

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON D.C. 20554**

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

**INITIAL COMMENTS OF THE  
NATIONAL ASSOCIATION OF REGULATORY UTILITY  
COMMISSIONERS**

The National Association of Regulatory Utility Commissioners (NARUC), respectfully submits these comments on the Notice of Proposed Rulemaking (NPRM) included in the November 16, 2017 adopted Federal Communications Commission (FCC) *Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking (NPRM) and Notice of Inquiry*.<sup>1</sup>

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<sup>1</sup> See, *In the Matter(s) 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, FOURTH REPORT AND ORDER, ORDER ON RECONSIDERATION, MEMORANDUM OPINION AND ORDER, NOTICE OF PROPOSED RULEMAKING, AND NOTICE OF INQUIRY (FCC 17-155) (rel. December 1, 2017)*, available online at: [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-17-155A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-155A1.pdf).

## NARUC'S INTEREST

NARUC is a nonprofit organization founded in 1889. Its members include the government agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with regulating the activities of telecommunications,<sup>2</sup> energy, and water utilities. NARUC is recognized by Congress in several statutes<sup>3</sup> and consistently by the Courts,<sup>4</sup> as well as a host of federal agencies,<sup>5</sup> as the proper entity to represent the collective interests of State utility commissions. In the Telecommunications Act,<sup>6</sup> Congress references NARUC as “the national

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<sup>2</sup> NARUC's member commissions have oversight over intrastate telecommunications services and particularly the local service supplied by incumbent and competitive local exchange carriers (LECs). These commissions are obligated to ensure that local phone service is provided universally at just and reasonable rates. They have a further interest to encourage LECs to take the steps necessary to allow unfettered competition in the intrastate telecommunications market as part of their responsibilities in implementing: (1) State law and (2) federal statutory provisions specifying LEC obligations to interconnect and provide nondiscriminatory access to competitors. *See, e.g.*, 47 U.S.C. § 252 (1996).

<sup>3</sup> *See* 47 U.S.C. §410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Board to consider issues of common concern); *see also* 47 U.S.C. §254 (1996); *see also* *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (explaining that “[c]arriers, to get the cards, applied to . . . [NARUC], an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the “bingo card” system”).

<sup>4</sup> *See, e.g., U.S. v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), *aff'd* 672 F.2d 469 (5th Cir. 1982), *aff'd en banc on reh'g*, 702 F.2d 532 (5th Cir. 1983), *rev'd on other grounds*, 471 U.S. 48 (1985) (noting that “[t]he District Court permitted [NARUC] to intervene as a defendant. Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions of those States in which the defendant rate bureaus operate.” 471 U.S. 52, n. 10. *See also, Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976); *compare, NARUC v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007); *NARUC v. DOE*, 851 F.2d 1424, 1425 (D.C. Cir. 1988); *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

<sup>5</sup> NRC Atomic Safety and Licensing Board *Memorandum and Order* (Granting Intervention to Petitioners and Denying Withdrawal Motion), LBP-10-11, *In the Matter of U.S. Department of Energy (High Level Waste Repository)* Docket No. 63-001-HLW; ASLBP No. 09-892-HLW-CABO4, *mimeo* at 31 (June 29, 2010) (“We agree with NARUC that, because state utility commissioners are responsible for protecting ratepayers’ interests and overseeing the operations of regulated electric utilities, these economic harms constitute its members’ injury-in-fact.”)

<sup>6</sup> *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. §151 *et seq.*, Pub.L.No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) (“Act” or “1996 Act”).

organization of the State commissions” responsible for economic and safety regulation of the intrastate operation of carriers and utilities.<sup>7</sup>

NARUC and its members have a long history of supporting the federal Lifeline program.<sup>8</sup> We have also supported conditionally transitioning the program to include broadband service,<sup>9</sup> and changes to “defray a meaningful amount of the program participant’s average cost for the installation/activation and monthly charges for broadband service and acquisition of enabling devices.”<sup>10</sup>

However, none of our resolutions support the unlawful procedure outlined in the FCC’s March 31, 2016 [Third Report and Order, Further Report and Order, and Order on Reconsideration](#), *In the Matter(s) of Lifeline and Link Up Reform and Modernization*, 31 F.C.C. Rcd. 3962 (rel. April 27, 2016)(*2016 Lifeline Order*).

That *2016 Lifeline Order* proposed a new “multi-state” Broadband Lifeline Provider designation procedure that bypassed the State Commission-based process Congress specified in the 1996 Act.

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<sup>7</sup> See 47 U.S.C. § 410(c) (1971) (NARUC nominates members to FCC Joint Federal-State Boards which consider universal service, separations, and related concerns and provide formal recommendations that the FCC must act upon; *Cf.* 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). *Cf. NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains “...Carriers, to get the cards, applied to...(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system.)

<sup>8</sup> See, e.g., NARUC’s July 2000 [Resolution Regarding Universal Service for Low Income Households](#); July 2005 [Resolution Supporting the efforts of the Federal Communications Commission and the National Association of Regulatory Utility Commissioners to promote Lifeline Awareness](#); July 2009 [Resolution Proclaiming National Telephone Discount Lifeline Awareness Week](#).

<sup>9</sup> See, NARUC’s February 2008 [Resolution to Support Equal Access to Communication Technologies by People with Disabilities in the 21st Century](#); February 2009 [Resolution on Legislation to Establish a Broadband Lifeline Assistance Program](#); November 2009 [Resolution on Lifeline and Link-Up Program Support for Broadband Internet Access Services and Devices](#).

<sup>10</sup> See, NARUC’s July 2011 [Resolution Supporting a Low-Income Broadband Service Adoption Program](#).

This *NPRM*<sup>11</sup> seeks comments on proposals to modify the Lifeline program to, among other things, properly recognize the State’s role in the federal process for designating Eligible Telecommunications Carriers (ETCs), correct the flawed analysis, and remove the illegal procedures included in the *2016 Lifeline Order*.

In direct response to this *NPRM*, at the February 2018 NARUC Winter Policy Summit, the association passed a *Resolution to Ensure that the Federal Lifeline Program Continues to Provide Service to Low-Income Households* specifically addressing issues raised in this proceeding. That resolution specifically urges the FCC to:

- Continue to cooperate with the States and acknowledge States’ significant role in the Lifeline program;
- Approve its tentative decision to eliminate the stand-alone Lifeline Broadband Provider designation and reverse its pre-emption of State regulatory authority to designate ETCs;
- Continue to allow non-facilities based carriers to receive Lifeline funds because they have been crucial in ensuring that low-income households are connected to vital telecommunication services; *and*
- Carefully balance, in any budget it sets for the Lifeline program: (1) ensuring that qualified households that are current subscribers do not lose their Lifeline benefit; and (2) reasonable and rational growth in the Lifeline fund to serve subscribers in an amount that does not exceed the current soft budget notification amount.

NARUC applauds the *NPRM*’s explicit recognition of the “important and lawful role of the states” assigned by Congress with respect to federal universal service programs.<sup>12</sup>

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<sup>11</sup> *NPRM* at ¶¶ 53-118

<sup>12</sup> *NPRM* at ¶ 54.

The tentative decision to reverse its pre-emption of State authority to designate ETC's is correct. The FCC cannot create a designation process under 47 U.S.C. § 214 that bypasses *ab initio* State commissions.

