

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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In the Matter of)	
)	
Restoring Internet Freedom)	WC Docket No. 17-108
)	
Bridging the Digital Divide for Low-Income)	WC Docket No. 17-287
Consumers)	
)	
Lifeline and Link Up Reform and)	WC Docket No. 11-42
Modernization)	
_____)	

COMMENTS OF THE NATIONAL LIFELINE ASSOCIATION

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SUMMARY

The National Lifeline Association (NaLA), by and through the undersigned counsel, respectfully submits these comments in response to the Wireline Competition Bureau's (Bureau's) Public Notice¹ seeking to refresh the record in the Restoring Internet Freedom and Lifeline proceedings in light of the Court of Appeals for the District of Columbia Circuit's (D.C. Circuit's) decision in *Mozilla v. FCC*² on the Federal Communications Commission (Commission or FCC) reinstating the information service classification of broadband Internet access services.³ NaLA's comments are focused on the Bureau's effort to "refresh the record on how the changes adopted in the *Restoring Internet Freedom Order* might affect the Lifeline program" and in particular on "the Commission's authority to direct Lifeline support to eligible telecommunications carriers (ETCs) providing broadband service to qualifying low-income consumers."⁴ Consistent with precedent from the Court of Appeals for the Tenth Circuit interpreting several provisions of Section 254 of the Communications Act and upholding universal service high cost program support for broadband when it was classified as an information service, the Commission does have the authority to support Lifeline broadband even though it is once again an information service.

Chairman Pai and commenters in the Restoring Internet Freedom and Lifeline dockets have expressed support for the Commission's authority to support Lifeline broadband. The

¹ See *Wireline Competition Bureau Seeks to Refresh Record in Restoring Internet Freedom and Lifeline Proceedings in Light of the D.C. Circuit's Mozilla Decision*, WC Docket Nos. 17-108, 17-287, 11-42, Public Notice, DA 20-168 (Feb. 19, 2020) (Public Notice).

² *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

³ See *Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking, FCC 17-60 (rel. May 23, 2017) (NPRM).

⁴ Public Notice at 2-3.

Commission can, as it has proposed,⁵ maintain support for broadband in the Lifeline program by following the legal authority path outlined in the Universal Service Transformation Order to support broadband through the Connect America Fund (CAF).⁶ 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. Moreover, the Commission asserted authority to support Lifeline broadband in 2012 when broadband was an information service and the Commission granted blanket forbearance from the facilities requirement for Lifeline ETCs. The circumstances are the same today.

The Commission should stop the phase out of Lifeline support for voice minutes because affordable voice service remains important for low-income Americans, especially for public safety and remaining connected during national, regional or local emergencies such as the COVID-19 crisis and natural disasters like wildfires and hurricanes. Further, continuing monthly Lifeline support pursuant to Section 54.403 of the Lifeline rules for voice telephony service, for example through bundled offerings of voice and data, would clearly retain the voice “supported service” upon which the Commission can place the obligation to provide broadband service as

⁵ See Public Notice at 3 (“In the 2017 Lifeline NPRM, the Commission proposed that it ‘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,’ and that ‘[t]his legal authority does not depend on the regulatory classification of broadband service.’” (citing *Bridging the Digital Divide for Low-Income Consumers et al.*, WC Docket Nos. 17-287 et al., Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, FCC 17-155, ¶ 77 (2017)).

⁶ See *Connect America Fund, et al.*, WC Docket No. 10-90, et al., Report and Order, Further Notice of Proposed Rulemaking, FCC 11-161 (2011) (Universal Service Transformation Order).

well. However, if the Commission does phase out monthly Lifeline financial support for voice services, the agency can still provide support for Lifeline broadband services consistent with its precedent for the high cost program wherein universal service money is disbursed only for the offering of broadband service at certain speeds, but voice telephony service remains a “supported service” in the rules and voice service is offered by ETCs.

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.

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COMMENTS OF THE NATIONAL LIFELINE ASSOCIATION

The National Lifeline Association (NaLA), by and through the undersigned counsel, respectfully submits these comments in response to the Wireline Competition Bureau’s (Bureau’s) Public Notice⁷ seeking to refresh the record in the Restoring Internet Freedom and Lifeline proceedings in light of the Court of Appeals for the District of Columbia Circuit’s (D.C. Circuit’s) decision in *Mozilla v. FCC*⁸ on the Federal Communications Commission (Commission or FCC) reinstating the information service classification of broadband Internet access services.⁹ NaLA’s comments are focused on the Bureau’s effort to “refresh the record on how the changes adopted in the *Restoring Internet Freedom Order* might affect the Lifeline program” and in particular on “the Commission’s authority to direct Lifeline support to eligible telecommunications carriers (ETCs) providing broadband service to qualifying low-income

⁷ See *Wireline Competition Bureau Seeks to Refresh Record in Restoring Internet Freedom and Lifeline Proceedings in Light of the D.C. Circuit’s Mozilla Decision*, WC Docket Nos. 17-108, 17-287, 11-42, Public Notice, DA 20-168 (Feb. 19, 2020) (Public Notice).

