

January 12, 2022

Marlene Dortch, Secretary
Federal Communications Commission
45 L Street NE
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation
Affordability Connectivity Program, WC Docket No. 21-450
Emergency Broadband Benefit Program, WC Docket No. 20-445

Dear Ms. Dortch:

On January 10, 2022, Patrick Halley, Senior Vice President, Policy & Advocacy and General Counsel, Morgan Reeds, Director, Policy & Advocacy, and the undersigned of USTelecom – The Broadband Association (USTelecom) met by videoconference with Greg Watson Wireline Legal Advisor to Commissioner Carr regarding the recently published draft Order in the above-referenced docket.¹ On January 11, 2022, the same parties met separately by videoconference with Austin Bonner, Wireline and Public Safety Legal Advisor to Commissioner Starks, Marco Peraza, Wireline Legal Advisor to Commissioner Simington, and Jessica Campbell, Negheen Haya Sanjar, Christian Hoefly, Eric Wu, Travis Hahn, Sherry Ross and Rashan Duvall from the Wireline Competition Bureau (Bureau), and Trent Harkrader, Acting Special Advisor to the Chairwoman and Deputy Bureau Chief, Wireline Competition Bureau regarding the same topic.

During the meetings, USTelecom expressed its sincere appreciation for the work of the Bureau in drafting a thoughtful and comprehensive item in a compressed time period and for the opportunity to review the draft before it is adopted. USTelecom discussed specific aspects of the draft Affordable Connectivity Program (ACP) Order (Draft Order) that appear inconsistent within the Draft Order and/or need clarity. More specifically, USTelecom raised concerns about the non-payment provisions, the grandfathered plans requirement, the non-usage tracking rules, the broad delegation to the Bureau and Office of Economics and Analytics (OEA) to collect additional service quality data, and prescriptive advertising requirements. In addition, USTelecom sought clarity on the prioritization of federal and state lifeline discounts in providing the ACP discount on a consumer bill.

Non-payment

With respect to the non-payment provisions, USTelecom argued that it cannot be the case that when including the non-payment clause in the statute, Congress intended for providers to be permitted to discontinue service after 90 days of non-payment only to be required on day 91 to re-enroll that same customer without the customer having paid their outstanding balance. As a general matter, it is inconsistent with the statute and bad policy to allow consumers to obtain service from one provider for 90 days, not pay their bill, and then re-enroll with that same provider or seek to enroll with another provider, only to continue the pattern of non-payment without penalty. At a minimum, a provider who disconnects a customer for non-payment should not be forced to re-enroll the same customer until they pay any outstanding debts.

With this in mind, we appreciate the language in paragraph 144 of the Draft Order that appears to permit providers to mitigate this problem by allowing a customer to be transitioned to a plan that is less

¹ *In the Matter of Affordable Connectivity Program et al.* Report and Order and Further Notice of Proposed Rulemaking, WC Docket Nos. 21-450 & 20-445, FCC CIRC22-450-010722 (*Draft Order*).

than \$30 so as to avoid incurring any additional debt and remain connected.² However, the draft requires customer consent for such a mitigation measure and, absent consent, if the provider elects to transition them to a different lower-cost plan, the provider would be in a position of running afoul of the downselling rules which prohibit a provider from “requiring a prospective or current household to change to a lower-cost service plan...”³ On the other hand, in discussing prohibitions on limiting consumers to switch plans, in para. 166 the Draft Order helpfully notes that “it is not inappropriate for a provider to limit a household that is in non-payment status to service plans covered by the full benefit amount...”

This combination of language requires clarification such that a provider should have the option of either terminating service without being required to re-enroll the customer until they have paid their outstanding bill or transitioning the customer to a new plan that will not require payment without customer consent until they have paid their balance. To effectuate this suggestion, the Commission should remove the consent language from paragraph 144 of the Draft Order and clarify in paragraph 163 that it is not a violation of the downselling rule if a provider transitions a customer to a new lower-cost plan to mitigate their non-payment, consistent with the language in paragraph 166.