NARUC's resolution also specifies that non-facilities-based carriers should continue to receive lifeline funds. Non-facilities-based Lifeline providers provide service to 75 percent of eligible users or about 8.3 million households. Even with a transition period, the potential to disrupt and even eliminate service to literally millions of eligible users is obvious.

It is also clear, that, as a supported service, voice should remain part of any lifeline service package; that support for voice service should not be phased out; and that the FCC should continue to work to provide access to USAC data about certificated Lifeline providers and the program.

Finally, if the FCC does establish a budget for this program, it should carefully balance the need to ensure current eligible subscribers "do not lose their lifeline benefit," with "reasonable and rational growth in the Lifeline fund to serve subscribers in an amount that does not exceed the current soft budget notification amount."

In support of these positions, NARUC states as follows:

### **BACKGROUND**

Since 1985 the FCC's Lifeline program has provided a federal discount to low-income customer phone bills.<sup>13</sup> In the 1996 Act, Congress integrated Lifeline into a suite of federal universal service mechanisms. The 1996 Act created a structure that requires the FCC to work hand-in-glove with State Commissions.<sup>14</sup>

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<sup>13</sup> In the Matter of *MTS and WATS Market Structure, and Amendment of Parts 67 & 69 of the Commission's Rules and Establishment of a Joint Board*, Report and Order, 50 Fed. Reg. 939 (1985).

<sup>14</sup> *Weiser, Philip, Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U.L. Rev. 1692, 1694 (2001) (describing the 1996 Act as "the most ambitious cooperative federalism regulatory program to date").

Like the FCC, State commissions are *affirmatively charged* by Congress to “preserve and advance universal service,”<sup>15</sup> and to encourage deployment “of advanced telecommunications” to all Americans. Indeed, State universal service programs are a crucial component of Congress’s plan. Forty-three States have State-funded programs. Some State’s laws impose State Lifeline service obligations on certain carriers along with carrier of last resort obligations.

Many States provide subsidies that complement FCC mechanisms for: Lifeline service (17); high-cost companies (22); and broadband (5).<sup>16</sup> State Lifeline programs provide subsidies ranging from \$2.50 to \$14.30 per month that add to the FCC Lifeline discount for low income consumers.

The 1996 Act also assigns States key roles to facilitate the intended coordinated approach to these programs. Among the other “affirmative duties” imposed, Congress required “State commissions to designate the telecommunications carriers eligible to receive support in exchange for their provision of the universal service package.”<sup>17</sup>

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<sup>15</sup> See, 47 U.S.C. §254(b)(5)(“should be specific . . . federal and state mechanisms to advance universal service”); §254(f) (authorizing State programs); §251(f) (allowing States to exempt rural carriers from certain requirements); and §254(i) (requiring FCC and States to insure universal service at reasonable rates.)

<sup>16</sup> Lichtenberg, Sherry, Ph.D., State Universal Service Funds 2014, Report No. 15-05 (NRRI June 2015) at iv.

<sup>17</sup> Peter W. Huber et al., *Federal Telecommunications Law*, Second Edition, at 589 (Aspen Law 1999) (citing §214(e)(2)).

Since 1997, the FCC has repeatedly confirmed that “Section 214(e)(2) of the Act provides state commissions with the *primary* responsibility for performing ETC designations.”<sup>18</sup> The subsequently added § 214(e)(6), however, only permits the FCC to take over the designation process, where “a common carrier providing telephone exchange service and exchange access . . . is not subject to the jurisdiction of a State Commission.”

The 1996 Act also specifies that ETCs must provide all supported services.<sup>19</sup> Specifically, § 214(e)(1) requires ETCs to “advertise” and “offer the services that are supported by the Federal universal service support mechanisms under § 254(c).” Absent forbearance,<sup>20</sup> each ETC, *however designated*, must comply with §214(e)(1).

The *2016 Lifeline Order* departed from the statutory scheme by interpreting “section 214(e) to permit carriers to obtain ETC designations specific to particular service,” establishing a Lifeline Broadband Provider (LBP) ETC designation and “preempting” the § 214(e)(2) State designation process for just the new broadband Lifeline category purportedly based on § 214(e)(6).<sup>21</sup> The new type of ETC was only required to offer one supported service: broadband access. It could *only* be designated by the FCC. Both requirements are inconsistent with the statutory text.

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<sup>18</sup> *In the Matter of Federal-State Joint Board on Universal Service*, 20 F.C.C. Rcd. 6371, 6374 ¶ 8 (Mar. 17, 2005) (emphasis added); *see also, id.* at ¶ 61, noting “[§]214(e)(2) demonstrates Congress's intent that state commissions evaluate local factual situations in ETC cases.” *See also, In the Matter of Connect America Fund*, 26 F.C.C. Rcd. 17663 at 17798 (2011) (“By statute, the states...are empowered to designate common carriers as ETCs” and specifying in note 622 that “[S]tates have primary jurisdiction to designate.”); *see also In Re Western Wireless Corporation*. 16 F.C.C. Rcd. 19144, 19147(2001), where the FCC explains its authority under §214(e)(6) “is no greater than that of the state that would have otherwise made the designation.” Indeed, as then Commissioner Pai pointed out in his dissent to the *2016 Lifeline Order*, there was *no* back-up role for the FCC in the 1996 Act; §214(e)(6) was added a year later because carriers not subject to the jurisdiction of any State commission could not otherwise be designated.

<sup>19</sup> 47 U.S.C. § 254(a)(1)-(2), (b)(5), (c)(2) & § 214(e)(1)-(2), & (6).

<sup>20</sup> 47 U.S.C. § 160 permits the FCC to “forbear” to relieve the application of “any provision of this Act” or “any regulation” required by specific provisions of the Act.

<sup>21</sup> *1996 Lifeline Order* at ¶ 229.

As noted, *supra*, § 214(e)(1) requires ETCs to, absent forbearance, “offer” and “advertise” all supported services.<sup>22</sup> And there was, apparently, no forbearance.<sup>23</sup> According to the *2016 Lifeline Order*, Appendix A, the services designated for support in 47 C.F.R. § 54.101 currently include both *voice telephony services* and *broadband services*. In ¶¶ 267-268, the *2016 Lifeline Order* did forbear from “applying the provision of Section 214(e)(6) requiring carriers to be providing telephone exchange service and exchange access.” But that forbearance was unlawful.<sup>24</sup> As then-Commissioner Pai pointed out in his dissent, the statute limits

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<sup>22</sup> This even though the *2016 Lifeline Order*, at ¶¶ 297-298, inconsistently, found it necessary to forbear “from Lifeline-only ETCs obligations to offer [broadband] to permit such ETCs to solely offer voice if they so choose,” and with respect to ETC’s that are *not* Lifeline only, when it forbears from requiring such ETC’s to provide Lifeline-supported broadband service with voice service in certain areas.

<sup>23</sup> Instead, the *2016 Lifeline Order* FCC seems to rely upon a novel (and untested) legal theory to explain why forbearance is not required at ¶ 361 under E.2.(c) *Forbearance Regarding the Lifeline Voice Service Obligation*,” subpart (iii) *Lifeline Broadband Provider ETCs*:

[W]e interpret section 214(e)(1) to impose service obligations on ETCs that mirror the service defined as supported under section 254(c) in the context of the specific universal service rules, mechanisms, or programs for which they were designated.[] Consequently, providers that obtain an ETC designation as an LBP receive a designation that is specific to the Lifeline broadband program and will only have section 214(e)(1) service obligations for BIAS. Thus, by default, providers do not have any Lifeline voice service obligations as a result of their designation specifically as an LBP.

