Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Bridging the Digital Divide for Low-Income Consumers	)	WC Docket No. 17-287
	)	
	)	
Lifeline and Link Up Reform and Modernization	)	WC Docket No. 11-42
	)	
Telecommunications Carriers Eligible for Universal Service Support	)	WC Docket No. 09-197
	)	

COMMENTS OF THE NATIONAL LIFELINE ASSOCIATION

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SUMMARY

The National Lifeline Association (NaLA), by and through the undersigned counsel, hereby submits its comments to the Federal Communications Commission (FCC or Commission) in response to the proposals set forth in the Further Notice of Proposed Rulemaking (FNPRM) adopted by the Commission on November 14, 2019.[1] Several of the proposals in the FNPRM carry the risk of further squeezing and marginalizing the Lifeline program, which has already shrunk to serving fewer than 7 million subscribers at an annual cost of less than half of its current budget.[2] The program has not shrunk because of a lack of eligible low-income Americans; rather, it appears that program participation stands at less than 20 percent of those eligible nationwide because it has become more difficult to provide Lifeline services, and for eligible consumers to enroll and remain in the program.[3] With the National Verifier rollout nearly complete, the Commission should be focusing on improving implementation and on reducing barriers to program participation by service providers and consumers, so that Lifeline can fully meet its potential to bridge the digital divide, while respecting the desire and ability of low-income consumers to choose for themselves the communications services that best meet their needs.

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[1] *See Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support*, WC Docket Nos. 17-287, 11-42, 09-197, Fifth Report and Order, Memorandum Opinion and Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 19-111 (rel. Nov. 14, 2019) (FNPRM).

[2] The Lifeline budget for 2020 is $2,385,292,106. *See Wireline Competition Bureau Announces Updated Lifeline Minimum Service Standards and Indexed Budget Amount*, WC Docket No. 11-42, Public Notice, DA 19-704 (July 25, 2019).

[3] According to November 2019 subscriber totals from CGM, LLC, which uses USAC disbursement data.

When considering the appropriate goals for the Lifeline program, and in all of its Lifeline-related decisions, the Commission should return and renew its commitment to adhering to the primary statutory goals of the program – making telecommunications and information services affordable for, and accessible to, low-income Americans. The most recent and comprehensive analysis of the Lifeline program refutes earlier flawed student research purporting to demonstrate that most Lifeline subscribers would purchase service without the subsidy and indicates instead that the Lifeline program's current free offerings are increasing broadband adoption by those who would not subscribe but for the subsidy. Further, while "increased broadband adoption for consumers who, without a Lifeline benefit, would not subscribe to Lifeline"[4] is a laudable goal, that goal is too narrow. Limiting the Lifeline program to that goal would not advance the program's primary goals of making telecommunications and information services affordable for, and accessible to, low-income Americans. To advance Lifeline's primary goals, the Commission should seek to make continuous connectivity affordable for Lifeline-eligible subscribers. To succeed in today's connected society, consumers need connectivity that is continuous and they would not be well served by a system that measured success by checking a box simply because they signed up for service at one point in time.

In the FNPRM, the Commission seeks comment on requiring eligible telecommunications carriers (ETCs) to charge Lifeline eligible low-income subscribers a fee in exchange for receiving a handset during enrollment.[5] This is the latest incarnation of the "skin in the game" proposals, which mistakenly assume that subscribers only value their Lifeline service

[4] FNPRM ¶ 136.

[5] *See id*. ¶¶ 151-158.

to the extent they must pay something to receive it. The Commission has rejected this argument in the past and should do so again here. Forcing subscribers to pay a handset fee – no matter how small – would not make low-income consumers value Lifeline more, but rather make the service unaffordable and inaccessible for many. The proposal is based on news stories from 2014-15 that predate the adoption of the National Verifier to verify applicants' eligibility for the Lifeline program, and other reforms.[6] There is no reason to think that the National Verifier and other Lifeline reforms such as the National Lifeline Accountability Database (NLAD) are not effective at denying enrollment attempts by ineligible consumers. As a result, the Commission should not adopt the proposed free handset ban, which would discourage Lifeline program participation by eligible subscribers, consign eligible subscribers to a "second class" service rather than what a competitive marketplace would otherwise provide, and appears likely to exceed the Commission's authority. The Commission instead should focus its efforts on completing the implementation of the National Verifier, which (along with the NLAD) is designed to combat any potential waste or fraud during enrollment.

NaLA also opposes the Commission's proposals to upend the process for demonstrating compliance with the Lifeline program's usage rules, which would impose unnecessary and likely unworkable obligations on eligible low-income subscribers and ETCs.[7] As explained herein, "app" data usage is undertaken by the subscriber and shows that he or she still wants Lifeline service, thereby qualifying as usage under the Commission's rules. Moreover, it would be

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[6] *See id.* ¶ 151, n. 420 (referencing news reports from 2014 and 2015 concerning alleged distribution of free handsets to individuals ineligible for the Lifeline program). Note that whether eligibility was verified by ETCs before the National Verifier, or is determined by the National Verifier now, if an ETC gives an ineligible applicant a free handset, it is the ETC that has to bear the cost of that handset and the ineligible applicant will not be enrolled in the Lifeline program.

[7] *See* FNPRM ¶¶ 146-148.

inadvisable and impractical to require ETCs to judge or further parse the types of data used by their subscribers. The Commission therefore should not impose additional usage-related requirements.

Finally, in the FNPRM, the Commission proposes to impose on ETCs a number of additional "program integrity" requirements to further address purported waste, fraud, and abuse.[8] Each of the proposals would impose additional burdens and costs on ETCs with little to no concomitant benefit to the program. The proposals also would require ETCs to carry out activities that already are or should be the responsibility of the National Verifier (collecting eligibility proof type and number), the NLAD (establishing customer account numbers), or the Universal Service Administrative Company (USAC) (privacy protection training and background checks). As explained herein, having the National Verifier, the NLAD, or USAC take on the proposed obligations instead of ETCs would be the most effective (and cost-effective) alternative to achieve the Commission's goals. In particular, the National Verifier only has been implemented recently and the Commission should hold back on adopting new obligations for ETCs until it gathers sufficient data regarding the National Verifier's impact on addressing potential waste, fraud, and abuse in the Lifeline program. The Commission therefore should not foist additional requirements on Lifeline providers, in particular small entities, especially when there are readily-apparent alternatives available.

[8] *Id.* ¶¶ 143-145, 159-164.

TABLE OF CONTENTS

Page

Before the
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In the Matter of	)	
	)	
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COMMENTS OF THE NATIONAL LIFELINE ASSOCIATION

The National Lifeline Association[9] (NaLA), by and through the undersigned counsel, hereby submits its comments to the Federal Communications Commission (FCC or Commission) in response to the proposals set forth in the Further Notice of Proposed Rulemaking (FNPRM) adopted by the Commission on November 14, 2019 in the above-referenced proceedings.[10]

Several of the proposals in the FNPRM carry the risk of further squeezing and marginalizing the Lifeline program, which has already shrunk to serving fewer than 7 million subscribers at an annual cost of less than half of its current budget.[11] The program has not shrunk because of a lack of eligible low-income Americans; rather, it appears that program

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[9] NaLA is the only industry trade group specifically focused on the Lifeline segment of the communications marketplace. It supports eligible telecommunications carriers (ETCs), distributors, Lifeline supporters and participants, and partners with regulators to improve the program through education, cooperation and advocacy. *See* https://www.nalalifeline.org/.

[10] *See Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support*, WC Docket Nos. 17-287, 11-42, 09-197, Fifth Report and Order, Memorandum Opinion and Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 19-111 (rel. Nov. 14, 2019) (FNPRM).

[11] The Lifeline budget for 2020 is $2,385,292,106. *See Wireline Competition Bureau Announces Updated Lifeline Minimum Service Standards and Indexed Budget Amount*, WC Docket No. 11-42, Public Notice, DA 19-704 (July 25, 2019).

participation stands at less than 20 percent of those eligible because it has become more difficult to provide Lifeline services, and for eligible consumers to enroll and remain in the program.[12] With the initial National Verifier rollout nearly complete, the Commission should be focusing on improving implementation and on reducing barriers to program participation by service providers and consumers, so that Lifeline can fully meet its potential to bridge the digital divide, while respecting the desire and ability of low-income consumers to choose for themselves the communications services that best meet their needs.

I. THE LIFELINE PROGRAM SHOULD MAKE CONTINUOUS BROADBAND AND VOICE CONNECTIVITY AFFORDABLE AND ACCESSIBLE TO LOW-INCOME AMERICANS

When considering the appropriate goals for the Lifeline program, and in all of its Lifeline-related decisions, the Commission should return and renew its commitment to adhering to the primary statutory goals of the program – making telecommunications and information services affordable for, and accessible to, low-income Americans. The most recent and comprehensive analysis of the Lifeline program refutes dated and flawed student research purporting to demonstrate that most Lifeline subscribers would purchase service without the subsidy and indicates instead that the Lifeline program's current free offerings increase broadband adoption by those who would not subscribe but for the subsidy. Further, while "increased broadband adoption for consumers who, without a Lifeline benefit, would not subscribe to Lifeline"[13] is a laudable goal, that goal is too narrow. Limiting the Lifeline program to that goal would not advance the program's primary goals of making telecommunications and information services affordable for, and accessible to, low-income Americans. To advance

[12] According to November 2019 subscriber totals from CGM, LLC, which uses USAC disbursement data.