⁸ *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

⁹ See *Restoring Internet Freedom*, WC Docket No. 17-108, Notice of Proposed Rulemaking, FCC 17-60 (rel. May 23, 2017) (NPRM).

consumers.”¹⁰ Consistent with precedent from the Court of Appeals for the Tenth Circuit interpreting several provisions of Section 254 of the Communications Act and upholding universal service high cost program support for broadband when it was classified as an information service, the Commission does have the authority to support Lifeline broadband even though it is once again an information service.

Chairman Pai and commenters in the Restoring Internet Freedom and Lifeline dockets have expressed support for the Commission’s authority to support Lifeline broadband. The Commission can, as it has proposed,¹¹ maintain support for broadband in the Lifeline program by following the legal authority path outlined in the Universal Service Transformation Order to support broadband through the Connect America Fund (CAF).¹² 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. Moreover, the Commission asserted authority to support Lifeline broadband in 2012 when broadband was an information service and the Commission granted blanket forbearance from the facilities requirement for Lifeline ETCs. The circumstances are the same today.

¹⁰ Public Notice at 2-3.

¹¹ See Public Notice at 3 (“In the 2017 Lifeline NPRM, the Commission proposed that it ‘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,’ and that ‘[t]his legal authority does not depend on the regulatory classification of broadband service.’” (citing *Bridging the Digital Divide for Low-Income Consumers et al.*, WC Docket Nos. 17-287 et al., Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, FCC 17-155, ¶ 77 (2017)).

¹² See *Connect America Fund, et al.*, WC Docket No. 10-90, et al., Report and Order, Further Notice of Proposed Rulemaking, FCC 11-161 (2011) (Universal Service Transformation Order).

The Commission should stop the phase out of Lifeline support for voice minutes because affordable voice service remains important for low-income Americans, especially for public safety and remaining connected during national, regional or local emergencies such as the COVID-19 crisis and natural disasters like wildfires and hurricanes. Further, continuing monthly Lifeline support pursuant to Section 54.403 of the Lifeline rules for voice telephony service, for example through bundled offerings of voice and data, would clearly retain the voice “supported service” upon which the Commission can place the obligation to provide broadband service as well. However, if the Commission does phase out monthly Lifeline financial support for voice services, the agency can still provide support for Lifeline broadband services consistent with its precedent for the high cost program wherein universal service money is disbursed only for the offering of broadband service at certain speeds, but voice telephony service remains a “supported service” in the rules and voice service is offered by ETCs.

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.

I. THE CHAIRMAN AND COMMENTERS HAVE EXPRESSED UNANIMOUS SUPPORT FOR LIFELINE BROADBAND

Chairman Pai has expressed steadfast support for Lifeline broadband. In a 2017 statement, Chairman Pai confirmed “I support including broadband in the Lifeline program to

help provide affordable, high-speed Internet access for our nation’s poorest families.”¹³ He further assured low-income Americans that “[g]oing forward, I want to make it clear that broadband will remain in the Lifeline program so long as I have the privilege of serving as Chairman.”¹⁴ Even in his dissent to the 2016 Lifeline Modernization Order,¹⁵ then Commissioner Pai noted his view that “modernizing the Lifeline program to support affordable, high-speed Internet access for our nation’s poorest families is a worthy goal.”¹⁶ Also in dissent, Commissioner O’Rielly stated, “[f]or over a year, I argued that there is a viable path to reform the Lifeline program in a way that garners bipartisan support at the Commission. The program would shift to include support for broadband service....”¹⁷

Further, in the Restoring Internet Freedom proceeding and in response to the 2017 Lifeline Notice of Proposed Rulemaking (NPRM), parties that addressed the impact of reclassifying broadband as an information service on the Lifeline program favored continuing support for Lifeline broadband service.¹⁸

¹³ FCC News Release, Statement of FCC Chairman Ajit Pai On the Future of Broadband in the Lifeline Program, Mar 29, 2017.

¹⁴ *Id.*

¹⁵ *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 et al, Third Report and Order, Further Report and Order, and Order on Reconsideration, FCC 16-38 (2016) (Lifeline Modernization Order).

¹⁶ *Id.*, Dissenting Statement of Commissioner Ajit Pai, 1.

¹⁷ *Id.*, Dissenting Statement of Commissioner Michael O’Rielly, 1.

