

2. Introduction

On December 27, 2020, the President signed the Consolidated Appropriations Act, 2021 (“Consolidated Appropriations Act” or “Act”).² Section 904 establishes an Emergency Broadband Connectivity Fund of \$3.2 billion and directs the FCC to use that fund to establish an Emergency Broadband Benefit Program, under which eligible households may receive a discount off the cost of broadband service and certain connected devices during an emergency period relating to the COVID-19 pandemic, and participating providers can receive a reimbursement for such discounts. TechFreedom supports this effort, but suggests a number of areas in which the FCC’s implementation of the Act can lead to a quicker and more efficient rollout of this program.

3. The Emergency Broadband Benefit Program Should Include All Providers Capable of Providing Service

The FCC, in implementing the Act, must ensure that all providers capable and eligible to provide service can participate. A strict (but incorrect) reading of the definitions provision of the Act, however, could lead to a situation where only existing providers would be eligible to participate, only in their previously served local areas, and then only to their current subscriber base. Section 904(a)(9) states:

(9) INTERNET SERVICE OFFERING.—The term “internet service offering” means, with respect to a broadband provider, broadband internet access service provided by such provider to a household, offered in the same manner, and on the same terms, as described in any of such provider’s offerings for broadband internet access service *to such household*, as on December 1, 2020.³

² Consolidated Appropriations Act, 2021, H.R. 133, 116th Cong. (2020) (enacted), available at <https://www.congress.gov/bill/116th-congress/house-bill/133/text>. (“Consolidated Appropriations Act” or “Act”).

³ *Id.* at § 904(a)(9) (emphasis added).

Read (over-)literally, the Emergency Program would be limited only to existing providers and their existing customers as of December 1, 2020. The Public Notice seems to acknowledge this interpretation when it states that “[t]o avoid processing elections for providers that cannot receive any reimbursement, we construe the statute as limiting participation to broadband providers offering service as of December 1, 2020.”⁴

But this narrow reading of Section 904(a)(9) is not supported by the other provisions of Section 904 or the intent of Congress. The definition of “Eligible Household,” for example, does not require that a household be a broadband customer as of December 1, 2020, in order to be eligible.⁵ Clearly, Congress anticipated that households not currently receiving broadband service could be eligible to participate. The FCC can never close the “Homework Gap” if the FCC only supports households that already have broadband connections.

Similarly, if households without broadband connections are eligible to participate (as they should be), then, by definition, a provider should be eligible to provide broadband service to that household, even though it did not do so on December 1, 2020. The first round of CARES funding, for example, allowed many carriers to create new infrastructure, deploying deeper into rural America, some of which came online after December 1, 2020. Surely these new service areas should be supported by the Emergency Program. Instead, Section 904(a)(9) should be read only to mean that in order to be eligible to participate, a

⁴ Public Notice at 3.

⁵ H.R. 133 § 904(a)(6).

provider must have had established services anywhere in the United States as of December 1, 2020.⁶

Similarly, in order to maximize the number of households the \$3.2 billion can support, the Emergency Program should allow households with existing connections to change providers. First, this must be the case, otherwise eligible households currently receiving broadband connections from carriers that choose not to participate in the Emergency Program would not receive the subsidy unless they switch to a carrier that does participate, as Congress intended. The rules should also allow eligible households to switch broadband providers under the Emergency Program if a competing provider is willing to provide a better service package. Such an approach will encourage providers to compete for customers, and encourage consumers to seek out the best and most affordable service offerings. Tying households to their existing carriers will not optimize the Program, and would instead stifle competition amongst providers.

4. The FCC's Implementation of the Act Should be Technology Neutral

The FCC similarly should not pick “winners and losers” in the Emergency Program by favoring one delivery technology over another. The Public Notice, however, seems to favor existing wireline technologies:

We seek comment on whether the Commission should provide any further clarity on Internet service offerings and associated equipment that are eligible for reimbursement in the Emergency Broadband Benefit Program. Would associated equipment include, for example,

⁶ If the current pandemic lingers long into 2021, and the Emergency Program lasts more than a few months, TechFreedom hopes that Congress will revisit the December 1, 2020 language. With so many new and innovative systems being deployed, there is scant justification for arbitrarily excluding a provider willing to participate and offer broadband service to those in need, just because they were not fully up and running on December 1, 2020.

the monthly rental costs for modems and/or routers that are offered as part and parcel of an Internet service offering? Is there other customer-premises equipment that should be eligible for reimbursement?⁷

The simple answer is “yes,” the FCC should provide more guidance, and not restrict services and equipment available for support under the Emergency Program. Antennas for fixed wireless systems and satellite systems need to be included in the Emergency Program, lest those delivery modes be hampered. In the most rural areas of the country, and especially on tribal reservations, traditional wireline services simply are not available, and the FCC should not discriminate against both providers and subscribers who rely on equipment other than a wire, a router, and a modem. If we are to ultimately close the Digital Divide, and overcome the Homework Gap, then we need to apply every innovative technology we can to deliver service as ubiquitously as possible. The Emergency Program should be technology agnostic.