[13] FNPRM ¶ 136.

Lifeline's primary goals, the Commission should seek to make continuous connectivity affordable for Lifeline-eligible subscribers. To succeed in today's connected society, consumers need connectivity that is continuous and they would not be well served by a system that measured success by checking a box simply because they signed up for service at one point in time.

A. The Primary Goal of the Lifeline Program Is to Ensure That Low-Income Americans Can Afford and Have Access to Telecommunications and Information Services

In the FNPRM, the Commission seeks comment on adding a Lifeline program goal of increasing broadband adoption for consumers that would not otherwise subscribe to broadband without the subsidy, but also wisely asks how this goal would relate to the principles of promoting the availability of quality services at affordable rates and promoting access to reasonably comparable telecommunications and information services for low-income consumers.[14] First, the Commission should reaffirm its recognition that the primary, statutorily mandated goals of the Lifeline program are to make telecommunications and information services affordable for, and accessible to, low-income Americans. Section 254(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 254(b), states that "the Commission shall base policies for the preservation and advancement of universal service on the following principles," which include (1) "[q]uality services should be available at just, reasonable, and **affordable** rates," and (3) "[c]onsumers in all regions of the Nation, **including low-income consumers…should have access to telecommunications and information services**, including

[14] *See id*. ¶¶ 134, 137.

interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas…."[15]

Less than one year ago, the Court of Appeals for the D.C. Circuit confirmed these statutory obligations – "Congress established in the 1996 Act the principles underlying the universal service program as making '[q]uality services' 'available at just, reasonable, and affordable rates.' 47 U.S.C. § 254(b)(1)."[16] Further, the Court found that "the Commission's long-stated **primary tenets** for the program are availability and affordability."[17] In the opening sentences of the 2016 Lifeline Modernization Order, the Commission recognized the primary goals of the Lifeline program as addressing affordability and access — "The time has come to modernize Lifeline for the 21st Century to help low-income Americans *afford access* to today's vital communications network—the Internet, the most powerful and pervasive platform in our Nation's history. *Accessing* the Internet has become a prerequisite to full and meaningful participation in society."[18] The Court found that the Commission must "consider the impact" of changes to the Lifeline program "on the Lifeline subsidy's '**primary purpose**' or otherwise

[15] 47 U.S.C. § 254(b)(1), (3) (emphasis added).

[16] *Nat'l Lifeline Ass'n v. FCC*, 921 F.3d 19, 28 (D.C. Cir. 2019) (*NaLA v. FCC*). The Commission recognized this Congressional directive in the introduction to the 2016 Lifeline Modernization Order when it noted that "Congress expressed its intent in the Communications Act of 1934 to make available communications service to 'all the people of the United States' and, more recently, in the Telecommunications Act of 1996, Congress asserted the principle that rates should be 'affordable,' and that access should be provided to low-income consumers in all regions of the nation." *Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support, Connect America Fund*, WC Docket Nos. 11-42, 09-197, 10-90, Third Report and Order, Further Report and Order, and Order on Reconsideration, FCC 16-38, ¶ 4 (2016) (2016 Lifeline Modernization Order).

[17] 2016 Lifeline Modernization Order ¶ 4 (emphasis added).

[18] *Id.* ¶ 1 (emphasis added).

explain how it is compatible with that purpose."[19] Therefore, affordability and access is the lens through which the Commission should view the establishment of any additional goals for, and all changes to, the Lifeline program.

All too often in recent Commission decision-making, the primary goals of affordability and access have been either ignored or addressed with meaningless or unsupported assertions patently at odds with the record. In the Minimum Service Standards Waiver Order released in November 2019, which increased the mobile broadband minimum service standard (MSS) to 3 GB per month and refused to halt the phase-down of support for voice services,[20] the Commission once again failed to consider the impact of those decisions on the affordability of, and access to, communications services for Lifeline subscribers. Despite several pending petitions for reconsideration of the minimum service standards that raised the impact of increasing standards on affordability and access to such services for low-income Americans,[21] the Commission once again failed to address those pending petitions. Moreover, in its

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[19] *NaLA v. FCC*, 921 F.3d at 28.

[20] *See Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support, Connect America Fund*, WC Docket Nos. 11-42, 09-197, 10-90, Order, FCC 19-116 (Nov. 19, 2019) (MSS Waiver Order).

[21] *See* Joint Lifeline Petitioners' Petition for Partial Reconsideration and Clarification, WC Docket Nos. 11-42, 09-197, 10-90 at 3 (filed June 23, 2016) ("Joint Petitioners urge the Commission to reconsider its minimum service standard for broadband, which relies on an unworkable multi-person household formula untethered to the Lifeline program's "central touchstone" of affordability, and replace it with a formula that respects single-individual households and includes an affordability safety valve."). The Joint Petitioners also raised the issue of affordability with respect to the phase down in support for voice services when they stated, "if the Commission determines that prices or demand for standalone voice services have not decreased sufficiently to warrant decreasing support for voice, support amounts should remain at $9.25 per month or the minimum standard should be reduced to reflect the support amount and affordability for low-income consumers.**"** *Id*. at 10-11. In its Petition for Reconsideration, CTIA stated, "[t]he Commission…failed to analyze whether the minimum service standard for mobile broadband—set at 70 percent of the calculated average mobile data usage per household—is consistent with one of Congress' most critical and central universal service principles: affordability." CTIA Petition for Reconsideration, WC Docket Nos. 11-42, 09-197, 10-90 at 3 (filed June 23, 2016).

consideration of last year's waiver petition, the Commission did not study the potential impact of a 1 GB increase in the mobile broadband minimum standard on affordability and access. The agency did not properly consider record evidence indicating that the increase would result in a price increase for low-income Americans, or would impact the marketing and availability of free Lifeline services in states without additional support,[22] and consider whether that will serve as a barrier to access for consumers and program participation by service providers.[23] Moreover, the Commission did not consider alternatives (*e.g.*, increasing the monthly reimbursement amount) as would be necessary to allow this change to go into effect without a potential increase in consumer prices or lack of availability for many low-income consumers.

In the MSS Waiver Order, the Commission also failed to consider the impact of reduced support for Lifeline voice services on consumer choice and the primary goals of affordability and access to telecommunications services for low-income consumers. The Commission allowed the reimbursement for Lifeline voice services to decrease from $9.25 to $7.25 per month without considering the impact on those voice services and the Lifeline subscribers that choose voice services,[24] and it has shown no intention to study the Lifeline marketplace until the 2021 State of

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[22] *See* George S. Ford, PhD, Phoenix Center For Advanced Legal & Economic Public Policy Studies, "Phoenix Center Policy Paper Number 55: A Fresh Look at the Lifeline Program," at 13 (July 17, 2019), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjhoMy5947nAhWWGc0KHWnTB-gQFjAAegQIBhAB&url=http%3A%2F%2Fwww.phoenix-center.org%2Fpcpp%2FPCPP55Final.pdf&usg=AOvVaw018GyT1I7GTcVUJ8PVxKph. ("As minimum service standards rise, a fully-discounted offering may no longer be feasible, raising the price of communications services (and/or devices) to low-income Americans participating in the Lifeline program.") (Phoenix Center Policy Paper).

[23] As the Court of Appeals for the D.C. Circuit recognized, availability (access) and affordability are Commission-established primary tenets of the Lifeline program. *See supra* at 4.

[24] The Commission stated that "Petitioners do not show that the phase-down in voice support would result in unaffordable services or lead to de-enrollments from the program," but the obligation to consider affordability and accessibility is on the Commission, which established no

the Lifeline Marketplace Report that is scheduled to be released just a few months before support for voice is completely eliminated.[25] The Commission should study to what extent low-income consumers primarily use application-based voice services (*e.g.*, WhatsApp) or whether they primarily continue to rely on traditional wireless voice minutes. To the extent that voice calling over broadband has not substantially replaced traditional wireless voice services, the Commission should respect consumer choices and not phase down Lifeline support for such voice telecommunications services. The Communications Act and the primary tenets of the Lifeline program, affordability and access, demand that the Commission consider the impacts of the phase down in support for voice telecommunications services on low-income Americans before allowing the phase down to take effect, not after.

Further, the Commission failed to consider the impact of the phase down in voice support on public safety. The D.C. Circuit's recent decision in *Mozilla v. FCC* affirms the Commission's legal imperative to consider the impacts of its policies on public safety.[26] In addition to challenging the Restoring Internet Freedom Order for failing to address the impact on Lifeline services,[27] the *Mozilla* Petitioners "challenge[d] as arbitrary and capricious the Commission's

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record showing that Lifeline voice services would remain affordable and would remain widely available to all Lifeline subscribers. *See* MSS Waiver Order ¶ 19.

[25] One of the policy choices that should be considered, both now and in the marketplace study, is whether the reimbursement amount should be increased.

[26] *See Mozilla Corp. v. FCC*, 940 F.3d 1, 59 (D.C. Cir. Oct. 1, 2019).