¹⁸ NaLA is not aware of a commenter that argued that the Commission does not have authority to, and should not, support Lifeline broadband. The Florida Public Service Commission questioned the FCC’s authority in light of the reclassification specifically with respect the phase-out of Lifeline reimbursements for voice service and how a carrier offering only broadband could be designated as an ETC. *See* Comments of the Florida Public Service Commission, WC Docket Nos. 17-287, 11-42, 09-197 at 4 (Feb. 21, 2018). We address the Commission’s planned phase-out of voice support below, but it should be noted here that, like in the high cost program, the Commission can retain voice as a supported service in the rules that is offered by ETCs even if the universal service financial support is tied to the provision of broadband service.

II. THE COMMISSION SHOULD MAINTAIN SUPPORT FOR LIFELINE BROADBAND BY FOLLOWING THE LEGAL AUTHORITY SET FORTH IN THE UNIVERSAL SERVICE TRANSFORMATION ORDER REGARDING CONNECT AMERICA FUND SUPPORT FOR BROADBAND

The Commission can and should continue to support Lifeline broadband pursuant to the provisions of section 254 of the Act as applied by the Commission in the Universal Service Transformation Order to support broadband services and facilities with Connect America Funds, which was upheld by the Court of Appeals for the Tenth Circuit. Specifically, the Commission should condition receipt of Lifeline funds on Lifeline ETCs continuing to provide broadband service.

A. The Commission Has a Statutory Obligation to Ensure That Low-Income Consumers Have Access to Advanced Telecommunications and Information Services (Broadband)

The Commission's obligation and authority to support Lifeline broadband emanates from several provisions of section 254 of the Communications Act, as amended. First, section 254(b) states that "the Commission *shall* base policies for the preservation and advancement of universal service on the following principles."¹⁹ One of those principles states, "Consumers in all regions of the Nation, including low-income consumers...should have access to telecommunications and information services, including...advanced telecommunications and information services...."²⁰ As recently as last year, the Commission has referred to this principle as a "statutory mandate of ensuring that all consumers 'have access to...advanced telecommunications and information services."²¹ In addition, in the Universal Service

¹⁹ 47 U.S.C. § 254(b) (emphasis added).

²⁰ 47 U.S.C. § 254(b)(3).

²¹ *Connect America Fund, et al.*, WC Docket No. 10-90, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 16-33 (rel. Mar. 30, 2016) (2016 CAF Order).

Transformation Order, the Commission adopted a new universal service principle pursuant to section 254(b)(7),²² which is “Support for Advanced Services – Universal service support should be directed where possible to networks that provide advanced services, as well as voice services.”²³

Second, section 254(c) defines universal service as “an evolving level of telecommunications services” and directs the Commission in section 254(c)(1) to establish supported services “taking into account advances in telecommunications *and information technologies and services*.”²⁴ Finally, section 254(e) provides that only ETCs may receive specific federal universal service support, and that “[a] carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services *for which the support is intended*.”²⁵ As discussed in detail below, the Court of Appeals for the Tenth Circuit has held that these provisions provide broad authority to the Commission to determine what a recipient may or must do with the universal service funds.

B. The Commission’s Support for Lifeline Broadband Should Track the Legal Authority Set Forth in the Universal Service Transformation Order

In response to the D.C. Circuit’s remand in *Mozilla*, the Commission should look to the statutory provisions discussed above and their application in the Universal Service Transformation Order for the legal authority to continue supporting Lifeline broadband. Based on that precedent, which was upheld by the Court of Appeals for the Tenth Circuit, the

²² Section 254(b)(7) allows the Commission to establish “Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.”

²³ Universal Service Transformation Order ¶ 45.

²⁴ 47 U.S.C. § 254(c) (emphasis added).

²⁵ 47 U.S.C. § 254(e) (emphasis added).

Commission should condition receipt of Lifeline funds on Lifeline ETCs continuing to provide broadband service.

In the Universal Service Transformation Order, the Commission determined that it had clear legal authority in section 254 to use universal service funds to support broadband services provided by ETCs, even though at the time broadband service was classified as a Title I information service and not a Title II telecommunications service. The Commission determined that it had “a ‘mandatory duty’ to adopt universal service policies that advance the principles outlined in section 254(b)” and “authority to ‘create some inducement’ to ensure that those principles are achieved.”²⁶ Further, the Commission explained “Congress made clear in section 254 that the deployment of, and access to, information services – including ‘advanced’ information services – are important components of a robust and successful federal universal service program.”²⁷ The Commission did not add broadband to the list of “supported services” in section 54.101 of its rules pursuant to section 254(c)(1) of the Act.²⁸ Rather, the Commission found that “Section 254 grants the Commission clear authority to support telecommunications services and to condition the receipt of universal service support on the deployment of broadband networks, both fixed and mobile, to consumers.”²⁹

The same authority and obligations of section 254 apply to making broadband service affordable through the Lifeline program. The Commission has a mandatory duty to advance the principles outlined in section 254(b), including that low-income consumers have access to advanced telecommunications and information services (broadband) and the Commission can

²⁶ Universal Service Transformation Order ¶ 65.

