some telecommunications providers who will have to make payments into the fund will not have the opportunity to obtain a direct benefit from their contributions.

It is just this kind of "disconnect," or lack of "nexus" between the party required to make a contribution and those likely to achieve a direct benefit that changes the character of a payment from a "fee" to a "tax."

I certainly do not need to tell this Committee what a tax is. However, I have had, in my Committee assignment, a fair acquaintance with determining what a "fee" looks like. "Fees" are generally imposed on users of services for whom the payment is in recognition of services rendered or to be rendered. If contributors to the fund have no expectation or chance of direct benefit, it is my understanding that courts have found that kind of assessment to be a tax. The broader the benefit, the less "connected" those who pay are with the aims and ends of the payments made, the more likely it is going to be a tax and not a fee.

In this instance, there is a good prospect that what the FCC has devised is a tax. If that is the case, we have an independent agency imposing a tax without the specific authorization of Congress--something the Constitution prohibits, as this Committee knows all too well.

This legislation takes an existing, longstanding tax--the telecommunications excise tax--which every American household and business pays if it has a telephone, and reduces it by two-thirds on January 1, 1999. By October 1, 2003, it repeals the tax altogether. In the years between the tax reduction and outright repeal, the remaining revenues are dedicated to funding the "e-rate" programs. I should add that the administration of those programs is shifted, under my bill, from the FCC, which had not instilled confidence in its stewardship of the effort, to the Commerce Department's National Telecommunications and Information Administration. This is a more appropriate agency to oversee the accomplishment of the policy objectives intended by Congress when it passed telecommunications reform landmark legislation in 1996.

My legislation does not stop there. Unlike the current funding scheme, which is open-ended and has already been plagued by criticism for excesses, H.R. 4324 sunsets the trust fund created to receive the excise tax revenues, and, as I indicated, ultimately repeals the tax. The reasons for this are simple: our national goal to wire schools, libraries and hospitals can be met within five years, and, once met, there is no longer a need to continue to impose a tax on the act of communicating over the phone. Furthermore, we limit the amount that can be annually spent from the trust fund to $1.7 billion in the first year, and to 100 % of the revenues collected thereafter until the sunset date, October 1, 1998.

The telecommunications excise tax dates back at least to World War I. It has served a variety of revenue purposes over the years, including support of war efforts and reducing the deficit. In a new budget environment, in a period of growing fiscal surplus, with the nation at peace, why continue to impose the full tax on people communicating with people?

Madam Chair, I hope the Committee will carefully look at H.R. 4324 for what it is intended to be: a creative and efficient way to achieve good for a very broad cross-section of Americans. I thank you for your attention and will be happy to answer any questions you may have.

Chairman JOHNSON of Connecticut. Thank you, Mr. Tauzin.

Mr. Blumenauer.

Mr. COYNE. Madam Chairman——

Chairman JOHNSON of Connecticut. Welcome to have you. Sorry.

Mr. COYNE. I wonder if I could make an observation relative to what's been said here. To continue to refer to this tax as the Gore Tax I think is misinterpreting what the purpose of this hearing here today is. As the Chairwoman pointed out, the purpose here today is find out whether or not it is a tax, or it isn't a tax. But to refer to this as a Gore Tax I think just brings some partisan rhetoric into this hearing that is not becoming of the process here today.

We could just as easily be calling this the Weller Tax in as much as Representative Weller voted, as I did, for this legislation, and maybe we ought to refer to it as the Weller tax instead of naming it after the Vice President.

Chairman JOHNSON of Connecticut. Mr. Blumenauer, it's a pleasure to have you before our committee.

STATEMENT OF THE HON. EARL BLUMENAUER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Mr. BLUMENAUER. Thank you, Madam Chair.

And I appreciate your courtesy in allowing me to join with you. And the exchange that's been going on I think underscores the importance of why you should have this oversight series of hearings and testimony. I identify with the 1,800 schools in Illinois. I have schools who have applied for the e-rate in my district. You have them in yours. They are a part of the 100,000 schools and libraries that Mr. Coyne referenced who've made application and who should, by rights, be receiving benefit for it. And the longer that we continue to dilly dally here in the Federal Government, we hold our children and their future hostage. And I think it's inappropriate.

I want to state from the outset that I am a strong supporter of the e-rate. I believe Congress, in 1996, made that commitment, and it was with the clear expectation that the e-rate was going to be funded out of the savings that were going to accrue to the telecommunication industry. In section 254, there was a notion that it would be part of the Universal Service Program, which been in place administratively for over 60 years. Universal service provides services to high-cost and rural areas, and it is something that has, in fact, been litigated. The Federal Court District Court for the District of Columbia did already settle earlier in the game that the Universal Service program was not a tax. It was a fee because it was used to ensure affordable rates for specified services not designated primarily as a means of raising revenue. The addition of a support mechanism for schools and libraries does not change the fundamental nature of the Universal Service Program. And as was referenced by Mr. Tauzin, when this issue was under debate in the House, it was called before the parliamentarian and a ruling was made in the House that it was not a tax, it was a fee. And I think it is important for us to keep that in perspective as we move forward.

Now we have these pesky little extra items that are being added to phone bills. You referenced, I believe, the one that AT&T has. There's a 93 cent surcharge for Universal Service activities. However, only 19 cents of that is attributable to the e-rate cost. The majority is for the Universal Service that they have, in fact, been collecting for over 60 years.

It seems to me that it is important to allow the litigation to go forward as been referenced. But I think the evidence is clear from the legislative history, from what's happened with the Universal Service in the past, that it's very likely that it will be, in fact, determined to be a fee. It is important I think for this committee, however, to look at proposals that have been proposed by my colleagues to my left, because it may well be at some point in the game that we do want to have an alternative mechanism available, either because there are politics that intervene, as they have intervened to this point, or because there are better ways of going about it.

I remain open to alternatives frankly at some point if they're necessary. But at this point, they aren't necessary. I have grave reservations about starting over again. The FCC has addressed what I think were legitimate complaints about the administration and structure. They have implemented the recommendations from the GAO report. They're ready to go, albeit at a scaled down level. If we somehow get lost in the rhetoric, the politics, try and score points, the children and the commitment will be lost in the dust.

And I think that would be a mistake, because there are these 100,000 schools and libraries that have made application for e-rate discounts, as was envisioned earlier. They are ready to go. We have the ability as a Congress to move forward in cooperation with the administration and the FCC and do so. And I hope that in the course of your deliberations, it will be clear that that is the course that we should follow.

I do have a great deal of information that I'm not going to bore you with that I would like to be made a part of the record if I could submit it.

And I stand willing to answer any questions or engage in a conversation as you see fit.

Chairman JOHNSON of Connecticut. So ordered. We will submit your material for the record.

[The prepared statement and attachments follow. An additional attachment is being retained in the Committee files.]

EARL BLUMENAUER
THIRD DISTRICT, OREGON

COMMITTEE:
TRANSPORTATION AND INFRASTRUCTURE

SUBCOMMITTEES:
RAILROADS
WATER RESOURCES AND ENVIRONMENT

WASHINGTON OFFICE:
1113 LONGWORTH BUILDING
WASHINGTON, DC 20515-3703
(202) 225-4811

DISTRICT OFFICE:
THE WEATHERLY BUILDING
516 S.E. MORRISON STREET
SUITE 250
PORTLAND, OR 97214
(503) 231-2300
email: write.earl@mail.house.gov
website: http://www.house.gov/blumenauer

Congress of the United States
House of Representatives
Washington, DC

FUNDING FOR THE E-RATE
Statement of Representative Earl Blumenauer (D-OR)
Ways and Means Subcommittee On Oversight
August 4, 1998

Thank you for allowing me to testify this morning regarding the funding mechanism for the Education Rate. This E-Rate hearing is timely and important, and I appreciate the opportunity to present my views. At times, I fear we may be losing our perspective on these matters. Long distance phone bills are now at their lowest point in history. AT&T has just agreed to merge with TCI at a cost of $48 billion. GTE and Bell Atlantic are seeking to spend $52 billion on their recently announced merger. The telecommunications industry has saved billions in costs as a result of telecommunications reform to date. Yet controversy has erupted over one element the so-called E-Rate, which would represent less than 1 cent-per-day-per-customer line to provide internet access for America's schools and libraries.

I believe it would be most useful for me to provide members of the subcommittee with a legislative and historical framework behind what has unfortunately become a very controversial program. Let me state at the outset, I am a strong supporter of the E-Rate. I believe that Congress and the FCC made a commitment to assist schools and libraries across the country in their efforts to provide America's school children with access to the Information Highway. Thousands have taken us at our word and we must honor that commitment.

History / Background

The Legislative, Executive and Judicial branches have all taken actions relating to establishment and implementation of the E-Rate.

Legislative Branch: The Telecommunications Act of 1996

The federal commitment to schools and libraries is grounded in the Telecommunications Act of 1996. Section 254 of the Act created the E-Rate, a discounted rate for the telecommunications needs of schools and libraries, as part of the Universal Service program. The Universal Service program had been in place administratively for over 60 years. It provides telephone services to low cost and rural areas. In addition to establishing the E-Rate, the 1996 Act codified the existing Universal Service program into statute, with some changes.

Under Section 254(d) of the Act, carriers are required to contribute to mechanisms established by the Commission to preserve and advance Universal Service. Section 254(h)(1)(B) established E-Rate as part of the overall Universal Service fund. Hence, the FCC collects contributions from telephone companies for Universal Service fund activities, including the E-Rate.

The Conference Report language clarifies that the new E-Rate program "is intended to ensure that health care providers for rural areas, elementary and secondary school classrooms, and libraries have affordable access to modern telecommunications services that will enable them to provide medical and educational services to all parts of the Nation." (Committee Report -- Hse. Rpt. 104-458 - Telecommunications Act of 1996)

I have attached a copy of the statutory language and conference report language on this provision.

Perhaps most important to understanding the E-Rate is the legislative history, as reflected in the Senate and House floor debates. These debates reflect the clear understanding on the part of sponsors of the E-Rate provision that an agreement had been reached -- that this discounted rate for schools and libraries would be paid for through the savings and opportunities that telephone companies would receive as a result of deregulation. This was just one of the delicate balances that were struck between those who believed that

telephone consumers would best be served through a "let the marketplace decide" approach and those who favored retaining regulatory protections.

Executive Branch: The Federal Communication Commission's Implementation of Section 254(h)

Once the Act was passed, the FCC began to implement the E-Rate program. In May of 1997, the FCC issued its first Notice of Proposed Rulemaking on the Education Rate. At that time, the FCC proposed that total expenditures for universal service support for schools and libraries would be capped at $2.25 billion per year, with a roll-over into following years of funding authority, if necessary, for funds not disbursed in any given year. Eligible schools and libraries would receive discounts ranging from 20% to 90%, depending on whether a school or library is disadvantaged or located in a high cost area. The understanding, under the FCC's order, was that the costs of the E-Rate program to telephone carriers would be more than offset by the savings telephone companies were receiving as a result of deregulation.

The funding mechanism that the FCC established for the E-Rate program was similar, but not identical to the mechanism already in place to fund existing programs for universal service. Under existing universal service programs, the FCC collects contributions from telecommunications carriers which are deposited in a revolving fund and used to reimburse those companies who have provided telecommunications services to rural and poor areas at reduced or subsidized rates.

Unfortunately, due to controversies which arose in large part as a result of charges that were placed on consumers' phone bills, in June of this year the FCC cut the proposed E-rate funding by nearly half to approximately $1.9 billion through June of 1999, instead of the $3.35 billion that would have been generated for the 18 months.

Judicial Branch: Court Decisions on the Universal Service Program

Before Congress codified the Universal Service program and established the E-Rate under the Telecommunications Act of 1996, the United States Court of Appeals for the District of Columbia considered whether the Commission's administratively established Universal Service program represented an inappropriate delegation of the power to tax. The Court found that it did not [*Rural Telephone Coalition V. FCC*, 838F2nd 1307 (DC Circuit 1988)]. The reasoning was that Universal Service is intended to ensure affordable rates for specified services; it is not designated primarily as a means of raising revenue. In my opinion, the addition of a support mechanism for schools and libraries does not change the fundamental nature of Universal Service. The E-Rate meets the DC Circuit court's test of providing affordable rates for a specified service.

Current Status

Judicial Branch Actions

Telephone companies and others have used the changes made to the Universal Service funding mechanism in the 1996 Act as an opportunity to once again put the question of Universal Service before the courts. The Fifth Circuit Court of Appeals is currently considering a case (*Texas Office of Public Utility Counsel Et. Al. vs. FCC*) regarding the legality of the Universal Service program in its entirety, as constituted under the Telecommunications Act. In particular, the court is considering whether it is legal for the FCC to collect funds from an expanded group of telecommunications carriers (as opposed to just the long distance companies, who, before the 1996 Act, were the only contributors to Universal Service). A ruling on this issue could come as early as the end of this year.

Executive Agency Actions

Some opponents of the E-Rate point out that there have been a great number of problems with the administration and structure of the program, and particularly the Schools and

Libraries Corporation, which was set up to administer the E-Rate. I concur. The head of the SLC did receive a salary in excess of $200,000. Schools and libraries across the country have been extremely frustrated by the morass of red tape they must go through to apply for the E-Rate and the inconsistency of some of the SLC's decisions. The General Accounting Office did, indeed find serious constitutional problems with the structure of the SLC.

The FCC agrees there are serious concerns and has taken immediate steps to comply with all GAO recommendations on improving management by reducing salaries, combining the SLC and the RHCC into one entity with the existing Universal Service Administrative Company, and clarifying that funding may be used only for telecommunications services, Internet access, and Internal connection. (not carpeting, drywall, etc.) Once those questions are resolved, funds for the E-Rate will begin to flow, albeit at a greatly reduced rate, to eligible schools and libraries sometime this fall.

Legislative Actions

Some Members of Congress are suggesting that the E-Rate is an illegal tax, despite the fact that the Fifth Circuit has not yet ruled on this question. Two bills (H.R. 4032 and H.R. 4065) have been introduced to end the FCC's authority to collect funds for the E-Rate program. Rep. Scarborough has filed an amendment to the Commerce Justice State Appropriation bill to end the FCC's authority to administer the program.

Our colleague, Rep. Tauzin, has introduced separate legislation which would also put an end to the FCC's authority to collect funds for E-Rate, but also designates an alternative funding source, the telephone excise tax, to help schools and libraries in their efforts to connect America's school children to the Information Highway.

Getting to the Heart of the Matter: Is this an Illegal Tax?

The charges that have appeared on phone company bills have lead some to argue that the E-Rate is an illegal tax that the FCC is imposing on the American people. From the review of the E-Rate's legislative, judicial, and regulatory background, four key points are clear:

- Congress established a discounted rate for schools and libraries under the Telecommunications Act of 1996. It is not something the FCC decided to pursue on its own authority;
- The FCC has taken significant steps to resolve legitimate concerns about the structure and administration of the program;
- The courts have already ruled that the Universal Service Fund, as administered by the FCC before the 1996 Telecommunications Act, does not constitute a tax, and;
- The issue about whether the changes to universal service constitutes a tax is before the courts and will be resolved in the near future.

Although it is not necessarily within the jurisdiction of this Committee, it is important to point out the charges on phone bills which some have blamed on the E-Rate actually reflect the cost to phone companies of the entire range of Universal Service activities. For example, only 19 cents of AT&T's 93 cent surcharge will go to schools and libraries. The remainder is for ongoing universal service costs that phone companies have been paying since 1934.

These surcharges do not reflect the over $3 billion in savings that phone companies have enjoyed as a result of deregulation provided by the 1996 Telecommunications Act. Before deregulation of the industry, the charges for providing Universal Service were hidden in the rates paid by telephone consumers. Now that telephone companies are providing as-low-as-possible per minute rates, they are pulling these once-hidden costs out into line items.

Conclusion: What is the Appropriate Congressional Response?

Congress can react in any one of a number of ways to the current E-Rate controversy. We can throw the baby out with the bath water, and completely eliminate the E-Rate. We can seek alternative funding mechanisms (even though we have a funding mechanism in place). Or we can work with what we have.

Elimination of the E-Rate

As I pointed out earlier, a number of my colleagues have introduced legislation to completely defund the E-Rate. I oppose these proposals. Defunding the E-Rate now will do irreparable harm to America's school children. Over 100,000 schools and libraries across the country took the federal government at its word -- they spent countless hours and tens of thousands of dollars preparing applications to receive funds from the FCC under the "E-Rate" program. We must not break that commitment.

Alternative Funding Mechanisms: The Telephone Excise Tax

I appreciate Rep. Tauzin's desire to continue the federal commitment to schools and libraries his efforts to find an alternative source of funding

For the past year, my office has been working with a national network of organizations and businesses dedicated to ensuring that our schools and libraries are connected to the Information Highway. The depth and breadth of this network is astonishing, ranging from schools and libraries groups to civil rights organizations, telecommunications carriers, media interests, and high tech companies. Our efforts are dedicated to ensuring that our commitment to Internet access is honored.

Rep. Tauzin, who joins me on this panel, has proposed an alternative source of funding to help schools and libraries gain access to information services. While appreciated, I'm not convinced his legislation is necessary. We have a mechanism for funding the E-Rate in

place which, hopefully, will not be brought down by either the Fifth Circuit court, or through the Appropriations process.

Mechanically, I have concerns about the substance of the proposal, particularly whether it will provide adequate funds to fully connect our schools and libraries to the Information Highway.

I stand ready to work with the gentleman in any way we can be helpful should he think that appropriate. I feel an obligation to be open to any and all funding alternatives that will ensure access to the Information Highway for America's school children, although I'm reluctant to use the excise tax as an alternative source of funds. Clearly, maintaining the E-Rate's status as a part of Universal Service makes an important policy statement that access to the Internet for America's schoolchildren, particularly those in low-income areas, is an essential service. By keeping the E-Rate within the Universal Service program, we all share the burden of ensuring that tomorrow's leaders have access to today's technological tools.

I think, though, we should consider keeping our options open. Depending upon a number of factors: the ruling of the Fifth circuit court, the outcome of attacks on the E-Rate through the appropriations process, and possible other political considerations, those of us who want, ultimately, to see our schools and libraries wired may be forced to seek alternative sources of funds.

I'm not sure how wise it is for Congress to attempt to legislate in this area before we know more about the legality of the current Universal Service construct. Our best course of action would be to await the ruling of the Court before determining our next legislative steps on actual funding for the program. In the meantime, I intend to pursue two courses of action:

- I will continue to support the current E-Rate funding mechanism at the FCC. We must not hold our kids hostage to inter-governmental disputes -- they need this

technology today. Our schools and libraries can not educate tomorrow's leaders with decades-old technological tools. The E-Rate puts our children on par with the rest of the world. They must have this critical connection. Our future leadership and prosperity depends on it.