[27] In *Mozilla Corp. v. FCC*, the Court remanded a separate FCC order to the Commission on the grounds that "the agency did not adequately address Petitioners' concerns about the effects of broadband reclassification on the Lifeline program." *Mozilla Corp. v. FCC*, 940 F.3d at 18. However, commenters including NaLA members (as members of the Lifeline Connects Coalition) and TracFone have filed comments with the Commission explaining how it can continue to support broadband services with Lifeline program funds now that the Commission has determined that broadband is an information service. *See* Comments of the Lifeline Connects Coalition, WC Docket No. 17-108 (filed July 17, 2017) ("the Commission can, as it has proposed, maintain support for broadband in the Lifeline program after reclassification by following the legal authority path outlined in the Universal Service Transformation Order to

failure to consider the implications for public safety of its changed regulatory posture in the 2018 Order."[28] The Court agreed with the Petitioners, finding that because "Congress created the Commission for the purpose of, among other things, 'promoting safety of life and property through the use of wire and radio communications,'"[29] and because the Commission "has repeatedly deemed [the telecommunications industry] important to protecting public safety," the Commission is "required to consider public safety by its enabling act" and bound to "take into account its duty to protect the public" when it acts.[30] The Court further found that despite stakeholders raising concerns about the impact of broadband reclassification on public safety, the Commission failed to address this issue. Accordingly, "[t]he Commission's disregard of its duty to analyze the impact of the 2018 Order on public safety render[ed] its decision arbitrary and capricious in that part."[31]

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support broadband through the Connect America Fund (CAF). Section 254 of the Communications Act of 1934, as amended (the Act) and applicable Commission and court precedent authorizes the Commission to support not just broadband facilities, but services as well, which dovetails with the Commission's longstanding forbearance policy that does not require Lifeline eligible telecommunications carriers (ETCs) to provide supported services using their own facilities. Finally, in addition to the express authority in section 254 to support Lifeline broadband, the Commission has Title I ancillary authority to support Lifeline broadband. Broadband is within the Commission's general jurisdictional grant in Title I and supporting Lifeline broadband would be reasonably ancillary to the Commission's statutorily mandated responsibility to ensure that all consumers, including low-income consumers, have access to advanced telecommunications and information services."); Comments of TracFone Wireless, Inc. WC Docket No. 17-108 at i (filed July 17, 2017) ("BIAS meets all four prongs of the Section 254(c) test for the evolving level of universal service to be established by the Commission….").

[28] *Mozilla*, 940 F.3d at 59.

[29] *Id*. (quoting 47 U.S.C. § 151).

[30] *Id*. at 60 (citing *Nuvio Corp. v. FCC*, 473 F.3d 302, 307 (D.C. Cir. 2006)) (quotation marks omitted).

[31] *Id*. at 63.

Here, too, despite the proliferation of broadband services and applications, Lifeline voice capabilities remain essential for access to communications to promote public safety. Such communications include calls to emergency services, but also communications before, during and after natural disasters like wildfires and hurricanes, and man-made tragedies such as mass shootings and terrorist attacks. Stakeholders raised concerns about the impact of reducing and then eliminating Lifeline support for voice services on public safety[32] and the Commission failed to "undertake the statutorily mandated analysis of…the effect on public safety" [33] of its decision to allow the phase down in Lifeline voice support to take effect, rendering the decision arbitrary and capricious.[34]

When considering the appropriate goals for the Lifeline program, and in all of its Lifeline-related decisions, the Commission should return to the long-recognized primary tenets of the program – making telecommunications and information services affordable for, and accessible to, low-income Americans.

B. Available Evidence Demonstrates That the Lifeline Program Is Increasing Broadband Adoption for Consumers Who Would Otherwise Not Subscribe, But That Goal Is Too Narrow and Should Not Be Used to Restrict Eligibility

The most recent and comprehensive analysis of the Lifeline program refutes earlier flawed student research purporting to demonstrate that "only one out of eight households that

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[32] NARUC National Verifier Launch and Minimum Service Standards Resolution, (July 23, 2019), available at https://www.naruc.org/meetings-and-events/naruc-meetings-and-events/2019-summer-policy-summit/final-resolutions/ (informing the Commission that "[m]any consumers, including seniors and families with children, **rely on voice services to contact first responders in times of emergency**, reach social service agencies, access healthcare, and keep connected to other essential services.").

[33] *Mozilla*, 940 F.3d at 61.

[34] *See State Farm*, 463 U.S. at 43 ("An agency's failure to address during rulemaking "an important aspect of the problem" renders its decision arbitrary and capricious."); *NaLA v. FCC*, 915 F.3d at 27.

receive the subsidy subscribes to telephone service because of the subsidy" and indicates instead that the Lifeline program's current free offerings are increasing broadband adoption by those who would not subscribe but for the subsidy. Further, while "increased broadband adoption for consumers who, without a Lifeline benefit, would not subscribe to Lifeline"[35] is a laudable goal, that goal is too narrow. Limiting the Lifeline program to that goal would not advance the program's primary goals of making telecommunications and information services affordable for, and accessible to, low-income Americans. To advance Lifeline's primary goals, the Commission should seek to make continuous connectivity affordable for Lifeline-eligible subscribers.

1. Available Evidence Demonstrates That the Lifeline Program Is Increasing Broadband Adoption for Consumers Who Otherwise Would Not Subscribe, But Affordability Remains a Challenge

In the FNPRM, the Commission seeks comment on adding a Lifeline program goal of increasing broadband adoption for consumers that would not otherwise subscribe to broadband to "help ensure that Lifeline funds are appropriately targeted toward bridging the digital divide."[36] Likewise, in the 2017 Lifeline NPRM, the Commission sought comment on the suggestion of "some parties" that "the Commission should target Lifeline support to low-income consumers who have not yet adopted broadband service."[37] For support the Commission cited to a joint blog post by Commissioner Michael O'Rielly and Representative Marsha Blackburn,[38] which

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[35] FNPRM ¶ 136.

[36] *Id*. ¶¶ 134, 136.

[37] *Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support*, WC Docket Nos. 17-287, 11-42, 09-197, Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, FCC 17-155, ¶ 117 (2017) (2017 Lifeline NPRM).

[38] *See* Michael O'Rielly and Rep. Marsha Blackburn, "FCC's Lifeline Program Ripe for Fraud, Abuse," Politico (July 12, 2015), available at https://www.politico.com/magazine/story/2015/07/fccs-lifeline-program-expansion-without-reform-120008 ("Second, the program must be better targeted to eligible low-income individuals who would not otherwise sign up for service. The GAO found that the Lifeline program may be

cited to a GAO Report on the efficiency and effectiveness of the Lifeline program,[39] which in turn cited to a 2015 paper by Olga Ukhaneva titled "Universal Service in a Wireless World."[40] That student economic paper purported to find that "only one out of eight households that receive the [Lifeline] subsidy subscribes to telephone service because of the subsidy."[41] The 2017 Lifeline NPRM also cited to a 2015 paper entitled "Towards a More Efficient Lifeline Program" by John Mayo, Olga Ukhaneva and Scott Wallsten, which advocates targeting Lifeline to "those who would not have service without a subsidy" and its first citation for the principle that "Economics research finds that the program has increased low-income access [to] telephone service, but at a high cost: subsidies flowing to many consumers who would have subscribed even without the subsidy" is to the same 2015 working paper by Georgetown University student Olga Ukhaneva.[42]

Therefore, the genesis of the idea that most Lifeline subscribers would purchase communications services without the subsidy (displacement effect), and the Commission should target Lifeline support to non-adopters, is an unreviewed student working paper that is based on

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"inefficient and costly," pointing to academic research that estimated that only 1 in 8 subscribers (and 1 in 20 wireless subscribers) would not have service absent the Lifeline subsidy. These findings, which **have not been credibly refuted**, are extremely troubling, since they mean consumers are supporting service for people that would have signed up and paid in full without a subsidy.") (emphasis added). The authors were clearly referring to the Olga Ukhaneva 2015 working paper discussed herein. As demonstrated herein, the findings have now been more than credibly refuted by the Phoenix Center Policy Paper.

[39] *See* United States Government Accountability Office, Report to the Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, "FCC Should Evaluate the Efficiency and Effectiveness of the Lifeline Program" at 14, n. 31 (Apr. 23, 2015) (referring to the "studies that FCC referred us to" and citing to the Olga Ukhaneva 2015 working paper).

[40] *See* Olga Ukhaneva, "Universal Service in a Wireless World," Georgetown University (Nov. 17, 2015) (Universal Service in a Wireless World).

[41] *Id*. at 1.

[42] John Mayo, Olga Ukhaneva and Scott Wallsten, "Towards a More Efficient Lifeline Program" at 1 (Aug. 31, 2015).

data that is at this point a decade old.[43] In July 2019, the Phoenix Center undertook an economic analysis of the Lifeline program, including this displacement effect alleged by Ms. Ukhaneva and referenced by some since. The Phoenix Center's Policy Paper "A Fresh Look at the Lifeline Program" written by Dr. George Ford, PhD found that "[t]o date, the only evidence available regarding this displacement effect is an unpublished graduate student research paper by Olga Ukhaneva (2015)."[44] Dr. Ford's analysis of Ms. Ukhaneva's student paper found it to be based on extremely old data and ultimately "not credible."