²⁷ *Id.*

²⁸ That was done in the 2016 Lifeline Modernization Order, Appendix A.

²⁹ Universal Service Transformation Order ¶ 60.

create an inducement for ETCs to achieve those principles by conditioning Lifeline support on the provision of broadband service.

When the CAF broadband requirement was challenged, the Court of Appeals for the Tenth Circuit upheld the Commission's interpretation of section 254.³⁰ The Court recognized the clear principles in section 254(b), but also responded to the criticism that section 254(c) restricts universal service support to telecommunications services only. The court disagreed and found that,

nothing in the language of subsection (c)(1) serves as an express or implicit limitation on the FCC's authority to determine what a USF recipient may or must do with those funds. More specifically, nothing in subsection (c)(1) expressly or implicitly deprives the FCC of authority to direct that a USF recipient, which necessarily provides some form of 'universal service' and has been deemed by a state commission or the FCC to be an eligible telecommunications carrier under section 47 USC §214(e), use some of its USF funds to *provide services* or build facilities related to services that fall outside of the FCC's current definition of 'universal service.' In other words, nothing in the statute limits the FCC's authority to place conditions, such as the broadband requirement, on the use of USF funds.³¹

Moreover, the Court determined that the language in section 254(e) requiring carriers to use universal service support only for the provision, maintenance and upgrading of facilities *and services* "for which the support is intended" is not narrowly limited, but rather "was intended as an implicit grant of authority to the FCC to flesh out precisely what 'facilities' and 'services' USF funds should be used for."³² Tying all of the statutory provisions together, the Court found that,

By interpreting the second sentence of §254(e) as an implicit grant of authority that allows it to decide how USF funds shall be used by recipients, the FCC also acts in a manner consistent with the directive in §254(b) and allows itself to make

³⁰ See *Direct Commc'ns. Cedar Valley, LLC v. FCC (In re FCC 11-161)*, 753 F.3d 1015, 1046-54 (10th Cir. 2014).

³¹ *Id.* at 1046 (emphasis added).

³² *Id.* at 1047.

funding directives that are consistent with the principles outlined in §254(b)(1) through (7).³³

These same statutory provisions apply to both CAF and Lifeline, and the Commission’s legal authority and mandate to implement the principles in 254(b) through both programs are the same. The Tenth Circuit’s holding in *Cedar Valley v. FCC* makes clear that the Commission can continue to provide universal service funds, including CAF and Lifeline funds, to ETCs conditioned upon the provision of broadband service.

C. The Commission Has Granted Blanket Forbearance from the “Own Facilities” Requirement to Lifeline Providers

The Universal Service Transformation Order relied on the Commission’s authority to support broadband networks or facilities and the new universal service principle adopted in the Universal Service Transformation Order pursuant to section 254(b)(7) states that universal service support should be directed to networks that provide advanced services. However, provisions of section 254 and the Tenth Circuit in the *Cedar Valley v. FCC* case clearly recognize the Commission’s authority to support both broadband *services* and facilities.

Further, while the Lifeline program helps to demonstrate demand and return on investment for the facilities that support voice and broadband services, it is not a facilities program. Rather, the Lifeline program addresses affordability, which is why the Commission has a longstanding policy of facilities forbearance in the Lifeline program. Today, over two-thirds of Lifeline subscribers are served by non-facilities-based service providers.³⁴

³³ *Id.* Again, one of those principles is §254(b)(3), which states “Consumers 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, including interexchange services and advanced telecommunications and information services....”

³⁴ Based on a CGM analysis of the USAC Lifeline Funding Disbursement tool showing disbursements as of February 2020 (estimating 4,232,872 Lifeline subscribers served by non-facilities-based wireless ETCs divided by 6,234,773 total Lifeline subscribers, which equals 68 percent).

Since 2005, the Commission has granted forbearance from the facilities requirement for Lifeline service providers culminating in the blanket grant of such forbearance in the 2012 Lifeline Reform Order. In that order, the Commission determined that “[r]equiring Lifeline-only ETCs to use their own facilities to offer Lifeline service does not further the statutory goal of the low-income program.”³⁵ To our knowledge, the Commission has never fully reversed a blanket forbearance decision, either granted by the Commission or by operation of law, in order to impose more regulations on some or all market participants. This makes sense, as the Commission itself has recognized that “modifying or reversing forbearance once granted . . . should be taken with great care.”³⁶ Therefore, while the Commission found in the Universal Service Transformation Order that it could support broadband facilities, there is ample statutory flexibility to support non-facilities-based Lifeline broadband services and the Commission has a more than decade old policy of not requiring Lifeline ETCs to provide service using their own facilities.