*See also* the more detailed exposition at ¶¶ 243–244 of the *2016 Lifeline Order* which relies on prior FCC “E-rate” precedent distinguishable on both the facts and the applicable provisions of the Act.

<sup>24</sup> Assuming *arguendo* the forbearance was permissible, in ¶ 267 and ¶ 272, the same order made clear that that forbearance only applied to “service or services *already classified* by the Commission as telephone exchange service and exchange access.” (emphasis added) The fact is that the 47 C.F.R. § 54.101(b) referenced “voice telephony” services necessarily include *currently unclassified* -Voice over Internet Protocol services (VoIP). The FCC has, for more than 12 years, in numerous orders, continued to insist it has not classified such VoIP services as either a “telecommunications service” or an “Information service.” That, in turn, suggests they do not fall within the defined forbearance of *telephone exchange service* and *telephone exchange access services* – both putative *telecommunications services* subject to State jurisdiction. *See, e.g.*, 47 U.S.C. §§ 221(b), 251(b)(3) & (c)(2)(A), & 253(f).

FCC “forbearance authority to apply provisions of the Act to carriers, not to the FCC itself.”<sup>25</sup>

Now that the FCC has reclassified Broadband Internet Access Service (BIAS) as an information service,<sup>26</sup> a similar problem with § 214(e) is presented. A carrier that only provides a BIAS service, cannot qualify as an *eligible telecommunications carrier* because it no longer is providing a *telecommunications service* as defined in the Act.

Prior to the *2016 Lifeline Order*, ninety-six Commissioners from thirty-seven States signed a letter explaining the impact if the FCC chose to bypass the § 214 procedure.<sup>27</sup> It also explained how the *2016 Lifeline Order* is inconsistent with crucial Congressional goals, and directly undermines existing complementary State Lifeline programs sanctioned by Congress in § 254, as well as service quality for Lifeline consumers.<sup>28</sup>

NARUC and its Commissioners were not alone. Commissioner O’Rielly argued the *2016 Lifeline Order* “absolutely mangled section 214,” and joined then-Commissioner Pai, in filing separate and strong dissents pointing out the FCC lacks statutory authority to bypass the State designation procedure.

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<sup>25</sup> See, Pai dissent at, 31 FCC Record 3962 at 4177 (explaining the FCC could not designate BLPs under § 214(e)(6) unless they currently offered exchange and exchange access services).

<sup>26</sup> *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, FCC 17 -166 (released on Jan. 4, 2018).

<sup>27</sup> See, *Letter from 96 Commissioners representing 37 State Commissions to FCC Chairman Wheeler et. al.*, WC Docket Nos. 11-42 09-197 (March 20, 2016). Although the FCC did not go with its original proposal, the impact was the same.

<sup>28</sup> *2016 Lifeline Order* at ¶ 227(noting where States retain designating authority, the State process ensures “that carriers have the financial and technical means to offer service, including 911 and E911, and have committed to consumer protection and service quality standards.”)

NARUC appealed the *2016 Lifeline Order*, but ultimately agreed to a voluntary remand of the proceedings back to the FCC to address these issues.<sup>29</sup>

## DISCUSSION

### ***I. The FCC should eliminate the Lifeline Broadband Provider (LBP) category of ETCs and the State preemption upon which it is based.***

As noted, *supra*, NARUC passed several resolutions concerning the inclusion of broadband in lifeline services after a joint board referral.<sup>30</sup> None of those resolutions support the approach adopted in the *2016 Lifeline Order*. Indeed, in July 2015, NARUC passed a [\*Resolution on ETC Designations for Lifeline Broadband Service\*](#) specifically urging the FCC to refrain from disrupting the existing federal-State partnership in the provision of Lifeline Services by preempting the authority of States to designate ETCs for the provision of advanced telecommunications services. More recently, NARUC's 2018 resolution specifies that the FCC should confirm the *NPRM's* tentative conclusion and eliminate the stand-alone LBP category of ETCs and reverse the State preemption upon which it is premised.

#### ***A. The FCC lacks authority to enforce the 2016 Order's LBP Designation procedure.***

The plain text of the statute requires State Commissions in the first instance to conduct ETC designations for carriers. As noted, *supra*, the FCC has continuously acknowledged that § 214(e)(2) “provides state commissions with the *primary* responsibility for performing ETC designations.”<sup>31</sup>

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<sup>29</sup> *NARUC v. FCC*, Case No. 16-1170 (D.C. Cir., filed June 3, 2016).

<sup>30</sup> *See* notes 8, 9, and 10 *supra*.

<sup>31</sup> *See* note 17 *supra*.

The nature or regulatory classification of the service does not matter.<sup>32</sup> Congress specifies that States designate carriers as ETCs before they can receive any federal universal service subsidy. The FCC simply has no role in the ETC designation process unless the State cannot act as a result of State law.

NARUC agrees with the *NPRM*'s acknowledgements<sup>33</sup> that the 2016 Lifeline order “preempted state authority in a manner wholly inconsistent with section 214,” and that it “erred in preempting state commissions from their primary responsibility to designate ETCs.” The proposed broadband provider designations specified in the *2016 Lifeline Order* bypass clear Congressional directives. Similarly, absent forbearance, all lifeline providers must offer all listed supported services. Voice, even in the 2016 order's regulations,<sup>34</sup> is still a supported service.

The statute, by its express terms, *requires* the action proposed in ¶¶ 54-55 of the *NPRM*. The FCC must “eliminate the Lifeline Broadband Provider category of ETCs and the State preemption upon which it is based.”<sup>35</sup>

Similarly, the LBP designation appears to be structured to permit entities to participate in the Lifeline program without assuming obligations with respect to

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<sup>32</sup> Compare, *Verizon v. F.C.C.*, 740 F.3d 623, 638 (D.C. Cir. 2014) (“Observing that the statute applies to both “[t]he Commission *and* each State commission with regulatory jurisdiction over telecommunications services,” 47 U.S.C. § 1302(a) (emphasis added), Verizon contends that Congress would not be expected to grant both the FCC and state commissions the regulatory authority to encourage the deployment of advanced telecommunications capabilities. But Congress has granted regulatory authority to state telecommunications commissions on other occasions, and we see no reason to think that it could not have done the same here. *See, e.g., id.* § 251(f) (granting state commissions the authority to exempt rural local exchange carriers from certain obligations imposed on other incumbents); *id.* § 252(e) (requiring all interconnection agreements between incumbent local exchange carriers and entrant carriers to be approved by a state commission).”

<sup>33</sup> *NPRM* at ¶ 55.

<sup>34</sup> The *2016 Lifeline Order* specifies in amended 47 C.F.R. § 54.101(a) that “Voice telephony services and broadband service shall be supported by federal universal service support mechanisms.”

<sup>35</sup> *Id.*

voice service. However, as described, *supra*, the *2016 Lifeline Order* did not comply with the statute when it suggested such action. Even if the proclaimed forbearance of one provision of § 214(e)(6) were sufficient, if the FCC rejects § 214(e)(6) as a legal basis for FCC authority, then it must continue to require the offering of all supported services including voice.

