

# ALA American Library Association

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

RE: WC Docket No. 03-109  
WC Docket No. 96-45  
WC Docket No. 11-42

Dear Secretary Dortch:

The purpose of this letter is to set forth The American Library Association's (ALA) view of the legal issues involved as the Federal Communications Commission (FCC or Commission) considers whether to use funds from the Universal Service Fund (USF) to support digital literacy training. The letter is a follow-up to a November 21, 2011, meeting with FCC staff and counsel to seek clarity on the FCC's legal authority regarding digital literacy training and the USF. ALA suggests that there is no legal authority that allows the FCC to use funds from the E-rate program to support digital literacy, but there may be other options for supporting digital literacy through the Lifeline and Link Up programs.

ALA strongly supports efforts to promote digital literacy to address a skills gap, promote digital opportunity, and enhance broadband subscribership. In fact, many libraries actively provide digital literacy training to seniors, immigrants, low-income, and other residential consumers around the country, through initiatives funded through the Broadband Technology Opportunities Program (BTOP)<sup>1</sup> and other sources. Providing digital literacy training is one of the critically important services that libraries provide to their communities to help people succeed in the 21<sup>st</sup> century information age. For this reason, we applaud the efforts by the FCC to promote digital literacy.

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<sup>1</sup> See, NTIA, Broadband Technology Opportunities Program, Expanding Broadband Access and Adoption in Communities Across America, Overview of Grant Awards (2010) (*available at* [http://www.ntia.doc.gov/reports/2010/NTIA\\_Report\\_on\\_BTOP\\_12142010.pdf](http://www.ntia.doc.gov/reports/2010/NTIA_Report_on_BTOP_12142010.pdf)). ALA has worked closely with NTIA and its digital literacy portal providing feedback on the user interface, promoting its use among librarians, as well as providing content from libraries across the country (see: <http://www.digitalliteracy.gov/>). See also ALA's comments on broadband adoption and the National Broadband Plan (*available at* [http://www.districtdispatch.org/wp-content/uploads/2009/12/ALA-NBP-Public-Notice-16-12\\_2\\_09\\_final.pdf](http://www.districtdispatch.org/wp-content/uploads/2009/12/ALA-NBP-Public-Notice-16-12_2_09_final.pdf)).

We are dismayed, however, by the suggestion that funds from the underfunded E-rate program could be used to support digital literacy training.<sup>2</sup> The E-rate program was created by Congress to support telecommunications services and access to information services for schools and libraries. The program has allowed countless schools and libraries to obtain high-speed access to the Internet and other telecommunications services that they could not otherwise afford. Expanding the E-rate program to cover “training” would go beyond the statutory purposes and authority established by Congress and likely would prevent many libraries (and schools) from being able to provide their patrons with the high-speed Internet connections on which they depend.

**1. The FCC does not have authority to use E-rate to support digital literacy training.**

The statutory language in section 254 that serves as the controlling legal authority for the E-rate program is very limited and does not allow funding for any kind of “training.” The statutory language is focused on funding advanced telecommunications services and access to information services, such as the Internet. For instance,

- Section 254(b)(6) says “Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).”
- Section 254(h)(1)(B) says that telecommunications carriers must offer discounted rates for “services that are within the definition of universal service under subsection (c)(3).”
- Section 254(h)(2) states “The Commission shall establish competitively neutral rules – (A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries;”

Some may argue that one provision of the E-rate statutory language – section 254(c)(3) – is more open-ended. Even this provision, however, is itself limited by the goals set forth in section 254 and the provisions of subsection (h) quoted above. Thus, section 254(c)(3) cannot justify expanding the E-rate program to include digital literacy training. Section 254(c)(3) states:

(3) SPECIAL SERVICES. – In addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h).

While this provision allows the FCC to support services that are broader than “telecommunications services,” it is nonetheless limited to “services . . . for schools, libraries and health care providers.” The services supported by the E-rate program must be related to improving the schools’ and

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<sup>2</sup> See, Remarks of FCC Chairman Julius Genachowski on Broadband Adoption, Oct. 12, 2011, *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-310350A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-310350A1.pdf).

libraries' telecommunications services and access to the Internet. Stated another way, the E-rate program is intended to support services provided for libraries, not services (such as digital literacy training) provided by the libraries to others. Furthermore, section 254(c)(3) is tied to "the purposes of subsection (h)." There is no language in subsection (h) that refers to any form of "training."

