

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Modernizing Suspension and Debarment Rules) GN Docket No. 19-309

COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

NCTA – The Internet & Television Association (NCTA) submits the following comments in response to the Notice of Proposed Rulemaking in the above-referenced proceeding.¹ NCTA appreciates and shares the Commission’s interest in ensuring that the Universal Service Fund and other subsidy programs operate efficiently and free from fraud and abuse. While a more effective use of suspension and debarment procedures would bolster the Commission’s ability to protect these programs, the substantial agency discretion provided under the rules proposed in the *Notice* raises due process and other concerns that should be addressed before the Commission moves forward with this proposal.

INTRODUCTION

In the *Notice*, the Commission solicits comment on whether to augment its suspension and debarment rules so as to “enhance the Commission’s ability to root out bad actors from participation in its support programs.”² In particular, the Commission proposes to adopt new rules consistent with the Office of Management and Budget Guidelines to Agencies on Government Debarment and Suspension (Nonprocurement) (Guidelines).³

¹ *Modernizing Suspension and Debarment Rules*, GN Docket No. 19-309, Notice of Proposed Rulemaking, FCC 19-120 (rel. Nov. 25, 2019) (*Notice*).

² *Notice* at ¶ 2. The support programs covered by this proceeding include the Universal Service Fund, the Telecommunications Relay Services program, and the National Deaf-Blind Equipment Distribution Program.

³ *Id.*

NCTA strongly supports the Commission’s goal of ensuring that its support programs are “well managed, efficient, and fiscally responsible.”⁴ We also understand the Commission’s interest in developing additional tools to protect these programs beyond the current suspension and debarment rules, which “cover a relatively narrow range of conduct” and apply only after a person has been convicted or found civilly liable of certain types of unlawful activity.⁵ But in deciding whether to move beyond the current “clear-cut, mandatory, and virtually self-executing” rules,⁶ the Commission must take care not to sweep too broadly. In particular, any new rules should ensure that: (1) robust due process protections are in place; (2) the discretion provided to the agency under the Guidelines is not abused; (3) parties do not face suspension and debarment for actions beyond their control; and (4) parties do not face suspension and debarment for conduct that predates the new rules.

I. THE COMMISSION SHOULD ENSURE THAT THERE ARE ROBUST DUE PROCESS PROTECTIONS IN PLACE

As the *Notice* recognizes, the most significant change proposed in the new rules is moving away from a regime in which suspension and debarment must be preceded by a criminal conviction or finding of civil liability.⁷ While we appreciate the Commission’s interest in expanding the use of suspension and debarment, if a finding of criminal or civil liability is no longer a prerequisite, there is a risk that parties will face suspension and debarment without adequate notice of the allegations against them or insufficient opportunity to challenge the allegations and introduce exculpatory or mitigating evidence.

⁴ *Id.*

⁵ *Id.* ¶ 4.

⁶ *Id.* ¶ 8.

⁷ *Id.* ¶ 4.

Given the significant consequences associated with suspension and debarment, the Commission should ensure that its rules provide robust protections for the due process rights of affected parties. The necessary due process protections should include procedures that occur *before* the Commission acts to suspend or debar a participant in one of its programs, evidentiary standards *during* the process, and procedures for challenging such decisions *after* they are made and addressing such challenges in a timely manner. Below we address a few specific steps the Commission should take.

First, the Commission should create a process by which parties are informed of the potential for suspension or debarment proceedings before the formal initiation of such proceedings. The use of “pre-notice” or “show cause” letters could serve to inform the affected provider of the alleged basis for the suspension or debarment and the facts upon which such allegations are based. Such a notice also could be the trigger for discussions about resolution through less extreme alternatives than suspension and debarment. While there may be cases where suspension and debarment is the best response to egregious conduct that threatens the Commission’s programs, in many cases the better approach for the Commission and other stakeholders would be a consent decree or similar agreement that imposes a fine or other cure for the offending behavior and binding commitments on future behavior.⁸

The robust use of alternatives to suspension and debarment also provides a way for the Commission to ensure that it is accounting for the effect of its actions on the customers that are served by the affected provider. In the context of the Universal Service Fund, it generally will be the case that only a single provider has deployed facilities to serve the geographic area, school, or rural health care facility that is the ultimate beneficiary of the funding.

⁸ *Id.* ¶ 69.