In ¶ 56, the *NPRM* includes a series of questions about the possible impact of reversing the *2016 Lifeline Orders* LBP designation procedure. The answers to three of the questions are straightforward and compelled by the plain text of the 1996 Act.

First, the *NPRM* asks if “reversing the preemption in the *2016 Lifeline Order* resolves the legal issues surrounding LBPs and their designation process?” If “reversing the preemption” results in requiring any carrier seeking a “broadband-only” designation to go first to each State in the proposed area of operations, then the answer is such reversal would cure one illegality in the *2016 Lifeline Order*, but would still unlawfully permit carriers to offer only a non-telecommunications service.<sup>36</sup>

Second, the *NPRM* asks how reversing the preemption in the *2016 Lifeline Order* impacts the future of LBPs in the Lifeline program. As the answer to the prior question indicates, at a minimum, such carriers would have to approach each State where it proposes to operate and seek an ETC designation from a State authority. But § 214(e)(1) requires ETCs to “offer the services that are supported by the Federal universal service support mechanisms under § 254(c).” Voice remains a supported service. Leaving the *2016 Lifeline Order*’s LBP procedure intact without addressing § 214(e)(1) requirement to offer voice services opens this alternate procedure to additional legal challenges.

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<sup>36</sup> *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, FCC 17-166 (released on Jan. 4, 2018).

Assuming *arguendo*, the FCC can legally create brand new categories of ETC's that are not reflected in the Act, still - retaining a separate category designation that by statute must - like other ETCs - provide all supported services is unnecessarily complicated, will increase consumer confusion, and will undermine program goals.

Third, the *NPRM* asks what rule changes would be needed to restore the traditional State and federal roles for ETC designations. NARUC has not taken a detailed position on all the rules imposed by the *2016 Lifeline Order*. However, some obvious changes are required.

Section 54.201(j) blocking the State ETC designation role must be eliminated.

On its face, to restore traditional roles, it is not necessary to eliminate broadband as a supported service in any revision of § 54.101. Note, NARUC is on record supporting expansion of the Lifeline program to include broadband services, albeit after another referral of related issues to the Federal State Joint Board on Universal Service.<sup>37</sup>

The revisions to the remainder of the rules should eliminate all text that suggests the FCC can supplant the State ETC designation procedure.

The FCC should clarify that where a State is unable to conduct an ETC designation, the FCC is free to structure its own designation procedures. NARUC has not taken a position on those procedures. However, absent additional findings, the FCC must also correct the rules to assure that any LBP offers all supported services, which of course includes voice.

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<sup>37</sup> See, *Testimony of Commissioner Ronald A. Brisé, on behalf of the National Association of Regulatory Utility Commissioners before the United States Senate Commerce, Science & Transportation Subcommittee on Communications, Technology, Innovation & the Internet June 2, 2015 hearing on Lifeline: Improving Accountability and Effectiveness*, available online at: [http://www.commerce.senate.gov/public/?a=Files.Serve&File\\_id=c97efe66-fc7c-4c63-a69a-efb280b1759d](http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=c97efe66-fc7c-4c63-a69a-efb280b1759d).

Also the “relinquishment procedure” in § 54.205 should reflect FCC/State’s obligations under 47 U.S.C. § 214 (e) to designate carriers in unserved areas to provide supported services.

***B. Elimination of the 2016 Order’s LBP Designation procedure is good policy.***

As discussed earlier, not only is elimination required by the plain text of the 1996 Act , that elimination is, on its face, the best option for maximizing oversight of program integrity and efficiency. Legal considerations aside, it is difficult to understand why any advocate for Lifeline services would support the approach outlined in the *2016 Lifeline Order* as it allows a carrier’s choice to eliminate crucial State safeguards to the integrity of the program. That bypass of State oversight can do nothing but reduce scrutiny imposed on any carrier’s application and its subsequent operations. Conversely, the *NPRM*’s proposal to comply with the law and reestablish the State’s ETC designation role can only result in less fraud and abuse. Fraud and abuse divert funds from the consumers Congress expects to benefit from the Lifeline program. State “cops” remain a significant barrier to such diversions through the conduct of ETC designations and thereafter by monitoring designated carrier activities. The *2016 Lifeline Order* allows a carrier to choose to take the State cops off the beat without providing any effective replacement. The FCC can never access sufficient resources to fill the resulting deficit.

No one can seriously contend that this *NPRM*’s proposal to insure States retain their role in the designation process can do anything but increase the scrutiny imposed on any carrier’s application and subsequent operations.<sup>38</sup>

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<sup>38</sup> See, e.g., February 22, 2016 *Letter from California PUC Commissioners Sandoval, Peterman, and Florio*, in WC Docket No. 11-42, online at: <http://apps.fcc.gov/ecfs/comment/view?id=60001484187> noting, among other things that “CPUC staff has found inaccurate and misleading statements in FCC-approved compliance plans regarding the technical capability of purported MVNO subject matter experts.” {emphasis added}

To date, State oversight has been crucial. In some cases, States have revoked or refused to grant an ETC designation pursuant to § 214(e). This capability is a crucial component for policing the federal fund to eliminate bad actors. At least six States responding to an informal 2015 NARUC survey have refused an application for ETC designation filed by a carrier. Seven respondents to that survey revoked designations for questionable practices and/or violating program rules.<sup>39</sup> And at least two commissions have either rejected designations to carriers that provided substandard 911 services or their questions caused the carriers to withdraw pending applications. But those numbers do not tell the whole story. In many cases, a carrier whose ETC application or existing ETC designation is being challenged will withdraw its application or relinquish its ETC status once it becomes clear that it will not be granted or may be revoked. Such actions are not tracked or reflected in any listed statistics. Florida, for example, has had 19 ETC filings withdrawn. On top of States' initial reviews of ETC applications, informal NARUC surveys indicate that *at least* 14 States have programs to periodically conduct compliance audits on ETCs and/or of Lifeline Recipients.<sup>40</sup>

Moreover, service quality problems with Lifeline service and Lifeline providers will continue, along with inevitable disputes and fraudulent schemes.

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<sup>39</sup> States responding to the 2015 survey indicating they had revoked a carrier's ETC designation include FL, KS, KY, MI, MN, WA, and WI. Florida revoked the designations of two companies for abuse of the Lifeline program, one of which faced criminal charges in Tampa federal court last summer (2015). See Florida PSC Docket No. 080065, *Investigation of Vilaire Communications, Inc.'s eligible telecommunications carrier status and competitive local exchange company certificate status in the State of Florida*, and Docket No. 110082-TP, *Initiation of show cause proceedings against American Dial Tone, Inc., All American Telecom, Inc., Bellerud Communications, LLC, BLC Management LLC d/b/a Angles Communication Solutions, and LifeConnex Telecom, LLC for apparent violations of Chapter 364, F.S., Chapters 25-4 and 25-24, F.A.C., and FPSC Orders*.

<sup>40</sup> States responding to 2013, 2015, and 2016 surveys that have requirements for requiring periodic compliance audits on lifeline carriers or recipients include AK, CA, CO, FL, KS, MA, MO, MS, NE, NJ, OH, OR, WI, and VA.