To understand the legal boundaries of the E-rate provisions, it is useful to review the Commission's initial steps to implement this language in 1997 and the court action that followed. When the FCC first established the E-rate program, it found that the statutory language limited the E-rate program to supporting telecommunications services, Internet access, and internal connections. The inclusion of "internal connections" was justified as necessary to provide "access to information services" (in section 254(h)(1)(B)) and was supported by the statutory language that encouraged connections to "classrooms."<sup>3</sup> The legislative history surrounding section 254 also supported the inclusion of Internet access and internal connections.

Furthermore, the 1997 Order also generally found that the E-rate program was created to support services that provide a form of "conduit" to the Internet, but generally not to support "content" provided over the Internet connection. The Commission's recognition of the difference between "conduit" and "content" again reflects that the term "special services" in section 254(c)(3) is not unlimited but relates back to the provision of section 254(h)(1)(B) supporting "access to" information services.<sup>4</sup> Thus, section 254(c)(3) cannot be used to justify support for digital literacy training, because such training is not supported by the legislative history and is not necessary to support the libraries' "access to advanced telecommunications and information services."

A subsequent court decision also demonstrates the narrow scope of the FCC's E-rate authority. Some telecommunications carriers (notably GTE) challenged the FCC's 1997 decision to include E-rate support for Internet access and internal connections, arguing that the statutory language was limited to supporting "telecommunications services" alone. The FCC's decision to include Internet access and internal connections was upheld by the 5<sup>th</sup> Circuit Court of Appeals, but barely. The court agreed with GTE that the "best reading" of the statute did not authorize support for non-telecommunications services. The court nonetheless upheld the FCC's 1997 Order, finding the statutory language and the legislative history sufficiently ambiguous that the FCC deserved deference in its interpretation of the language.<sup>5</sup> Given this court's skepticism of the FCC's

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<sup>3</sup> "Given the directive of section 254(h)(2)(A) that the Commission enhance the access that schools and libraries have to 'information services,' as described in the legislative history, i.e., actual educational content, we conclude that there should be discounts for access to these services provided by telecommunications carriers under the broad provisions of sections 254(c)(3) and 254(h)(1)(B)." In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, May 8, 1997 ("1997 USF Order"), para. 440.

<sup>4</sup> See, 1997 USF Order, para. 441 ("We do not grant schools and libraries discounts on the cost of purchasing information content. We conclude, however, that we are authorized to provide discounts on the data links and associated services necessary to provide classrooms with access to those educational materials, even though these functions meet the statutory definition of "information services" because of their inclusion of protocol conversion and information storage.").

<sup>5</sup> "The best reading of the relevant statutory language nonetheless indicates that the FCC exceeded its authority by mandating discounts for internet access and internal connections. . . Even though GTE has offered a persuasive reading

inclusion of non-telecommunications services, it is extremely doubtful that any reviewing court would uphold an FCC decision to expand the E-rate program to cover digital literacy training when there is no statutory provision or legislative history to support such an expansion.

Perhaps because of this court decision, the FCC has not (to our knowledge) permitted the E-rate program to be used for services other than those that help schools and libraries obtain “telecommunications services” or “access to advanced telecommunications and information services.” In fact, the Eligible Services List specifically excludes (rather than simply omitting) “training” from the list of services that can be supported by the E-rate program because the statutory language forbids training from being funded by the E-rate program.<sup>6</sup>

The 2010 E-rate Reform Order seemed to affirm that the E-rate program could not and should not be expanded. In that Order, the FCC described its decision as modernizing the E-rate program while ensuring that the E-rate program would continue to be used for its intended purposes.<sup>7</sup> That Order did not discuss using E-rate funds for digital literacy. In fact, the Order encouraged private sector contributions to schools and libraries to support digital literacy outside the E-rate process.<sup>8</sup>

In summary, there is no legal support for using the Congressionally-mandated E-rate program to fund digital literacy training, and it is highly unlikely that a reviewing court would permit such an expansion. There is a great risk that opening the E-rate program to new purposes such as training will drain resources from the E-rate fund and move away from its Congressionally-mandated purpose of supporting telecommunications and advanced communications services and access to the Internet.<sup>9</sup>

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of the statute, its plain language does not make Congress's intent sufficiently "unambiguous" for *Chevron* step-one review. Therefore, we defer to the FCC's interpretation under *Chevron* step-two and affirm those aspects of the Order providing internet services and internal connections to schools and libraries.” [footnotes omitted] *Texas Office of Public Utility Counsel, et. al. v. FCC*, 183 F.3d 393 (5th Cir. 1999).