> I find that the results of Ukhaneva's work are not credible. Her complex econometric model is poorly documented, measures displacement only indirectly, and contains a number of apparent flaws. Perhaps most limiting to the analysis is that nothing in the data indicates whether a household is a Lifeline subscriber. So, at best, the analysis of the Lifeline program is indirect. It is simply not possible for Ukhaneva to measure accurately the flow of households in-and-out of the Lifeline program. Also, Ukhaneva's data (ending in 2010) precedes a number of material reforms (in 2012, 2014, 2015, and 2016) as well as the dramatic shift from wireline to wireless services.[45]

Ms. Ukhaneva's 2010 data simply does not reflect the wireless-dominated Lifeline program that we have today. Dr. Ford found that "[u]sing the most recent data on Lifeline and regular paid wireless accounts, my straightforward empirical analysis indicates no displacement between regular and Lifeline mobile wireless accounts in the current, reseller-dominant Lifeline environment"[46] because "the issue of subsidies which end up flowing to households that would buy service even in the absence of assistance is likely to be far more serious under broad, uniform partial subsidies to market offerings, rather than targeted, free-but-limited services."[47]

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[43] *See* Universal Service in a Wireless World at 1.

[44] Phoenix Center Policy Paper at 9.

[45] *Id*.

[46] *Id*. at 4.

[47] *Id*. at 13.

In other words, because current Lifeline offerings from wireless carriers offer a limited service for free (2 GB for free at the time of Dr. Ford's study instead of unlimited for $50 or more), the offerings target the lowest income consumers that would not otherwise purchase service.[48] Therefore, Dr. Ford's analysis demonstrates that current Lifeline offerings do increase broadband adoption by consumers that otherwise would not subscribe.

In addition, there are periodically updated studies available to determine success in increasing broadband adoption, including by low-income Americans.[49] In December 2015, the Brookings Metropolitan Policy Program released a study of 2013 and 2014 American Community Survey data on broadband adoption and reported that 75.1 percent of American households, but only 46.8 percent of households with incomes under $20,000 annually, had broadband Internet subscriptions in 2014.[50] That was a 28 percent disparity by income. More recent data show about a 10-15 percent disparity in broadband adoption between low-income and wealthier Americans. In 2019, Pew reported that while 81 percent of Americans have a smartphone and 73 percent have home broadband, only 71 percent of Americans earning less than $30,000 annually have a smartphone and only 56 percent of those low-income Americans have home broadband.[51] According to the Benton Institute for Broadband and Society, "[a]n

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[48] This also suggests that if the Commission wants to increase the amount of broadband data that Lifeline subscribers receive, then it should increase the reimbursement amount in order to keep the service free to end users to retain the focus on the lowest income consumers.

[49] In the FNPRM, the Commission seeks comment on "the best data sources to help measure adoption progress." FNPRM, ¶ 139.

[50] Adie Tomer and Joseph Kane, Brookings Metropolitan Policy Program, "Broadband Adoption Rates and Gaps in U.S. Metropolitan Areas," at 3-4 (Dec. 2015), available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjzp8-SrpDnAhUZac0KHZFIBDMQFjAAegQIAhAB&url=https%3A%2F%2Fwww.brookings.edu%2Fwp-content%2Fuploads%2F2016%2F07%2FBroadband-Tomer-Kane-12315.pdf&usg=AOvVaw27iZwY_o_skIWTmR3SCgn_.

[51] Monica Anderson, Pew Research Center, "Mobile Technology and Home Broadband 2019," at https://www.pewresearch.org/internet/2019/06/13/mobile-technology-and-home-broadband-2019/.

average of over 77 percent of households has a broadband subscription in counties with median household incomes equal to or above $50,000 per year. In counties with median incomes below $50,000 per year, the average rate of subscription falls to roughly 65 percent."[52] Despite this apparent progress, Pew research shows that low-income households are still more than twice as likely to not use the Internet than households in the next income category up and nine times more likely to not use the Internet than top earners.[53] Only age was a more significant determiner of likelihood of not using the Internet.[54]

There are data sets and studies available for the Commission to track progress on broadband adoption by low-income Americans, which show progress being made, but that affordability continues to be a persistent challenge to expanding broadband adoption. This data underscores the need for a robust and successful Lifeline program.

2. The Goal of the Lifeline Program Should be Making Continuous Connectivity Affordable and Accessible for All Low-Income Americans Rather Than Limited to Only Increasing Broadband Adoption by Consumers Who Would Otherwise Not Subscribe

While "increased broadband adoption for consumers who, without a Lifeline benefit, would not subscribe to Lifeline"[55] is a laudable goal,[56] that goal is too narrow. Limiting the Lifeline program to that goal would not advance the program's primary goals of making

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[52] Benton Institute for Broadband and Society Weekly Digest, "New Data, Old Divides," (Dec. 14, 2018), available at https://www.benton.org/blog/new-data-old-divides.

[53] *See* Monica Anderson, Andrew Perrin, Jinjing Jiang and Madhumitha Kumar, Pew Research Center Fact Tank, "10% of Americans Don't Use the Internet. Who Are They?," (Apr. 22, 2019), available at https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/ (Finding that of the Americans that say they do not use the Internet, 18 percent earn less than $30,000, 7 percent earn between $30,000 and $49,999 and 2 percent earn over $75,000 annually).

[54] *See id.*

[55] FNPRM ¶ 136.

[56] *See supra* Section I.B.1.

telecommunications and information services affordable for, and accessible to, low-income Americans. To advance Lifeline's primary goals, the Commission should seek to make continuous connectivity affordable for Lifeline-eligible subscribers. In the 2016 Lifeline Modernization Order, the Commission recognized that "[a]ffordability must remain a central touchstone within the Lifeline program"[57] and explained,

> **We do not interpret and implement the concept of "affordability" under sections 254(b)(1) and 254(i) by looking narrowly at whether and when a customer would not purchase a service at all but for discounts made possible, directly or indirectly, by universal service support**. In applying that concept we also consider the risk that, while some low-income consumers subscribe to a service, they must spend an undue portion of their funds to do so but for the provision of universal service support. *See, e.g.*, *High-Cost Universal Service Support et al.*, Order on Remand and Memorandum Opinion and Order, 25 FCC Rcd 4072, 4089-90, para. 32 (2010) (concluding that then-existing universal service programs 'provide support that is sufficient to ensure that rates are affordable, as required by section 254(b)(1)' by evaluating factors including telephone subscribership penetration and the portion of household expenditures associated with telephone service). Moreover, the Commission recently has cited evidence that segments of existing broadband subscribers, including **low income subscribers, "more frequently have to cancel or suspend service due to financial constraints," reinforcing that subscribership at a given moment in time does not, standing alone, provide sufficient insight into such issues of affordability under our section 254**. 2015 Broadband Progress Report, 31 FCC Rcd at 716, para. 39. Ultimately, any decisions about which households should benefit from Lifeline support mechanisms, and under what circumstances, involves an exercise in drawing administrable lines while balancing the various policy objectives in section 254 of the Act and section 706 of the 1996 Act.[58]

NaLA agrees with this goal of continuous connectivity, which would fulfill the Lifeline program's primary affordability and accessibility goals. It is only through continuous monthly connectivity that low-income Americans can have a reliable phone number for job applications, employers, schools and healthcare providers; communicate consistently by email; and have the Internet available at their fingertips.

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[57] 2016 Lifeline Modernization Order ¶ 57.

[58] *Id*. n. 163.

In the FNPRM, the Commission seeks comment on proposals to ask Lifeline applicants at the time of enrollment whether they already subscribe to voice or broadband service and whether they would be able to afford the service without the discount.[59] Asking these questions with the intention of then denying Lifeline service to any applicant that says they already have voice or broadband service, or could find a way to afford it without the subsidy, would undercut the primary goals of the Lifeline program and would not be effective means to achieve any goal.

Asking such questions as a gating mechanism would be inviting Lifeline applicants to say they do not have service and could not afford it, whether or not that is true, because those who are eligible are means-tested and clearly need the subsidy and there is no available way to test the veracity of their claims. There is no available NLAD for non-Lifeline communications services to identify who does or does not have voice or broadband service, nor will there ever be. Further, even if a Lifeline applicant has a wireless phone, that does not mean the applicant has any minutes or megabytes left that month or can afford service that month or the next. Although ETCs have no means to confirm the veracity of applicants' claims that they don't already have service or could afford it, it is easy to anticipate that the Commission would likely unjustly hold the ETCs responsible for reimbursement claw backs and potential enforcement action if the Commission or USAC were to later claim that a consumer had not been truthful.

[59] *See* FNPRM ¶ 139 ("We propose asking Lifeline applicants questions in the enrollment process regarding how the program has impacted their broadband adoption, and we seek comment on what those specific questions should be. For example, should the Commission ask Lifeline applicants whether they already subscribe to voice or broadband service, and whether they would be able to afford their Lifeline-supported service without the Lifeline discount?").

By virtue of effective program design, applicants qualify for Lifeline because they earn an income near the federal poverty level, are on Medicaid or other low-income safety net programs, and need assistance to meet most human needs (*e.g.*, housing, food, medical care). There is no reason for the Lifeline program to attempt to further parse this "truly needy" population to determine who is ready to prioritize scarce resources toward connectivity and who is not in a particular month. The Commission should avoid exercises in which it would make value judgments as to how low-income Americans spend their scarce resources. Doing so could result in people foregoing communications services in order to retain eligibility for Lifeline support.