- Because the confusion generated by these surcharges clouds the future of the E-Rate, I have introduced legislation, H.R. 4018, calling for a GAO study on the actual savings that have accrued, and to give consumers some truth in billing. It would show how much money has been saved by telecommunications carriers, how much has been passed on to consumers, and how much additional costs telecommunications carriers will have to bear, if any. In addition, the legislation would require that those companies seeking to put line items on their bills, reflect the full and accurate picture of both savings and costs that have resulted from federal regulatory actions. I believe it entirely appropriate for the Congress to consider and adopt "Truth in Billing" legislation to give telephone consumers a greater understanding of the inherent subsidies within the telephone system, and how these subsidies are becoming more explicit as a result of deregulation.

The E-Rate proponents are simply asking Congress and the FCC to live up to the commitment they made to schools and libraries to use some of the savings from telephone deregulation to make an investment in our Nation's technological future. I remain willing to work with my colleagues on identifying funding options that retain the spirit and actual effect of that commitment.

E-RATE TALKING POINTS

Background: The Telecommunications Act of 1996 created the E-Rate program. Under the FCC's implementation Report and Order of May, 1997, up to $2.25 billion in annual discounts will be provided for Internet access, internal connections and local and long distance phone rates to schools and libraries. The discounts will range from 20 to 90%, with those schools and libraries located in the most rural and high cost areas receiving the deepest discounts. The Schools and Libraries (SLC) Corporation, the entity established to administer this program, estimates that school and library applications for discounts in 1998 will be $2.02 billion. Over 30,000 applications have been received by the SLC thus far. In the next week, the FCC will determine how much money will be available to fund this program in 1998.

THE ROLE OF THE FEDERAL GOVERNMENT

Myth: The Federal government has no business being involved with providing Elementary and Secondary schools access to information services. This is a local issue.

- In fact, the federal government has made it its business to use its ability to aggregate funds to assure that all areas of the country have electric, telephone and highway service. Further, the federal government has been involved in local educational issues since the Northwest Ordinance of 1787, which provided schools with public lands. Under the Ordinance "Schools and the means of education shall forever be encouraged." It does not seem beyond our purview to help make certain that children and library patrons in poor and rural areas can access the Information Superhighway.

Myth: This is a Pet Project of Al Gore's and Liberals in Congress

- This program is by no means a program only supported by Vice President Gore. It was originally sponsored by a bipartisan group of Senators, including Maine Senator Olympia Snowe, West Virginia Senator Jay Rockefeller and Nebraska Senator Bob Kerrey. It becamse law in the Telecommunications Act, which was passed overwhelmingly by a Republican Congress.

- In the past three weeks, over 11,000 e-mails in support of the E-Rate from citizens across the country have poured into the offices of Congressional representatives, the FCC Commissioners and the six telephone companies threatening the program. On May 22, eight U.S. Senators sent a bipartisan letter to FCC Chairman William Kennard supporting the E-Rate program and urging that "all valid applications to this program be fully funded." The letter was signed by Senators Edward Kennedy (D-MA), James Jeffords (R-VT), John D. Rockefeller (D-WV), Rick Santorum (R-PA), Robert Kerrey (D-NE), John Chafee (R-RI), Christopher Dodd (D-CT) and Olympia Snowe (R-ME).

- This program is the result of a public 18 monthly FCC proceeding in which nearly 1000 groups participated with nearly 3000 filings amounting to nearly 56,000 pages

NEED FOR THE EDUCATION RATE

Myth: There is no demand for E-Rate like discounts

- Since the SLC began accepting applications in January of this year, it has received over 30,000 applications from libraries, public school districts, private schools and state departments of education

Myth: The vast majority of schools and libraries are already connected to the Internet

- While 78% of U.S. public schools that have access to the Internet, only 27% of all public school instructional rooms - where learning occurs -- have access to the Internet. Moreover, poor and minority students are hardest hit by the lack of access to the Internet, with only 14% of poor and minority classrooms having a connection.

Myth: The Internet isn't really all that important for education anyway

- A recent survey by Quality Education Data, a Denver-based market research firm specializing in educational trends, found that teachers and students make excellent use of the Internet's resources. In fact, 65% of teachers surveyed said that they used the Internet in their work, with its most popular uses being research, searching for curriculum material, professional development, and preparing lesson plans. Additionally, a study by the U.S. Department of Education reports that students in classes that use computers outperform their peers on standardized tests of basic skills by an average of 30%.

- In a decade-long series of studies, the Education Department reports that students in classes that use computers outperform their peers on standardized tests of basic skills by an average of 30%. And a 1996 study showed that students with access to the Internet not only presented their final projects in more creative ways but also turned in work that was more complete and had better syntheses of different points of view. Numerous other studies show that children in technology-rich learning environments showed more enthusiasm, had higher attendance rates, developed better writing skills and displayed a greater capacity to communicate effectively about complex problems.

Administration / Implementation / Constitutionality of the E-Rate Program

Myth: The Schools and Libraries Corporation, which administers the E-Rate, is a "complicated array of boards in a system recently declared illegal by the General Accounting Office."

- Congressional and GAO concerns about the SLC's structure have already been addressed. The FCC is currently implementing Congressional proposals to streamline the entities administering universal service programs, including merging SLC and the Rural Health Care Corporation and consolidating their boards.

Myth: The E-rate program "circumvents the legislative system -- a reason that the Supreme Court may declare it unconstitutional."

- This program cannot be fairly said to have circumvented the legislative system. When Congress passed the provision establishing this program it fully intended to bring the Internet to libraries and specifically to classrooms. Recognizing it lacked the expertise to develop such a complicated telecommunications program, Congress empowered the FCC to determine the parameters of the program, including the types of services eligible for discounts and the overall cost of the program. The FCC did all of this and, in addition, heeded Congress's particular concern that schools and libraries in rural and high-cost areas not be left behind. In establishing a sliding scale of discounts that provides the highest discounts to schools and libraries in poor and rural areas, the FCC carried-out Congress's will.

Myth. The E-Rate is administered by a giant bureaucracy headed by someone paid as much as the President.

- The Schools and Libraries corporation is not a giant bureaucracy. There are a total of 14 people on its staff.

- Before a single dime has gone to a single school, the FCC has put this program on solid footing by taking steps to further streamline the structure of the organization. The schools and libraries corporation is soon to be merged into the Universal Service Administrative Company which will administer assistance for schools and libraries as well as rural health care providers, and high cost subscribers. This change will occur on January 1.

- The salary for CEO of the Schools and Libraries Corporation was originally set by the schools and libraries corporation board to be comparable with a national non-profit, When the schools and libraries corporation structure is changed in January the position's salary will be reduced to $151,000.

TAX / FEE ARGUMENTS

Myth: The E-Rate is part of a new scheme to get some telephone ratepayers to subsidize others -- that's not fair.

- The concept of traditional universal service, which provides affordable phone service to poor and rural areas, is not new: it has been around since 1934. Nor is the idea of paying for universal service support through surcharges on customer bills a novel concept: that has also occurred for many years. What is new is that the Telecommunications Act of 1934 extended universal service beyond residential customers to include schools and libraries, and expanded services available for universal service support beyond plain old telephone service. Under the Act, schools and libraries can receive universal service support for phone service rates, Internet access, and internal connections. What is most novel is that universal service has

finally come to encompass schools and libraries and, in so doing, permitted millions of students and library patrons the opportunity to reap the educational and employment benefits of the Internet for the first time.

Myth: AT&T and other companies are being forced to put new charges on their bills.

- AT&T does not have to charge consumers more. This is not a federally mandated charge, but a choice that AT&T has made on its own.

Myth: AT&T's new 93 cent charge on their interstate long-distance bills is equal to the amount of money they have to pay for the E-Rate.

- AT&T's 93 cent charge is not just for the E-Rate program. Only 19 cents is for E-Rate -- the rest will go to support basic phone service in rural areas and low-income consumers. This is NOT a new task but the continuation of a 60 year commitment America has made to help all our citizens have phone service. Opponents of the E-rate are trying to hide this fact by blaming the surcharge on schools and libraries. Moreover, the AT&T charge does not reflect that it has already received dramatic reductions in the access fees it pays to local providers. By July 1, 1998, these reductions will total $3 billion.

Myth: Phone companies have saved less money in access charge reductions and other changes then they have to pay out in fees for the E-Rate.

- By July 1, 1998, the net savings to long distance carriers will total $3 billion -- that includes the payments they have had to make for E-Rate up to this point. Since phone companies have already paid $625 million into the fund, the remaining need is only about $1.4 billion, in other words, less than half of the amount they have already saved so far.

Myth: Phone bills are going up because of the E-rate.

- Long distance phone bills are now at their lowest point in history. The telecommunications Act of 1996 created a unique opportunity to both lower telecommunications prices and extend the benefits of the information age to all of our nation's children. The cost to industry for support of the schools and libraries program has been offset by reductions in access charges -- money that long distance companies pay to connect to local telephone companies.

SERVICES ALLOWED UNDER THE E-RATE

Myth: Schools are going to get discounts for new paint, carpeting, etc.

- This program is very limited - by design. Only telecommunications services defined as eligible by the FCC - mostly phone rates, Internet connections, internal wiring, hubs, routers and servers - receive discounts. Moreover, the total discounts available are capped at $2.25 billion annually. It is crystal clear that E-Rate discounts CANNOT be spent on workstations, applications software, training, or other applications that do not fall into these categories. If

schools and libraries wittingly or unwittingly apply for discounts on carpeting, painting or computers, those portions of their applications will be rejected.

- No money has gone to any school to pay for any ineligible services. In fact, this is premature speculation since **no school has received any money yet under this new program**. The Schools and Library Corporation is conducting a meticulous examination of requests to ensure that only valid applications that adhere to all requirements receive funding.

Myth: Schools applying for Internet discounts as "having no idea what they're buying."

- Schools absolutely know what they are paying for. Since the enactment of the Telecommunications Act in February 1996, they have had to meet a number of requirements designed to ensure that they are efficiently and effectively using the discounted services that they are purchasing. In order to receive the discounts, eligible entities must certify that 1) they have a technology assessment and plan for how they will use discounted services; 2) the plan has been approved by their state agency (in addition to having an authorized signature from the local entity); and 3) they will provide a description of the services sought. Moreover this is not a free ride for schools and libraries. Each school and library applying for its E-rate discount must pay a portion - as much as 80% - of the total cost of the discounted service.

Myth: The E-Rate will not promote competition and lower prices. Schools will contract with companies that will over charge them.

- The program is set up to provide the lowest prices for services and to encourage competition - something the 1996 Act was supposed to promote. The May 8 order provides incentives for eligible entities to aggregate their demand to get the lowest price on services and requires that these services be competitively bid.

Myth: Congress never intended for the E-Rate to pay for inside wiring.

- In the Telecommunications Act of 1996, the need to connect information services to classrooms is specifically referenced. About 33% of e-rate spending is going towards telecommunications services; 4.4% towards Internet access; and about 63% towards inside wiring. The fact that the bulk of funding will support internal connections should not be surprising given that 73% of all public school instructional rooms lack access to the Internet. Furthermore, removing internal connections from this E-rate program will have a devastating effect on our poorest and most rural students. Over 50% of discount requests made for internal connections come from the neediest schools and libraries - those eligible for 80 and 90% discounts.

ACCESS TO THE INTERNET VS. OTHER PRIORITIES

Myth: There are schools in low-income areas that can't even afford books. This a mismatched priority diverting needed resources away from other, more pressing, educational priorities.

- We need not limit ourselves to investing in one or the other. We can do both, and we must.

  Since 1993, the President and Vice President have worked hard to improve education from preschool to postgraduate level, The administration expanded Head Start, created Goals 2000 to help states set high academic standards, expanded charter schools, focused Title I funds more on low-income children, while setting the same standards for those children as for all others, and made college affordable to everyone through grants, loans, scholarships and tax benefits.

  In the President's balanced budget, which he sent to Congress in February, he proposed to build on those accomplishments by expanding those key investments while also paying for 100,000 new teachers, tax incentives to accelerate new school construction or renovation and investing more in education technology.

Myth: This government program is having the effect of bringing unbridled pornography into every child's classroom in the country.

- We must protect children from inappropriate material on the Internet. this problem could be solved through passage of legislation that would require every school and library that receives assistance from this program to certify that it has developed a plan to protect schoolchildren from inappropriate Internet content.

EARL BLUMENAUER
THIRD DISTRICT, OREGON

COMMITTEE:
TRANSPORTATION AND INFRASTRUCTURE

SUBCOMMITTEES:
RAILROADS
WATER RESOURCES AND ENVIRONMENT

WASHINGTON OFFICE:
1113 LONGWORTH BUILDING
WASHINGTON, DC 20515-3703
(202) 225-4811

DISTRICT OFFICE:
THE WEATHERLY BUILDING
516 S.E. MORRISON STREET
SUITE 250
PORTLAND, OR 97214
(503) 231-2300
email: write.earl@mail.house.gov
website: http://www.house.gov/blumenauer

Congress of the United States
House of Representatives
Washington, DC

August 4, 1998

The Honorable Nancy Johnson
Chair, Subcommittee on Oversight
House Ways and Means Committee
1136 Longworth
Washington, D.C. 20515

The Honorable Bill Coyne
Ranking Member, Subcommittee on Oversight
House Ways and Means Committee
1106 Longworth
Washington, D.C. 20515

Dear Chair Johnson and Ranking Member Coyne,

Thank you again for the opportunity to appear before your subcommittee to discuss the funding mechanism for the E-Rate. I appreciated the opportunity to share my views on this important issue. As part of my testimony, I had asked to submit a number of letters supporting the E-Rate for the hearing record. It is my understanding that these letters will be kept on file at the House Ways and Means Committee. For purposes of the written record, I am submitting a list of the organizations whose letters are on file with the Committee.

National Education Association
National School Boards Association
National Governors Association
American Symphony Orchestra League
National Rural Education Association
Council of Chief State School Officers
National Education Knowledge Industry Association
National Association of Independent Schools
American Vocational Association
National PTA
International Society for Education in Technology
National Grange
National Science Teachers Association
United States Catholic Conference
National Catholic Education Association
American Association of Museums
American Library Association

This list represents only a few of the broad, nationwide network supporting the E-Rate. Thank you again for your attention to my views. I look forward to working with the Committee on this issue in the future.

Sincerely,

Earl Blumenauer
Member of Congress

Chairman JOHNSON of Connecticut. I think it is important to acknowledge that historically the Universal Service Charge has been dedicated to goals that have benefitted everyone. At times, it was used for the war effort. That certainly benefitted everyone. Deficit reduction—has the same impact on everyone. Universal connectivity of all the telephone lines benefits everyone. It means that anyone can call into any little rural remote area.

The way the FCC interpreted their responsibility under this law has, I think, raised very fundamental questions. You point out that there was the expectation and I think particularly Congressman Tauzin on the Commerce Committee, it is my understanding that, and it was my understanding as a legislator voting for that bill, that our expectation was that this responsibility would be funded from the savings that we were in a sense giving to the industry. Is that not correct?

Mr. TAUZIN. It's important to understand that there are three things happening here, though.

The first is the collection—the administration, rather, of a Universal Service Fee and helps us all have telephones.

The second thing we intended in the bill was the administration of a second discount service, specifically designed for schools and libraries, to come out of the Universal Fee, to be funded by the savings. That's correct.

Nowhere did we intend that the FCC would add a third thing, amounting to this grant program for construction inside the school.

If I can maybe draw an analogy that helps us understand it.

When America decided on a Universal Service Fee system to make telephones more affordable for rural people and poor people, nowhere in that system did we provide a tax collecting to go out and wire up the insides of houses, to put communication centers, to put a telephone in every room of every rural house, in the barn and in the tractor. This is such a separate concept of actually providing construction grants to go out and do the inside wiring and to put communication centers in all the buildings and offices of a farm.

What the FCC did was to make that extension, that leap, if you will, of interpretation. What they said was not only are we going to provide discounted service for the monthly charges that a school or library would be assessed for access to the Internet, we're going to actually add another charge, a tax, which we will collect and administer through a corporation to grant money to the schools and libraries to do what?—to do construction programs inside the schools, to build communications centers, to put wiring into every class, to put wiring in the offices of the administrators. There are even applications to put them inside buses.

Now, here's my point. That's a separate concept from Universal Service discounted rate that Congress never intended. And no one in an administrative agency ought to assume they have the power to tax and spend like that.

Now, I'm not quarreling with the goal. I think it's a good goal. But it's our responsibility under the Constitution to both levy that tax, and we have in 1914, and to spend it properly, with congressional oversight and approval.

One final thought, Madam Johnson. I think this is critical. For all of you who want to see schools and libraries wired up, understand what happened in the last several months. The FCC has now scaled back its program. It's trying now to decide which schools and libraries are going to get this money as opposed to which are not, in a scaled back program. The problem with that is that when we wrote our bill, in 1996, we created an entitlement. We did so on purpose. We didn't want politics played with this program. So we said that any school that filed a bona fide request for this discounted service had to get it. The FCC couldn't deny it. Now, they've interpreted that section to mean a grant of construction funds. Does that mean that any school, the richest in the America, that applies for this money has an entitled right to get that money if its a bona fide request. Maybe so. Do you get where I'm going?

By interpreting it this one step further, the FCC may have created not only a legal mess over whether they can tax, but a legal mess over who's entitled to this money. Under the bill that Jerry and I filed, Congress would oversight the spending of this money. We could target it to the schools and the libraries around America that most need it, under a five-year program that would be administered properly through the State education authorities of our country. And I suggest that's a much sounder approach.

Chairman JOHNSON of Connecticut. And, Mr. Tauzin and Mr. Weller, would your bill provide sufficient funding to meet the entitlement nature of the original vision of this program?

Mr. WELLER. Well, if you look at the projected funding that's provided, Madam Chair. In the first year with the funding mechanism, which is a legal funding mechanism that's already established in the statutes. In fact, you know, that telephone tax that was created in 1914, the one penny out of every dollar that we earmark for the school and library Internet access program, it's projected it would generate $1.7 billion in the first year.

Now, in the FCC's current program, as they suggest, they would provide about $1.2 billion, so we actually provide more money if you're looking at it from the standpoint of what way can we provide more money. And as we pointed out earlier, we solved the problem. There's the question about constitutionality of this tax that the FCC has levied that was not authorized by Congress, which we solve the problem by providing a legal funding stream.

I have some figures here Mr. Tauzin just shared with me, but its budget estimates are in 1999, the legal funding stream, one penny out of every dollar in your phone—telephone use, would generate $1.7 billion in 1999. In the year 2000, $1.7 billion. In the year 2001, $1.8 billion. In the year 2002, $2.—excuse me—$2 billion. 2003, $2.1 billion. Of course, now we—our legislation does sunset it five years from today. But if Congress were to determine, as you know, as Congress should have the right to do in our oversight, that we should extend it, we certainly could. For that five years, we provide more money than the current FCC tax.

Chairman JOHNSON of Connecticut. And what exactly does your legislation allow the money to be used for?

Mr. TAUZIN. Specifically, for all the purposes that the e-rate fund as devised by the FCC envisions for the construction grants to schools and libraries and rural hospitals so that they can, in fact,

have communication centers wired up to all the classrooms or all the specific reading rooms or what have you in the library or the hospital.

Chairman JOHNSON of Connecticut. Does your legislation retain the responsibility of the FCC to develop a discounted rate for libraries and schools?