<sup>6</sup> See, *Schools and Libraries Universal Service Support Mechanisms, Eligible Services List for Funding Year 2012*, Sept. 28, 2011, p. 11, available at [http://www.usac.org/res/documents/sl/pdf/ESL\\_archive/EligibleServicesList-2012.pdf](http://www.usac.org/res/documents/sl/pdf/ESL_archive/EligibleServicesList-2012.pdf).

<sup>7</sup> “Through this order, and future upgrades, the Commission is taking a measured approach to modernizing the E-rate program, while maintaining protections to ensure that E-rate support is being used only for its intended purposes.” *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, A National Broadband Plan for Our Future, GN Docket No. 09-51 (“2010 E-rate Order”), para. 3.

<sup>8</sup> “The rule we articulate today does not discourage companies from making charitable donations to E-rate eligible entities in the support of schools – including, for example, literacy programs, scholarships, and capital improvements – as long as such contributions are not directly or indirectly related to E-rate procurement activities or decisions.” 2010 E-rate Order, para. 90. The statements of Chairman Genachowski and Commissioner Clyburn noted that enhancing schools and libraries’ broadband connections can enhance digital literacy, but neither statement suggests using E-rate funds for this purpose.

<sup>9</sup> See Statement of Commissioner McDowell regarding the wireless project initiated in the 2010 E-rate Order (“It would be unfortunate if the demands of new expenditure streams were to drain the reservoir of funds needed to accomplish the primary objective of the fund: connecting schools and libraries to the Internet.”)

## **2. The Lifeline and Link Up programs could be used to support digital literacy training.**

ALA respectfully suggests that incorporating digital literacy training into the Lifeline and Link Up programs is more legally sustainable than attempting to use the E-rate program.<sup>10</sup> The Commission has legal authority pre-dating the Telecommunications Act of 1996 to amend the Lifeline and Link Up programs to support broadband services and to include digital literacy training. Furthermore, the Lifeline/Link Up programs and the digital literacy initiative have similar purposes, as both are intended to promote adoption by residential consumers.

Admittedly, the Lifeline/Link Up programs currently do not support broadband services.<sup>11</sup> But Congress has encouraged the FCC to take action to promote broadband adoption,<sup>12</sup> and the National Broadband Plan calls upon the FCC to expand Lifeline/Link Up to support broadband services.<sup>13</sup> The pending Lifeline/Link Up modernization proceeding provides an appropriate opportunity to provide funding for digital literacy training through those programs.<sup>14</sup>

The FCC adopted the Lifeline/Link Up programs in 1985 under authority granted by the Communications Act of 1934, well before passage of the Telecommunications Act of 1996.<sup>15</sup> The FCC adopted the Lifeline/Link Up programs pursuant to its general authority under sections 1, 4(i), 201, and 205 of the Communications Act. Section 1 directs the Commission to make “available to all people of the United States . . . a rapid, efficient . . . wire and radio communication service.” This language is broad enough to include broadband as a form of “communication service.” In fact, the Commission has already recognized in its “Net Neutrality” decision<sup>16</sup> that it has authority

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<sup>10</sup> The Commission's Lifeline program reduces qualifying consumers' monthly charges, and Link Up provides federal support to reduce eligible consumers' initial connection charges by up to one half.

<sup>11</sup> If the FCC chooses not to modify the Lifeline/Link Up programs to accommodate broadband services and digital literacy, another option would be to establish a separate (fifth) program under the USF umbrella. The Commission appears to have the flexibility to establish a fifth program for broadband and digital literacy if it chooses to do so, as nothing in section 254 dictates the existence of four and only four separate funds within the USF. The FCC could, for instance base its authority to create a fifth program for broadband and digital literacy on the same authority it used to create the Lifeline/Link Up programs. The Commission may also be able to create such a program under section 706, which directs the FCC to take immediate action to spur broadband deployment.

<sup>12</sup> Congress required the Commission to report annually on the state of broadband availability, and to develop the National Broadband Plan, “to ensure that all people of the United States have access to broadband capability.” American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 516, § 6001(k)(2)(D), (“Recovery Act”).

<sup>13</sup> See, Federal Communications Commission, *Connecting America: The National Broadband Plan* (rel. Mar. 16, 2010), (“National Broadband Plan”) at 172.