Grandfathered Plans

USTelecom also seeks clarity on the time permitted to “accommodate requests of existing subscribers to apply the [ACP] benefit to legacy or grandfathered plans on a case-by-case basis.”⁴ USTelecom appreciates that the Commission understands the technological challenges of requiring providers to apply the ACP benefit to plans that are no longer sold and that offering a grandfathered customer the option of transitioning to a current offering that may better meet their needs is not upselling.⁵ However, the Order does not provide a clear time frame within which a provider can accommodate that grandfathered customer once a request is made. The backend work that is required to provide the benefit to a particular legacy/grandfathered plan cannot happen within the five days required to apply the benefit to a customer bill.⁶

Providers will be challenged to complete the systems work necessary to comply with the 60 day implementation for currently offered generally available plans. With respect to grandfathered plans, a provider has no way to know at the outset whether any or what portion of grandfathered customers will seek to apply the ACP benefit to their legacy plans. For some providers, if a substantial number of customers on legacy plans seek to apply the ACP benefit, this will require a significant amount of one-off systems work that will require far more than five days. Therefore, it would be helpful for the Commission to clarify what a reasonable time is to accommodate such individual case-by-case requests. USTelecom proposes up to 90 days. This should be an adequate amount of time to make all of the necessary changes to a provider’s systems and accommodate the consumer. While there would be a period in which the customer is waiting for the benefit to apply, the consumer is in no way harmed because they are making a choice to remain on a plan that they are already subscribed to and already paying for. Additionally, provided the request is made after the 60 day implementation period for currently offered and generally available plans, the customer has the option to select one of those plans if they wish to have the ACP more immediately applied.

Non-usage Requirements

The non-usage requirements in the draft Order require providers to continuously track usage of a customer⁷ rather than the way it is done now in the EBB Program which allows providers to determine if the service was used at least once in a calendar month.⁸ USTelecom understands the Commission’s

² *Draft Order* at para. 144.

³ *Id* at para. 163.

⁴ *Id* at para. 96

⁵ *Id.* at para. 161.

⁶ *See id.* para. 171 (“We require providers to enroll an eligible household within five business days from the date the provider receives the household’s affirmative consent to enroll with that provider for the Affordable Connectivity Program.”).

⁷ *Id.* at para 75; 47 CFR § 54.405(e)(3) (requiring Lifeline subscribers who receive a service for which a fee is not assessed or collected to use their service at least every 30 days).

⁸ *See EBB Program Order*, 36 FCC Rcd at 4658-59, 4680, paras. 92, 145.

concerns around potential waste fraud and abuse in this program. However, the approach in the Draft Order requires systems work that providers do not already have in place. A potential solution to this problem is to allow providers to continue to track usage the way they do now, but require them to provide a certification explaining how they track and certifying that they will ensure that a consumer utilizes its service in order to receive reimbursement.

Secondarily, the rule also requires providers to de-enroll the customer if they do not cure the non-usage. USTelecom members would like the flexibility to keep these customers enrolled so long as they do not claim the benefit for the customer while the provider works with the customer to ensure that they use their service. If the Commission declines to provide such flexibility and requires providers to de-enroll customers for non-usage, at least some providers will be required to undertake substantial systems work to support such a requirement that will take additional time to implement beyond what is currently contemplated in the Commission rules. For example, one provider reports that its monthly process for checking usage is highly manual, and that, today, it simply declines to seek reimbursement when it cannot demonstrate usage for a customer that received service at no cost, even though in many, if perhaps not all such cases, the customer in fact used the service but the usage monitoring tools could not confirm it. It is not clear that providers in such circumstances would be able to support a requirement to de-enroll customers for non-usage at all, but if it is possible, making the systems and equipment changes necessary to remedy the usage monitoring process and automating it to provide notifications to customers of their lack of usage is expected to take months.