If the purpose of asking questions is not to use responses to withhold Lifeline benefits, but instead to better understand the communications needs of low-income Americans, they could have some value. However, the Commission should also ask questions focused on how to make the Lifeline application and eligibility determination process faster, less difficult, more accurate and more effective; what services consumers choose and why; and whether voice and broadband services are affordable and accessible.

Lifeline program goals should always be tethered to the primary statutory tenets of ensuring that telecommunications and information services are affordable for, and accessible to, low-income Americans. Therefore, increasing broadband adoption by non-adopters is too narrow of a goal. The Lifeline program's goal should be making continuous monthly broadband and voice services affordable for low-income Americans.

II. THE COMMISSION SHOULD NOT PROHIBIT THE DISTRIBUTION OF HANDSETS TO ELIGIBLE LOW-INCOME LIFELINE SUBSCRIBERS AT ENROLLMENT AT NO COST TO THE SUBSCRIBER

The Commission seeks comment on requiring ETCs to charge Lifeline eligible low-income subscribers a fee in exchange for receiving a handset during enrollment.[60] This is the latest incarnation of the "skin in the game" proposals, which mistakenly assume that subscribers only value their Lifeline service to the extent they must pay something to receive it. The Commission has rejected this argument in the past and should do so again here. Forcing subscribers to pay a handset fee – no matter how small – would not make low-income consumers value Lifeline more, but rather make the service unaffordable and inaccessible for many. The proposal is based on news stories from 2014-15 that predate the adoption of the National Verifier to verify applicants' eligibility for the Lifeline program and other reforms.[61] There is no reason to think that the National Verifier and other Lifeline reforms such as the NLAD are not effective at denying enrollment attempts by ineligible consumers. As a result, the Commission should not adopt the proposed free handset ban, which would discourage Lifeline program participation by eligible subscribers, consign eligible subscribers to a "second class" service rather than what a competitive marketplace would otherwise provide, and appears likely to exceed the Commission's authority. The Commission instead should focus its efforts on completing the implementation of the National Verifier, which (along with the NLAD) is designed to combat any potential waste or fraud during enrollment.

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[60] *See* FNPRM ¶¶ 151-158.

[61] *See id.* ¶ 151, n. 420 (referencing news reports from 2014 and 2015 concerning alleged distribution of free handsets to individuals ineligible for the Lifeline program). Note that whether eligibility was verified by ETCs before the National Verifier, or is determined by the National Verifier now, if an ETC give an ineligible applicant a free handset, it is the ETC that has to bear the cost of that handset and the ineligible applicant will not be enrolled in the Lifeline program.

A. The Proposed Free Handset Ban Would Make Lifeline Services Less Affordable and Discourage Lifeline Program Participation by Eligible Low-Income Americans

NaLA understands the Commission's desire in the FNPRM to balance the perceived risk that free handsets could encourage ineligible Lifeline applicants (who cannot enroll anyway because of the National Verifier and tight programmatic controls)[62] with the harm of mandatory charging for handsets to consumers that cannot afford a device that is necessary to receive the value of Lifeline-supported voice and broadband service. However, the proposed ban would fail to strike the correct balance by barring Lifeline providers from making affordable (*i.e.*, free) handsets available to the most vulnerable in America, which runs counter to the Commission's goal of making telecommunications and information services affordable to low-income Americans.[63] As discussed above, affordability remains one of the principal barriers to broadband adoption and the Lifeline program is designed to address this barrier by ensuring the availability of quality services at just, reasonable, and affordable rates.[64] When proposing changes to the Lifeline program, the Commission must consider the impact of the reforms on the program's twin tenets of affordability and availability and assess how they are compatible with such goals.[65] Here, the Commission does not explain (nor can it explain) how the proposed ban

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[62] NaLA notes that the Commission already prohibits ETCs from providing applicants with activated devices enabling use of Lifeline-supported service unless it is confirmed that the applicants are eligible for the program. 47 C.F.R. § 54.410(a). Consequently, it is unclear what benefit the proposed ban would provide in discouraging ineligible subscriber enrollments beyond what Commission rules already require.

[63] *See Lifeline and Link Up Reform and Modernization, et al.*, WC Docket No. 11-42, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11, ¶ 267 (2012) ("The Lifeline program is serving the truly neediest of the population in the most dire economic circumstances.") (2012 Lifeline Reform Order).

[64] *See supra* Section I; 47 U.S.C. § 254(b)(1).

[65] *See NaLA v. FCC*, 921 F.3d at 28. *See supra* Section I.A.

will make Lifeline service more affordable for eligible subscribers or increase the accessibility of communication services to low-income consumers.

As feared in the FNPRM, the proposed free handset ban would discourage participation by otherwise eligible Lifeline subscribers and undermine the Commission's express broadband-adoption goals.[66] Critically, the proposed ban would operate like a "minimum charge" for Lifeline service for many low-income consumers, as access to Lifeline service means little unless a subscriber has a device on which to access it.[67] While NaLA's ETC members generally allow eligible subscribers to "bring their own devices" on which to receive supported services, the distribution of free handsets at enrollment remains an essential driver of Lifeline service adoption by low-income consumers.[68] As the Commission noted in the FNPRM, distribution of free handsets during enrollment is particularly important for certain vulnerable populations, including those who are homeless or otherwise displaced.[69] For these subscribers and other eligible low-income consumers, even a nominal handset fee is an insurmountable obstacle to obtaining Lifeline service. In the 2012 Lifeline Reform Order, the Commission explained that a minimum charge "could be burdensome for those low-income consumers who lack the ability to make such payments electronically or in person, potentially undermining the program's goal of serving low-income consumers in need."[70] The Commission further found that a minimum

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[66] *See* FNPRM ¶¶ 136 (noting the impact of broadband adoption on closing the digital divide), 154 (asking whether the proposed ban would discourage participation in the Lifeline program by eligible subscribers).

[67] *See id.* ¶ 158 (inquiring whether the proposed handset fee would constitute a "minimum charge" for Lifeline service).

[68] *See* Comments of the National Lifeline Association, WC Docket No. 17-287, *et al.*, 98 (filed Feb. 21, 2018) (NaLA Comments).

[69] *See* FNPRM ¶ 152 (citing NaLA Comments at 98).

[70] 2012 Lifeline Reform Order ¶ 266 (internal citation omitted).

charge "could potentially discourage consumers from enrolling in the program and could result in current Lifeline subscribers leaving the program."[71] The Commission determined that even a small, one-time fee at service activation – similar to the proposed handset fee – could represent a "significant barrier" to Lifeline program entry for otherwise eligible subscribers.[72] When the Commission once again raised the prospect of imposing a maximum discount on Lifeline (which would operate like a minimum charge) in the 2017 Lifeline Report and Order and NPRM, commenters overwhelmingly opposed the Commission's proposal.[73] As NaLA previously noted, mandating a handset fee (especially if such fee is small) also would impose additional logistical and administrative burdens on low-income consumers, ETCs, and USAC, likely costing more to manage than the handset fee would bring in.[74] Implementing such a process is not administrable, unnecessary and would only increase the potential for waste in the Lifeline program.[75]

The Commission suggests in the FNPRM that a handset fee is necessary to ensure that eligible subscribers actually "value" their Lifeline service.[76] But as the Commission recognized in the 2012 Lifeline Reform Order, "the possibility that the subscriber will not or cannot pay [a] minimal charge does not necessarily mean that the low-income consumer does not value Lifeline

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[71] *Id.* ¶ 267.

[72] *Id.* ¶ 268.

[73] *See* Reply Comments of the National Lifeline Association, WC Docket No. 17-287, *et al.*, 16-18 (filed Mar. 23, 2018) (noting that nearly all commenters addressing the issue opposed a maximum discount and addressing the three supportive comments) (NaLA Reply Comments).

[74] *See* NaLA Comments at 64-65; NaLA Reply Comments at 16-17 (Mar. 23, 2018).

[75] NaLA notes that such potential waste is at odds with a Commission seeking to control USF costs, including the costs associated with the Lifeline program. *See Universal Serv. Contribution Methodology*, WC Docket No. 06-122, Notice of Proposed Rulemaking, FCC 19-46, ¶ 1 (May 31, 2019) (seeking comment on establishing an overall USF cap).

[76] FNPRM ¶ 154.

service."[77] The same remains true today and the Commission should not discourage Lifeline program participation by otherwise eligible subscribers through the proposed ban.

The proposed free handset ban also threatens to relegate low-income eligible consumers to a "second-class" service compared to that received by wealthier Americans. With the exception of some expensive high-end devices, leading wireless carriers currently offer new subscribers handsets during enrollment at no additional cost.[78] There is no reason that Lifeline eligible subscribers should be required to pay a separate handset fee when other consumers are not.