As a result, any action that the Commission takes to suspend or debar a participant in one of these programs raises concerns about the potential impact on affected customers. Because there are a wide variety of potential fact patterns, we would not recommend that the Commission adopt a rigid one-size-fits-all policy for these situations. Rather, the Commission will need to balance the harm to customers from removing the service provider with the harm to the program from allowing continued participation.

Second, the Commission must ensure that the evidentiary rules that apply to the suspension and debarment process are fair. Parties must be given the opportunity to understand and challenge the facts upon which the proposed suspension and debarment is based. The rules should make clear that allegations in a different context, such as a Notice of Apparent Liability or a civil complaint, are merely allegations and not findings.⁹ The Commission also must provide parties a meaningful opportunity to introduce evidence of exculpatory or mitigating factors. For example, evidence that the employee or contractor responsible for the alleged misconduct has been terminated should be an important factor in the decision whether to suspend or debar a participant from one of the covered programs.

NCTA also has concerns about the Commission's proposal to use an "adequate" evidence standard.¹⁰ Given the significant consequences for a party facing suspension or debarment, the adequate evidence standard is a fairly low bar for the agency to meet. While the use of a pre-suspension notice might alleviate some of this concern, there is still a concern that the Commission could move forward with suspension based on incomplete evidence.

⁹ 47 U.S.C. § 504(c) (A pending Notice of Apparent Liability "shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued.").

¹⁰ *Notice* ¶ 71.

For example, in the E-rate context, NCTA is concerned that the adequate evidence standard would enable the Commission to move forward with suspension based solely on assertions made by an unsuccessful competing bidder. Given the government-wide ramifications of a suspension decision, the Commission should consider a “preponderance of the evidence” standard or some other heightened standard.

Third, the Commission should establish a set of clear timeframes for action by the agency officials responsible for making decisions regarding suspension and debarment, as well as review of those decisions by the full Commission. Delay in any part of the process can impose significant harm on a party that has been accused of conduct so damaging that it warrants suspension and debarment. In addition, such delays could harm the beneficiaries of universal service support, such as schools, libraries, and rural healthcare providers, who are subject to time constraints for completing the competitive bidding process and seeking funding for services, and would therefore risk missing out on participation in the program for a given funding year while suspension proceedings play out. Accordingly, there should be clear deadlines for commencing the process, submission of evidence, and issuance of decision by the responsible agency officials. There also should be clear deadlines by which a party can seek review by the full Commission of a suspension or debarment decision, along with deadlines by which the Commission will address such a request.

II. THE COMMISSION SHOULD TAKE STEPS TO ENSURE THAT THE DISCRETION PROVIDED TO THE AGENCY UNDER THE GUIDELINES IS NOT ABUSED

As explained in the *Notice*, the Commission’s current suspension and debarment rules are “clear-cut and mandatory, with little room for discretion and a targeted focus on a narrow set of

misconduct.”¹¹ In contrast, the Guidelines “address a broader range of misconduct and provide federal agencies with substantial discretion to suspend and debar entities based on consideration of numerous factors.”¹²

Any regime in which a regulatory agency can provide itself with broad discretionary authority to limit or end a party’s ability to participate in a federal program necessarily raises concerns about the risk that such discretion will be exercised in an arbitrary manner. This is especially true under a framework in which other government agencies can give reciprocity to decisions made by the Commission. Unless appropriate substantive and procedural protections are put in place, suspension and debarment in the absence of a conviction or finding of civil liability increases the risk that parties will be precluded from participating in these programs based on minor infractions that do not threaten the programs.

One way the Commission can address these concerns is by making clear that it will weigh the severity of the alleged misconduct against the provider’s overall track record. Many of the providers participating in these programs have been providing service subject to Commission regulation for decades and many serve millions of customers spread over numerous states. The fact that a company with this type of experience has a few minor blemishes on its record over a long period of time should not necessarily lead to the conclusion that there is a pattern of misconduct that warrants suspension or debarment from one of the Commission’s programs.

¹¹ *Notice* ¶ 8.