Customers will have complaints. Unfortunately, the FCC can never access sufficient resources to handle universal service policy – including Lifeline – alone. That, along with the desire to maintain strong State matching programs, is exactly the reason why Congress specified the role the States have today. If the State designation and oversight authority is diminished as per the *2016 Lifeline Order's* alternate designation procedure, it undermines any State commission's efforts to justify assigning staff to either promote or protect users of such programs. There is no question that that is exactly what States do today. As the Pennsylvania PSC notes in a February 2016 *ex parte*:

[S]eparating the ETC designation process from an entity's ability to participate and receive federal Lifeline support [] undermine[s] the ability of the States and the Commission to protect consumers for services supported by Section 254, as required by Section 254(i). The Commission and most stakeholders agree that States are best suited to address the consumer or competitor complaints and concerns sure to arise with services supported by Section 254 under the Section 214(e)(2) designation process. This State role is a welcome, not burdensome, feature of cooperative federalism under Section 254(i). This approach makes it easier for the Commission to focus on complex interstate matters, knowing that the States can utilize their ETC designation authority to ensure adequate consumer protection for services supported by Section 254.<sup>41</sup>

California provided the FCC with similar examples, pointing out that the State has rejected Lifeline plans “with wireless local loop service that did not reliably identify caller location when calling E911 and did not reliably complete calls,” and that “cost a Lifeline customer more than comparable retail plans.”<sup>42</sup>

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<sup>41</sup> See, February 22, 2016 *Letter from David E. Screven, Assistant Counsel for the Pennsylvania Public Utility Commission to Marlene Dortch, FCC Secretary*, in WC Docket No. 11-42, at 3, available online at: <http://apps.fcc.gov/ecfs/document/view?id=60001515632>.

<sup>42</sup> See, e.g., February 22, 2016 *Letter from California PUC Commissioners Sandoval, Peterman, and Florio to FCC Secretary*, in WC Docket No. 11-42,, at p. 2-3 of the attachment, available online at: <http://apps.fcc.gov/ecfs/comment/view?id=60001484187>.

As the *NPRM* points out, even the *2016 Lifeline Order* recognized its approach “could create inconsistencies with the operations” of State programs. NARUC strongly endorses the *NPRM* conclusion in the same paragraph that:

States continue to play an important role in ensuring affordability of voice, and also supporting broadband; accordingly, reversing the preemption in the *2016 Lifeline Order* may resolve inconsistencies between state and federal efforts and provide benefits to the operation of state and federal programs.<sup>43</sup>

The fact is, the *NPRM* proposal to fully comply with the 1996 Act and restore the State’s Congressionally assigned role in ETC designations will provide clear benefits to the operations of both State and federal programs.

Additional State “cops” can only provide additional protections for both the program and program participants. It will also encourage the continuation of existing State matching programs.

The first telephone Lifeline programs in the United States started at State commissions which have a long history of supporting such vital social programs.<sup>44</sup> Many State Lifeline programs provide support subsidies ranging from \$2.50 to well over \$10.00 per month to qualifying Lifeline recipients.<sup>45</sup> To access State funds will continue to require some sort of registration or qualification. If the FCC retains the

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<sup>43</sup> *NPRM* at ¶ 57

<sup>44</sup> Compare, *MTS and WATS Market Structure; Amendment of the Rules and Establishment of a Joint Board*, Order Requesting Comments, 50 FR 14727-01 (April 15, 1985) and *Re Moore Universal Tel. Serv. Act*, 14 CPUC 2d 616 (Apr. 18, 1984) (“The [1983] Act is intended to provide affordable local telephone service for the needy, the invalid, the elderly, and rural customers. The Act mandates that this Commission establish a subsidized telephone service funded by a limited tax on suppliers of intrastate telecommunications service.”); See also, *NARUC’s July 2000 Resolution regarding Universal Service for Low Income Households*.

<sup>45</sup> An informal survey of States indicated that California provides a \$14.30 subsidy, Colorado \$12.75, Connecticut \$7.00, the District of Columbia between \$6.50 & \$8.50, and Kansas, \$7.77. Several other States offer \$3.50/month.

structure Congress specified and permits States to continue in their current role, it seems more than likely that State Legislators (or Commissions) will over time modify existing matching programs to mirror the federal structure. Assuming *arguendo* leaving the 2016 Lifeline Order’s LBP designation procedure intact were legally permissible, it would, at a minimum, undermine State programs and cause unnecessary diversions of FCC and State resources, which are better directed towards serving deserving Lifeline consumers. In the words of NARUC’s 2018 resolution, the optimal policy approach for the FCC in this docket is to “continue to cooperate with” State commissions.

***II. The FCC should reject the NPRM’s ¶ 65 proposal to limit Lifeline Support “to facilities-based broadband service provided over the ETC’s voice-and-broadband capable last mile network.”***

There are 11,339,293 Lifeline customers.<sup>46</sup> More than 75% of low-income families in the Lifeline program use non-facilities-based services. In ¶ 65, the *NPRM* proposes to limit Lifeline Support “to facilities-based broadband service provided over the ETC’s voice-and-broadband capable last mile network.”

At this point in the evolution of the Lifeline program, shifting to only facilities-based carriers will severely undermine the *raison d’etre* for the program<sup>47</sup> and will certainly significantly reduce subscriptions by *qualified* consumers.

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<sup>46</sup> Wireless and Wireline Data: USAC report LI03- Eligible Telecommunications Carriers, at: <http://www.usac.org/about/tools/fcc/filings/2017/q4.aspx>; USAC Funding Disbursement Search tool, at: <http://www.usac.org/li/tools/disbursements/default.aspx>.

<sup>47</sup> The federal lifeline program is based on a 1985 *Federal-State Joint Board Recommended Decision and Order*, which resulted in a January 13, 1986 FCC decision. The FCC’s decision was clearly focused on “promoting telephone subscribership among low income groups.” *MTS and WATS Market Structure*, 51 FR 1371-01 (January 13, 1986). There was no discussion of supporting infrastructure. In passing the 1996 Act, Congress reaffirmed this program by including in 47 U.S.C. § 254(b)(3) a requirement to assure that “[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services.”

And there are other problems with this approach. As the Indiana Utility Regulatory Commission points out in its January 24<sup>th</sup> comments:<sup>48</sup>

[O]ne of Indiana's dominant ILECs recently relinquished its ETC designation in portions of its service territory. In this case, in each wire center of the relinquishment area, the only ETCs remaining to offer service were Lifeline-only wireless ETCs. Only one of these ETCs has been recognized as facilities-based carrier by the FCC. However, that ETC may or may not qualify as providing Lifeline services over the last mile as the FCC is considering. In addition, this ETC did not serve all the relinquishment areas, leaving only ETCs that have received forbearance from [§] 214(e)(1)(A) to provide Lifeline service in some areas of the state. Therefore, the Indiana Commission is concerned that if the FCC rescinds the forbearance . . . granted to existing Lifeline-only ETCs, many would exit the market rather than take steps to meet the facilities requirement. As a result, many areas of Indiana would not only be without a Lifeline provider, but also without any ETC.

Similarly, the comments from two Minnesota agencies point out:<sup>49</sup>

In Minnesota, only three of the 19 wireless ETCs appear to qualify under the proposed enhanced definition of “facilities-based.” The Minnesota Agencies are concerned that many Lifeline subscribers would not have a viable alternative if the last mile facilities are required of the ETC. For many poor, some of whom have no permanent address, a wireless telephone is the only option to meet their communication needs and be able to manage in society.