Mr. TAUZIN. Yes. Yes, ma'am.

Chairman JOHNSON of Connecticut. So the original purpose of the FCC as a rate setter, to develop a discounted rate for schools and libraries is retained under your proposal. What you are doing is creating a clear tax to fund a clear public purpose?

Mr. TAUZIN. Yes, ma'am. In it, the fee that's charged for all of us to have telephones. The telecommunications services is about $690 million. That's retained within the FCC authority. They still have the additional Internet access authority. It's about $88 million to make sure that schools and libraries can get cheaper rates for Internet service. All we do is remove this tax and spend authority with the construction grants and put that back under Congress where it belongs.

Chairman JOHNSON of Connecticut. Thank you very much. I do—will just sort of conclude my initial statement about the use of the former Universal Service revenues being for universal goals, and point out that it does seem to be a problem; that the FCC levied a fee that everyone pays, but not everyone benefits from.

Mr. TAUZIN. Madam Chairman?

Chairman JOHNSON of Connecticut. Yes.

Mr. TAUZIN. Could I add one thing? I want to correct the record. The statement was that the charges that Americans are feeling for this e-rate—they're only 19 cents on the AT&T 93 cent surcharge. According to the FCC's order, which I have a copy of, 36 percent of the total is for this e-rate. Thirty-six percent of the 93 cents is a 33 cent charge on Americans on AT&T. On MCI, it's 5 percent of the fee. When you multiply that out, a $1.80 is being charged under this e-rate. It's a significant tax on American telephone users, and as Jerry pointed out. I want to make this point as we conclude perhaps. This is the most regressive tax in America. The poorest of the poor use their telephones. And they're being taxed at these high rates, again, by an agency I don't think has the authority to do so.

Chairman JOHNSON of Connecticut. Thank you. I think that is a very significant point.

Mr. Coyne.

Mr. COYNE. Thank you, Madam Chairman. I wonder if the two authors would tell us how you intend to fund the bill?

Mr. WELLER. Well, Mr. Coyne, as I stated in the testimony, our legislation, as when it relates to revenue, in 1914, there was a three percent tax that was levied on telephones. And at that time, of course, very few Americans had telephones in 1914, so it was considered a luxury tax and the intention was to use that as a revenue source to finance the World War I effort. And like most taxes, the war is over with but the revenue is still coming in. And it goes into the general revenues. Then you also have the FCC tax that they levied on telecommunication services. Our legislation eliminates the FCC's tax and also reduces the World War I tax from

three percent to one percent. The remaining one percent we earmark so we have a legal, already established revenue stream, which, as projected, would generate $1.7 billion to go towards the school and library Internet access program.

Mr. COYNE. CBO, I am told, says that the legislation would reduce budget receipts in 1999 by $4.3 billion; and over a five-year period, $23.9 billion. Is that correct?

Mr. TAUZIN. Yes, Mr. Coyne, that's correct. In fact the industry had estimated $28 billion. OMB came back with the $23.9 billion. And that's the total offset required if you want to do this. If you want to repeal both two-thirds of that old 1914 tax and also repeal this e-rate tax. It takes $23.9 billion of offsets over five years—a little less than $5 billion a year. And what we've suggested to our leadership here is that if we're going to do a tax bill that benefits specific groups of Americans included in that tax relief bill ought to be this general tax relief against the most regressive taxes in America, this tax on talking in our country, that all people pay, particularly poor people. In some jurisdictions, Mr. Coyne, taxes on telephones are higher than the total taxes on tobacco. And for a free speech society, that ought to be untenable. And what we're suggesting is that in a good tax relief package, $23.9 billion over five years ought to go to all Americans in the form of general tax relief on their telephone bills.

Mr. COYNE. But you still feel that even with the reduction and the revenue coming in as a result of your legislation, we'd be able to fund the purpose of the schools and libraries?

Mr. TAUZIN. Absolutely, Mr. Coyne.

Mr. WELLER. If I could interject, Mr. Coyne, as I pointed out the one penny per dollar in telephone service, the 1914 World War I tax, which we reduce from three cents per dollar to one cent per dollar, that remaining one cent is earmarked for the School and Library Internet Access Program—goes into that trust fund. And that is projected to generate $1.7 billion, which is a half a billion dollars more than what the FCC currently projects to spend this year.

Mr. TAUZIN. It theoretically could go on forever on our telephone bills. There is no sunset today. The FCC theoretically, if it has this authority, could it continue to collect this tax as long as it felt it had a purpose to collect it.

Secondly, if a school came back in five years and demanded more money, I mean theoretically, they might be entitled to it if they have a bona fide request. They might have to raise the amount of this tax over time to fund the request that come.

Suppose somebody file suit and says, we were denied funding and we think we were entitled to funding and they win that suit; then this tax has to continually go up. What we'd do is we'd provide what we think is sufficient amount of monies over five years trust funded. Then, as Jerry said, if this Congress feels like it wants to go further, it always has that right over that five year period to extend that program. But that's a legislative authority, not an agency authority.

Mr. COYNE. Mr. Blumenauer.

Mr. BLUMENAUER. It just seems to me that my colleagues are sort of arguing against themselves on this.

First of all, over the course of five years, if you compare their proposal with what the FCC would do if allowed, there is a much larger portion that would accrue under the FCC that would meet the projected needs. The proposal that is being suggested by my friends is considerably less than what is needed—and they're criticizing the FCC for not doing enough. In fact, the only reason the FCC scaled it down was because of the firestorm of political controversy. But they have scaled it down and they would set the money out on a priority basis to get funds to those most in need first. But over five years, they would do more than that which is proposed by Representative Tauzin, who also proposes sunsetting the program. Furthermore, if you block grant to the States, there's no guarantee that you will get this same scope as we are talking about under the FCC proposal.

Finally, if the suggestion is that you shouldn't include wiring to the classrooms, well, then you in your wisdom can go ahead and cut back. But I would submit for the record some report language that specifically references getting services to the classroom. I think it was a reasonable interpretation the gentlemen included in their legislation, and that's what America schools and libraries are expecting. I am confident in the final analysis this in what Congress and the Administration will do.

Mr. COYNE. Thank you.

Chairman JOHNSON of Connecticut. Mr. Blumenauer, just to that point, doesn't it concern you that if the FCC, the way they have constructed this fee, and the way they are planning to implement it, will put them in the position of reimbursing systems where they are building a new school and would have naturally have wired the classroom billing us for that wiring? I mean, if you do it with a block grant, States can make some judgments about whether some of the, frankly, more affluent communities that were already building a school where they would normally would have done this really needs that help or not. I can tell you, in the old innercity schools, which we are not going to absolutely replace in the near future, the construction costs of wiring to the classrooms are very great. But there are other suburban areas where, frankly, they are building new schools with a lot of state aid, where we do not need to use Federal resources to complement that construction grant.

So one of the problems with the FCC program is that, since they are not accustomed to administering an appropriated program, they aren't equipped to make those decisions. If we either do that at the State level, I think we need to deal with that.

One of the problems with the FCC extending its authority—and it is, after all, a rate regulatory agency—and the things it does through rates, it does for everybody and everybody is to benefit. This is a situation of which benefits are differentiated across the scope, but everybody pays the fee. This is a very dramatic expansion of the FCC authority. I'm glad to know that some members have done some thinking about it, so that we can clearly ascribe a source of funding for what is a very important public purpose program.

I think that one of the things that this committee has to be concerned with is how do we honestly raise money through taxes, but

also it assures that it get to the right place at the right time to the people who really need it.

Mr. BLUMENAUER. May I respond?

Chairman JOHNSON of Connecticut. Yes.

Mr. BLUMENAUER. Well, first of all, the innercity school that you talked about would get more benefit under the FCC because there is a scale from 20 to 90 percent, with the larger benefit rolling to those most in need. So a new suburban school in the FCC proposal would receive very little compared to the innercity school. The interpretation that my colleagues have just made would wipe out the wiring to the innercity school. They're complaining that that's what the FCC is doing.

Chairman JOHNSON of Connecticut. I want to let the other members question, so we'll come back to this. I think 0 to 100 is just about as fair as 10 to 90.

Let me yield to Congressman Jennifer Dunn.

Ms. DUNN. Thank you very much, Madam Chairman. I appreciate your putting together this hearing today because I, for one, have real concerns about the assault on constitutional authority that I've seen in the last few years, whether it's the American Heritage Rivers Act or it is second amendment rights taking those away from the State's jurisdiction. I have a real concern and I think it's necessary for us to discuss this sort of constitutional jurisdictional issue.

I like very much the bill being proposed by you, Mr. Tauzin, and you, Mr. Weller. I think it gets jurisdiction back to where it belongs, which is the Ways and Means Committee under section 1 of the Constitution and the Congress. I'm very pleased to hear the detail on your bill.

I think, Mr. Blumenauer, where you described this as a user-fee versus a tax, very clearly that has not been declared yet by the appeals court and it lies in the 5th circuit court of appeals. Right now I think we will have our answer eventually, and I tend to believe that the FCC have gone a step too far, but will wait to make my decision until I hear about that.

I have concerns generally about taxation and the United States Government. The fact that this luxury tax was imposed in 1914 when few people had telephones, it was definitely a surtax or a luxury tax on those people who were able to afford telephones. And now, how many decades later it still is in place. I think we must continue to do very solid and detailed oversight on this sort of taxation.

The amounts of money vary that we have heard from you. I have a concern on Mr. Tauzin and Mr. Weller. I wonder if you could please explain for me if we are able to get by this FCC Gore Tax and into the proposals that you've included in your legislation? How do you make up for those revenues—that 2 percent of revenue—that has before flowed into the general funds and now would be eliminated as you phase out that portion of the tax?

Mr. TAUZIN. Well, first of all, let me—if everyone is not aware or acknowledged that, and I've cosponsored an earlier bill that would completely repeal that 1914 tax—before this e-rate problem became a problem that we saw an opportunity perhaps to correct with it. Let me concur with you that a 1914 luxury tax on tele-

phones is long overdue for appeals. Our bill does that over repeals some immediately, two-thirds immediately, one-third at a later date.

Secondly, repealing a tax that is going to the general fund obviously requires an offset. Repealing the e-rate, we found out, also requires an offset because the e-rate collections were counted in the budget estimates. The total again is about $4 billion over five years—by a little less than $5 billion a year. That has to come out of budget estimates, budget spending, and over in the course of our deliberations between now and the end of this session.

Our plan is obviously to get the leadership, and hopefully the chairman of your committee, to accept the notion that in any general tax relief bill that this is a good place to give Americans tax relief and fund it indeed out of surplus that we expect to come to the Government on top of what Social Security surpluses are being generated, and would be protected under our general plan.

In a nutshell, we would hope that this is part of the general tax relief bill, and that this $5 billion a year is funded as a general tax relief for all Americans, in addition of whatever special tax relief is provided in that bill, out of surplus that we expect to generate over the next five years over and above what Social Security trust fund surpluses are generated and would be protected.

Ms. DUNN. Good. I thank the gentleman. Mr. Weller, did you want to comment on that?

Mr. WELLER. Well, just actually to build on a comment that my friend Billy Tauzin made, but responsed to my friend, Mr. Blumenauer's comment. We were talking in response to Mrs. Johnson's question regarding urban schools and suburban schools, and I represent part of the City of Chicago, as well as the south suburbs and a lot of rural areas. Of course, I think of LaSalle Peru High School, a building which I think was designed to withstand a nuclear strike—the building is a fortress; it was built over a century ago and it'll last a lot longer than most buildings in the District that I have the privilege of representing.

But in talking with the school administrators, and their goal of course is to give every child access to the computers and the Internet. What I think is wonderful about the discussion we've had this morning, we've moved beyond the question of whether or not we all work towards the goal of giving every child access to computers and the Internet. I think we all have agreed, and with the comments this morning. The question is how do we solve the problem in getting there. And with the FCC's tax, of course we have a constitutional question, and of course the legislation that Mr. Tauzin and I offer solves the problem by providing the legal source of revenue, and accomplishes every goal that the FCC suggest we accomplish with their goal.

Of course, in the case of LaSalle Peru High School, they need $1 million really to put in the wire, the fiber, and of course the hardware so they can provide computers and Internet access for every child. Our program would make that available. Of course, we block-granted to the States and then the State of Illinois—in our case, the Illinois State Board of Education—would administer in the application process and distribution of those funds. This follow our philosophy which is that those that are closest to the communities

and the schools and library districts being served can best make decisions in allocating those funds. That's why we intend to do this, rather than having a regulatory agency, which is what the FCC is.

The FCC was not created as an agency to provide grant money to schools and libraries. The FCC was put in place to regulate telecommunications. We of course solved the problem of helping our schools, and helping our libraries provide access to the Internet by providing a legal revenue stream—$1.7 billion in the first year—which is more than the FCC indicates that they would provide. And, of course, we get that money out to the States, through their State Education Authority to allocate those funds to local school districts and libraries. It's common sense, it's legal, and it would work. it is consistent with a lot of other funding programs they already have in place for education.

Ms. DUNN. Thank you very much, Madam Chairman. It is the belief of this Congress that we not increase taxes, and certainly we would not like to have taxes increased arbitrarily by an administrative agency. That's something for this committee first to put great thought into. So I appreciate your defining what the nut of this problem is for our hearing today.

Thank you very much.

Chairwoman JOHNSON of Connecticut. Thank you. Congresswoman Thurman.

Mrs. THURMAN. Thank you, Madam Chairman.

I'm going to follow up on this. If what I read is that this was passed through the telecom bill, how are we saying that this was not an authorization for Congress to raise these dollars? I understand there might be a law suit on this to make that determination, so quite frankly right now, we're assuming something without any legal terms for this. I don't understand why we are saying that they've done something that we're not sure about yet. Maybe you can explain that. I don't know.

Mr. TAUZIN. Ms. Thurman, let me try again. The problem is basically in our universal service fund concept, we've always thought of universal service as a subsidy system where you and I perhaps may be charged a subsidy. But our poor neighbor, our rural neighbor, might enjoy the use of a telephone. That enhanced our telephone.

Mrs. THURMAN. And we did that, though?

Mr. TAUZIN. Yes, we did that a long time ago?

Mrs. THURMAN. And we did it again and redid it again in 1996 with the telecommunications?

Mr. TAUZIN. We did it again in terms of Internet services. We not only said it's a good idea for everybody to have telephones that I telephone and yours is more valuable, all Americans are connected. We also said in the 1996 act is look, we're entering a new age of communications. Internet services are not only good and useful, they're going to be critical to educating our children. So we said for heavens sake, let's make sure that every school and library has the ability to access Internet services at discounted rates. The same way we wanted to make sure that every rural person and poor person had access to telephone service at discounted rates. That was our intent.

What the FCC did was to take that very legitimate purpose and add another one on to it. By defining that reference access to the classroom, they decided well, let's put together a program whereby the telephone companies will collect money from their customers. We will collect it through a corporation, in fact three of them they set up, that will then give grants to schools and libraries to do what inside construction. It's a little bit like taking the universal service fund that we've enjoyed all these years and saying we're going to interpret it now to allow the farmer out in rural America, to reconstruct his house so that every room in his house has a telephone and has all kind of new services—that his barn is equipped with telephone services, his tractor now is equipped with telephone services.

We never interpreted universal services to include construction grants. That's the problem. The problem for us now is how do we take this good purpose and clarify any questions about legal funding also preserved for you and I, our constitutional function of taxing and spending on the Nation for legitimate purposes like this. Hence our bill.

What we're saying is that whether or not the 5th circuit decides it's a fee or a tax. I think it's a tax; I think the 5th circuit is going to decide that. Why not clarify that? Why not get rid of this question about whether these corporations are legal or not?

Mrs. THURMAN. But that would only be on the construction part of it?

Mr. TAUZIN. Yes, only on the construction part.

Mrs. THURMAN. Okay, so we'll move on beyond that. So now what happens then to doing what was intended to do, which was to open up the telecommunications for schools and libraries. You just totally get away with, even from the 1914 to even what was passed in 1996?

Mr. TAUZIN. Yes.

Mrs. THURMAN. Your surplus dollars for the purpose of Interneting schools throughout this Country?

Mr. TAUZIN. What we're saying is that the FCC should provide discounted rates of service for every classroom in America where the kids are going to be connected to the Internet and learning on it. So that's true. The FCC should provide discounted rates of service, the monthly charges you pay, for Internet access to every hospital in America so that we all have the advantage of telemedicine, which is going to save us all money and save many lives.

We said that the same is true for every library in America. That no library ought to suffer for the lack of Internet services because the rates are too high. There ought to be discounted services for them. Yes, the FCC continues to do that. It simply doesn't have the power to tax for this construction program. You and I would have that power through this bill.

Mrs. THURMAN. When you put your bill together and you said that you'll take two-thirds of the money or $24 billion whatever your amount was. In putting your numbers together, how have you made the assessment for the needs for this Country? I mean, have you got this down to a formula, do we know—is it going to be similar to what schools and libraries have had before? 20–80, 90–10,

whatever based on their disadvantage? I mean, how have you made this assessment?

Mr. TAUZIN. What we did was to, first of all, determine that 1 cent out of this 3 percent tax was adequate to provide, as Jerry pointed out, 1.7 escalating to 2.1 billion each year for five years. We looked at what the FCC originally intended in the e-rate proposal and we recognized that this was more money than the FCC had originally intended to collect—very close to those numbers. We said, here is a fund that can do that.

Secondly, as was pointed out, the FCC is not scaling back its program. Under our proposal, you wouldn't have to scale it back. You could do full funding.

The third thing is we wanted to make sure that in this full funding that there was not going to be an uncapped, unlimited amounted that might be collected; that we would have some control over that. So, in essence, as we administer the grant program through the States, if the States present to us legitimate needs as Jerry pointed out, we can expand it. If the States are presenting request that aren't as legitimate for rich schools, etc. that don't really need this money, then we can literally live with our cap or even limit those spendings.

Ms. DUNN. So didn't that concern you a little bit if what the chairman said earlier was that there was a universal need, universal goals for everybody, and then we do get into the politics, a little bit of divvying these dollars up State by State. I mean, you're making mention that well if they really need it or if they don't need it or whatever. I mean, I'm a little concerned the way you phrased that. Maybe that's not exactly what you mean, but I don't want to get into the politics. This is about children; this is about our libraries; this is about access.

Mr. TAUZIN. Good point. That's why we wrote the language in 1996 as an entitlement. Let me say it again. That is why we carefully said that no school, rich or poor, who filed a bona fide request for discounted rate of service would be denied. We wrote it as an entitlement so there wouldn't be any politics. There wouldn't be any calling of names on this proposal or anything else. This would be a simple, straight forward. The school provides a bona fide request for discounted service for cheaper rates per month for service to the Internet. They were going to get it from the FCC. The FCC could not tell one school or another you don't get it. That's why we wrote it that way.

But now we're talking about something different. We're talking about a construction grant program, and what we're saying there is, and the FCC has finally come to that conclusion too, that when you come to construction grant programs, you could have unlimited request for dollar. But you have to have some kind of assessment of need. The FCC is trying to work their way through that. What we're saying if we properly fund this program, properly administer it through the NTIA which is our technology, telecommunications technology grant agency, and then let the State and their State authorities design their programs for their own need, that we're more likely to achieve that result without an open-ended program like the FCC has potentially created out of misinterpreting the act.