¹² *Id.*

The Commission also should make clear that it will only consider using suspension and debarment where it finds that a party has willfully violated the Commission’s rules or been grossly negligent in its compliance efforts, and not in instances of administrative error or inadvertent oversights. For example, the Commission proposes to treat the submission of forms or statements “that could result in overpayments” as a cause for suspension or debarment.¹³ Given the complexity of many of the support programs, including the complexity of the forms used to seek reimbursement from those programs, it is not difficult to envision scenarios in which a company could end up submitting forms “that could result in overpayments” notwithstanding a good faith effort to comply with all applicable rules. Indeed, given the lag time that often occurs before USAC or the Commission clarifies the proper method of handling questions or ambiguities in the programs, it is entirely conceivable that such good faith mistakes could be repeated over some period of time or, for larger providers, that the same mistake could appear in the forms associated with dozens of projects.

Along the same lines, NCTA is concerned about language in the Guidelines that would potentially trigger disqualification for having a state or local “transaction” terminated within the preceding three years.¹⁴ Given that many participants in the federal universal service fund programs have extensive dealings with state and local governments this provision would create a significant risk of suspension or debarment from federal programs based on state or local actions that are not the result of any serious wrongdoing or that may be completely unfounded.

Accordingly, the Commission should make clear that it will only pursue suspension and

¹³ *Id.* ¶ 67.

¹⁴ *Id.* ¶¶ 12, 30.

debarment when there is evidence that a party has acted willfully or been grossly negligent in its failure to comply with the rules.

III. THE COMMISSION SHOULD NOT HOLD PARTIES ACCOUNTABLE FOR ACTIONS BEYOND THEIR CONTROL

Among the ways in which the Guidelines would expand the Commission’s discretion is the ability to impute conduct from one entity to another. As the *Notice* explains, the Guidelines “allow an agency to impute conduct from an individual to an organization; from an organization to an individual or between individuals; or from one organization to another.”¹⁵ The expanded imputation ability that the Commission would have under these rules also increases the risk that parties will face significant consequences for actions that are beyond their control. The Commission should take steps to address this concern.

As “covered primary tier participants,” NCTA’s members would face the potential for suspension or debarment not only for actions of the company and its employees, but also for contractors, sub-contractors, and a wide array of professionals who may be involved in a project. The result of this potential for extensive imputation of conduct among all of these entities is that covered primary tier participants face a heavy burden in ensuring that all of the entities involved in a supported project are aware of, and comply with, the applicable disclosure obligations that would reveal problematic conduct. But the Commission should recognize that the bad actors that should be excluded based on these disclosures are the least likely to be forthright in making such disclosures. Accordingly, the Commission must take care in implementing these requirements that it does not end up imposing a strict liability standard on providers that would hold them

¹⁵ *Id.* ¶ 10.

accountable for actions by a third party that are not within their control and that they made a good faith effort to identify.

The Commission could address these concerns completely by limiting the scope of its suspension and debarment rules solely to primary tier participants, as is the case with the Commission's current rules. Such an approach appropriately puts the focus on the entities most likely to have a significant effect on the programs the Commission is trying to protect. Alternatively, the Commission could at least ease the burden on primary tier participants by adopting the safe harbor in the OMB rules that provides for a one-time check on subcontractors rather than an ongoing obligation.¹⁶ Enabling primary tier participants to take one of three clearly defined steps to address their obligation should help to protect those companies from unwarranted burdens or liability, while also protecting the programs at issue from the participation of bad actors.

IV. THE COMMISSION SHOULD NOT APPLY NEW RULES RETROACTIVELY

The *Notice* solicits comment on a proposal to apply new suspension and debarment rules to conduct that occurred before the effective date of the new rules.¹⁷ NCTA is concerned that the ability to initiate suspension and debarment based on conduct that would not have been subject to such penalties at the time it occurred simply increases the already substantial discretion, and corresponding potential for arbitrary enforcement, that exists under the Commission's expanded suspension and debarment regime. The fact that such retroactive application of the new rules might be triggered by past conduct at the state or local level compounds this concern.

¹⁶ See 2 C.F.R. § 180.300 (“When you enter into a covered transaction with another person at the next lower tier, you must verify that the person with whom you intend to do business is not excluded or disqualified. You do this by: (a) Checking SAM Exclusions; or (b) Collecting a certification from that person; or (c) Adding a clause or condition to the covered transaction with that person.”).

¹⁷ *Notice* ¶ 87.

CONCLUSION

For all the reasons explained in these comments, the Commission should adopt appropriate safeguards before augmenting its suspension and debarment rules as proposed in the *Notice*.

Respectfully submitted,

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