Similarly, the FCC should not limit support to broadband systems that deliver the Internet only to devices within the traditional definitions of a “computer” or “tablet.” Instead, the FCC should support any broadband connection capable of delivering data to devices that can perform the functions of a computer or tablet. This must include smartphones. It is not just a hackneyed phrase that today’s smartphones have a million times the computing capability of the NASA computers that took us to the Moon.⁸ As a 2017 *Computer World* article pronounced: “With smartphones like these, why do we need laptops? It’s official: Smartphones are powerful enough to serve as laptop or desktop computers. What are we

⁷ Public Notice at 8.

⁸ Tibi Puiu, *Your smartphone is millions of times more powerful than the Apollo 11 guidance computers*, ZME SCIENCE (Feb. 11, 2020), <https://www.zmescience.com/science/news-science/smartphone-power-compared-to-apollo-432/>.

waiting for? Smartphones are supercomputers.”⁹ In the same way that the poor who live in rural areas must rely on wireless and other innovative technologies, many of these same people rely almost exclusively on their smartphones for Internet access. A 2019 Pew Research Center study showed that 37% of Americans go online mostly via smartphones, and that rises to 58% for younger users. 17% of users report that they access the Internet **only** via a smartphone, and for 26% of adults with a high school education or less, their only onramp to the Internet is a smartphone.¹⁰ Are they to be excluded from the Emergency Program? If so, then for whom exactly is this Emergency Program intended?

The Public Notice suggests that to “ensure that eligible households with students are able to use their benefit to participate in such activities, we propose that a connected device provided through the Emergency Broadband Benefit Program should be expected to support video conferencing platforms and other software essential to ensure full participation in online learning.” In general, TechFreedom supports this concept, but fears that the “other software essential to ensure full participation in online learning” language is too restrictive, given the immaturity, proprietary nature, and often closed systems hastily deployed by many school districts during the pandemic.¹¹ Moreover, are providers to be held liable (or lose

⁹ Mike Elgan, *With smartphones like these, why do we need laptops?*, COMPUTERWORLD (Dec. 9, 2017), <https://www.computerworld.com/article/3241233/with-smartphones-like-these-why-do-we-need-laptops.html>.

¹⁰ Monica Anderson, *Mobile Technology and Home Broadband 2019*, PEW RESEARCH CTR. (June 13, 2019), <https://www.pewresearch.org/internet/2019/06/13/mobile-technology-and-home-broadband-2019/>.

¹¹ See Juan Lozano, Adriana Gomez Licon & Rebecca Boone, *Computer glitches disrupt classes as schools return online*, AP NEWS (Sept. 8, 2020), https://apnews.com/article/technology-miami-connecticut-hartford-alabama-06f5fdc1f7cdf62621a2539a1433bd21_ (“Students across the U.S. ran into computer glitches Tuesday as they began the school year with online instruction at home because of the coronavirus, adding to the list of problems that have thrust many a harried parent into the role of teacher’s aide and tech support person.”).

support) if they connect a dwelling with a device that isn't capable of "full participation in online learning"? Burdening the program with such a standard will needlessly slow rollout and participation, as providers will have to carefully assess the computing capabilities of every new connection. Think how long that will take and the number of IT professionals who will have to be engaged to assess each dwelling's computer set-up, and then no doubt be required to troubleshoot every time someone's Zoom link goes down. Such a regulatory overburden will doom the program from the start, and many providers simply will not participate.

Instead, the FCC should adopt a standard that allows support for all devices capable of running apps for the most popular collaborative video conferencing systems such as Zoom, WebEx, Microsoft Teams, and Google Meet. Such a standard will not unnecessarily "redline" those users without powerful home computing systems who are in the greatest need of the Emergency Support this program will offer. It also will not scare off providers who might fear the cost of ensuring all subscribers have the necessary equipment, as well as the danger of being audited, and having to repay subsidies (possibly decades in the future),¹² if they receive a subsidy for a subscriber who ultimately was unable to fully participate in online learning because of the proprietary software deployed by a particular school system.

¹² The threat of fines based on decades-old participation in Universal Service Fund programs is very real. In *In the Matter of Application for Review of a Decision of the Wireline Competition Bureau by Net56, Inc. Palatine, Illinois*, 32 FCC Rcd. 963 (2017), the FCC ruled that the Universal Service Fund has no statute of limitations, and providers are now subject to USAC audits and recoupment actions *decades* after the funding years in question. Providers will think twice before participating if they have to carry the threat and contingent liability on their books forever.