Chairman JOHNSON of Connecticut. Congressman Hulshof.

Mr. HULSHOF. Thank you, Madam Chair. I was flipping through an old Farmers Almanac the other day and saw this quote that said, "If Patrick Henry thought that taxation without representation was bad, he ought to see taxation with representation." [Laughter.]

And yet, I echoed the comments that my colleague from Washington State made that ultimately the power of taxation should rest with those of us who are here.

Mr. Blumenauer, I wasn't here in 1996 to vote for or against the Telecommunications Act, and regardless of what the parliamentarian's decision was at the time, whether it was a user-fee or an excise tax, in the Hulshof household, one of my responsibilities is to pay the bills. This past weekend, I wrote the check for our family to GTE and I looked at the bill, knowing this hearing was coming up, and GTE tells me that I'm paying an excise tax. Do you disagree?

Mr. BLUMENAUER. No, you're paying an exise tax. That's been on the bill and it's been a separate line item. What we're talking about is the e-rate which is separate and distinct from that. You've been paying your monthly bills with universal service for as long as you've been writing checks. And appropriately so because it is contributed to the entire universe and it's made, as Mr. Tauzin said, the entire system more valuable. This system of telecommunications will be made more valuable by having all of our children have access to it. That doesn't make it a tax.

Mr. HULSHOF. Well I think that everyone here that's been discussing that question and those of you responding, we share the same goal. It use to be when I was in school doing a school project, you went to the local library and paged through books and now with the click of a mouse you have a wealth of information that wasn't there before. I think the intent and the goal of everyone is the same.

I want to give you a chance to respond because Billy was making a point earlier, and I've noticed that you were not in agreement through your nonverbal reaction. Congressman Tauzin makes the point that the e-rate Program is now being administered beyond the scope of universal service; it's being administered through an improper FCC agent—I'm paraphrasing his words of course. It's being funded well above its demonstrated needs. And fourthly, that it is open-ended. Now, what disagreement do you have with any or all of those premises?

Mr. BLUMENAUER. I just finished explaining why I think this application of the universal service fee extension doesn't transmit it into a tax. Let me just reference the last two points that you made.

First of all, with all due respect, the information I have is distinctly different from my two colleagues. The demonstrated need for what's in the pipeline now is far above the $1.9 billion that the FCC has earmarked. They've scaled it down as a result of all the controversy that's been going on. They had originally identified $2.25 billion for the year, it would be something like $3.35 billion through June of 1999. They've scaled it back to $1.9 billion. The gentleman's proposal would be $1.7 billion, and then go on over time. So the demonstrated need for what's in the pipeline, the estimate is higher than what the FCC is doing; and the $1.9 billion

the FCC is proposing is higher than the $1.7 billion that the gentleman had suggested. That was the point that I was trying to make.

You've suggested that somehow that it's the rich districts that are going to be accruing the benefit under this, and we need to be concerned about the innercity. That's precisely what the FCC has been attempting to do, by giving a larger payment subsidy to the innercity school to the rural poor schools that have a much lower connection. And as the chair mentioned, some of these innercity schools have to have wiring or else it is illusory to assume they have Internet access because you'll continue to have it as it is today, the 73 percent that have Internet access have access mostly to the principal's office. It's only 27 percent of the classrooms. You need a proposal like this that gets it to the classrooms.

Mr. HULSHOF. Let me reclaim because I see my time is about to expire. No that's okay. Mr. Tauzin, did you want to quickly respond?

Mr. TAUZIN. Quickly, let me, first of all, thank you for being an original cosponsor.

Mr. HULSHOF. Proud to be on the bill.

Mr. TAUZIN. Secondly, the answer is that the so-called demonstrated need figure includes all these rich school request. The FCC is now admitting they're going to fund at a much lower percentage rate of grant. That number they cited to you is an unrealistic number. It includes requests that are extraordinary to even wire up and connect to the Internet school buses in some districts. So keep in mind, the number we provide, nearly $2 billion a year over a five year period is quite adequate to the real needs expressed already by applications to the FCC.

Mr. HULSHOF. I appreciate that. As a concluding comment, Madam Chair, and conversations with a young man, a 27 year old man who's an Internet provider back home in Hannibal, MO, who for other reasons because of the telecom bill is now $11,000 a year in fees/taxes who came to me an said, "Look, I would prefer much better that at least you consider, and either vote up or down these increases, these taxes, so that I can at least express my opinion at the ballot box every two years because that's why we send people to Washington to represent us."

I appreciate each of you being here. Thank you, Madam Chair.

Chairman JOHNSON of Connecticut. I think, Mr. Blumenauer that your previous response demonstrates that what the FCC has done is unprecedented in terms of the scope of the exercise of its authority. For it to exercise its authority to provide a discounted rate is harmonious its statutory authority and with its traditions. For it to get itself in the position of administering what is in effect an appropriated program supported by a tax is to not only extend their scope of authority beyond their law it seems to me, but also face them with administrative responsibilities that they have never had before. And whether this should go through the Commerce Department and in the block grounds, or whether it should go to the Education Department and down through one of their mechanisms.

We do have in the Federal Government already established bureaucracies who have long experience in thinking through how do we best allocate these and whether it's $1.8 billion or $2.2 billion.

So it is disturbing that the FCC should be trying to make this determination in an area which we actually have a whole department established to deal with the educational needs of our schools throughout America and have a much greater body of experience in how you would distribute and administrate these dollars.

I think part of what we're dealing with here is that when you, in a sense, levy a tax for a major public purpose, and this is a major public purpose I don't think anybody would deny that hooking up all of our schools, libraries, and hospitals is not a major public purpose. That with that comes a lot of complicated decisions and a lot of investment in a bureaucratic delivery system. So it's important for us to really engage in this issue as a fee to support a discounted service. Or is this a tax to support a program to implement construction grant. These are very different entities with different sources of legal authority, and they do have enormous implications for the overall bigger picture of Congresses obligation to tax the people of America to fund programs that fulfill our public purposes. And to be accountable for where we raise the tax and where they go.

A fee upon a discounted service in the context of regulation is a very different animal both legislatively and constitutionally from a tax purpose. I think this discussion has been very helpful to show the scope of this program and the difficulties that scope represents. I think we are all in agreement that we would want to have money enough to do the job. I personally would like to see us be able to do it as an entitlement because you don't want schools to wait two years to do something that they need to do now. So there is a lot more that has to be delved into in another realm.

The focus of this hearing is important. Is this is a tax or a fee because it helps us deal with it. Is this going to be an appropriated program of which we're going to deliver through the appropriate bureaucratic mechanism and oversee its accomplishment of its goal. Or is this rate regulation and discount subsidies over endless periods of time, which it is. I mean, the rate regulation, the discount rates will be forever. They are not for five year.

Mr. Coyne.

Mr. COYNE. If you would allow me at this point, I think at this point a clarification here would be helpful relative to the issue of fee versus taxation.

In AT&T, the way they are billing their customers, what they are putting into the bills currently as of July 1998, and I quote from their bill that says, "The universal connectivity charge that appears on your bill is being assessed at a monthly fee of 93 cents per account, instead of the previously announced 5 percent monthly charge. This fee—and they refer to it as a fee—supports the extended universal service fund which now not only helps provide affordable telephone service, but also gives schools and libraries access to the Internet. The FCC has also reduced the fees AT&T pays local phone companies to connect toll calls. That's one reason our prices for long distance service have continued to come down over the last decade." Then they give a phone number for information if you want to call, an 1-800 number.

Chairman JOHNSON of Connecticut. Great, and I appreciate that and I have a copy of their bill here. The issue remains as its appro-

priately described as a fee and are the purposes for which it is used are traditional purposes that fees are used for. Is the delivery mechanism a traditional fee-delivery mechanism? And more importantly on the issue of fee versus taxes, does everyone who pays the fee benefit from paying the fee, or do only selected groups benefit from pay the fee? And does everyone who benefits pay the fee? Because in this case not necessarily everyone who benefits pays the fee.

I appreciate your recognition of the way this is worded, but I think the problem is really profound and not one we should protect ourselves from.

Because we have other people waiting to testify, let me move on to Mr. Neal.

Mr. NEAL. Thank you, Mrs. Johnson, thank you very much. Not being a member of the subcommittee, I appreciate you granting me some time.

I think that the panelist have all indicated that the goal of the e-rule program was desirable. I could just maybe direct my question to Mr. Tauzin. Could you recreate quickly where this provision was inserted and at what time it was inserted?

Mr. TAUZIN. Are you talking about in legislative history?

Mr. NEAL. Yes.

Mr. TAUZIN. I would probably make a mistake in doing that without reference to the documents right now. I can only tell you that through the creation of the act, the 1996 Act, it culminated over about four or five attempts. We passed the bill several times in succession. The final act in 1996 signed into law did contain clearly the instruction of the FCC for discounted service. Without reference to the documents, I couldn't tell you whether it happened in the subcommittee, the full committee or in the conference committee. But I'll be happy to supply that information to the committee.

Mr. NEAL. I think it might have happened at conference. Do you think that——

Mr. TAUZIN. I think that the final language agreed to in conference——

Chairwoman JOHNSON of Connecticut. If the gentlemen would yield, we did have earlier testimony on this and the committee can clarify this for you.

Mr. TAUZIN. But I'll be happy to submit the chronology. I would also like if it would help you to submit for the record a copy of the letter from Chairman Bliley to the FCC bitterly complaining about the FCC's attempt to force the carriers to hide this fee in their rates without showing the customers that it was being collected.

Mr. NEAL. The only point I'm trying to raise is that we've agreed that the goal is desirable and it's interesting that Mr. Weller made reference to the Gore Tax, when you could also suggest that Senator Snow from Maine was a full participant. So maybe we could appropriately call it the Snow Tax, if that's the rhetoric we're going to apply in hearings like this when there should be a better attempt to crystallize the issue so that we can intelligently focus on the issue for the American people and we can help them help us make a determination.

There are unintended consequences of the Telecommunications Act, including cable TV rates which none of us thought would increase at such a fast pace. My point is simply this, that in forums like this, there is an opportunity to elevate the public debate. We don't elevate the public debate by suggesting things like the Gore Tax when there are Republican members who were fully aware of what was going to take place. In fact, an amicus brief filed in the 5th Circuit by Senator Snow, as well as Senator Rockefeller.

I don't know what purposes are achieved when we come into a forum like this and suggest that it's the Gore Tax. Maybe you could clarify that for me in your testimony.

Chairman JOHNSON of Connecticut. Mr. Neal, if we may. We are terribly behind and I really would like to go onto to the next——

Mr. NEAL. Mrs. Johnson, I appreciate that.

Chairman JOHNSON of Connecticut. We've been through that before. Neither the chairman nor the ranking member are characterizing this discussion as anything other than a very importing discussion about where taxing authority lies in the constitution and in this body. And how we hold ourselves accountable for the raising of revenues and the expenditure of those revenues. And while I appreciate your point, and I regret that people characterize the tax one way or another, we have been through this several time in this hearing. We've been at this an hour and a half and we have yet to call the commissioner.

Mr. NEAL. I understand the suggestion that you made, Mrs. Johnson, and do appreciate the point on how this issue should be characterized and the suggestion is fully accepted. Thank you.

Chairman JOHNSON of Connecticut. I'd like to move on now. I thank the panel very much for your input.

Excuse me. Stop one minute. Sorry, I forgot that Mr. English arrived, and I will recognize him before we dismiss the panel, if the three of you could remain for a moment.

My apologies, Mr. English.

Mr. ENGLISH. And I thank the chair for the opportunity. I'll keep my questions relatively brief. Having examined this issue, it seems to me that the e-rate is a tax and I would like to get some comments on that in a moment, but I want to first raise a couple of questions with my colleague, Mr. Tauzin, who has been pushing for a national consumption tax very eloquently. Obviously it had not occurred to him that we had given the FCC the power to impose one unilaterally.

I wonder in you view, is the e-rate funding mechanism essentially an open-ended tax and is your tax proposal open-ended?

Mr. TAUZIN. First of all, to highlight your comment, you know that I'm pushing for a general tax, not a special luxury tax. In fact we repeal most excise tax.

I think the idea of special excise taxes is damaging to the success of programs like telephone service for all Americans. It's the most regressive way to treat this issue. So I think it's consistent with our approach.

Secondly, our plan is not open-ended. Our plan is a five year plan. Congress would have to extend it after five years if they wanted to. Our plan says that for five years we would retain the revenues from one-third of the 1914 luxury excise tax that was

placed on telephones. And for that five year period that one-third of those revenues, about 1.7 billion a year escalated to 2.1 billion we estimate, would go into a trust fund for the administration of this construction grant program for schools and libraries. At the end of five years, that one-third of taxing authority in the trust fund would terminate unless extended by Congress. So that our plan terminates completely two-thirds of that old 1914 tax, it terminates completely the e-rate tax imposed by the FCC. So Americans would see immediately the benefit of $5 billion of tax relief per year. But it retains one-third of that old 1914 tax, but only for a period of five years, sunsetting at that point unless extended by Congress.

Mr. ENGLISH. And I approve of the gentleman's approach because you are getting at one of the things that bothers me, and that is the huge accretion of excise taxes that the Federal Government has imposed over the years and has not reassessed in a long period of time.

In your view, and examining your proposal, why do you feel we need to create a trust fund in this case?

Mr. TAUZIN. Well, for two reasons. Number one, I think it's very clear that because of the FCC's action to create the e-rate, there has been a very large outpouring of expectations from the American education community and from rural hospitals and libraries of America for this assistance.

Number two, I think it makes sense. I think we ought to help if we are going to take full advantage in the 1996 act of the educational opportunities that are offered us in long-distance learning through the Internet, if we are going to have telemedicine really save us money in our Medicare, Medicaid programs, and save money for all Americans in their insurance bills, we ought to make sure that no hospital, no library, no school is not properly equipped to take advantage of all these efficiencies that the Internet is rapidly bringing to us in these critical areas.

So, for the reason that I think it is a legitimate purpose; and number two, that the expectations have been developed, I think we ought to make sure that as we repeal one, we are leaving no doubt that we are establishing a trust fund to carry out the purposes that were intended by the e-rate program.

Mr. ENGLISH. Thank you. Madame Chair, I have a number of other questions, but this panel has been here a long time. I appreciate their testimony and I appreciate the opportunity to engage a little bit on this debate. Again, I believe that the e-rate program clearly is tied in to a tax, rather than a fee, and I believe should have come under the jurisdiction of this committee.

I appreciate your efforts to reassert our role in this process, and I thank the panel.

Mr. TAUZIN. Thank you, Mr. English.

Chairman JOHNSON of Connecticut. I thank the panel very much.

I would like to call forth Commissioner Harold Furchtgott-Roth of the Federal Communications Commission, and Christopher Wright, the General Counsel of the Federal Communications Commission.

Mr. Furchtgott-Roth, if you would proceed, please.

STATEMENT OF HAROLD FURCHTGOTT-ROTH, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. FURCHTGOTT-ROTH. Madam Chair, distinguished members of the House Ways and Means Committee, it is a great honor for me to appear before Congress and to appear before this Committee in particular. I have a prepared statement that I would like to have entered into the record.

Even the most casual observer of Congress knows of the importance of the Ways and Means Committee. It is not just that most Members want to be on this Committee. It is not just that it has jurisdiction over important issues ranging from taxes to social security. And, it is not just that it has a beautiful committee room.

This Committee is important because it is rooted in the Constitution. Its jurisdiction is squarely in Article I, and its singular importance within Congress and within the House of Representatives is guaranteed by the Origination Clause. "All bills for raising revenue shall originate in the House of Representatives."

Why was this sentence, of all sentences, included in a Constitution remarkable for its brevity? The answer lies in a theme that influenced both the founding of our Nation and our history ever since. Americans should be taxed only, only by elected representatives. There should be no taxation without representation, and the House was originally the only popularly elected body.

Taxation and overregulation of commerce characterize the intolerable acts that the British Parliament, without American representation, placed upon the American colonies that precipitated the Revolutionary War. Disputes over taxation and duties have scarred much of American history since.

This Committee has a solemn duty under the Constitution. First, it alone must originate legislation that results in taxes and revenue. Second, as a corollary, it alone must ensure that other elements of the Federal Government, whether in Congress or elsewhere, do not create taxes or raise revenues without specific and direct authority from legislation originating in this Committee.

It is with respect and admiration, reverence and humility that I come before this Committee. I have been asked to comment on whether the e-rate program, as implemented by the FCC, is a tax or a fee. Let me note that my views on this topic are my own. They do not represent a majority of the FCC. I have articulated these and related views in a series of statements and dissents over the past several months.

But my views are not outside the mainstream. The Republican and Democratic leadership of both the House and Senate Commerce Committees have written to the FCC expressing their dismay at the entire implementation of universal service and suggesting bluntly that the Commission start over.

The underlying statute, the Telecommunications Act of 1996, does not, in any way, establish authority for taxes. During the legislative process, the underlying bill was vetted by the Parliamentarian to ensure that there was no language that was properly under the jurisdiction of this Committee. The Act can and should be implemented in such a manner that no revenues are raised and no fees are promulgated that are, in fact, taxes.

The issue before this Committee is not whether its jurisdiction has been usurped by another Committee of Congress. The answer to that question is an unambiguous "No." The issue is whether the jurisdiction of this Committee has been usurped by an independent agency.

Let me be clear: the issue before this Committee is not one of policy. The issue is not whether spending Federal money on computer equipment and services for schools and libraries is a good idea. Everyone likes education. Many, perhaps most, Americans would like the Federal Government to spend more money on education. As the father of six children, I would only welcome more Federal money to subsidize my children's education.

But my responsibility as a Commissioner of the Federal Communications Commission, however, is not to set tax policy or to set Federal education policy, or frankly, even to make telecommunications policy. Congress, not the FCC, sets Federal policy in all areas, whether education or telecommunications. The responsibility of the Federal Communications Commission is simply to follow the Communications Act and other laws governing the FCC.

Perhaps collecting more money for telecommunications carriers and customers to support additional spending on infrastructure for schools and libraries is a good idea. The authority for that good idea, however, should be based in law and should originate in this Committee. To the best of my knowledge, it has not.

In my prepared statement, I explain why the FCC's implementation of schools and libraries program resulted in the creation of a tax. Fees for schools and libraries are assessed at a fixed percentage of both the interstate and intrastate revenues of telecommunications carriers, but the receipts are disbursed primarily to non-telecommunications carriers to provide "internal connections" for schools and libraries.

Please understand what this means. Every telephone company in your district is paying a tax on every customer's telephone bill. The receipts from this assessment are not used to benefit the consumer directly by expanding the number of low-income or high-cost consumers who remain on the telecommunications network only as a result of the fee. There are other universal service programs for this purpose, and those programs are clearly based on fees, not taxes.

The receipts from this fee do not defray the costs for the carrier to provide telecommunications service and thus, ultimately benefit the telecommunications consumer. There are Federal and State programs for that purpose, which are not taxes.