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<sup>48</sup> COMMENTS OF THE INDIANA UTILITY REGULATORY COMMISSION, at 3-4, filed January 24, 2018, in the proceedings captioned: *In the Matter(s) of Bridging the Digital Divide for Low-Income Consumers*, WC Docket 17-287, *Lifeline and Link Up Reform and Modernization*, WC Docket 11-42, *Telecommunications Carriers Eligible for Universal Service Support*, WC Docket 09-197, online at: <https://ecfsapi.fcc.gov/file/101242034523045/Indiana%20Commission%20Comments%20NPRM%20FC%2017-155.pdf>.

<sup>49</sup> JOINT COMMENTS OF THE MINNESOTA PUC AND THE MINNESOTA DEPT. OF COMMERCE, at 5, filed January 24, 2018, in the proceedings captioned: *In the Matter(s) of Bridging the Digital Divide for Low-Income Consumers*, WC Docket 17-287, *Lifeline and Link Up Reform and Modernization*, WC Docket 11-42, *Telecommunications Carriers Eligible for Universal Service Support*, WC Docket 09-197, online at: <https://ecfsapi.fcc.gov/file/10124106384251/MN%20PUC%20and%20Commerce%20Lifeline%20Comments.pdf>

It is clear that the bulk of Lifeline users use non-facilities-based providers. Unlike the federal High Cost program, the direct focus of the Lifeline program has always been on promoting service to low income users, not on promoting infrastructure deployment.<sup>50</sup> The elimination of non-facilities-based service has the very real potential of gutting the Lifeline program.

The Lifeline programs of the largest two facilities-based wireless providers are far from ubiquitous. In small minority of States where they are offered,<sup>51</sup> they are simply not comparable in terms of affordability to services provided by resellers. For example, both Verizon and AT&T wireless only offer \$9.25/month off their monthly access rates.<sup>52</sup>

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<sup>50</sup> See note 47, *supra*.

<sup>51</sup> Verizon only offers wireless lifeline services in parts of four states. See Verizon’s “Discounted Wireless Lifeline Program Phone Service” webpage, online at: <https://www.verizonwireless.com/solutions-and-services/lifeline/> (last accessed 2/21/2018), describing its \$15.75 (after application of the federal discount) per month plan as only available “in areas where Verizon Wireless is approved to offer Lifeline service.” According to the linked brochure: “Lifeline service through Verizon Wireless is only available in parts of Iowa [8 counties], North Dakota [all but 4 counties], New York [8 counties] and Wisconsin [4 counties].” (emphasis added) *That brochure also specifies that – on top of the required 2 year contract, the requirement to supply your own handset, the \$15.75/month fee, and one-time \$35 activation charge:*

the market you’re in determines taxes, surcharges and fees, such as E911 and gross receipt charges. As of October 1, 2017, they can add between 7% and 46% to the standard monthly access and other charges. Lifeline subscribers will not be assessed a Federal [USF] charge. The Verizon Wireless Administrative Charge as of October 1, 2017 (\$1.23 per line), is a Verizon Wireless charge, not a tax, and subject to change. (emphasis added)

AT&T only offers wireless lifeline services in 14 States and Puerto Rico. See AT&T’s “Lifeline for Wireless Service” webpage, at <https://www.att.com/esupport/article.html#!/wireless/KM1008768> (last accessed 2/21/2018), noting “Qualifying States” are Alabama, Alaska, Arkansas, Idaho, Kentucky, Louisiana, Michigan, Mississippi, North Dakota, Oregon, South Dakota–Pine Ridge, Texas, Washington and West Virginia. Compare, T-Mobile’s “Lifeline Program” webpage, online at: <https://www.t-mobile.com/offers/lifeline-program> (last accessed 2/21/2018), which notes that T-Mobile also only offers its \$10/month (cost after applying the federal subsidy) lifeline plan in nine states and Puerto Rico.

<sup>52</sup> See note 51, *supra*; See also Verizon “Lifeline and Link Up Programs FAQs” webpage, available online at: <https://www.verizonwireless.com/support/lifeline-link-up-faqs/> (last accessed February 20, 2018); Compare AT&T “Lifeline for Wireless Service” webpage, (last accessed February 21, 2018), noting AT&T only offers low income customers a discount on monthly bills, online at: <https://www.att.com/esupport/article.html#!/wireless/KM1008768>.

In contrast, non-facilities-based resellers offer a service package covered completely by the \$9.25/month federal subsidy with no separate activation charge, and frequently no contract. The qualified recipient must pay nothing.

There simply is no question that the overwhelming majority of the homeless and those with no fixed address will necessarily be the first to lose this vital communications lifeline if the FCC goes forward with this proposal. This approach will effectively target the poorest (and most needy) people in the program first and hit them the hardest. Even in the most optimistic scenario, many consumers that qualify for the service will no longer receive it. Moreover, even with a lengthy transition, this change will also necessarily cause widespread consumer angst and confusion.

The *NPRM* suggests in ¶ 63 that this change might spur additional investment in infrastructure. However, there is also no credible evidence that eliminating non-facilities-based service will spur additional investment in voice-and broadband-capable networks. After all, it seems unlikely that any network owner would be selling unused airtime in large blocks to Lifeline resellers if that sale was not profitable and thus did not also contribute to the maintenance and improvement of the “resold” facilities. Also, simple economics suggest it is unlikely the FCC’s revised policy can be calibrated to provide adequate encouragement to current non-facilities-based service providers to either build their own wired facilities or overbuild other facilities-based providers – particularly in underserved/low population areas. As the Indiana comments quoted, *supra*, confirm, economic concerns have already caused (i) some large wireline facilities-based carriers to relinquish ETC status in many areas, and (ii) the largest two facilities-based wireless carriers – AT&T and Verizon – to only offer Lifeline services in a small minority of States. This is not a surprise these wireline and wireless carriers business plans are obviously not premised or focused on Lifeline programs. In contrast, many non-

facilities-based reseller's business plans are premised squarely on the existence of federal (and State) lifeline programs as the basis for operations in multiple jurisdictions.

In ¶ 65 the *NPRM* asks if a facilities-based requirement would further the FCC's goal of eliminating waste, fraud and abuse in the lifeline program. But that goal must be balanced against the reason for having a Lifeline program in the first place. Several measures implemented by the FCC in recent years have dramatically reduced incidents of waste, fraud, and abuse. This is evidenced by the significant drop in the cost of Lifeline program from \$2.1 billion in 2012 to \$1.3 billion in 2017. Moreover, the FCC is currently in the process of bringing up the national verifier – which should reduce incidents of fraud further.

NARUC strongly opposes *any* abuse of the Lifeline program. We have been partners with the FCC in reducing that abuse. It is true, of course, if the FCC imposes changes that significantly reduces the number of eligible subscribers to the program, it will likely have some impact on abuses. After all, if you spray *Roundup* on your lawn you will definitely kill all the weeds choking the grass. Unfortunately you will also kill *all the grass*. Similarly, in the context of the existing Lifeline program, any limited reductions in abuse that might accompany the imposition of a facilities-based restriction cannot offset the obvious and severe detrimental impact on Lifeline program goals – and on service to eligible consumers.

***III. The FCC should help states “defray any cost associated with making customer eligibility information available” to the National Verifier.***

The *NPRM*, at ¶¶ 59-61, asks a number of questions about how it can better partner with States to implement the National Verifier. Paragraph 50 specifically “seeks comment on ways States can be encouraged to work cooperatively with the Commission and USAC to integrate their state databases into the National Verifier without unnecessary delay.”