5. The FCC Must Closely Monitor the Cost of this Program

The Consolidated Appropriations Act calls for the FCC (and USAC) to take up to two percent (2%) of \$3.2 billion allotted for the Emergency Program in administrative costs.¹³ That's \$64 **million** dollars to administer an **emergency** program designed to function for only a short period of time. USAC's budget already is over \$195 million annually.¹⁴ To inflate USAC's budget by nearly a third just for administering this Emergency Program seems an exercise in bureaucratic largesse. While the Commission has sought to fight "waste, fraud and abuse," it should also more diligently oversee the private company which is able to take two percent "off the top," reminiscent of the innkeeper M. Thénardier in *Les Misérables*. The FCC should demand a full accounting from USAC for the money spent to administer the Emergency Program, especially given that the FCC will rely on the National Verifier and other systems USAC already has in place to administer other Universal Service Fund programs.¹⁵ Handing USAC a \$64 million windfall would be the antithesis of fighting "waste, fraud and abuse."

¹³ H.R. 133 § 904(i)(3) ("Amounts in the Emergency Broadband Connectivity Fund shall be available to the Commission for reimbursements from participating providers under this section, and the Commission may not use more than 2 percent of such amounts to administer the Emergency Broadband Benefit Program.").

¹⁴ 2019 Annual Report, USAC (2019), <https://www.usac.org/wp-content/uploads/about/documents/annual-reports/2019/USAC-2019-Annual-Report.pdf>.

¹⁵ Public Notice at 12 ("We propose to use the authority granted by the Consolidated Appropriations Act to use USAC's services to implement the Emergency Broadband Benefit Program, including administering approvals and elections of participating providers, determinations of household eligibility, including whether a household resides on Tribal lands, by relying upon the USAC-administered National Verifier, National Lifeline Accountability Database, Representative Accountability Database, and Lifeline Claims System for the provider reimbursement process, call centers for program support, provider and consumer outreach, and conducting program audits.") (footnote omitted).

6. The FCC Needs to Plan *Today* How It Will Transition Away from This Emergency Program.

TechFreedom agrees with the Comments filed by USTelecom on January 4, 2021, that the FCC must plan *now* for how it transitions away from the Emergency Program.¹⁶ The \$3.2 billion will only last so long. What happens then? Will there be an instant cliff when the money runs out with wholesale cut-offs? Will providers be expected to eat the \$50/month subsidy when the money runs out, as they have had to do with the “Keep Americans Connected” promise made at the beginning of the pandemic? Will the FCC attempt to merge the Emergency Program into the Lifeline Program with a resulting huge increase in the contribution factor for other subscribers to voice and broadband services (the single most regressive tax in the United States)?¹⁷ The FCC recently announced that the contribution factor for the first quarter of 2021 will jump to 31.8 percent, the largest it has been in history.¹⁸ That means that any telephone subscriber not currently on Lifeline, even those just above the economic cut-off, are now paying almost a one-third tax on their phone service. As laudable as the Emergency Program is, there is no “soft landing” in sight. The FCC must consider now what it will do when the “well runs dry.” Dumping all of the negative feelings when the money runs out on providers who will have to cut off service will only serve to dissuade many from participating in the first place. The FCC must act now to explain how it plans to avoid a giant crash at the end of the program.

¹⁶ Comments of USTelecom, WC Docket No. 20-445, 2 (filed Jan. 4, 2021).

¹⁷ Scott Mackey & Ulrik Boesen, *Wireless Taxes and Fees Jump Sharply in 2019*, THE TAX FOUND. (Nov. 2019), <https://files.taxfoundation.org/20191111150812/Wireless-Taxes-and-Fees-Jump-Sharply-in-2019-PDF.pdf>.

¹⁸ See Proposed First Quarter 2021 Universal Service Contribution Factor, No. CC 96-45 (Dec. 14, 2020), <https://www.fcc.gov/document/proposed-first-quarter-2021-usf-contribution-factor-318-percent>.

CONCLUSION

Unique times certainly call for unique solutions, and the COVID-19 pandemic has placed a great strain on our people, our economy, and our infrastructure. The Emergency Program provides must-needed relief in one area — bridging the “affordability gap” for broadband services. The FCC faces some significant hurdles to smoothly implement, and then transition out of this program, however. It should focus on minimizing the regulatory costs and burdens on providers, as well as ensure that providers operating in good faith to provide services under the Emergency Program are not later taken to task, audited, and then fined for ministerial missteps in the program. Further, the FCC must address a longer term solution to the affordability gap that does not bankrupt the Universal Service Fund, nor imposes increasing taxes on Americans in the form of “contribution factors.” TechFreedom believes the FCC can “thread the needle” and implement the \$3.2 billion in new money, but only if it addresses the larger questions of the economics of its support systems at the same time.

Respectfully submitted,

TECHFREEDOM

_____/s/____

James E. Dunstan
General Counsel
110 Maryland Ave., NE
Suite 205
Washington, DC 20002

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