³⁵ *Lifeline and Link Up Reform and Modernization, Lifeline and Link Up, Federal-State Joint Board on Universal Service, Advancing Broadband Availability Through Digital Literacy Training*, WC Docket No. 11-42, WC Docket No. 03-109, CC Docket No. 96-45, WC Docket No. 12-23, Report and Order and Further Notice Of Proposed Rulemaking, FCC 12-11, ¶ 377 (2012) (2012 Lifeline Reform Order).

³⁶ *See Business Data Services in an Internet Protocol Environment, et al.*, WC Docket No. 16-143 et al., Report and Order, FCC 17-43 (rel. Apr. 28, 2017) ¶ 174. In the one unique instance where the Commission reassessed a forbearance decision—in the context of a deemed-granted forbearance petition from Verizon related to its enterprise broadband services—it only partially reversed forbearance for the narrowly tailored purpose of ensuring a level playing field among market participants. *See id.* ¶¶ 174, 177. We are not aware of a situation in which the Commission has reversed forbearance in order to create an uneven playing field, tipping the market against some providers (e.g., non-facilities-based providers) in favor of others (e.g., facilities-based providers), at the expense of broadband access, consumer choice, competition, innovation, and similar public interests. In fact, the Commission has recognized that doing so would be contrary to the public interest. *See id.* ¶ 177 (finding that “disparate treatment of carriers providing the same or similar services is not in the public interest as it creates distortions in the marketplace that may harm consumers.”).

Moreover, while the Commission had proposed in 2017 to limit the Lifeline program to facilities-based ETCs, it has not done so. In its initial comments on the 2017 Lifeline NPRM, NaLA argued that the Commission’s proposal to impose a facilities requirement that would effectively ban resellers from the Lifeline program and digitally disenfranchise over seven million low-income households, including up to 1.3 million veterans, was a radical and misguided step that would be bad for competition, bad for consumer choice, and bad for innovation.³⁷ Virtually all commenters agreed. Facilities and non-facilities based wireless carriers, facilities-based wireline carriers, state and local regulators, Tribal regulators, groups representing veterans, seniors, minorities, and children, progressive public interest and civil society groups and top conservative telecommunications policy thought leaders, all opposed the Commission’s proposal to ban resellers from the Lifeline program.³⁸

Further, on February 1, 2019, the Court of Appeals for the D.C. Circuit vacated the 2017 Lifeline Tribal Order imposing a facilities requirement for ETCs in the Tribal Lifeline program as arbitrary and capricious because “the Commission pointed to no record evidence that directing the enhanced Tribal subsidy solely to facilities-based providers would incentivize them to deploy additional facilities and networks, reduce prices or offer new service plans for low-income consumers” and the Commission failed to consider the impact of the change on the Lifeline subsidy’s primary purpose of availability and affordability or to justify its fundamental policy reversal on forbearing the “own facilities” requirement “in light of its previous findings regarding the important role of non-facilities-based providers in promoting affordable

³⁷ See Comments of the National Lifeline Association, WC Docket Nos. 17-287, 11-42, 09-187 (Feb. 21, 2018).

³⁸ See Reply Comments of the National Lifeline Association, WC Docket Nos. 17-287, 11-42, 09-187 at 2-5 (Mar. 23, 2018).

telecommunications service.”³⁹

Moreover, in the 2012 Lifeline Reform Order, wherein the Commission granted blanket forbearance from the facilities requirement, the Commission also established a Lifeline broadband Pilot Program.⁴⁰ The Commission referenced its precedent in the Universal Service Transformation Order to condition receipt of support for the provision of voice telephony on the offering of broadband services and concluded that “sections 254 and 706 authorize us to fund bundled voice and broadband services as well a standalone broadband services” as part of the Pilot Program.⁴¹ The Commission asserted this authority to support Lifeline broadband at a time when broadband was an information service and the Commission had granted blanket forbearance from the facilities requirement so that resellers could continue to be Lifeline ETCs. The circumstances are the same today.

Based on the foregoing, the Commission can and should continue to support Lifeline broadband service pursuant to the provisions of section 254 of the Act as applied by the Commission in the Universal Service Transformation Order to support broadband **services** and facilities with high cost funds, including services provided by resellers pursuant to the Commission’s longstanding forbearance from the facilities requirement for Lifeline providers.