Some of the schools and libraries' fees do go for telecommunications services under section 254(h)(1). Support for these services, while reasonable people may differ on priorities, are clearly based on fees, as they defray the cost of service to carriers.

But the vast majority of funds from the schools and libraries corporation could not be supported under section 254(h)(1) alone. They require an expansive, and I believe, unlawful interpretation of section 254(h)(2) to provide subsidies for internal connections of schools.

And let's be sure the discussion is not just about wire and fiber. It is about sophisticated computer equipment, about servers, about

routers that cost tens of thousands of dollars each, and that the computer industry of America comes to the FCC and lobbies for with their hands out. Of the requests for 1998, $1.3 billion of the total of $2 billion was for this hardware.

The telecommunications customer does not benefit from this transfer to the computer industry, nor does the telecommunications carrier. It is unambiguously a transfer to schools, libraries, and computer companies without any benefit to those paying the fee. It is, in short, a tax.

What authority does the FCC claim to establish this tax? The usual citation is section 254(h)(2). This section authorizes the FCC to establish rules to enhance access to advanced telecommunications and information services. Based on this language, the Commission established rules that have led to requests for Federal subsidies of more than $1 billion for computer equipment.

This sentence does not require any Federal funds. It does not require any discounts. It does not require taxes. It does not require anything other than rules to enhance. In short, the statutory language does not lead to a tax; only the Commission's peculiar interpretation of this language does.

Who is shortchanged in this process? The American consumer who pays the tax, telecommunications carriers who pay the tax, and this Committee that did not authorize the tax. I trust that this Committee will find an appropriate remedy.

Madam Chair, members of the Committee, I am available to answer questions.

[The prepared statement follows:]

Statement of

Harold W. Furchtgott-Roth

Commissioner, Federal Communications Commission

Tuesday, March 31, 1998

at a Hearing before the Subcommittee on Oversight of the House Ways and Means Committee

Chairman Johnson and Members of the Committee:

I am honored to appear before this Committee today.

As I have described in several public statements, the FCC's current interpretation of universal service is not consistent with Section 254 of the Communications Act, the claimed statutory authority for the e-rate program, and I fear that this program is an illegal tax.[1] The divergence between Commission

---

[1] *See* Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding Federal State Joint Board on Universal Service, CC Docket 96-45, *Third Order on Reconsideration*, 12 FCC Rcd 22801 (1997); Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding Federal State Joint Board on Universal Service, CC Docket 96-45, *Fourth Order on Reconsideration*, rel. Dec. 30, 1997; Statement of Commissioner Harold Furchtgott-Roth Regarding the Second Quarter 1998 Universal Service Contribution Factors, rel. March 20, 1998; Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Federal-State Joint Board Report to Congress, rel. April 10, 1998; Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding the Report to Congress in response to Senate Bill 1768 and Conference Report on H.R. 3579, rel. May 8,1998; Statement of Commissioner Harold Furchtgott-Roth Regarding the Common Carrier Bureau's Proposed Revisions of 1998 Collection Amounts For Schools and Libraries and Rural Health Care Universal Service Support Mechanisms, rel. May 13, 1998; Statement of Commissioner Harold Furchtgott-Roth Regarding the Common Carrier Bureau's Clarification of "Services" Eligible for Discounts to Schools and Libraries, rel. June 11, 1998; Statement of Commissioner Harold Furchtgott-Roth Regarding the Common Carrier Bureau's Third Quarter 1998 Universal Service Contribution Factors, rel. June 12, 1998; Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding Federal State Joint Board on Universal Service, CC Docket 96-45, *Fifth Order on Reconsideration and Fourth Report and Order*, rel. June 22, 1998.

interpretation and the statute is not minor and cannot be corrected with small and technical changes in existing Orders. Rather, the Commission's understanding of its authority in this area represents a broad expansion of power beyond that which Congress actually gave it in section 254.

Below, I focus on just one of the problems created by the Commission's interpretation of the Act -- namely, that the agency's implementation of section 254 has transformed the e-rate program from what should essentially have been a discount program into an illegal tax. My concern is that in enacting a sweeping new welfare program for schools and libraries that went well beyond the more modest discount program authorized by Congress, this agency exceeded the scope of its authority and thereby enacted a new tax, engendering thorny constitutional problems.

Specifically, the Commission's overbroad reading of the provisions of the Act relating to schools and libraries begs two kinds of constitutional questions. First, by setting up what is basically a taxation scheme, the Commission creates a problem relating to the separation of powers between the three coordinate branches of the federal government. The Supreme Court has stated that, in our constitutional structure, Congress is the only branch that may levy taxes.[2] When this independent administrative agency, which is imbued not only with legislative functions but also with quasi-executive and quasi-judicial duties, engages in taxation, that undermines the general principle of separation of power. I am troubled by the possibility that this agency has trenched on exclusively Congressional turf in establishing the e-rate program.

Second, with respect to the distribution of power within the legislative branch, under the Origination Clause of the Constitution it is the House of Representatives -- and specifically the Ways and Means Committee -- that possesses the sole authority to initiate tax legislation. I agree with the concerns recently expressed by several members of the House Judiciary Committee that the House must retain "direct authority over and responsibility for any tax burden on the public."[3] I am concerned that the Federal Communications

---

[2] *See National Cable TV v. United States*, 415 U.S. at 340 ("Taxation is a legislative function, and Congress . . . is the sole organ for levying taxes."); *see also Air Transport Ass'n of America v. Civil Aeronautics Board*, 732 F.2d 219, 220 (D.C. Cir. 1984)("[T]axes . . . generally may be levied only by Congress.").

[3] Letter from Members of the Judiciary Committee's Subcommittee on Commercial and Administrative Law to Chairman Bliley, March 31, 1998.

Commission has infringed on this prerogative of the House of Representatives in establishing the e-rate program.

Separation of Powers and The Origination Clause

Article I, section 8, of the Constitution provides that "Congress shall have Power To lay and collect Taxes," and Article I, section, 1, states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." In other words, Congress has the legislative power to tax, and "all" such power -- not just some of it -- is vested in Congress. No other branch possesses the power to tax.

This separation of powers among the legislative, executive, and judicial branch is one of the great structural principles of our Constitution. The Supreme Court has emphasized that "the Constitution diffuses power the better to secure liberty."[4] Indeed, as Justice Scalia has explained, "[t]he Framers of the Federal Constitution . . . viewed the principle of separation of powers as the *absolutely central* guarantee of a just Government. In No. 47 of The Federalist, Madison wrote that '[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty.'"[5] By diffusing governmental power, the Framers sought to ensure that such power would be checked and balanced and the people's freedom safeguarded.

In addition to allocating powers among branches, the Constitution divides power within the legislative branch. Article I, section 7, provides that: "All Bills for raising Revenue shall originate in the House of Representatives." The Origination Clause is essential to democratic accountability. At the time the Constitution was drafted, the members of the United States Senate were appointed by the state legislatures, not voted directly into office by the public, as were the members of the House of Representatives. By requiring that any taxation be passed by the elected body of Congress, the Framers aimed to preserve direct, political accountability for the creation of any new taxes. Thus, in the Federalist Papers, the Framers "defend[ed] the decision to give the origination power to the House on the ground that the Chamber that is more

---

[4] *Morrison v. Olson*, 487 U.S. 654, 694 (1988).

[5] *Id.* at 697 (emphasis added) (citing The Federalist No. 47, p. 301 (C. Rossiter ed. 1961)) (Scalia, J. dissenting).

accountable to the people should have the primary role in raising revenue."[6] More fundamentally, as the Supreme Court has explained:

> "the Framers' purpose was to protect individual rights. As James Madison said in defense of that Clause: "This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."[7]

Even today, although members of the Senate are now elected pursuant to the Seventeenth Amendment, the House, due to its apportionment of seats based on state population and the shorter, two-year terms of its members, is still thought to be the chamber of Congress tied more closely to the people. Its responsibility for "[a]ll Bills for raising Revenue" is a critical one in our system of constitutional government.

Why The E-Rate Is A Tax, Not A Fee

I am convinced that the e-rate fund contributions, at least to the extent that they provide support for non-telecommunications services, and to non-telecommunications carriers, may not be fairly characterized as mere "fees." In so far as the contributions required by the Commission are more in the nature of a "tax," both Separation of Powers and Origination Clause issues are implicated. For, as explained above, no branch other than Congress may tax, and no chamber of Congress other than the House may initiate a tax.

In general, taxes can be distinguished from administrative fees by determining the recipient of the ultimate benefit: a tax "confers no special benefit on the payee," "is intended to raise general revenue," or is "imposed for some public purpose."[8] In contrast, a "fee" is a "payment for a voluntary act, such as obtaining a permit."[9] As the Supreme Court has held, and the D.C. Circuit further explained, a "fee" is a payment "incident to a voluntary act, *e.g.*,

---

[6] *United States v. Munoz-Flores*, 495 U.S. 385, 395 (1990).

[7] *Id.* (quoting The Federalist No. 58, p. 359 (C. Rossiter ed. 1961)).

[8] *Thomas v. Network Solutions*, 1998 WL 191205 (D.D.C. 1998).

[9] *Id.*

a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society."[10] Here, all these factors point toward the category of a tax: the fund, which creates internet access for schools and libraries, confers no particular advantages upon telecommunications carriers in exchange for their contributions, such as a license or permit; the funds have not, as far as I can tell, been segregated from other government monies, *see infra*; the purpose of the fund is a broad, social one, purportedly to improve education for all Americans; and the payment requirement is not triggered by a voluntary act on the part of telecommunications carriers, such as the filing of an application, but is a flat mandate.

In *Thomas v. Network Solutions*, the District of Columbia District Court recently found a similar mandatory contribution to be an illegal tax, not ratified by Congress.[11] The payment in that case -- known as the "Preservation Assessment" and destined for the "Intellectual Infrastructure Fund" -- was collected from registerers of internet domain names. Money from that fund was then used for the "Next Generation Project," a "program aimed primarily at upgrading the Internet infrastructure, improving the speed and accuracy of information delivery, and increasing access for schools."[12] The court held that the Preservation Assessment was "clearly a tax" as it was "involuntary"; "automatically charged to every domain registration"; and collected "for the government's use on public goals, and not in any way to defray regulatory costs."[13]

The Commission's e-rate program suffers from the same legal infirmities. First, it cannot be disputed that the contributions to the e-rate program are involuntary. Indeed, all telecommunications providers are required to pay based

---

[10] *National Cable TV Ass'n v. United States*, 415 U.S. 336, 340-41 (1974)(construing Independent Offices Appropriations Act); *see also National Cable TV Ass'n v. FCC*, 554 F.2d 1094, 1106 & n.42 (D.C. Cir. 1976) ("A 'fee' is a payment for a special privilege or service rendered, and not a revenue measure.") (citing cases).

[11] *Id.*

[12] *Id.* at 3-4.

[13] *Id.* at 5.

on revenue, and there is no way for them to opt out or to decline participation. Second, the FCC's e-rate program does not use the funds to help "defray [any] regulatory costs," but instead furthers the legitimate public goal of connecting schools and libraries to the Internet. While this may be a worthy social cause, it is neither directly related to the regulation of the telecommunications network nor necessary to the regulation of interstate telecommunication rates.

On several occasions, the FCC has defended its conclusion that the universal service contributions generally involve fees, not taxes, by pointing out that "all telecommunications carriers benefit from a ubiquitous telecommunications network."[14] In response to *Thomas v. Network Solutions*, the Commission specifically argued that universal service contributions in general and e-rate contributions in particular are not taxes because "[1] universal service contributions are not intended to raise general revenues as they are placed in a segregated fund dedicated for a specific regulatory purpose, and . . . [2] all telecommunication carriers required to contribute benefit from the ubiquitous telecommunications network that universal service makes possible."[15] The Commission even argued -- erroneously, I believe -- that if the e-rate program is an unlawful tax, then the entire universal service subsidy must be illegal.[16]

These attempts to distinguish *Thomas v. Network Solutions* are not persuasive, however. First, the fact that e-rate money does not go into general revenue does not save the program from invalidation under *Thomas*. In that case, the government, as co-defendant, attempted to defend the payment on the ground that the collected money was in a separate fund and thus did not constitute general revenue. As the court noted, however, the regulated company "deposits these funds and maintains the account, but it does so only as a proxy for [the National Science Foundation]," an independent agency.[17] The government admitted that "[f]und is the government's money, and that the

---

[14] *See, e.g.*, *Universal Service First Report and Order*, 12 FCC RCD 8776, 9188-89 (1997).

[15] *See, e.g.*, *Fifth Order on Reconsideration and Fourth Report and Order*, CC Docket 96-45, rel. June 22, 1998; *Universal Service First Report and Order*, 12 FCC RCD 8776, 9188-89 (1997).

[16] *Id.*

[17] 1998 WL 191205, at 3.

government alone can choose how and when to spend it," and "Congress seems to treat the [fund] as government money."[18] The court squarely rejected the "segregation" argument:

> Defendants assert that the assessment is not designed to raise revenue because it is not deposited into the federal treasury, but into a separate fund. However, this argument rests on mere semantics -- the assessment is income designed for a public purpose, which is essentially unrelated to the persons paying the fee. Where it is kept while awaiting that purpose is irrelevant. As such, it must be considered revenue for the government, whatever name defendants wish to attach to it.[19]

Similarly, e-rate fund contributions may be administered by the Schools and Libraries Corporation, but only at the direction of the FCC. Moreover, the Congressional Budget Office and the Office of Management and Budget have determined that all universal service contributions should be treated as federal revenues and universal service payments as federal outlays. Thus, as in *Thomas*, the fact that the money is placed in a designated fund does not preclude it from being classed as federal revenue.

Second, I do not dispute that there is a benefit to carriers from the maintenance of a ubiquitous nationwide telecommunications network. To the extent that the public switched telephone network can be considered a single telecommunications system, all users benefit when that system is capable of serving others. What good is it to be able to make calls if no one can receive them? Thus, to the extent that a fee is levied against telecommunications carriers and that money is used to ensure adequate support for the telephone network, the carriers would in return receive a benefit. The charge therefore would not be a tax.

But that is not the case here. There are no direct benefits to telecommunications carriers from the provision of Internet services to, and the inside wiring of, schools and libraries. With respect to the schools and libraries program, the funds raised are used to support other goods and services that are not classified as telecommunications services. Given the lack of any correlation

---

[18] 1998 WL 191205, at 3.

[19] 1998 WL 191205, at 3.

between those paying into the fund (telecommunications service providers) and the beneficiaries of the program (schools and libraries), there is not a "sufficient nexus between the agency service for which the fee is charged and the individuals who are assessed" for the contribution to be typed as a mere fee.[20]

The D.C. Circuit has in fact determined that establishing a universal service fund to make telecommunications service available to all Americans at reasonable charges is within the Commission's authority. In *Rural Telephone Coalition v. FCC*, the court held that the allocation of 25% of local phone costs to the interstate jurisdiction was not a tax because its primary purpose was not raising federal revenues but allocating costs.[21] The court also expressly upheld the establishment of a federal "Universal Service Fund" to subsidize telephone rates in high-cost areas as under the Commission's authority.[22] With special significance to the e-rate program, however, the court concluded that

> "[h]ad the Commission proposed the Universal Service Fund for the purpose of subsidizing the incomes of impoverished telephone users, it would have exceeded its authority under section 154(i), as the provision of public welfare is not among its functions. Instead the Commission explicitly (and properly) rejected "solv[ing] the problems of the poor" as an appropriate objective of the Fund, and restricted its use to the more limited purpose of ensuring that telephone rates are within the means of the average subscriber."[23]

In contrast, here the e-rate fund was established as a welfare scheme for schools and libraries.

Finally, these contributions do not meet the traditional definition of a fee because they are premised not on the use of some identifiable government service but purely on ability to pay. According to the Supreme Court, taxation is marked by the calculation of liability "solely on ability to pay, based on

---

20 *National Cable TV Ass'n v. FCC*, 554 F.2d at 1104.

21 838 F.2d 1307, 1314 (1988).

22 *Id.* at 1315.

23 *Id.*

property or income."[24] Here, of course, the contribution amounts are based entirely on revenues and are not triggered by any voluntary act undertaken by the payors but rather purely on their status as telecommunications service providers. As such, they carry the Commission "far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House."[25]

In sum, to the extent that the universal service program requires contributions based on telecommunications service revenues but uses the funds raised to provide support for non-telecommunications services (*i.e.* inside wiring and internet services) to non-telecommunications carriers, the Commission has established a mandatory exaction in order to promote the general welfare. In levying this tax, the Commission has created such difficult constitutional problems as the propriety of taxation by non-legislative bodies, based on legislation that did not originate in the House of Representatives.

As explained above, only Congress has the power to tax.[26] I fear that when a government agency that possesses non-legislative features engages in taxation, we run the risk of upsetting "the equilibrium the Constitution sought to establish--so that 'a gradual concentration of the several powers in the same department,' Federalist No. 51, p. 321 (J. Madison), can effectively be resisted."[27] In addition, assuming that the Congressional power to tax is delegable, in order for even a intended delegation of such power to be judicially sustainable, Congress must provide the agency with clear standards by which its compliance with the delegation can be measured.[28] The Commission, however, has disregarded the numerous limitations that Congress carefully included in

---

[24] *National Cable TV Ass'n v. United States*, 415 U.S. at 340; *see also National Cable TV Ass'n v. FCC*, 554 F.2d at 1107 ("[A] fee, in order not to be a tax, cannot be justified by the revenues received. . . .").

[25] *National Cable TV Ass'n v. United States*, 415 U.S. at 341.

[26] *Cf. National Cable Television Assn., Inc. v. United States*, 415 U.S. 336; *FPC v. New England Power Co.*, 415 U.S. 345.

[27] *Morrison v. Olson*, 487 U.S. at 699 (Scalia, J., dissenting). Even if Congress could delegate this power, there has been, as discussed below, no clear expression of Congressional intent that the Commission engage in a revenue redistribution scheme -- *i.e.*, a tax program -- under section 254.

[28] *Skinner v. Mid American Pipeline*, 490 US 212, 218-219 (1989).

section 254: that there would be a single federal universal service fund based on interstate revenue; that discounts be provided to schools and libraries; that only telecommunications carriers may receive credit; and that support may only be used for telecommunications services.

Moreover, the Commission has argued that the e-rate program does not violate the Origination Clause because "Congress does not exercise its taxing powers when funds are raised for specific government programs."[29] In that case, however, the Supreme Court also made clear that:

> A different case might be presented if the program funded were entirely unrelated to the persons paying for the program. Here, [the program] targets people convicted of federal crimes, a group to which some part of the expenses associated with compensating and assisting victims of crime can fairly be attributed. Whether a bill would be "for raising Revenue" where the connection between payor and program was more attenuated is not now before us.[30]

I remain concerned-- again, to the extent that telecommunications carriers alone are being assessed to pay for a computer network and Internet access program -- that the agency has created a program "entirely unrelated to the persons paying" for it.