<sup>14</sup> *Lifeline and Link Up Reform and Modernization NPRM*, 26 FCC Rcd at 2872-3; *Further Inquiry Into Four Issues in the Universal Service Lifeline/Link Up Reform and Modernization Proceeding*, WC Docket Nos. 03-109, 11-42, CC Docket No. 96-45, Public Notice, 26 FCC Rcd 11,098, 11,100-03 (Wireline Comp. Bureau 2011)

<sup>15</sup> Thus, the Commission’s authority to amend the Lifeline/Link Up programs to incorporate broadband and digital literacy does not depend upon the provisions of section 254, the universal service provisions added by the Telecommunications Act of 1996.

<sup>16</sup> *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905.

under Title I of the Communications Act to oversee broadband services, and its broad authority under Title I has been recognized by the Supreme Court.<sup>17</sup>

Section 706 may provide independent legal authority to include digital literacy training in the Lifeline/Link Up programs.<sup>18</sup> Section 706 directs the Commission to “take immediate action to accelerate deployment of [advanced telecommunications] capability” if it finds that broadband services are not being deployed in a reasonable and timely manner. The FCC has already made this finding, which triggers the duty to take action. The Commission recently determined that section 706 provides legal authority for the FCC to provide financial support to broadband networks.<sup>19</sup> Following the same logic, it could be argued that the Commission has a duty to provide support for digital literacy training and broadband through the Lifeline/Link Up programs, as encouraging broadband adoption also will encourage greater broadband deployment.

Section 254(j) does not pose a barrier to the Commission expanding the Lifeline/Link Up programs to incorporate broadband and digital literacy. Section 254(j) states

(j) LIFELINE ASSISTANCE. – Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title.

In the 1997 USF Order, the Commission rejected the notion that section 254(j) prevented the Commission from making changes to the Lifeline/Link Up programs:

We agree with the Joint Board that section 254(j) allows us to adopt certain changes to the Lifeline program in order to make it consistent with the goals of the 1996 Act. We thus concur with the Joint Board's finding that Congress did not intend for section 254(j) to codify every detail of the existing Lifeline program, but that it intended to give the Joint Board and the Commission permission to leave the Lifeline program in place without modification, despite Lifeline's inconsistency with other portions of the 1996 Act.<sup>20</sup>

The Commission also found that

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<sup>17</sup> NATIONAL CABLE & TELECOMMUNICATIONS ASSN. V. BRAND X INTERNET SERVICES (04-277) 545 U.S. 967 (2005). (“ . . . the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction.”)

<sup>18</sup> Some may point out that the Lifeline/Link Up programs are intended to address the needs of low-income persons, whereas digital literacy training is intended for any person regardless of income. In reality, low-income persons are likely to make up a significant percentage of the consumers who would benefit from digital literacy training, so a digital literacy training program is likely to be consistent with the goals of the Lifeline/Link Up program.

<sup>19</sup>In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Inter-carrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform – Mobility Fund, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WT Docket No. 10-208, FCC 11-161, November 18, 2011.

<sup>20</sup> 1997 USF Order, para. 332.

section 254(j) applies only to changes made pursuant to section 254 itself. Our authority to restrict, expand, or otherwise modify the Lifeline program through provisions other than section 254 has been well established over the past decade.<sup>21</sup>

Thus, it appears that the Commission has legal authority to incorporate broadband and digital literacy training into the Lifeline/Link Up programs under some of the same statutory provisions that it used to initiate the program in 1985. Furthermore, section 706 appears to provide independent legal authority to do so, and section 254 does not bar the Commission from expanding the program to include digital literacy. The pending Lifeline/Link Up proceeding provides the best opportunity to provide funding for this important initiative.

### **3. Conclusion**

Digital literacy training is an extremely important service that can help people across the country obtain broadband connections and take advantage of the critical health, education, e-government and information services that are increasingly available online. Libraries nationwide are making great efforts to educate people about digital technologies and services and how their use can improve the economic vitality and quality of life in every community.

While ALA supports federal efforts to promote digital literacy training, we believe there are several legal obstacles that prohibit use of E-rate funds for digital literacy training. Nonetheless, the FCC may have other avenues to pursue to support digital literacy. While the Commission may have legal authority to create a fifth program under the USF umbrella to support broadband and digital literacy, the best approach may be to amend the Lifeline/Link Up programs to support broadband adoption and digital literacy training. The Commission appears to have the legal authority under Title I and section 706 to expand these programs to provide funding for digital literacy training. We look forward to working with the Commission in its efforts to promote greater digital literacy and broadband adoption.

Respectfully submitted,



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<sup>21</sup> Id., para. 337.