B. The Commission Does Not Appear to Have the Authority to Prohibit the Distribution of Free Handsets to Eligible Low-Income Applicants

Beyond the policy concerns presented by the proposed ban, the Commission does not appear to have the authority to regulate the distribution of free handsets to eligible low-income subscribers at enrollment. In the FNPRM, the Commission correctly notes that the Lifeline program "does not provide support for equipment used with the [Lifeline] supported service" and asks whether it possesses the authority to impose a free handset ban.[79] The answer appears to be no.[80] As explained in the 2016 Lifeline Modernization Order, "[p]ast Commission precedent

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[77] 2012 Lifeline Reform Order ¶ 267.

[78] *See, e.g.*, Verizon, "Free Phone deals," available at https://www.verizonwireless.com/deals/free-phones/ (last visited Jan. 16, 2020); AT&T, "Phone deals," available at https://www.att.com/deals/cell-phone-deals/ (last visited Jan. 16, 2020); T-Mobile, "Shop great deals on devices and plans," available at https://www.t-mobile.com/offers/deals-hub (last visited Jan. 16, 2020); Sprint, "Deals," available at https://www.sprint.com/en/shop/offers.html?INTNAV=TopNav:Shop:Offers (last visited Jan 16, 2020).

[79] FNPRM ¶ 153.

[80] NaLA notes that the Commission does not identify any potential source of authority for the proposed ban in the FNPRM. *See id.* ¶¶ 151-158.

makes it clear that Lifeline . . . has been used to fund services, and not equipment."[81] Section 254 of the Act and the Lifeline rules similarly indicate that the Commission's regulatory authority extends to the provision of Lifeline service and not the equipment used to access the service.[82]

Although the Commission previously adopted Wi-Fi, hotspot, and tethering requirements for devices made available for use with a Lifeline-supported service in the 2016 Lifeline Modernization Order, it never claimed that it could prohibit the distribution of free handsets by ETCs to otherwise eligible low-income subscribers.[83] Indeed, the Commission reached the opposite conclusion, stating that "Lifeline providers retain the flexibility to decide whether to provide devices in general and if so, *what amount to charge, if any, for a device*."[84] NaLA also notes that the Commission's authority to adopt the Wi-Fi, hotspot, and tethering requirements has been questioned in recent years. For instance, in his dissent to the 2016 Lifeline Modernization Order, then-Commissioner Pai asserted that the Commission failed to provide sufficient notice before adopting the equipment requirements and "didn't suggest it had the legal authority to do so."[85] Led by now-Chairman Pai, the Commission has proposed to eliminate the equipment requirements, in part, because it "appears to lack the statutory authority to adopt or enforce such requirements."[86] Accordingly, the Wi-Fi, hotspot, and tethering requirements

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[81] 2016 Lifeline Modernization Order ¶ 125. *See* 2012 Lifeline Reform Order ¶ 348 (stating that Lifeline "historically . . . has been used for services not equipment").

[82] *See, e.g.*, 47 U.S.C. § 254(b)(1) (directing the Commission to ensure that "[q]uality services should be available at just, reasonable, and affordable rates"); 47 C.F.R. § 54.401 (defining Lifeline as "a non-transferrable retail service" meeting certain standards).

[83] *See* 2016 Lifeline Modernization Order ¶¶ 374-377; 47 C.F.R. § 54.408(f).

[84] *Id.* ¶ 374, n. 928 (emphasis added).

[85] *Id.*, Dissenting Statement of Commissioner Ajit Pai, 10.

[86] 2017 Lifeline NPRM ¶ 81.

remain under review and at this time provide no basis for prohibiting Lifeline providers from distributing free handsets to eligible subscribers at enrollment.

Although it is possible that the Commission could seek to exercise its ancillary authority under the Act to adopt requirements that relate in some way to handsets that are intended to be used for a Lifeline-supported service, it is difficult to conceive how banning free handsets could come within that authority. For example, the Commission grounded its authority to impose the Wi-Fi, hotspot, and tethering requirements on the directives in Section 254 of the Act to ensure USF supports quality services at just, reasonable, and affordable rates as well as the power under Section 1302 of the Act to encourage the deployment of advanced telecommunications capabilities to all Americans.[87] By contrast, it is unclear how erecting barriers to obtaining handsets needed to access quality services and thereby making service less affordable would increase access to Lifeline service or encourage the deployment of advanced telecommunications capabilities to low-income subscribers. The Commission therefore does not appear to possess the authority to impose a free handset ban.

C. Instead of Imposing a Free Handset Ban, the Commission Should Focus on Implementing the National Verifier to Ensure Lifeline Applicant Eligibility

Instead of imposing a free handset ban, the Commission should focus its efforts on completing and improving the implementation of the National Verifier, which (along with the NLAD) is designed to combat the potential for fraud during the Lifeline enrollment process.[88] The National Verifier has launched in some form in all 50 states, Puerto Rico and the District of

[87] *See* 2016 Lifeline Modernization Order ¶ 375, n. 929 (citing 47 U.S.C. §§ 254, 1302).

[88] *See* FNPRM ¶ 156 (asking whether the implementation of the NLAD and National Verifier will reduce the opportunities for fraud associated with the distribution of free handsets at enrollment).

Columbia, with most jurisdictions already in "hard launch" status.[89] In the 2016 Lifeline Modernization Order, the Commission championed the National Verifier as "more than simply a piece of technology," but rather a comprehensive system for determining Lifeline applicant eligibility when used in conjunction with the NLAD.[90] The Commission stated that the National Verifier would "close one of the main avenues historically leading to fraud and abuse in the Lifeline program: Lifeline providers determining subscriber eligibility."[91] Specifically, the Commission asserted that the National Verifier "takes on the risk of determining eligibility for subscribers" from Lifeline providers.[92]

In light of the National Verifier's promised benefits, NaLA once again urges the Commission to refrain from adopting reforms to the Lifeline program (such as the proposed free handset ban) that make Lifeline service less affordable and accessible, especially before the National Verifier has been fully implemented and the Commission has the benefit of studying Lifeline compliance thereunder to assess the status of waste, fraud and abuse in the current Lifeline program.[93] The Commission acknowledges in the FNPRM the potential of the National

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[89] *See, e.g.*, *Wireline Competition Bureau Announces the Launch of the Nat'l Lifeline Eligibility Verifier for All New Enrollments in Nine States*, WC Docket No. 11-42, FCC Public Notice, DA 19-1289 (Dec. 18, 2019); *Wireline Competition Bureau Announces the Next Nat'l Lifeline Eligibility Verifier Launch in Three States*, WC Docket No. 11-42, FCC Public Notice, DA 19-1290 (Dec. 18, 2019); *see also* https://www.usac.org/lifeline/eligibility/national-verifier/ (last visited Jan. 20, 2020).

[90] 2016 Lifeline Modernization Order ¶ 126. *See* 2012 Lifeline Reform Order ¶ 179 (establishing the NLAD to determine whether prospective Lifeline subscribers are already receiving support from another ETC and complete other subscriber verification checks).

[91] 2016 Lifeline Modernization Order ¶ 129.

[92] *Id.* ¶ 130.

[93] *See* NaLA Reply Comments at 20-21 (stating industry stakeholders agreed that implementation of the National Verifier represented the best means of addressing potential waste, fraud, and abuse in the Lifeline program).

Verifier (along with the NLAD) to reduce the opportunities for fraud during Lifeline enrollment.[94] The Commission should give these processes and other compliance measures time to work before imposing new burdens on eligible subscribers and Lifeline providers. The Commission therefore should not prohibit ETCs from distributing free handsets to eligible Lifeline subscribers during enrollment.[95]

III. ALL DATA USAGE IS ULTIMATELY CONTROLLED BY THE SUBSCRIBER AND DEMONSTRATES THE SUBSCRIBER'S CONTINUED DESIRE TO RECEIVE THE LIFELINE SERVICE

NaLA opposes the Commission's proposals to upend the process for demonstrating compliance with the Lifeline program's usage rules, which would impose unnecessary and likely unworkable obligations on eligible low-income subscribers and ETCs.[96] As explained below, app data usage is undertaken by the subscriber and shows that he or she still wants Lifeline service, thereby qualifying as usage under the Commission's rules. Moreover, it would be inadvisable and impractical to require ETCs to judge or further parse the types of data used by their subscribers. The Commission therefore should not impose additional usage-related requirements.

A. "App" Data Usage Is Undertaken by the Subscriber and Qualifies as Usage

The Commission asks whether an ETC could evade the Lifeline program usage requirements "by installing an application ('app') on a user's phone that would 'use' data

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[94] *See* FNPRM ¶ 156.

[95] Even though the Commission apparently lacks the authority to impose a free handset ban and NaLA strongly opposes such a ban, NaLA notes that a minimum handset fee would obviate the need to adopt a minimum Lifeline service charge.