Broad Delegation for Additional Data Collection

In the draft Order the Commission delegates authority to the Bureau and OEA in conjunction with USAC to determine whether it is useful to collect service plan characteristics at a later date and whether there is a need to establish quality of service metrics.⁹ This delegation to the Bureau is overly broad and unnecessary. Currently the Commission is in the process of implementing its Broadband Data Collection proceeding,¹⁰ which when complete will collect very specific data about each providers served locations by speed. Furthermore, the Commission has just announced that it will begin another proceeding stemming from the Infrastructure Act that will require transparency from providers about their service metrics and pricing.¹¹ Indeed the Draft Broadband Label NPRM specifically seeks comment on how to include information about the ACP in the broadband labels¹² and indicates that the Commission “will be undertaking a separate rulemaking to implement section 60502(c) of the Infrastructure Act, which requires the Commission to conduct an ‘annual collection . . . of data relating to the price and subscription rates of each internet service offering of a participating provider under the Affordable Connectivity Program.’”¹³ With all of this data collection in the offing, that will stem from Commission level orders, it is unnecessary and duplicative to allow the Bureau to have open-ended authority to collect the same or similar data.

Advertising Requirements

Relatedly, the draft Order places new advertising requirements on providers that requires them providers to include information about “charges and speeds” for all ACP supported services in *all* of their advertising.¹⁴ Such a requirement is overly prescriptive and unworkable. There are far too many possible combinations of speed and prices in plans and more being added frequently to allow providers to maintain such a requirement. USTelecom understand the potential concerns about inappropriate upselling and

⁹ *Draft Order* at para 100.

¹⁰ See Establishing the Digital Opportunity Data Collection; Modernizing the FCC Form 477 Data Program, WC Docket Nos. 19-195, 11-10, Third Report and Order, 36 FCC Rcd 1126 (2021); Establishing the Digital Opportunity Data Collection; Modernizing the FCC Form 477 Data Program, WC Docket Nos. 19-195, 11-10, Second Report and Order and Third Further Notice of Proposed Rulemaking, 35 FCC Rcd 7460 (2020); Establishing the Digital Opportunity Data Collection; Modernizing the FCC Form 477 Data Program, WC Docket Nos. 19-195, 11-10, Report and Order and Second Further Notice of Proposed Rulemaking, 34 FCC Rcd 7505 (2019).

¹¹ See *In the Matter of Empowering Broadband Consumers Through Transparency* CG Docket No. 22-2, FCC-CIRC-2201-01 (*Draft Broadband Label NPRM*).

¹² *Draft Order* at para. 21.

¹³ *Id.* at para. 25.

¹⁴ *Id.* at para.205.

downselling. However, this is adequately handled by those rules in this item. Furthermore, providers are quite adept at marketing their services and do not require such prescriptive rules in order to be effective in letting consumers know what services they provide. Additionally, requiring mass amounts of information on all advertising would likely result in consumer confusion and be less effective in garnering increased program participation.

Clarity on the Application of Federal and State Lifeline Programs and the ACP

Finally, USTelecom sought clarification regarding the prioritization of application of various low-income discounts. In its comments in this proceeding USTelecom asked that the Commission provide for a consistent approach where the consumer's federal Lifeline benefit was applied first, then the state low-income benefit and finally the ACP benefit.¹⁵ The Draft Order seems to imply that the entire Lifeline benefit (Federal and state) should be applied first, then the ACP.¹⁶ However, the same section ends with an open-ended statement suggesting that the Commission will “defer to any state on how that additional benefit should be applied in conjunction with the federal affordable connectivity benefit.”¹⁷ There is significant value in having a consistent approach across the country in applying these discounts and USTelecom urges the Commission to clarify as such.

Please contact the undersigned if you have any questions.

Sincerely,

/s B. Lynn Follansbee /
B. Lynn Follansbee
Vice President, Policy & Advocacy

cc: Marco Peraza
Austin Bonner
Greg Watson
Trent Harkrader
Jessica Campbell
Negheen Haya Sanjar
Christian Hoefly
Eric Wu
Travis Hahn
Sherry Ross
Rashan Duvall

¹⁵ Comments of USTelecom, WC Docket No. 21-450, p. 21 (Dec. 8, 2021)

¹⁶ *Draft Order* at para. 121 (“We now provide guidance that when applying the affordable connectivity benefit to a Lifeline service, providers should first apply the full Lifeline subsidy, and then the federal affordable connectivity benefit.”).

¹⁷ *Id.*