Why the FCC's E-Rate Program Goes Far Beyond The Requirements of The Telecommunications Act

The Commission could have avoided the above-described issues by reading section 254 less broadly and reading the statute more narrowly.[31] That is, the Commission should have read section 254 to authorize only what it says, and no more -- a discount for services, not a guaranteed entitlement to free goods as well as free services. The FCC's expanded e-rate program, however, goes far beyond what was required by Section 254 of the Telecommunications Act.

---

[29] *See, e.g., Fifth Order on Reconsideration and Fourth Report and Order*, CC Docket 96-45, at par. 26, rel. June 22, 1998.

[30] *See United States v. Munoz-Flores*, 495 U.S. 385, n. 7 (1990).

[31] *NCTA v. United States*, 415 U.S. 336, at 342. (1974).

Neither Section 254(h)(1)(B) nor Section 254(h)(2)(A) provides the type of clear and precise guidance to the Commission that could justify the adoption of a redistribution program to non-telecommunications carriers, for non-telecommunications services. Moreover, contrary to the Commission's assertions, section 254 does not mandate the creation of a "specific government program" that redistributes revenues from telecommunications carriers to other providers of non-telecommunications services.

Specifically, section 254 by its plain terms directs the Commission to establish a discount program for services provided to schools and libraries by "telecommunications carriers."[32]

In its original Universal Service Order, however, the Commission rejected the argument that construing the statute to allow non-telecommunications carriers to receive support would "convert this valid statute into a revenue raising measure within the meaning of the Origination Clause."[33] The Commission concluded that the general directive in section 254(h)(2)(A) that the Commission "establish competitively neutral rules to enhance" schools and libraries access to advanced services, along with the Commission's necessary and proper clause in section 4(i),[34] provide it sufficient statutory authority to allow non-telecommunications carriers to receive funds.

There are two flaws in this reasoning. First, the argument is built upon a misreading of section 254(h)(2)(a). That provision permits the Commission to establish competitively neutral rules "to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services."[35] It does not provide for an explicit discount program like the one envisioned in section 254(h)(1)(B). Indeed, if both provisions were meant to establish a single discount program for both telecommunications and non-telecommunications providers for telecommunications and non-

---

[32] 47 U.S.C.A. section 254(h)(1)(B); *see also* 47 U.S.C.A. section 254(e) ("only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support.").

[33] *Universal Service First Report and Order*, 12 FCC RCD 8776, 9088-89 (1997).

[34] 47 U.S.C.A. section 154(i).

[35] 47 USC section 254(h)(2)(A).

telecommunications services, Congress would not have needed to enact both sections. Instead, Congress specifically provided in section 254(h)(2)(A) for something less than a discount program in so far as non-telecommunications carriers are concerned -- namely, competitively neutral rules for enhanced *access*.

To rely on the rule regarding programs explicitly authorized by Congress, as described in the *United States v. Munoz-Flores* line of cases,[36] an agency must of course narrowly implement the program within the express mandate of the relevant statute -- in other words, the program must actually be expressly authorized. In this case, however, as described above, neither Section 254(h)(2)(A) nor section 4(i) directs the Commission to implement a redistribution program to benefit non-telecommunication carriers. The language in section 254(h)(2)(A) simply directs the Commission "to establish competitively neutral rules to enhance." A Congressional directive merely "to enhance" access to specific services seems much too general to justify the establishment of a revenue redistribution scheme. Moreover, similar general directives are repeated several times throughout the Act,[37] and if sufficient to justify a tax scheme here would theoretically justify further collection and disbursement of revenue to promote those goals as well. I do not think this is what Congress intended the Commission to do.

Second, even if the Act clearly authorized the establishment of a redistribution scheme for advanced services, section 254(h)(2)(A) does not authorize the FCC to distribute funds to any non-telecommunication carriers. The Commission has argued that the competitive neutrality demand of 254(h)(2), along with section 4(i), requires the Commission to allow non-telecommunications carriers to receive support. Traditional rules of statutory construction, however, require that specific directions in a statute trump any general admonitions. Section 254(h)(1)(B) unambiguously limits recipients of the schools and libraries fund to "telecommunications carrier[s] providing service

---

[36] 495 U.S. 385, 395 (1990).

[37] 47 U.S.C.A. section 157(n) (Advanced Telecommunication Incentives) (the Commission "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.").

under this paragraph;"[38] as this express limitation is more specific than 254(h)(2), it should take precedence here.

In addition, the provisions of section 254(e) -- which provide that only eligible telecommunications carriers may receive federal universal service support -- apply fully to section 254(h)(2)(A). In fact, in the context of the rural health care program, the Commission has acknowledged that Section 254(e)'s explicit requirement that only "eligible telecommunications carriers" receive support applies to Section 254(h)(1)(A).[39] If that is so, and I think it is, then I do not see how one could conclude that this requirement does not also apply to Section 254(h)(2), which the Commission relies upon to justify allowing non-telecommunication carriers to receive support for inside wiring. Thus, the requirements for receiving funds in conjunction with section 254(h)(2) are actually stricter than under section 254(h)(1)(B) -- that is, a recipient must be an "*eligible* telecommunications carrier."[40]

Conclusion

To the extent that mandatory universal service contributions from telecommunications carriers are providing support for non-telecommunications services, and to non-telecommunications carriers, these contributions may not be fairly characterized as mere "fees." Rather, such mandated contributions to the e-rate fund is a general "welfare scheme," and as such "the Commission [has] exceeded its authority."[41] By this excess of authority, the Commission has put itself in a position where it is exercising classic legislative power -- the power to lay and collect taxes -- without any clear evidence that this is what Congress intended. Worse, the Commission has claimed as its source of authority legislation that did not originate in the constitutionally proper chamber of

---

[38] Section 254(h)(1)(B) unambiguously states that "a telecommunications carrier providing service under this paragraph shall . . ." offset the discount from their universal service contribution obligation or receive reimbursement. 47 USC section 254 (h)(1)(B).

[39] *See* Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776 (1997).

[40] Some have argued that not allowing other entities who can provide a similar service to receive support is inequitable. Congress explicitly adopted this distinction, however, and for good reason -- because Congress only obligated telecommunications providers to contribute to the discounted service program in the first place.

[41] *Rural Telephone Coalition v. FCC*, 838 F.2d 1307, 1316 (1988).

Congress, a fact that only provides further evidence that Congress never intended the schools and libraries provision to be a tax law.

Chairman JOHNSON of Connecticut. Thank you very much.

Mr. Wright.

STATEMENT OF CHRISTOPHER J. WRIGHT, GENERAL COUNSEL, FEDERAL COMMUNICATIONS COMMISSION

Mr. WRIGHT. Thank you. It is a pleasure to be here today as Chairman Kennard's representative to discuss the FCC's universal service program for schools and libraries.

As Congressman Neal noted earlier, I'd like to emphasize that Senators Snowe and Rockefeller, the principal drafters of section 254(h), filed an amicus brief in the 5th Circuit fully endorsing the Commission's interpretation of the statute.

I'd like to first read three brief excerpts from section 254. The first, section 254(d), provides that "every telecommunications carrier that provides interstate telecommunications services shall contribute" to "mechanisms established by the Commission to preserve and advance universal service." So all telecommunications carriers contribute.

Section 254(h), which contains a subsection specifically addressed to "educational providers and libraries," first provides that "all telecommunications carriers" must provide services to "elementary schools, secondary schools, and libraries" at a discounted rate that the Commission, "determines is appropriate and necessary to ensure affordable access to, and use of such services by such entities." That is section 254(h)(1). It plainly provides that schools get discounts for telecommunications services. Internet services are not telecommunications services; they are information services.

The third section I'd like to quote is section 254(h)(2), which Commissioner Furchtgott-Roth has just mentioned. It directs the FCC 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."

If there is a source for Internet services, it is in that sentence. The Commission has concluded that both Internet services and inside wiring, both of which are information services, should be funded under this provision.

The Commission reasonably interpreted the statute to reach this result. Internal connections are necessary to provide services to classrooms. And as Senators Snowe and Rockefeller have emphasized, they wrote "classrooms" into section 254(h)(2) because that is where the students are. It is hard to imagine what section 254(h)(2) covers if it does not cover internal connections and Internet access.

The telephone companies that have challenged the Commission's interpretation of that provision have not suggested what it covers, even though it is a basic rule of statutory construction that a statutory provision should not be construed to be meaningless.

In their amicus brief, Senators Snowe and Rockefeller specifically endorsed the Commission's decision to provide discounts for internal connections and Internet access.

Let me turn now to the Origination Clause issue. With respect to this issue, I understand that this committee would like to focus on the schools and libraries program and not the aspects of the

Commission's order funding support to rural areas and low-income Americans.

However, the issue cannot be severed in that manner. If the schools and libraries program is an unconstitutional tax, so are the much larger high-cost and low-income programs. Fortunately, there is no merit to this Origination Clause challenge.

Prior to the enactment of section 254, when the Communications Act did not even contain the words "universal service," the D.C. Circuit heard and rejected an Origination Clause challenge to the Commission's universal service program in the ALC Communications case. The Court held that the assessments at issue were not taxes and were not fees, but instead were "transfers from interexchange carriers to high-cost, local exchange carriers, and low-income telephone subscribers that fit comfortably within the range of special purpose levies that are consistent with Congressional authority to regulate commerce."

In the Rural Telephone Coalition case, the D.C. Circuit rejected an argument brought by some telephone companies that the Commission's universal service program was a tax for purposes of the tax clause. The Court said that a regulation is a tax only when its primary purpose is raising revenue.

As Senators Snowe and Rockefeller have emphasized, extending universal service support to schools and libraries did not transform previously valid transfer payments into taxes. To the contrary, because section 254 "creates a particular governmental program rather than raising revenue to support government generally"—I am quoting there from the Supreme Court's decision in Munoz-Flores, it plainly is not a tax under the test enunciated by the Supreme Court.

In that same case, the Supreme Court squarely rejected the notion now being advanced before the 5th circuit that an assessment is a tax unless those required to pay the assessment receive a direct benefit from it.

In short, attacks on universal service by telecommunications companies are nothing new. In 1988, at a time when there was no universal service provision in the Communications Act, the D.C. Circuit upheld the Commission's efforts to provide affordable telephone service to all Americans and rejected the telephone companies' claims that the universal service program was a tax not authorized by Congress.

The analogous claims recently advanced in the 5th Circuit have even less force now that Congress has adopted section 254 and explicitly extended universal service for schools and libraries.

I very much appreciate the opportunity to testify, and I will be pleased to answer any questions that you may have. Thank you.

[The prepared statement follows:]

Statement of Christopher J. Wright
General Counsel
Federal Communications Commission

on
Implementation of the "E-Rate" Program

Before the Subcommittee on Oversight
Committee on Ways and Means
U.S. House of Representatives

August 4, 1998

STATEMENT OF CHRISTOPHER J. WRIGHT
GENERAL COUNSEL, FEDERAL COMMUNICATIONS COMMISSION
BEFORE THE HOUSE WAYS AND MEANS COMMITTEE
SUBCOMMITTEE ON OVERSIGHT

August 4, 1998

Madam Chair and Members of the Subcommittee:

I am pleased to be here this morning as the designee of the Chairman of the Federal Communications Commission to discuss your questions regarding the universal service program for schools and libraries. That program provides discounts to schools and libraries purchasing telecommunications service, internet access, and internal connections. As you have requested, my remarks address whether this program, as administered by the Commission, was authorized by Congress and whether the assessments on telecommunications carriers that fund the program violate the Origination Clause of the Constitution, Art. I, § 7, cl. 1. Those issues, along with about 30 others, have been raised in the Fifth Circuit by parties challenging the Commission's implementation of the universal service provision of the Communications Act, 47 U.S.C. § 254, which was adopted by Congress in 1996 as part of the Telecommunications Act. *See Texas Office of Public Utility Commissioners et al. v. FCC*, No. 97-60421 (and consolidated cases).

The Chairman (and a majority of the Commissioners) believe that the Commission's straightforward implementation of section 254 is fully consistent with the terms of the statute and does not constitute an unconstitutional tax. That view is shared by Senators Snowe and Rockefeller, the principal drafters of section 254(h) of the Communications Act, which specifically authorizes the provision of discounted service to schools and libraries. Senators Snowe and Rockefeller filed an amicus brief in the Fifth Circuit defending the Commission's implementation of the statute. Indeed, they specifically agree that the Commission properly provided for discounted internet access and internal connections to classrooms, the two aspects of the program that have been challenged most vigorously. With respect to the Origination Clause issue, I understand that this Committee would like to focus on the schools and libraries program and not the aspects of the Commission's order funding support to rural areas and low income Americans. However, although I will focus on the schools and libraries program, the issue cannot be severed in that manner. As the Fifth Circuit briefs make clear, if the schools and libraries program is an unconstitutional tax in violation of the Origination Clause, so are the larger high cost and low income programs. Fortunately, there is no merit to the Origination Clause challenge.

But before turning to that issue, I would like to address in more detail the claim that the Commission has not administered the new universal service provision properly. Prior to 1996, there was no provision in the Communications Act that explicitly addressed "universal service." Nevertheless, the Commission, together with state public utility commissions, developed a patchwork quilt of explicit and implicit subsidies to ensure that all Americans,

including those living in high-cost rural areas and those with low incomes, had affordable basic telephone service. A decade ago, some telephone companies challenged the Commission's universal service program, arguing both that it was not authorized by the statute and that it was an unconstitutional tax. The D.C. Circuit rejected those challenges in *Rural Telephone Coalition v. FCC*, 838 F.2d 1307 (1988). With respect to statutory authority, the court found sufficient authority under sections 1 and 4(i) of the Communications Act, 47 U.S.C. §§ 151, 154(i). 838 F.2d at 1315. Those provisions, which were adopted in 1934 and remain in force today, do not use the phrase "universal service," but instead, respectively, establish the goal of providing "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges," and authorize the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." Quoting the Supreme Court's 1943 decision in *NBC v. FCC*, 319 U.S. 190, 219, the D.C. Circuit held that the ability to subsidize telephone service is one of the "'expansive powers' delegated to [the FCC] by the Communications Act." 838 F.2d at 1315. With respect to the tax issue, the D.C. Circuit began by warning that "'[t]he definition of "tax" in the abstract is a metaphysical exercise in which courts do not have occasion to engage.'" *Id.* at 1314 (quoting *Brock v. WMATA*, 796 F.2d 481, 498 (D.C. Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987)). "Rather," the court held, "a regulation is a tax only when its primary purpose judged in legal context is raising revenue," and it dismissed the contention that the goal of the Commission's universal service program was to raise revenue. 838 F.2d at 1314.

Section 254 both specifically addresses "universal service" (that is its title) and specifically extends universal service to schools and libraries (the title of section 254(h)(1)(B) is "educational providers and libraries"). Congress generally described universal service as "an evolving level of telecommunications services" to be defined by the FCC, after consultation with state commissions and consideration of "the extent to which such telecommunications services -- (A) are essential to education, public health, or public safety; (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers; (C) are being deployed in public telecommunication networks by telecommunications carriers; and (D) are consistent with the public interest, convenience, and necessity." 47 U.S.C. § 254(c)(1). Section 254 separately required "[a]ll telecommunications carriers" to provide "services to elementary schools, secondary schools, and libraries" at a discounted rate that the Commission "determine[s] is appropriate and necessary to ensure affordable access to and use of such services by such entities." 47 U.S.C. § 254(h)(1)(B). In addition, section 254 directed the FCC 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 non-profit elementary and secondary school classrooms, health care providers, and libraries.*" 47 U.S.C. § 254(h)(2)(A) (emphasis added). *See also* 47 U.S.C. § 254(c)(3) (authorizing the FCC to designate "*additional services*" to be funded by the support mechanisms for "schools, libraries, and health care providers for the purposes of" section 254(h) (emphasis added)).

Consistent with the dictates of Congress, the Commission reasonably interpreted this language to mean that discounted services should include internal connections and internet access. Internal connections are necessary to provide services to classrooms, and the word "classrooms" appears twice in section 254. First, one of the Act's six "universal service principles" provides that "[e]lementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h)." 47 U.S.C. § 254(b)(6). Second, section 254(h)(2)(A) directs the FCC to enhance access to "information services" such as internet access "for all . . . classrooms." The Commission's reading also is supported by the legislative history, which states: "[T]he Commission could determine that telecommunications and information services that constitute universal service for classrooms and libraries shall include *dedicated data links and the ability to obtain access to . . . the Internet*." Joint Explanatory Statement of the Committee on the Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. (1996) at 133 (emphasis added). While expansive, the Commission's authority to designate additional services is by no means "open-ended," however. It is limited to those services that are consistent with the purposes of section 254(h), and the Commission accordingly designated only two additional services for support: internal connections and internet access, both of which are clearly consistent with section 254(h)'s mandate to "enhance . . . access to advanced telecommunications and information services for . . . classrooms." Thus, contrary to the claims of some telephone companies, the Commission acted well within the scope of its statutory authority.

Those telephone companies also argue that, if schools and libraries may obtain discounts for internal connections and internet access, only internet service providers owned by telephone companies should be eligible to obtain support for providing those services. The Commission properly rejected that contention. Congress made clear that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute" to the "mechanisms established by the Commission to preserve and advance universal service." 47 U.S.C. § 254(d). However, although only "telecommunications carrier[s]" contribute, the statute specifically authorizes payments for "access to advanced telecommunications and information services." 47 U.S.C. § 254(h)(2)(A). The statutory scheme would be distorted, the Commission reasonably concluded, if only certain types of information service providers (namely, those owned by telephone companies) were eligible for support. More specifically, the Commission concluded, adoption of the telephone companies' position would be inconsistent with the statutory directive that the Commission "establish competitively neutral rules," 47 U.S.C. § 254(h)(2), and would raise the costs of the program. According to the telephone companies, a school simply could not choose an independent internet service provider charging a lower rate for comparable service, but instead would be required to obtain internet service from a telephone company charging a higher rate. It is clear why the telephone companies would prefer such a result, but it also is clear why the Commission authorized schools to select from as many providers of internet access as possible.

As noted above, the Commission's interpretation of section 254 is supported by Senators Snowe and Rockefeller, the principal sponsors of the bill known as the "Snowe-Rockefeller-Exon-Kerrey amendment" that became section 254(h). In their amicus brief supporting the FCC before the Fifth Circuit, those Senators stated unequivocally "that the FCC's implementation of the universal service provisions of the 1996 Act is clearly supported by both the statutory language and congressional intent. The 1996 Act clearly contemplates the provision of non-telecommunications services to schools, libraries, and rural health care providers and clearly authorizes the FCC to provide funding to non-telecommunications carriers." Brief of Amici Curiae The Honorable John D. Rockefeller IV and The Honorable Olympia J. Snowe In Support of Respondents FCC and United States, at 4, filed in *Texas Office of Public Utility Counsel v. FCC*, No. 97-60421 (5th Cir.) (*Snowe-Rockefeller Brief*). Senators Snowe and Rockefeller also specifically endorsed "the FCC's decision that schools and libraries should receive a discount for inside wiring and Internet access." *Id.* at 5.