In February 2016, NARUC passed a *Resolution on Reform of Lifeline Program* that identifies one necessary element of any federal integration initiative: additional compensation to cover additional/ongoing costs associated with the new procedures. Almost 25 States have implemented databases that allow ETCs or State agents to verify the eligibility of an applicant for the Lifeline program before such applicant is enrolled in the program. The state databases have proven to be a strong and effective tool against waste, fraud, and abuse by ensuring that only eligible applicants receive Lifeline benefits. The FCC’s proposal for a National Verifier raises a range of questions. But it is obvious that, however integration occurs, State agencies may require additional federal funds to compensate for costs associated with verification and/or access to State databases/other resources. NARUC’s 2016 resolution supports a coordinated approach and suggests that State and federal agencies consider administering the program at a central source to lower overall costs for the Lifeline program. That resolution also encourages the FCC and the States to cooperate to facilitate access, directly or indirectly, to State social service databases for the purpose of verifying Lifeline applicants eligibility. Finally, it also specifically encourages the FCC to help States defray any cost associated with making customer eligibility information available to the centralized database.

In States that already have consolidated databases for Lifeline purposes, coordination and financial compensation are especially important.

#### ***IV. States should have access to USAC data.***

The *NPRM*, at ¶¶ 97-98 & 102-103, specifically seeks comment on “additional reports USAC could make public or available to state agencies to increase program transparency and accountability.”

At the outset NARUC would like to compliment both the staff of the Wireline Competition Bureau, including *WCB Bureau Chief Kris Monteith* and *Telecommunications Access Policy Division Chief Ryan Palmer*, along with the

*USAC staff* for their efforts to coordinate with the States on a range of issues associated with the Lifeline Program. USAC has been very responsive to several State staff requests for NLAD information. This cooperation should be encouraged and maintained.

State access to USAC reports and resources can only improve State oversight capability. Data collected by USAC should be available to State agencies to increase program transparency and accountability. Although some States have fewer resources than others to fully analyze such data, the usefulness of access cannot be underestimated. Whenever there is a company specific or a systemic problem with any aspect of the Lifeline program, it is likely to be an issue that extends beyond a single state. States and the USAC can leverage resources to achieve better oversight of both State and the federal Lifeline programs.

***V. The FCC should maintain support for Voice Services.***

The FCC should maintain support for Voice Services. As even the *NPRM* acknowledges at ¶ 76, at least in rural areas, it is unclear whether low income consumers would be able to obtain quality voice services without Lifeline support. Others have made valid policy arguments for retention of voice services,<sup>53</sup> pointing out, among other things, that if support for stand-alone voice service is removed, Lifeline customers will have to buy broadband bundles, which even with a \$9.25 discount, might well be unaffordable. Plus, maintaining voice-only Lifeline service promotes consumer choice. Certainly, some consumers simply want a phone – not broadband service. Obviously, the FCC should retain the exception permitting Lifeline support for voice services in areas where there is only one Lifeline

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<sup>53</sup> See, e.g., NTCA/WTA Petition for Reconsideration, WC Docket No. 11-42 et al., at 6-7 (filed June 23, 2016); Petition for Reconsideration of the National Association of State Utility Consumer Advocates, WC Docket 11-42 et al., at 3-4 (filed June 23, 2016); Joint Lifeline ETC Petitioners' Petition for Partial Reconsideration and Clarification, WC Docket No. 11-42 et al., at 9-11 (filed June 23, 2016).

provider. Universal access to voice service favors a Lifeline credit for such service to eligible customers wherever they reside.

Absent forbearance, or another legally sustainable theory for bypassing § 214(e)(1), as long as voice services are listed as “supported services” as discussed, *supra*, all ETCs are required to offer them.

Moreover, phasing out support for voice services is, at a minimum, facially inconsistent with a Congressional scheme which, in Title II, (i) focuses explicitly on opening competition in local phone “telecommunications services,” and (ii) requires carriers to offer a “telecommunications service” to qualify for federal universal service support subsidies. Given the recent reclassification of Broadband Internet Access Service as an information service, the only qualifying “telecommunications service” such subsidized carriers currently offer is voice service.

The *NPRM*<sup>54</sup> postulates that the FCC “has authority under Section 254(e) of the Act to provide Lifeline support to ETCs that provide broadband service over facilities-based, broadband-capable networks that support voice service.”

Respectfully, a carrier can “support” voice service *without offering it to the public for a fee*. And it must do so to be providing a “telecommunications service” to qualify as a “telecommunications carrier” for federal universal service subsidies.

The Act is crystal clear that only a provider of *telecommunications services* can qualify for a support subsidy. 47 U.S.C. § 214(e)(1) states that only *common carriers* designated as *eligible telecommunications carriers* can receive federal universal service support. Qualifying carriers, under § 214, are designated *eligible telecommunications carriers or ETCs*. The term *telecommunications carriers* is defined at 47 U.S.C. § 153(51) as “any provider of telecommunications services.” Finally, 47 U.S.C. § 153(51) specifies that a carrier “shall be treated as a common

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<sup>54</sup> *NPRM* at ¶ 76

carrier under this chapter only to the extent it is engaged in providing telecommunications services.” Section 214(e) is in “this chapter.” Necessarily, therefore, common carriers can only be treated as having that status under § 214(e) “to the extent they are engaged in providing telecommunications services.”

NARUC agrees with the implicit *NPRM* concession that “voice service” would qualify a carrier as providing a telecommunications service, but only if that carrier is offering that service for a fee to the public. After all, this approach recognizes that the 10<sup>th</sup> Circuit just a few years ago confirmed that carriers must be designated as an eligible *telecommunications carrier* and have *common carrier* status to access funds. See, In Re: FCC 11-161, 753 F.3d 1015, at 1048-1049 (10<sup>th</sup> Cir. 2014):

[T]o obtain USF [Universal Service] funds, a provider must be designated by the FCC or a state commission as an “eligible telecommunications carrier” under 47 U.S.C. § 214(e). See 47 U.S.C. § 254(e) (“only an eligible telecommunications carrier designated under section 214(e) . . . shall be eligible to receive specific Federal universal service support.”). And, under the existing statutory framework, only “common carriers,” defined as “any person engaged as a common carrier for hire . . . in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy,” 47 U.S.C. § 153(11), are eligible to be designated as “eligible telecommunications carriers,” 47 U.S.C. § 214(e). Thus, under the current statutory regime, only ETCs can receive USF funds that could be used for VoIP support. Consequently, there is *no imminent possibility that broadband-only providers will receive USF support under the FCC's Order, since they cannot be designated as “eligible telecommunications carriers.”* (emphasis added).

The 10<sup>th</sup> Circuit made clear that there is “no imminent possibility that broadband-only providers” (or to the 10<sup>th</sup> Circuit, ruling in 2014, an entity that only

provides an *information service*) will receive USF support. This is true, because, according to the statute (and the 10<sup>th</sup> Circuit) “they CANNOT be designated as eligible *telecommunications carriers*” if they are only providing an information service.<sup>55</sup> Therefore, voice service providers, even if using VoIP technology, must be providing a *telecommunications service*. A number of States have made similar legal determinations by designating eligible *telecommunications carriers* to receive federal universal service funding based solely on the carrier’s provision of interconnected VoIP services.<sup>56</sup>

**VI. Any Lifeline Budget must carefully balance several factors.**

The *NPRM* seeks comment about a budget for the Lifeline program, examining different mechanisms to determine the “responsible level and to prevent undue burdens on ratepayers.” Specifically, the *NPRM* proposes an annual cap for Lifeline disbursements and for the “program to automatically make adjustments to maintain the cap in the event the budget is exceeded.”