[96] *See* FNPRM ¶¶ 146-148.

without any action by the user."[97] The Commission's question appears to be at odds with the purpose of the usage rules and how eligible subscribers actually utilize their Lifeline service. When adopting the usage rules in the 2012 Lifeline Reform Order, the Commission was concerned about potential waste from Lifeline subscribers' handsets being lost, broken, or improperly given away.[98] The Commission therefore imposed the usage rules on consumers and providers of free services to provide a mechanism to determine whether a Lifeline subscriber demonstrates "a continued desire to continue to receive Lifeline benefits."[99] NaLA submits that none of the Commission's concerns that led to the adoption of the usage rules are at play when data usage stems from apps running on a Lifeline subscriber's handset. In order to use data through an app, a Lifeline subscriber must keep his or her handset charged with cellular data on and airplane mode turned off. The Lifeline subscriber also must ensure that the app remains on the device (not deleted). By keeping the handset charged and on with data-using apps running or on the device, we know that the device has not been lost or broken and the Lifeline subscriber demonstrates "a continued desire to continue to receive Lifeline benefits."[100] Just like wealthier Americans, Lifeline eligible subscribers may want to run a weather app in the background to keep up-to-date on local conditions or receive push notifications from a map app to avoid delays

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[97] *Id.* ¶ 146 (citing 47 C.F.R. § 54.407(c)(2)). The Commission also seeks comment on whether it has the authority to require Lifeline subscribers to use an app to confirm continued usage or prohibit ETCs from installing certain apps. *See id.* ¶ 147. As discussed above, the Commission's authority appears to extend only to the provision of Lifeline service and not the equipment used by eligible subscribers to access such service. *See supra* Section II. Thus, the Commission does not appear to have the authority to regulate the apps that a Lifeline provider installs on the handsets provided to eligible subscribers or the apps used by eligible subscribers.

[98] *See* 2012 Lifeline Reform Order ¶ 263 ("The possibility that a wireless phone has been lost, is no longer working, or the subscriber has abandoned or improperly transferred the account is much greater for pre-paid services.").

[99] *Id.*

[100] *Id.*

during commutes. Putting conditions on such app usage threatens to make Lifeline a "second class" service and increase the burdens imposed on eligible subscribers to demonstrate continued eligibility for the Lifeline program under the usage rules.

NaLA further submits that eligible subscribers signal their desire to use Lifeline service by not adjusting the data settings for handsets or specific apps. The Commission does not suggest (and NaLA has not found) that low-income consumers are either unfamiliar with or incapable of employing user controls in handsets and apps to control data usage. Users can generally control data usage of apps or delete them from the device (as noted above) and the handsets provided by NaLA's ETC members to eligible subscribers allow users to adjust their data settings and take other actions to stop data usage (*e.g.*, by turning the device off, turning off cellular data, or turning on airplane mode). It also is the experience of NaLA's ETC members that eligible subscribers are aware that apps on their handsets can use data and they can take action to minimize cellular data usage because their service has data limits (*e.g.*, by using Wi-Fi). Similar to acknowledging the need to utilize Wi-Fi where available to conserve cellular data, Lifeline subscribers generally also know how to control background data usage. Lifeline eligible subscribers therefore already possess the knowledge and tools necessary to ensure that any app data usage is undertaken at their direction. However, to the extent any gaps remain in low-income consumers' knowledge about app data usage, such issues are better addressed through Lifeline subscriber education efforts and/or disclosures in ETC terms and conditions than through new rules.[101]

[101] *See id.* ¶ 258 (stating that Lifeline providers should educate their subscribers regarding the usage requirements).

B. Requiring ETCs to Further Parse the Data Usage of Their Subscribers Is Inadvisable and Impractical

The Commission also seeks comment on amending its rules to require ETCs to collect and provide additional documentation to "show that data usage is 'undertaken by the subscriber,' and not the ETC."[102] ETCs should not be required to look into the types of data used by their subscribers, as any such requirement would be both unnecessary and likely unworkable. First, as explained in the previous section, Section 54.407(c)(2)(i) of the Commission's rules is clear that any "usage of data" undertaken by the subscriber qualifies as usage for the purposes of the Lifeline rules and demonstrates the subscribers desire to continue to receive the Lifeline service.[103] Parsing such usage imposes unnecessary burdens[104] and invites needless scrutiny into consumers' personal information which they rightfully may not wish to share with government and to which under these circumstances the government likely has no right to demand.[105] Accordingly, any expansion to the data usage documentation requirements is both unnecessary and inadvisable.

Second, expanding the amount and type of documentation ETCs must collect regarding subscriber data usage likely is unworkable. For example, the call detail records (CDRs) received

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[102] FNPRM ¶ 148. As with its question on apps, the Commission provides no proposed regulatory language or other guidance on what such a requirement would entail, making a cost/benefit analysis challenging.

[103] 47 C.F.R. § 54.407(c)(2)(i).

[104] *See* 2016 Lifeline Modernization Order ¶ 414 (finding it "unnecessarily burdensome" to require eligible subscribers to distinguish among qualifying services to ensure compliance with the Lifeline usage requirements); *see also, e.g., Carpenter v. United States*, 585 U.S. ___, 138 S. Ct. 2206, 2223 (2018) (requiring the government to secure a court issued probable cause warrant prior to seeking access to an individual's location information).

[105] Eligible subscribers should not be forced to cede their privacy in exchange for Lifeline support through granular data usage collection requirements, such as CDRs or some sort of app usage reporting. *See* FNPRM ¶ 147 (requesting input on the potential privacy implications of modifying the usage documentation obligation).

by NaLA's ETC members generally show when a subscriber undertakes an action qualifying as usage under the Lifeline rules (*e.g.*, completing an outbound call, sending a text message, using data). But the CDRs do not identify the particular app or service that an eligible subscriber employs or has permitted to generate data usage. As examples, the CDRs do not identify whether data usage is due to an email sent to a healthcare provider or a push notification from a weather app that has been left open. As a consequence, even if the Commission determined that additional Lifeline subscriber data usage documentation would facilitate its oversight efforts, ETCs would not be able to provide such granular data. The Commission therefore should not impose new usage-related requirements that will only increase the burdens faced by Lifeline eligible low-income consumers and the ETCs that serve them.

IV. THE COMMISSION SHOULD NOT FOIST ADDITIONAL OBLIGATIONS AND COSTS ON ETCS, IN PARTICULAR SMALL ENTITIES, FOR ACTIVITIES THAT SHOULD BE DONE BY THE NATIONAL VERIFIER, THE NLAD, OR USAC

In the FNPRM, the Commission proposes to impose on ETCs a number of additional "program integrity" requirements to further address purported waste, fraud, and abuse.[106] Each of the proposals would impose additional burdens and costs on ETCs with little to no concomitant benefit to the program. The proposals also would require ETCs to carry out activities that already are or should be the responsibility of the National Verifier, the NLAD, or USAC. As explained below, having the National Verifier, the NLAD, or USAC take on the proposed obligations instead of ETCs would be the most effective (and cost-effective) alternative to achieve the Commission's goals. In particular, the National Verifier only has been implemented recently and the Commission should hold back on adopting new obligations for

[106] *Id.* ¶¶ 143-145, 159-164.

ETCs until it gathers sufficient data regarding the National Verifier's impact on addressing potential waste, fraud, and abuse in the Lifeline program. The Commission therefore should not foist additional requirements on Lifeline providers, in particular small entities, related to the following proposals, especially when there are readily-apparent alternatives available.

Eligibility Proof Type and Number – The Commission requests input on requiring ETCs to collect and record the type of proof used by the applicant to demonstrate eligibility for the Lifeline program and the identification number or card number indicated thereon.[107] The Commission should not adopt this obligation, which would duplicate the eligibility check and recordkeeping functions already performed by the National Verifier and impose obligations on ETCs that should be performed by the National Verifier.

As discussed above, before the National Verifier, Lifeline providers had the responsibility to verify applicant eligibility by viewing proof documents. Now Lifeline applicants submit their eligibility documentation to the National Verifier, which "takes on the risk of determining eligibility for subscribers."[108] Consequently, "deploying the National Verifier in a state means the Lifeline eligibility responsibilities [are] transitioned from ETCs or state administrators to the National Verifier."[109] The National Verifier also retains all information collected during the Lifeline applicant eligibility determination process.[110] The Commission therefore found in the 2016 Modernization Reform Order that "Lifeline providers *will not be required to retain eligibility documentation* for subscribers who have been

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[107] *See* FNPRM ¶ 145.

[108] 2016 Lifeline Modernization Order ¶ 130, 150; *see also* 47 C.F.R. § 54.400(o) (providing that the National Verifier will "facilitate the determination of consumer eligibility for the Lifeline program").

[109] 2016 Lifeline Modernization Order ¶ 165.

[110] *See id.* ¶ 151.

determined eligible by the National Verifier."[111] Instead, ETCs are only required to obtain and retain the notices generated by the National Verifier confirming that their subscribers meet the Lifeline program eligibility requirements.[112]

The National Verifier has launched in some form in all 50 states, Puerto Rico and the District of Columbia with over half the states already in "hard launch" status.[113] Thus, there is no reason to impose a new misdirected obligation on Lifeline providers to collect and retain a Lifeline applicant's proof number and type when the National Verifier is now the official repository for all eligibility information.[114]

When it adopted the National Verifier in the 2016 Lifeline Modernization Order, the Commission emphasized that Lifeline providers would "recognize significant reductions in administrative and compliance costs."[115] Such savings – which have not yet materialized – will be forever lost if the Commission imposes duplicative record retention and other requirements on ETCs that are supposed to be performed by the National Verifier. Further, the Commission stated that, "[b]y adopting the National Verifier, the risk of enforcement actions against providers for eligibility related issues will decline as the National Verifier takes on the risk of determining eligibility for subscribers."[116] Requiring ETCs to continue to collect and retain certain eligibility documentation and information, and risk related audit liability and enforcement

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[111] *Id.* (emphasis added).