III. THE COMMISSION SHOULD STOP THE PHASE OUT OF MONTHLY SUPPORT FOR LIFELINE VOICE TELEPHONY SERVICE, BUT CAN SUPPORT LIFELINE STANDALONE BROADBAND SERVICES EVEN IF IT DOES NOT

The Commission should stop the phase out of Lifeline support for voice minutes because affordable voice service remains important for low-income Americans, especially for public

³⁹ *Natn’l Lifeline Ass’n, et. al. v. FCC*, 915 F.3d 19, 28-29 (D.C. Cir. 2019).

⁴⁰ 2012 Lifeline Reform Order ¶ 328.

⁴¹ *Id.*

safety and remaining connected during national, regional or local emergencies such as the COVID-19 crisis and natural disasters like wildfires and hurricanes. Further, continuing monthly Lifeline support pursuant to Section 54.403 of the Lifeline rules for voice telephony service would clearly retain the voice “supported service” upon which the Commission can place the obligation to provide broadband service as well. However, if the Commission does phase out monthly Lifeline financial support for voice services, the agency can still provide support for Lifeline broadband services consistent with its precedent for the high cost program wherein universal service money is disbursed only for the offering of broadband service at certain speeds, but voice telephony service remains a “supported service” in the rules and voice service is offered by ETCs.

The Commission’s current Lifeline rules provide monthly support for either voice or broadband service provided to eligible low-income consumers as long as they meet certain applicable minimum service standards (MSS).⁴² Lifeline ETCs can provide standalone voice, standalone broadband or, most commonly, a bundle of voice and broadband and receive support, as long as at least one of the services meets the applicable MSS. As of December 1, 2021, the rules provide that the Commission will no longer provide monthly support for standalone voice service or bundles that do not include broadband service that meets the applicable MSS.⁴³

Several parties, including NaLA members, have petitioned the Commission to reconsider the decision to phase out Lifeline financial support for voice services and NaLA supports those petitions.⁴⁴ Retaining Lifeline support for voice telephony service would ensure that voice

⁴² See 47 C.F.R. §§ 54.403, 54.408.

⁴³ See 47 C.F.R. § 54.403(a)(2)(iv).

⁴⁴ See *Lifeline and Link Up Reform and Modernization, et al.*, WC Docket No. 11-42 et al., Joint Lifeline ETC Petitioners’ Petition for Partial Reconsideration and Clarification at 9-11 (filed June 23, 2016); NASUCA Petition for Reconsideration, at 3-4 (filed June 23, 2016); Petition for Reconsideration/Clarification of NTCA—The Rural Broadband Association and WTA—

service continues to be offered at affordable rates for low-income Americans. The backing for retaining Lifeline support for voice service has been nearly unanimous. The backers include AARP, NAACP, several major cities, the Oklahoma, Pennsylvania, Michigan, Minnesota, Missouri, Nebraska, Florida and California public service commissions, GVNW Consulting, NASUCA, NARUC, Sacred Wind, General Communication, Inc., NTCA and WTA, the Leadership Conference on Human Rights, NaLA, Q Link and TracFone,⁴⁵ in addition to the Free State Foundation⁴⁶ and the petitioners to pause the minimum service standards – CTIA, the National Consumer Law Center, National Hispanic Media Coalition, OCA –The Asian Pacific American Advocates, and United Church of Christ, OC, Inc.⁴⁷

NASUCA’s Resolution urges the FCC to “stay or terminate the scheduled 2019 and future decreases to Lifeline support.”⁴⁸ Further, NARUC’s Resolution

Advocates for Rural Broadband at 6-10 (filed June 23, 2016); TracFone Petition for Reconsideration at 4-5 (filed June 23, 2016); *see also Lifeline and Link Up Reform and Modernization, et al.*, WC Docket No. 11-42, et al., Joint Lifeline ETC Respondents’ Opposition to Petitions for Reconsideration, 13-15 (filed July 29, 2016).

⁴⁵ *See* AARP Comments at 15-17; California PUC Comments at 13-14; City of Boston et al. Comments at 9; City of New York Comments at 4; Florida PSC Comments at 4; GCI Comments at 2-3; Leadership Conference on Civil and Human Rights Comments at 2; Low-Income Consumer Advocates Comments at 8; Medicaid Health Plans of America Comments at 3; Michigan PSC Comments at 7; Missouri PSC Comments at 6; Minnesota Agencies Comments at 6; NAACP Comments at 2; NASUCA Comments at 20; Nebraska PSC Comments at 7; OCA – Asian Pacific American Advocates et al. Comments at 4; Oklahoma PUD Comments at 9; PA Low Income Consumer Coalition Comments at 3; TracFone Comments at 56. Q Link has supported a voice and/or broadband bundles approach that would allow a Lifeline customer to choose a voice-only option with full support. *See* Comments of Q link Wireless, LLC at 43-44. All references to “Comments” here refer to the initial comments filed in response to the 2017 Lifeline NPRM in WC Docket No. 17-287 on or around February 21, 2018.