Let me turn to the Origination Clause issue. The telephone companies raised an Origination Clause challenge to the Commission's universal service program prior to the adoption of section 254. The D.C. Circuit found that challenge so baseless that it dismissed the claim in an unpublished decision. *ALC Communications Corp. v. FCC*, 925 F.2d 487, 1991 WL 17222 (D.C. Cir. 1991). In that case the interexchange carriers complained that, because they paid into the universal service fund but did not receive payments from the fund, "the universal service program assessments are a tax, not enacted in accordance with the requirements of the origination clause." *Id.* at *3. The court acknowledged that the assessments at issue were "transfers from IXCs [interexchange carriers] to high-cost LECs [local exchange carriers] and low-income telephone subscribers," but held that the assessments "need not be authorized in a revenue bill originating in the House since '[t]here was no purpose . . . to raise revenue to be applied in meeting the expenses and obligations of the Government.'" *Id.* (quoting *Millard v. Roberts*, 202 U.S. 429, 436-37 (1906)). The D.C. Circuit went on to conclude that "[u]niversal service assessments fit comfortably within the range of special-purpose levies that are consistent with congressional authority to regulate commerce." 1991 WL 17222, * 3. As Senators Snowe and Rockefeller have explained: "Extending universal service support to schools and libraries did not transform these previously valid transfer payments into taxes. Rather, the funding mechanism envisioned by Congress and implemented by the FCC merely extends the pre-existing support mechanism to these new beneficiaries." *Snowe-Rockefeller Brief* at 14.

Moreover, the argument made before the Fifth Circuit by a single paging company, Celpage, that universal service assessments are an unconstitutional tax, as applied to paging companies, is noteworthy in that its central premise was specifically rejected by the Supreme Court in *United States v. Munoz-Flores*, 495 U.S. 385 (1990). The gist of the argument is that the universal service assessment mandated by section 254(d) is an unconstitutional tax because paging companies contribute to the universal service fund but allegedly receive no direct benefits from universal service. In *Munoz-Flores*, the petitioner similarly argued that the Victims of Crime Act was an unconstitutional tax because "assessments are not collected for the benefit of the payors, those convicted of federal crimes." 495 U.S. at 400. The Court

specifically rejected the contention "that a bill must benefit the payor to avoid classification as a revenue bill." *Id.* Rather, the Court held that "a statute that creates a particular governmental program and that raises revenue to support that program, as opposed to a statute that raises revenue to support Government generally, is not a 'Bil[l] for raising Revenue' within the meaning of the Origination Clause." *Id.* at 398.

Indeed, this is a much easier case than *Munoz-Flores*. Some of the proceeds of the assessments raised by the statute at issue in that case were "deposited in the general fund of the Treasury," 495 U.S. at 398, yet the assessments did not constitute an unconstitutional tax. Here, none of the assessments are used for general purposes. Celpage has noted that the Congressional Budget Office and the Office of Management and Budget treat universal service contributions and payments as federal receipts and outlays, but that is irrelevant under the Supreme Court's test. The relevant question is whether section 254 "creates a particular governmental program" rather than "rais[ing] revenue to support Government generally," *id.* at 398, and section 254 plainly is not an unconstitutional tax under the test enunciated by the Supreme Court. In addition, contrary to Celpage's claim, paging companies actually benefit, both directly and indirectly, from the universal service program. Paging services are "telecommunications services," and hence paging companies are eligible for reimbursements for providing discounted paging services to schools and libraries. Paging companies also benefit indirectly from the universal service program, because their services are more valuable to the extent that more Americans have telephone service.

Also relevant is the Supreme Court's analysis of Article I, section 8, cl. 1 of the Constitution, which provides that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises" so long as they are "uniform throughout the United States." In the *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580 (1884), the Court upheld a statute requiring shipowners to contribute to a special fund for the regulation of immigration and for care of immigrants against a challenge by the shipowners. The Court found that "the power exercised in this instance is not the taxing power." *Id.* at 595. Rather, the assessment was a "mere incident of the regulation of commerce" because the money raised, "though paid into the treasury, is appropriated in advance to the uses of the statute, and does not go to the general support of the government." *Id.* at 595-96. *Cf. Rosenberger v. Rector and Visitors of the University of Virginia,* 515 U.S. 819, 840-41 (1995) (a student fee was not "a general tax designed to raise revenue for the University" in violation of the Establishment Clause in part because the fee "cannot be used for unlimited purposes") (citing *Head Money Cases*, 112 U.S. at 595-96).

A number of the other cases that have been cited by Celpage are irrelevant. Both *National Cable Television Ass'n., Inc. v. United States*, 415 U.S. 336 (1974), and *Thomas v. Network Solutions, Inc.*, 1998 WL 191205 (D.D.C. April 6, 1998), involved regulatory fees that agencies sought to justify as authorized by the Independent Offices Appropriations Act. The Commission has never contended that the universal service contributions are authorized by the Independent Offices Appropriations Act. Rather, as explained above, those contributions are authorized by the Communications Act. The district court in *Thomas v.*

Network Solutions also considered whether an assessment on registrants of internet names called the "Preservation Assessment" was "an illegal tax . . . not authorized by Congress" under the Constitution, Art. I, § 8, cl. 1. *Id.* at *5. That issue was relevant in that case because it was "undisputed that Congress did not itself impose the Preservation Assessment." As explained above, however, Congress has explicitly authorized the universal service assessment by providing that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute" to the "mechanisms established by the Commission to preserve and advance universal service." 47 U.S.C. § 254(d). Nor is *United States v. United States Shoe Corporation*, 118 S.Ct. 1290 (1998), relevant. The issue in that case was whether the Harbor Maintenance Tax was a tax for purposes of the Export Clause of the Constitution, Art. I, § 9, cl. 5, which prohibits even Congress from imposing certain types of export taxes. "Distinguishing case law developed under the Commerce Clause," 118 S.Ct. at 1294, and emphasizing that "decisions involv[ing] constitutional provisions other than the Export Clause . . . do not govern here," *id.* at 1295, the Court struck down the Harbor Maintenance Tax. But no claim has been or could be made that section 254 violates the Export Clause.

In short, attacks on universal service by telecommunications companies are nothing new. In 1988, in *Rural Telephone Coalition*, the D.C. Circuit upheld the Commission's efforts to provide affordable telephone service to all Americans and rejected the telephone companies' claims that the universal service program was a tax not authorized by Congress. Moreover, it did so at a time when there was no universal service provision in the Communications Act. The analogous claim recently advanced in the Fifth Circuit has even less force now that Congress has adopted section 254, including the Snowe-Rockefeller-Exon-Kerrey amendment, which (as its drafters confirm) specifically authorizes universal service support to schools and libraries for internal connections and internet service. The Origination Clause challenge brought by Celpage is considerably weaker than the Origination Clause attack brought by the interexchange carriers in 1991, because the paging companies now are eligible for universal service support. The D.C. Circuit dismissed that 1991 attack in an unpublished opinion in *ALC Communications*, and Celpage's pending claim deserves no better fate. As the Supreme Court stated in *Munoz-Flores*, a statute like section 254 "that creates a particular governmental program and that raises revenue to support that program" is not an unconstitutional tax. 495 U.S. at 398.

Finally, it should be noted that some of the parties in the Fifth Circuit, including Celpage, sought a stay of the Commission's universal service rules. They selected what they viewed as their strongest arguments, including the claim that the universal service program, as administered by the Commission, is an illegal tax, and emphasized their view that they were likely to succeed on the merits of their challenges to the Commission's implementation of the universal service provision. The Fifth Circuit denied the requests for a stay.

I appreciate the opportunity to testify and I am pleased to answer any questions that you and any other members of the Subcommittee may have.

Chairman JOHNSON of Connecticut. I thank the panel.

Mr. Furchtgott-Roth, would you go through, as explicitly as possible, exactly who pays and exactly who gets paid, who benefits.

Mr. FURCHTGOTT-ROTH. Madam Chair, would this just be for the schools and libraries program or for the other universal service programs as well?

Chairman JOHNSON of Connecticut. For the school and libraries program, although you may, if you wish, contrast it with the universal service program.

Mr. FURCHTGOTT-ROTH. Yes, ma'am. Right now, all telecommunications carriers pay a tax for the schools and libraries program from both their interstate and intrastate revenues. It is a fixed percentage that was established first by a Commission notice, and subsequently an order in December of 1997 that covered the first two quarters of 1998. In May of this year, I believe we issued a subsequent notice that covered the third and fourth quarters of 1998 and the first two quarters of 1999. So this is simply a percentage of telecommunications service revenue.

Who receives funds is very complicated, and there is a very complicated mechanism to apply for funds from the Schools and Libraries Corporation, an independent corporation established by the Commission in 1997. This is, from all I can tell, a private corporation, private nonprofit; it is not a government entity. It was incorporated in the State of Delaware.

And as noted in the last panel, more than 30,000 schools and libraries have applied for funds from this program. It requires a very complicated form. Many schools have invested a great many hours in filling out these forms, and when you go from doing nothing to trying to disperse more than $1 billion to 30,000 applicants, it is a very complicated process. And something that, frankly, the FCC has never done before and does not have a great deal of expertise.

Chairman JOHNSON of Connecticut. In your testimony, you mentioned that there were nine telecommunications companies that benefited, though all paid. Would you clarify that and then the other aspect of that, those who don't pay and do benefit.

Mr. FURCHTGOTT-ROTH. Yes. There are two parts of 254(h) that are used to establish benefits for schools and libraries. The first is under 254(h)(1), which is the traditional discount program which clearly says that only telecommunications carriers can receive these discounts, no one other than a telecommunications carrier.

In my view, (h)(1) by itself would just be a fee, as the Commission has interpreted; (h)(2), however, is where the Commission has engaged in some extraordinarily complicated legal gymnastics. And not being a lawyer, I am not quite sure how they got there. I am not sure if I were a lawyer, I would understand how they got there.

But what they said is that the beneficiaries can be anyone, and it doesn't have to be a telecommunications carrier. And it is under the advanced services that the internal connections enter, and $1.3 billion out of the $2 billion requested for 1998 are for internal connections.

I wish I could give you a precise breakdown of how much of this is going to telecommunications carriers, eligible telecommunications carriers under section 214, or to folks who are not telecommunications carriers at all.

I have requested some of this information from Schools and Libraries Corporation and they have not been able to give it to me at this point. But it is very clear that many companies that are not telecommunications carriers at all have applied for a great deal of money from the Schools and Libraries Corporation.

On the contributions side, right now it is just telecommunications carriers that pay in. Other companies that may, in fact, receive money or that the Commission has designated as eligible to receive money, do not pay in. And this would include Internet access providers, construction companies that might be providing internal wiring, and perhaps most importantly, it does not include the computer companies that come in to lobby me and say this is a billion dollar business for them and they'd like some of this money.

Chairman JOHNSON of Connecticut. Thank you. Then what I would interpret your testimony to be is that you are not arguing that all of universal service or even all of the e-rate program are an illegal tax, but that basically 24(h)(2), a limited part of the e-rate program, is an illegal tax.

Mr. FURCHTGOTT-ROTH. Let me be clear, Madam Chair. There are two points I would like to leave you with on this. First of all, I think that the Commission has completely misinterpreted paragraph (h)(2), independent of whether it is a tax or not. I just do not see how you get from the plain language of the statute to the creation of a multi-billion dollar program. I don't see how you get to any Federal dollars. And then above and beyond that, I don't see how you get to a tax from it.

Chairman JOHNSON of Connecticut. Thank you.

Mr. Coyne.

Mr. COYNE. Thank you, Madam Chair. Mr. Wright, how many schools and school districts nationwide have applied for Internet and related telecommunications assistance?

Mr. WRIGHT. We have received 30,000 applications.

Mr. COYNE. How many?

Mr. WRIGHT. Thirty thousand applications covering more than 100,000 schools. Some of the applications are multischool applications.

Mr. COYNE. Can you tell us what the total universal service subsidy breakout is State by State. In other words, which States or areas are subsidized and which pay to subsidize other areas or States? Do you have that breakdown?

Mr. WRIGHT. I don't have that on the tip of my tongue. Not surprisingly though, with 30,000 applications and 100,000 schools, this is spread around the country. Just before this hearing started, I was handed this purple document which I was told was given to staff of each member of this committee which does break it down by each State.

Mr. COYNE. Okay. There seems to be a perception in the general public that Congress and the FCC has increased phone costs. In your research and work that you do, can you give any indication of why you think that is?

Mr. WRIGHT. Well, you started off by admonishing all of us to avoid political rhetoric, so I will. But let me just stick to the facts. The facts are that since the 1996 Act was passed, we've reduced access rates by more than $4 billion, and these programs, including

the explicitly high-cost program, are smaller than $4 billion. So there has been a net reduction.

Mr. COYNE. Thank you.

Chairman JOHNSON of Connecticut. On that point, Mr. Wright, you say since the 1996 Act was passed, that we've reduced access rates by $4 billion.

Mr. WRIGHT. Yes.

Chairman JOHNSON of Connecticut. Then why is it necessary for the telephone company to use a billing mechanism that clearly includes, by some accounts, 19 cents for this purpose, and by other accounts, 36 cents for this purpose. If we've reduced their charges that much, why are they including this in the billing rate?

If they include it in the billing rate, then it is an identifiable entity, and we have to decide whether that entity is a fee or a tax. But if we've saved them $4 billion, why was Congress wrong to assume that deregulation would bring them so much more profit that they could fund this, which is the assumption that we made?

Mr. WRIGHT. I don't have the all the long-distance carriers' billing plans at the tip of my tongue, but some of them, like AT&T, didn't offer 10 cents a minute three years ago. They offered 15 cents a minute. Now they offer 10 cents a minute and they add in a half-penny for schools and libraries.

Chairman JOHNSON of Connecticut. Why do you allow them to do that? You are the regulators. The bill was to say, we're going to give you free open competition and it's going to cut your costs. But one of the things you are going to do is make sure that we do this and that that gets folded in. And yet, you are allowing them to put in their universal rate, either 19 cents or 36 cents, and that is an identifiable either fee or tax.

Mr. WRIGHT. Madam Chairman, you referred earlier—described us as rate regulators. That's not true. Over the past 25 years, we have very aggressively deregulated the long-distance market and we do not regulate their rates.

Chairman JOHNSON of Connecticut. Mr. Weller.

Mr. WELLER. Thank you, Madam Chair. This is an extremely helpful hearing. I really want to again commend you for conducting today's hearing as we look at a challenge. It is clear, I think, from the statements of members on both sides, as well as those who have testified this morning, that every one of us stands here in support of increasing access to the Internet and computers for every school library in our nation.

Of course, the question is how can we accomplish it, and the real question of this hearing is how do we fund, how do we finance that goal. And in listening to the testimony of the Commissioner, as well as the legal counsel, the chief lawyer for the FCC—we have a disagreement here, so we've got both sides represented. And the Commissioner indicated—and confirm with me—it's my understanding that you agree with the notion that many have, that the so-called fee is actually a tax, is that correct, Commissioner?

Mr. FURCHTGOTT-ROTH. I believe that that portion that goes to nontelecommunications carriers under (h)(2) is a tax, yes.

Mr. WELLER. And then, Mr. Wright, you argue that what he believes is a tax is actually a fee.

Mr. WRIGHT. No, we've never defended this as a fee. The language of the statute is "specific mechanisms." The language of the relevant cases are things like "special purpose levies." But some cases have been cited under something called the Independent Offices Administration Act, and it is alleged that we've claimed that these are fees under that Act; we've never made that claim, so it's setting up a straw man to beat that one down.

Mr. WELLER. So then if you don't believe it's a fee, then you believe it's a tax.

Mr. WRIGHT. No, we believe it's what Congress called it, and Congress called it a "specific mechanism."

Mr. WELLER. A specific mechanism?

Mr. WRIGHT. What the D.C. Circuit called——

Mr. WELLER. Kind of like a revenue-enhancer and all the other terms that politicians have used over the years to label a tax something else.

Mr. WRIGHT. I'm just a lawyer. But the courts have said that a regulation is a tax only when its primary purpose is raising revenue, and the courts have regularly approved——

Mr. WELLER. Sure. Well, reclaiming my time, Mr. Wright, I am not an attorney, so I turn to attorneys at times and ask for advice and counsel. And I know that the Commissioners look to you for advice and counsel, and they say this is what we want to achieve, we are asking you to figure out a way we can legally do it. And of course, you are charged with that.

As has been stated earlier, there are roughly 1,800 schools in my State of Illinois that have requested help through the e-rate program, not only for the reduced rate but also for the assistance in putting in the wire and the fiber so they can hook up computers. Of course, they use LaSalle-Peru High School as the example where it is most expensive. They estimate that it is going to cost them roughly $1 million. Ottawa, which is 10 minutes away, they estimate $100,000. So it varies from school district to school district what the costs are to achieve this goal.

One of the concerns I have, because many, including the General Accounting Office, and many in the Congress, including myself, question the constitutionality of what you label, I forgot the term again, but what most of us label a tax. And that if the court action in the 5th circuit finds the FCC's interpretation of subsection (h)(2) and its subsequent action unconstitutional, in the case of my State we have 1,800 schools that are left hanging.

And the question I have for you is if the 5th circuit rules against you and declares your funding mechanism, what we call a tax, a tax and unconstitutional, because it was not levied by Congress, what happens to your program?

Mr. WRIGHT. That would be a major problem then. I think your bill would be a great thing if the 5th circuit should take that action.

Mr. WELLER. Of course, I am one who believes that the Fifth—I am not an attorney, but listening to those who are—that the 5th circuit will rule it unconstitutional, which does jeopardize the funding. And that's why I worked with my colleagues and Mr. Tauzin and Mr. Hulshof and others to come up with a solution to the problem.

And I was wondering, should they rule against you and the solution we've offered, which is earmarking one cent of every dollar of an existing revenue source, an excise tax that was put in place in 1914 to finance World War I, do you feel that that is a legal funding mechanism that would solve the problem if the 5th circuit court rules against you?

Mr. WRIGHT. Oh, it certainly sounds like it would. I don't know all the details of the bill. I don't know whether it's specific with respect to internal connections and Internet access. But in what I would regard the unlikely event the 5th circuit rules against us, that would sure be a great backup.

If I could just make two brief points. You know, the telephone companies did go in and seek a stay. And we opposed it and they said this was an unconstitutional tax. The Court didn't grant the stay. And we then took the very unusual step, because we'd like to get this settled quickly, of moving to have the case expedited, which is something the defendant rarely does.

The telephone companies wouldn't join with us in our motion to expedite, but we filed it anyway. We are anxious to get this sorted out.

Mr. WELLER. Madam Chair, could I just have a brief followup? Of course, in Congress we are running out of time, we've got roughly 30 days in the legislation session left between now and the first week of October, and we can move this solution fairly quickly to solve the problem and ensure that the funds are available to those 1,800 schools in Illinois like LaSalle-Peru, and Ottawa and others in the Gilette library district.

From your standpoint, do you believe that if the Court rules against you, that the FCC should continue to administer the distribution of these funds or would you be willing to accept from the FCC standpoint, allowing as we propose, through the chief technology agency within the Commerce Department, to use that agency to block-grant the funds back to the States. Do you have any problem with shifting the administrative responsibility elsewhere for distribution of those funds?