[112] *See* 47 C.F.R. § 54.410(c)(2)(i).

[113] *See supra* Section II.C. In the three opt-out states (California, Texas and Oregon), eligibility has been and continues to be determined by a third party administrator.

[114] *See* 47 C.F.R. § 54.410(c)(1)(ii) (providing that ETCs must obtain and retain documentation of Lifeline program eligibility "except to the extent such documentation is retained by the National Verifier").

[115] 2016 Lifeline Modernization Order ¶ 130.

[116] *Id.*

actions, goes against the promises made by the Commission when adopting the National Verifier. The Commission therefore should leave the collection and retention of Lifeline applicant eligibility proof number and type to the National Verifier.

Internal Customer Account Numbers – The Commission also proposes requiring ETCs to submit their internal customer account numbers to the NLAD when enrolling or recertifying Lifeline subscribers.[117] The Commission asserts that access to such information will facilitate review of subscriber records by the Commission and other government entities.[118] NaLA submits that it would be more effective for the NLAD to generate these unique subscriber identifiers.

NaLA does not oppose measures to improve uniformity between NLAD and ETC subscriber records, but the Commission's proposal is not the most effective way to achieve that goal.[119] In particular, obtaining ETC internal customer account numbers would not ensure uniformity in subscriber records across providers in the NLAD, potentially complicating investigatory actions. While ETCs often assign internal customer account numbers to their subscribers, such numbers may vary in format and content across ETCs. Thus, even if receiving internal customer account numbers from an ETC would facilitate a review of that ETC's records, it would be of limited utility in cross-ETC investigations where the Commission or another government entity may want to track specific enrollment activity.

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[117] *See* FNPRM ¶ 144.

[118] *Id.*

[119] NaLA notes that ETCs already are required to submit a plethora of identifying information about their Lifeline subscribers to the NLAD during enrollment, including full name, address, date of birth, and last four digits of social security number as well as information regarding subscribers' use of the Lifeline service. *See* 47 C.F.R. § 54.404(b)(6). Accordingly, the Commission already has access to numerous data points regarding Lifeline subscribers through the NLAD to facilitate investigatory efforts without ETC internal customer account numbers.

Instead, NaLA recommends that the NLAD generate a unique identifier when an eligible subscriber is enrolled or recertified for Lifeline service. ETCs would then match this unique identifier to the relevant subscriber and use the identifier in their internal customer records. The NLAD already is responsible for identity verification of Lifeline applicants during enrollment and the NLAD can utilize the LexisNexis' "LexID" service to generate a Lifeline eligible subscriber's unique identifier.[120] Once assigned by the NLAD, the unique identifier should remain associated with the relevant subscriber following any benefit transfer and be re-associated with the subscriber if he or she leaves the program and subsequently re-enrolls. This approach would ensure the uniformity of subscriber account number information in the NLAD and facilitate Commission oversight without adding to ETC reporting obligations.

Certifying Privacy Protection Efforts and Background Checks – Finally, the Commission seeks comment on requiring ETCs to: (1) certify that they provide relevant personnel with privacy training before those individuals may access the NLAD and National Verifier systems and (2) provide written confirmation that they conducted background checks of relevant staff with access to the NLAD or National Verifier systems.[121] NaLA's ETC members provide training on how to properly access, use, and disclose Lifeline subscriber information and many conduct certain background checks for relevant personnel with access to the NLAD or National Verifier systems. But NaLA has concerns with the Commission's proposals, which provide no guidance on the substance of the trainings or background checks that would be required. The Commission does not provide examples or criteria for what would constitute

[120] *See* LexisNexis, "LexID," available at https://risk.lexisnexis.com/global/en/our-technology/lexid (last visited Jan. 16, 2020). The LexID service links continuously-updated public and proprietary databases of personal information to verify a person's identity, which will help bolster Commission efforts to combat the enrollment of ineligible subscribers in Lifeline.

[121] *See* FNPRM ¶¶ 159-164.

"appropriate" ETC privacy training.[122] The Commission similarly does not provide a benchmark for assessing the adequacy of ETC staff background checks.[123] It also fails to indicate what in a potential independent contractor or employee's background would be disqualifying. There is an important difference between an old misdemeanor for underage drinking and a previous conviction for fraud-related crimes. Without further clarification by the Commission, Lifeline providers would be left to guess as to whether their privacy training and background check procedures are sufficient and subject to potential improper payment claw backs or enforcement action if the Commission or USAC were to later determine that such procedures were insufficient.

NaLA therefore recommends that, to the extent the Commission decides that Lifeline privacy training and background check requirements are necessary, USAC should be responsible for carrying out these obligations. First, as proposed in the FNPRM, USAC should conduct the Lifeline privacy trainings either directly with relevant ETC personnel or make the training available to such personnel to complete on their own before accessing the NLAD or National Verifier systems.[124] Under this approach, individuals that are required to register in the new ETC enrollment representative database could be required to complete USAC's training prior to accessing the NLAD and National Verifier systems.[125] The privacy training should be based on industry best practices, with input from ETCs. However, the privacy training should not be used by the Commission to establish new privacy-related or other requirements, or obligations on ETC employees and contractors not found in the Lifeline rules.

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[122] FNPRM ¶ 159.

[123] *See id.* ¶ 164.

[124] *See id.* ¶ 163.

[125] *See id.* ¶¶ 78-86.

Second, USAC should conduct the background checks of relevant ETC employees and contractors with access to the NLAD and National Verifier systems. As with the privacy trainings, USAC should conduct the background checks as part of the new ETC enrollment representative registration process. In light of its potentially sensitive nature, the information obtained through the background checks should be accorded the same privacy protections USAC affords to other information collected through the ETC enrollment representative registration process.[126] By having USAC develop and conduct any privacy trainings or background checks adopted for Lifeline program, the Commission can establish a centralized and standardized process to protect Lifeline subscriber information from improper access, use, and disclosure, without foisting new (and potentially significant) costs and potential enforcement liability on Lifeline providers, which were supposed to decline with the implementation of the National Verifier and the removal of Lifeline eligibility verification responsibilities from ETCs.

When proposing a new rule, the Regulatory Flexibility Act (RFA) requires the Commission to provide "a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."[127] NaLA's ETC members are small entities[128] and object to the burdens associated with the Commission's proposals to make Lifeline providers responsible for personnel privacy trainings and background checks.[129] The

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[126] *See id.* ¶ 82 (directing USAC to comply with both the Privacy Act of 1974 and the Federal Information Security Management Act of 2002 with regard to the information obtained through the ETC enrollment representative registration process).

[127] 5 U.S.C. § 603(a).

[128] *See* FNPRM, Appendix D, ¶ 15 (noting a wireless carrier is a small business when "it has 1,500 or fewer employees").

[129] *See* 5 U.S.C. § 609(a) (allowing stakeholders an opportunity to comment on any rule that would have "a significant economic impact on a substantial number of small entities").

Commission failed to discuss any potential ways to minimize the impact of the proposed privacy training and background check requirements on small entity ETCs in the FNPRM Initial Regulatory Flexibility Analysis, even though it recognizes that its proposals "would increase the economic burdens on small entities."[130] NaLA submits that, while the proposed privacy training certifications and background check confirmations may not be burdensome in themselves, the potential burden associated with designing, arranging and paying for such trainings and conducting and analyzing background checks could be significant. These costs could draw ETC resources away from the provision and improvement of the Lifeline services provided to eligible low-income consumers, frustrating the program's purpose. Thus, consistent with the RFA, NaLA recommends that the Commission require USAC to develop and conduct any privacy trainings or background checks adopted for the Lifeline program as a reasonable and administrable alternative to minimize the proposals' economic impact on small ETCs.

NaLA notes that the proposed privacy training and background check obligations are similar to a requirement the Commission proposed in the 2015 Lifeline FNPRM to require ETCs to provide sufficient training to all company employees and third-party agents annually.[131] After receiving an RFA challenge, the Commission ultimately declined to adopt this requirement due to its potential impact on smaller ETCs and the fact that the creation of the National Verifier represented as a less burdensome alternative to prevent ineligible subscriber enrollments.[132] The Commission should reach a similar conclusion here, with the less burdensome alternative being

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[130] FNPRM, Appendix D, ¶ 33.

[131] *See Lifeline and Link Up Reform and Modernization, et al.*, WC Docket No. 11-42, *et al.*, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, FCC 15-71, ¶¶ 210-214 (2015).

[132] *See* 2016 Lifeline Modernization Order, Appendix B, ¶¶ 5-6.

reliance on USAC to conduct any Lifeline-related privacy trainings or background checks. Otherwise, the Commission risks imposing unnecessary costs on ETCs, in particular small entities, whose resources are better dedicated to improving and expanding Lifeline service to eligible low-income consumers across the nation.

CONCLUSION

When considering the appropriate goals for the Lifeline program, and in all of its Lifeline-related decisions, the Commission should return and renew its commitment to adhering to the primary statutory goals of the program – making telecommunications and information services affordable for, and accessible to, low-income Americans. Further, the Commission should further reform the Lifeline program consistent with those primary goals and the positions expressed herein.

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