⁴⁶ *See* Free State Blog Post (“The impending diminishment in support for voice services likely will adversely impact Lifeline customers by constraining the flexibility of service providers to tailor offerings affordability to meet Lifeline customers’ demands.”).

⁴⁷ *See* Joint Petition to Pause Implementation of December 2019 Lifeline Minimum Service Standards Pending Forthcoming Marketplace Study, WC Docket Nos. 11-42, 09-197, 10-90 (filed June 27, 2019); Written *Ex Parte* Notice of the National Consumer Law Center, National Hispanic Media Coalition, OCA –The Asian Pacific American Advocates, and United Church of Christ, OC, Inc., WC Docket Nos. 17-287, 11-42, 09-197 and 10-90 at 1 (Nov. 13, 2019).

⁴⁸ National Association of State Utility Consumer Advocates, Resolution 2019-02 Urging the FCC to Preserve Lifeline Support for Voice Service and to Stay and Study the Scheduled

urges the FCC to...not phase-down or eliminate support for voice services as it has proposed for 2019 to 2021. Many consumers, including seniors and families with children, rely on voice services to contact first responders in time of emergency, reach social service agencies, access healthcare, and keep connected to other essential services.⁴⁹

These public safety concerns were not addressed by the Commission in the 2016 Lifeline Modernization Order when it decided to phase out monthly support for voice service. However, the D.C. Circuit’s decision in *Mozilla, v. FCC* makes clear that “the Commission is ‘required to consider public safety by...its enabling act.’”⁵⁰ The Public Notice seeks to refresh the record on “how the changes adopted in the *Restoring Internet Freedom Order* might affect public safety”⁵¹ because the D.C. Circuit found that “the Order failed to examine the implications of its decisions for public safety.”⁵² Therefore, the Commission should halt the phase down and phase out of monthly Lifeline support for voice service in part because it has failed to adequately consider the implications of the phase out on public safety.

In addition, continuing monthly Lifeline support pursuant to Section 54.403 of the Lifeline rules for voice telephony service would clearly retain the voice “supported service” upon which the Commission can place the obligation to provide broadband service as well.⁵³ In

Changes in Lifeline Minimum Services (June 20, 2019), available at <https://www.nasuca.org/nwp/wp-content/uploads/2018/11/2019-02-Final-NASUCA-Telecom-Resolution-re-Lifeline-for-Voice-Service-Min-Standards.pdf>.

⁴⁹ NARUC National Verifier Launch and Minimum Service Standards Resolution. While the Commission in 2016 may have assumed that mobile voice services would transition to Voice over LTE or over-the-top applications, that has not happened on a large scale and, as NARUC emphasizes, mobile voice service remains important for many low-income Americans.

⁵⁰ *Mozilla*, 940 F.3d at 59.

⁵¹ Public Notice at 1.

⁵² *Mozilla*, 940 F.3d at 18.

⁵³ In the Lifeline rules, Lifeline service is defined as a voice telephony service or broadband Internet access service “for which qualifying low-income consumers pay reduced charges as a result of application of the Lifeline support amount described in §54.403.” 47 C.F.R. § 54.401(a).

particular, the Commission could provide monthly support for bundled offerings of voice minutes and broadband data. Such offerings could provide either a certain number of minutes and megabytes of data or preferably a certain number of units that would allow consumers to choose the number of minutes versus megabytes that they want to use. In that way the Lifeline support could be conditioned on providing both the supported telecommunications service and broadband service, and consumers get to choose how much they use of each.

However, even if the Commission does phase out financial support for Lifeline voice telephony service, the Commission can continue to provide support for standalone broadband service pursuant to precedent from the high cost program. Section 54.101 of the Commission's rules states that "Voice telephony services...shall be supported by federal universal service support mechanisms" and specifically requires that ETCs "eligible to receive high-cost support must offer voice telephony service...in order to receive federal universal service support."⁵⁴ High cost support recipients receive support based on minimum broadband speeds provided to eligible locations.⁵⁵ They are also required to offer voice service to those customers, but the support amount is not tied to providing any certain amount of voice telephony service.

High cost ETCs can provide broadband-only service and continue to receive high cost support. In a 2016 order, the Commission modified its CAF rules for rate of return carriers to permit them to receive CAF funds for standalone broadband service.⁵⁶ In the Order, the Commission corrected a shortcoming in its existing rules that would deny CAF support where

⁵⁴ 47 C.F.R. § 54.101(a), (b).

⁵⁵ *See e.g.*, 54.308 (providing the broadband public interest obligations (speeds) for recipients of high-cost support).