Mr. WRIGHT. Of course, we abide by decisions of the courts. This brown book I am holding is the Communications Act. It is our job to administer it and anything Congress writes into it, we will administer.

Mr. WELLER. So you'd work with us, then. That's good. Thank you, Madam Chair, and thank you.

Chairman JOHNSON of Connecticut. Thank you, Mr. Weller. Mrs. Thurman.

Mrs. THURMAN. Thank you, Madam Chairman. Staff just brought to my attention—and I am curious, since this is my first time on Ways and Means—that there evidently is a parliamentary procedure that can be used when a revenue issue has not originated in the House, called blue-slipping. And it's my understanding that the staff of Ways and Means went to the parliamentarian to get clarification as to whether or not they could blue-slip this so the Ways and Means Committee could take it. Their answer was no.

And even to the point where the Senate had said they would go back and clarify any language to make sure that it wasn't consid-

ered to be a tax. Are you familiar with this procedure that took place, or any of the inquiry that took place on this issue?

Mr. FURCHTGOTT-ROTH. Mrs. Thurman, I had the privilege of being a staff member on the House Commerce Committee when the 1996 Act was going through the House in conference, and I do have a recollection of the Parliamentarian reviewing it. I don't have the specific recollection of the Ways and Means Committee staff requesting a blue slip, but I would be very surprised if the Ways and Means Committee staff did not, in fact, review the language.

Mrs. THURMAN. And that process is not open just to the chairman or the ranking members? It's open to all members of Congress?

Mr. FURCHTGOTT-ROTH. Yes, ma'am.

Mrs. THURMAN. Secondly, Mr. Wright, let me ask you a question. I am trying to get to the bottom of this. In your beliefs in this dialogue, is the universal issue a tax or a fee? Or is it just what we are now looking at in this new provision, the tax?

Mr. WRIGHT. Well, let me make clear that there is only one funding provision in the Act. That is 254(d). It covers high-cost, low-income and schools and libraries, says all telecommunications carriers pay. There is only one funding provision in the Act, and it applies without distinction to any of the them.

Mrs. THURMAN. So then what we are really doing is dissecting this issue into, first of all, the school and libraries issue, and then into the construction issue. Is that——

Mr. WRIGHT. Right. Let me make clear that in the 5th Circuit, the telephone companies claim that all of this is an unconstitutional tax.

Mrs. THURMAN. Have they ever done this before?

Mr. WRIGHT. Yes, twice in the last decade, they went to the D.C. Circuit making the same case. Look, I am in the business of defending the constitutionality of the acts of Congress. It does not come easily to my lips to say that an act is unconstitutional or even that there is a grave question. But to the extent there was a grave question, it was with respect to the high-cost fund before the 1996 Telecommunications Act was enacted.

The high-cost fund, there was nothing in the act saying anybody paid anything and the way we put together a program to make service affordable to all Americans, we had the inter-exchange carriers or the long-distance companies pay, they didn't get any money. The local exchange carriers, the Bell Atlantics and Ameritechs, collected all the money. And we won that case. So this case seems easy in comparison.

Mrs. THURMAN. Mr. Roth.

Mr. FURCHTGOTT-ROTH. Mrs. Thurman, I'd just like to make a couple points on that. First of all, Mr. Wright is entirely correct that 254(d) is the only source of funding. But I would note that today the telecommunications carriers pay different rates on different bases for different funds. The Commission has set up a very complicated structure, so for instance, for schools and libraries, they pay a certain percentage on both inter and intrastate funds, entirely separable from a different rate that is applied only to interstate funds that is used for high-cost and low-income programs.

The other issue which I think is relevant to the question of whether or not it is a tax is how the money is spent. And for both high-cost and low-income, all of the money consistent with section 214(e) and 254(e) only goes to eligible carriers. The eligible carriers are all telecommunications carriers, so all of the money stays within the telecommunications industry. It is a shifting of funds from one telecommunications carrier to another.

Mrs. THURMAN. But in the final analysis, once the connection or the wiring—I wouldn't call it construction, but wiring—they still then are the beneficiary in the final analysis by this rewiring, is that correct?

Mr. FURCHTGOTT-ROTH. No, ma'am, I would not——

Mrs. THURMAN. Well, when they broke up and deregulated, a lot of what they stopped doing—they have a lot of subcontractors out there that do wiring and those kinds of things today. But to provide the service, if I am correct, later on once when they get the wiring done, then the whole universe gets the opportunity to participate.

Mr. FURCHTGOTT-ROTH. Not under 254, not for schools and libraries. A lot of that service will not go to telecommunications carriers at all.

Mr. WRIGHT. If I could add just a word, of course if the schools are connected and they need the inside wiring to get the Internet access, of course, the telephone companies end up benefitting. World Com and MCI are the largest owners of the Internet backbone in this country. That's one of the problems in their pending merger. Of course, if the schools and libraries have Internet access, they will use it, and the telephone companies that contribute will benefit, it's just like high-cost.

Mr. FURCHTGOTT-ROTH. Eighty percent of schools and libraries in the United States are connected to the Internet without a nickel of money from the FCC. The vast majority of these schools and libraries receive today free or discounted service to the Internet.

In fact, of the $2 billion that has been requested for 1998, less than $100 million of that is for Internet services. Most of this money is not going for Internet services. A third of the money is going for just regular telephone service discounts, and two-thirds of the money is going for what is euphemistically being described as internal connections, but what is in fact primarily money to pay for extraordinarily sophisticated computer equipment.

Mrs. THURMAN. For schools and libraries.

Mr. FURCHTGOTT-ROTH. For schools and libraries.

Mrs. THURMAN. So that universe still stays.

Mr. FURCHTGOTT-ROTH. But those people are not paying into the fund.

Mrs. THURMAN. Okay. Thank you.

Chairman JOHNSON of Connecticut. Mr. Hulshof.

Mr. HULSHOF. Thank you, Madam Chairman. So, in essence, the telecommunications carriers are paying into the e-rate program, but then companies that are not telecommunications carriers are receiving disbursements under the program. Commissioner, is that essentially——

Mr. FURCHTGOTT-ROTH. That is true for only a portion of the schools and libraries program, yes. It is not true for the other universal service programs.

Mr. HULSHOF. Mr. Wright, following up on what Ms. Johnson asked earlier, somewhere in all the information given us, I saw some information that reduced access charges have saved long-distance carriers $2 billion, is the number that comes to mind. Is that accurate, more or less?

Mr. WRIGHT. It's more like $4 billion.

Mr. HULSHOF. Four billion, okay. Is it your testimony or statement that reduced access charges to long-distance providers should pay for the e-rate program?

Mr. WRIGHT. The e-rate program is separate, but I think in understanding the whole system, it's certainly nice that they balance out this way.

Mr. HULSHOF. Well, hasn't the FCC stated that reduced access charges should be passed on to the consumers?

Mr. WRIGHT. Again, we are not in the direct business of rate regulation. But it is our understanding that in a competitive market, rate reductions should be passed on to the consumers. We've declared this a competitive market; that's why we've deregulated it.

Mr. HULSHOF. And hasn't the fact been long-distance carriers have reduced their rates in excess of the savings from the reduced access charges?

Mr. WRIGHT. Some of them are offering some very good deals these days, yes.

Mr. HULSHOF. So I guess my question is how can the savings be spent twice? That is a nonlegal way to say it, but ultimately, it seems that we are spending the savings more than once, are we not?

Mr. WRIGHT. Again, there is no direct tie. The long-distance companies set their own rates. You are certainly right that the e-rate program costs money; it comes from somewhere.

If I could give you an example, though, of why it's very important that some nontelecommuncations companies get money, I think look at this from the point of view of a school district. You want to buy Internet service. The telephone companies are arguing that only telecommunications companies should provide that, so around here you could get Bell Atlantic.

But, of course, there are lots of Internet service providers that are not telecommunications carriers. They are not eligible under the telephone companies' argument. Under the telephone companies' argument, a school has to choose the high-cost telephone company and can't choose AOL, can't choose Gateway, can't choose Erol's, even if they are lower cost and better priced.

Mr. HULSHOF. Let me explore just a bit—and even, Mr. Weller, as an attorney, I am not sure that I am conversant, certainly not on the scale that you are, Mr. Wright and I acknowledge that—but one of the things Mr. Weller talked about is there are some questions being raised by the General Accounting Office regarding the constitutionality of the corporation that has been established to administer the program.

Do you have any quick comment on that?

Mr. WRIGHT. Well, the quick comment is that we directed the universal service group to reorganize itself. They are in the process of doing it. We believe that that fully responds to GAO's complaints.

Mr. HULSHOF. Regarding your comments about the 5th circuit—and I am not holding you to this—but the case has been argued, or are we simply waiting for the Court's opinion at this point?

Mr. WRIGHT. No, the case hasn't been argued yet.

Mr. HULSHOF. Okay, it has not been argued.

Mr. WRIGHT. It has been briefed, but not argued.

Mr. HULSHOF. You wanted to put this on an expedited track, but the other parties have not. Any anticipation of when? What is the normal course as far as when briefs and arguments and ultimately an opinion? What's your best guess?

Mr. WRIGHT. Briefs are in. Unless expedited, the argument probably won't be held until the winter.

Mr. HULSHOF. Okay. Let me ask you this question. You state that these issues are raised in the 5th circuit litigation. But I'm not sure that your brief responds to the argument that the e-rate program, as distinct from the entire universal service program, raises the separation of powers issue.

You talk about the Origination Clause issue. Can we be confident that the 5th circuit will address the issue of the separation of powers, because I am not sure your brief quite addresses that point.

Mr. WRIGHT. The way the issue is teed up in the 5th circuit, the tax issue has been separate from whether we interpreted 254(h) properly. And we filed about a 200-page brief there. You will find a few pages on the tax issue. There are about 25 pages somewhere else on whether we've interpreted 254(h) properly to cover internal connections and Internet access.

Mr. HULSHOF. So hopefully, the 5th circuit, although again, drawing upon past experience, oftentimes courts will only give us a narrow holding. So even though some of the witnesses previously say we should wait until the 5th circuit returns its opinion, it could very well be that the 5th circuit is only going to narrowly address the issue and we still may have this discussion at a later time.

Mr. WRIGHT. Yes. I would say that in the normal course, we won't get an opinion from the 5th Circuit until next summer, and as already noted, we've got 30,000 applications pending, 100,000 schools. And we are getting a lot of complaints from the schools that we ought to move more quickly.

Mr. HULSHOF. Thank you, Madam Chair.

Chairman JOHNSON of Connecticut. I thank the panel for testifying. I think the number of applications you received attests the importance of this program and the importance of resolving the problems around it.

I would also want to comment on the fact that the bill wasn't blue-slipped does indicate that the parliamentarian judged that this was not a tax, presumably in consultation with either the Joint Tax Staff or with the staff of the Ways and Means Committee. The issue really is whether or not it becomes a tax by virtue of the way the FCC implemented it. And I think this hearing has given us a great deal of insight into that issue.

I personally am very impressed with the fact that two-thirds of the money is going to wiring and computers. And I would just remind both the members and the public that this Congress doubled the money for school technology in last year's budget to over half a billion dollars, because we do believe it is our responsibility to help schools become state-of-the-art technologically.

This Congress also passed just last year in the tax bill tax incentives to help schools be able to get state-of-the-art technology and to improve the partnership between the business community and the schools in terms of the transfer of modern technology into the school system for their usage.

So there are many indications that the Congress feels responsible for achieving the goal of assuring state-of-the-art technology in our schools and libraries, and certainly, the directive to the FCC of a discounted rate is harmonious with achieving not only the goal of creating that system, but assuring its functioning and assuring it in a way that is harmonious with the history of our effort to subsidize those who are least able to pay the rates for communications services.

But I do think that the nature of the grant subsidy program that the FCC developed raises very significant questions about whether a fee has then become a tax by virtue of who pays and who benefits, and also whether we can afford to have administrative agencies make that kind of interpretation and put in place programs that, in many ways, duplicate the administrative efforts of the government to achieve the same goal in other parts of the bureaucracy.

So I think we have gained a lot more insight into both the constitutional and legal issues that the recent actions of the FCC raise, and I think we also have given ourselves a lot more information about the variety of ways in which we can go about assuring that the goal, on which we all agree, of high technology and modern wiring into our schools can be achieved.

So I thank you for your participation today, and I thank the members for their constancy in staying until the end. Thank you.

[Whereupon, at 12:25 p.m., the hearing adjourned subject to the call of the Chair.]

[A submission for the record follows:]

August 3, 1998

Subcommittee on Oversight
U.S. House of Representatives Committee on Ways and Means
1102 Longworth House Office Building
Washington, D.C. 20515

Dear Representative:

As you consider funding issues arising out of the E-Rate program at this week's hearing, the members of the Education and Library Networks Coalition (EdLiNC) thought it important that we share with you our perspectives on the program's significance and the various proposals advanced to fund it. EdLiNC is a coalition of 35 public and private education and library groups that collectively represent millions of parents, students, educators and librarians. We have spent the past four years advocating for schools and libraries to receive discounted access to advanced telecommunications services. We are strong supporters of the E-Rate program and seek its preservation.

In the program's first year, schools and libraries nationwide have submitted more than 30,000 applications - representing an estimated $2.02 billion - for discounts on Internet access, telecommunications service, and internal connections. Such a response is extraordinary in light of the extremely rigorous application requirements, which include: drafting and receiving approval for comprehensive technology plans; reserving adequate local funds to pay for the undiscounted portions of the telecommunications services requested; purchasing complementary technology such as hardware and software; and completing two detailed applications.

The popularity of this program underscores the desperate need that poor and rural schools and libraries have for the discounted telecommunications services that the E-rate will help provide. Currently, only 27 percent of this nation's classrooms - and only 14 percent of classrooms in low-income schools - are linked to the Internet. Moreover, according to a recent study, only one in seven public library systems is able to offer public access to the Web at some or all of its branches.

The significance of these numbers is deepened further by a July 1998 report from the National Telecommunications and Information Administration (NTIA) which indicates that urban, minority and rural students lack computers and Internet access at home and must depend on their schools and libraries for access to technology. According to NTIA's *Falling Through the Net II: New Data on the Digital Divide*, 14.7 percent of urban households with annual income between $25,000 and $35,000 have Internet access, well below the national average for home Internet access. Black and Hispanic households are particularly technology deprived when it comes to this measurement, with only 7.7 percent of Black households and 8.7 percent of Hispanic households having Internet access. Access to the Internet for white households, by way of comparison, is 25.2

percent nationwide. According to the report, rural households are "among the least connected." Whereas 5.6 percent of urban households with annual incomes between $10,000 and $15,000 receive Internet access, only half that number of rural households in the same income bracket are able to reach the Internet.

The strong response to the program's call for applications and obvious need for this technology has engendered vocal support for its goals from members of both parties. During the debate on the Telecommunications Act of 1996, Senators Snowe, Rockefeller, Exon and Kerrey successfully pressed for the adoption of the E-Rate program. Subsequently, a bipartisan board comprised of federal and state regulators approved unanimously a plan to implement the program. Since the formal inception of the application process, letters extolling the program were sent by Governors Voinovich and Carper on behalf of the National Governors' Association and by Governor Geringer for the Western Governors' Association. In March 1998, a letter to FCC Chairman Kennard that endorsed the program was signed by over 100 House members, including Representatives Blumenauer, Bereuter, Morella, Rush, Shays and Weldon. On the Senate side, a bipartisan letter from eight Senators, spearheaded by Senators Kennedy, Jeffords, Rockefeller and Santorum, decried efforts to cut funding for this program and sought full funding for all valid applications.

America's high-technology corporations also recognize the need for the E-Rate program. Today, more than 300,000 information technology jobs remain unfilled due to a lack of qualified candidates. By the year 2000, fully two-thirds of all jobs will demand skills using computers and information technologies. In May 1998, 3Com Corporation wrote to the FCC that: "For students in (low-income) schools, E-Rate is the clearest way for them to benefit from information technologies and the Internet." A second letter from Cisco Systems, Sun Microsystems, Apple and Novell advised that, "In order for our children and our country to compete and win globally in the New Economy, we must bring technology into the classrooms where we can better prepare them for the jobs of the 21st Century...E-Rate will help level the playing field for all our children."

Despite this groundswell of support, the E-Rate has sustained a barrage of criticism on the ways it is administered and funded. In response, the FCC ordered the removal of nearly $1 billion from the program this year and that discounts for internal connections go only to the poorest schools. Additionally, the FCC streamlined the administrative mechanisms established to run the program, lowered the salaries of the program's administrators, and instituted even more stringent and independent auditing and accountability measures to preclude fraud and abuse in the application process.

These new cuts mandated by the FCC have already wreaked considerable havoc on the program. Under this new plan, schools where as many as half of the students are poor will be ineligible for internal connections discounts. Furthermore, many of the resources leveraged by these schools, including acquisition of hardware, software, training, and their portions of telecommunications services, will be rendered valueless without the

ability to connect students in classrooms. It is not an exaggeration to say that any further efforts to cut or delay the implementation of the E-Rate program will be very unfortunate.

EdLiNC does welcome and encourage good faith efforts to place the E-Rate program on stable financial ground. We are pleased that Representative Tauzin and Senator Burns recognize the important mission of the E-Rate program, and we acknowledge their work on a proposal to fund the program, including the internal connections component, through the telephone excise tax.

However, there are a number of principles that must be met for any proposal to truly meet the needs of the schools, libraries and communities that are counting on the E-Rate.

1. All of the current, valid applications must receive the promised and needed discounts without delay.

2. The E-Rate must remain a locally-driven initiative with minimal administrative requirements. The current discount structure achieves those goals. We are concerned that any new administrative structure not undermine local decision-making and create a significant delay in the program while new rules and systems are established. In addition, any proposal that substitutes federal tax dollars for universal service discounts will create confusion regarding the eligibility of some private and parochial schools for the E-Rate.

3. Sufficient and predictable funding must be available for discounts. Original estimates showed that a fund capped at $2.25 billion would be sufficient to make services affordable. Given that current applications are estimated at $2.02 billion, that cap appears to reflect the need. Moreover, given the obligations and contracts that must be undertaken and signed in advance for E-Rate covered services, any proposal must guarantee that funds will be available.

4. All service areas -- Internet access, recurring telecommunications services and internal connections -- must be eligible for discounts. Each of these areas is vital. For instance, without internal connections discounts that bring services directly to the classroom, few students will be able to utilize these important resources.

We appreciate the Committee's interest in the program and look forward to working together to ensure its continued vitality. As you engage in this week's hearing, please don't forget that 30,000 applicants, representing millions of students, educators, librarians and library patrons, await the fulfillment of the promise of telecommunications discounts that Congress made to them in February 1996. We hope that their wait will not be in vain.

Sincerely,

American Association of Educational Service Agencies
American Association of School Administrators
American Federation of Teachers

American Library Association
American Vocational Association
Consortium for School Networking
Council of Chief State school Officers
International Society for Technology in Education
National Association of Elementary School Principals
National Association of Independent Schools
National Association of Secondary School Principals
National Education Association
National Education Knowledge Industry Association
National Grange
National Rural Education Association
National School Boards Association