According to 2014/2015 census data, only 33 percent of all eligible households subscribe to Lifeline services. NARUC urges the FCC, in any budget it sets for the Lifeline program to “carefully balance: (1) ensuring that qualified

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<sup>55</sup> *Id.* (emphasis added)

<sup>56</sup> *In the Matter of Transworld Network, Corp. Petition For Designation as an Eligible Telecommunications Carrier Pursuant to § 214(E)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 214(E)(2), and 17.11.10.24 NMAC*, Before the New Mexico Public Regulation Commission, Case No. 11-00486-UT, FINAL ORDER (issued 20 February 2013) quote is from Exhibit 1, the ALJ’s *Recommended Decision*, at 16. (“Based upon its common carrier regulation as an interconnected-VoIP provider, TransWorld meets the requirement of being a common carrier for purposes of ETC designation.”); *In Re: Application of Public Service Wireless, Inc. for Designation as an Eligible Telecommunications Carrier in the State of Georgia, Docket No. 35999, Document #152453 Order on Application for Designation as an ETC (March 20, 2014)*, at 1-3 (“Public Service Wireless’s basic service offering is wireless . . . VoIP service.”); *In re: Application of Cox California Telcom, LLC (U5684C) for Designation as an ETC, Application 12-09-014, Decision 12-10-002 (10/3/2013), Decision Approving Settlement (rel. 10/07/2013)*, at 8-9, 11 (“Cox does not distinguish between circuit-switched and packet-switched telephone services. The customer is merely ordering telephone service.” and “Cox asserts by offering a service that utilize[s] VoIP to the public on a nondiscriminatory basis, Cox fulfills the role of common carrier.”)

households that are current subscribers do not lose their eligible Lifeline benefit; and (2) that there is reasonable and rational growth in the Lifeline fund to serve subscribers in an amount that does not exceed the current soft budget notification amount.”

#### CONCLUSION

NARUC appreciates the opportunity the FCC has provided to submit comments on this *NPRM*. The Lifeline program is heavily dependent on effective oversight at both the federal and the State level. NARUC believes that partnership must continue. The reversal of the flawed legal constructs in the *2016 Lifeline Order*, continued FCC fidelity to the 1996 Act, additional information sharing between the FCC, USAC and the States, and providing incentives for State participation in the National Verifier are all crucial steps towards maintaining that partnership.

**Respectfully submitted,**

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Dated: February 21, 2018

## APPENDIX A

### ***Resolution to Ensure that the Federal Lifeline Program Continues to Provide Service to Low-Income Households***

*Whereas* on Dec. 1, 2017, the Federal Communications Commission (“FCC”) released a Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking (“NPRM”), and Notice of Inquiry addressing the federal Lifeline program and “Bridging the Digital Divide for Low-Income Consumers;”

*Whereas* in the NPRM, the FCC tentatively concludes that it “erred in preempting state commissions from their primary responsibility to designate [Eligible Telecommunications Carriers] under section 214(e) of the [Telecommunications] Act [of 1996] and seeks comment on this issue;”

*Whereas* in the NPRM, the FCC proposes to eliminate the “stand-alone LBP [Lifeline Broadband Provider] designation.”

*Whereas* since 1985, the federal Lifeline program has provided eligible low-income households with more affordable access to telecommunications services so that low-income households can be connected to jobs, healthcare, education, family, and friends;

*Whereas* currently, approximately 11.3 million households participate in the federal Lifeline program receiving \$9.25 per month from the federal Universal Service Fund;

*Whereas* the federal Lifeline program is transitioning from an affordable voice subsidy to an affordable broadband subsidy. As of December 2017, the minimum usage amount for mobile broadband is 1 GB and as of December 2018, the minimum usage amount for mobile broadband will be 2 GB;

*Whereas* since 2009, the FCC, determining that it is in the public interest, has granted forbearance to wireless resellers from “owning their own network” to obtain Eligible Telecommunication Carrier (“ETC”) designation to provide Lifeline service;

*Whereas* since 2009, many wireless resellers have been approved as ETCs by the FCC and the States providing voice and broadband service;

*Whereas* the FCC, in the NPRM, seeks comment on the lawful role of States in the Lifeline program. States have been and will continue to be an important player in the Lifeline program where they have approved service providers as “eligible telecommunication carriers” pursuant to 47 CFR 54.201(b) to receive Lifeline funds; partnered with the FCC to prevent “waste, fraud, and abuse”; and used their own State dollars creating state Lifeline programs to supplement the federal Lifeline subsidy;

*Whereas* the FCC seeks comment on ways states can be encouraged to work cooperatively with the FCC and USAC [Universal Service Administrative Company] to integrate their state databases into the National Verifier without unnecessary delay. States are committed to preventing waste, fraud, and abuse and look forward to partnering with the FCC to launch the National Verifier;

*Whereas* the FCC seeks comment on discontinuing Lifeline support for non-facilities-based services. Non-facilities-based Lifeline providers make up approximately 74 percent of the Lifeline market with approximately 8.3 million households. By contrast, facilities-based providers are only 26 percent of the market with approximately 2.9 million households and each year their Lifeline customers have decreased;

*Whereas* by discontinuing Lifeline support for non-facilities-based services, the FCC will disconnect more than 8.3 million low-income households; *and*

*Whereas* the FCC is seeking comment about a budget for the Lifeline program, examining different mechanisms to determine the “responsible level and to prevent undue burdens on ratepayers.” The FCC proposes an annual cap for Lifeline disbursements and for the “program to automatically make adjustments to maintain the cap in the event the budget is exceeded.” According to 2014/2015 census data, only 33 percent of all eligible households subscribe to Lifeline services; *now therefore be it*

*Resolved* that the Board of Directors of the National Association of Regulatory Utility Commissioners (“NARUC”), convened at its 2018 Winter Policy Summit in Washington, DC, urges the FCC to continue to cooperate with the States and acknowledge States’ significant role in the Lifeline program; *and be it further*

*Resolved* that NARUC urges the FCC to approve its tentative decision in the “Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry” (WC Docket Nos. 17-287, 11-42 and 09-197) to: (1) eliminate the stand-alone Lifeline Broadband Provider designation; and (2) reverse its pre-emption of State regulatory authority to designate Eligible Telecommunications Carriers; *and be it further*

*Resolved* that NARUC urges the FCC to continue to allow non-facilities based carriers to receive Lifeline funds because they have been crucial in ensuring that low-income households are connected to vital telecommunication services; *and be it further*

*Resolved* that NARUC urges the FCC, in any budget it sets for the Lifeline program that it carefully balance: (1) ensuring that qualified households that are current subscribers do not lose their eligible Lifeline benefit; and (2) that there is reasonable and rational growth in the Lifeline fund to serve subscribers in an amount that does not exceed the current soft budget notification amount.

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*Sponsored by the Committee on Consumers and the Public Interest and the Committee on Telecommunications*

*Adopted by the NARUC Board of Directors, February 14, 2018*