⁵⁶ *See generally Connect America Fund, et al.*, WC Docket No. 10-90, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 16-33 (rel. Mar. 30, 2016) (2016 CAF Order).

“consumers cho[se] to drop voice service, often referred to as ‘stand-alone broadband’ or ‘broadband-only’ lines.”⁵⁷ Specifically, the Commission modified its rules to “provide support for broadband-capable loops in an equitable and stable manner, regardless of whether the customer chooses to purchase traditional voice service, a bundle of voice and broadband, or only broadband.”⁵⁸ The Commission noted that its determination was consistent with the requirements of section 254 of the Act to support network investment “regardless of what services are ultimately purchased by the customer.”⁵⁹ The Republican Commissioners, then-Commissioner Pai and Commissioner O’Rielly, supported the change. Concurring with the ruling, then-Commissioner Pai noted the fact that he had supported a stand-alone broadband solution for years, and highlighted the dilemma that rate of return carriers had faced:

Th[e existing] regulatory system . . . put some carriers to a Hobson’s choice. On one hand, they can offer stand-alone broadband—which urban consumers have and rural consumers want—and lose universal service support. On the other, they can deny consumers the option of an Internet-only service, and risk them dropping service altogether (which they increasingly are). The net result is that rural carriers hold back investment because they are unsure if they can deploy the next-generation services that consumers are demanding.⁶⁰

Therefore, as long as voice telephony service remains a supported service and ETCs are offering voice service, the Commission can continue to provide universal service funding only for the provision of broadband service consistent with its statutory obligations.

This precedent from the high cost programs should be applied to Lifeline support if and when financial support for voice telephony service is phased out in 2021. The phase out of

⁵⁷ *See id.* ¶ 3.

⁵⁸ *See id.* ¶ 5.

⁵⁹ *See id.* ¶ 89 (“Consistent with our authority to encourage the deployment of the types of facilities that will best achieve the principles set forth in section 254(b), [the Order] will allow carriers to receive federal high-cost universal service support for their network investment regardless of what services are ultimately purchased by the customer.”).

⁶⁰ *See id.*, Pai Concurrence at 1.

monthly Lifeline voice support from \$5.25 to \$0 as of December 1, 2021 does not modify Section 54.101 of the Commission’s rules, which continues to state that “Voice telephony services...shall be supported by federal universal service support mechanisms.”⁶¹ Lifeline ETCs are required to make Lifeline service available to qualifying low-income consumers, however, Lifeline service is defined as a retail voice telephony service or broadband Internet access service for which qualifying low-income consumers pay reduced charges as a result of applying Lifeline support amounts.⁶² Unless the Commission changes course, as of December 1, 2021 there will be no Lifeline support amounts for voice service that does not also meet the broadband minimums. Therefore, the Commission would need to explicitly require Lifeline ETCs to offer voice telephony service like high cost ETCs pursuant to Sections 54.101 and 54.401. Under this approach, pursuant to precedent from the high cost program, the Commission could continue to provide universal service funding for broadband-only services as long as voice service is offered.

IV. IN ADDITION TO EXPRESS STATUTORY AUTHORITY, THE COMMISSION ALSO HAS TITLE I ANCILLARY AUTHORITY TO SUPPORT LIFELINE BROADBAND

The Public Notice also seeks to “refresh the record on whether there are other sources of authority that allow the Commission to provide Lifeline support for broadband services.”⁶³ As recognized in the Public Notice,⁶⁴ NaLA and TracFone have asserted that in addition to the express authority in section 254 to support Lifeline broadband, the Commission has Title I ancillary authority to support Lifeline broadband. Section 4(i) of the Act provides that “[t]he Commission may perform any and all acts, make such rules and regulations, and issue such

⁶¹ 47 C.F.R. § 54.101(a).

⁶² 47 C.F.R. § 54.401(a).

⁶³ Public Notice at 3.

⁶⁴ *Id.* at n. 14.

orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”⁶⁵ The two-part test for the Commission to exercise its ancillary authority is: “(1) the Commission’s general jurisdictional grant under Title I covers the subject of the regulations and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”⁶⁶

Commission support for Lifeline broadband meets both prongs of the test to regulate pursuant to Title I ancillary authority. First, even if broadband is not a “telecommunications service,” it remains “interstate and foreign communication by wire or radio,”⁶⁷ over which the Commission holds general jurisdiction under Title I. Second, supporting broadband using Lifeline funds is reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibility in section 254(b)(3) of the Act to ensure that “[c]onsumers in all regions of the Nation, including low-income consumers...have access to advanced telecommunications and information services.”⁶⁸ Therefore, in addition to the express mandate and authority to support Lifeline broadband found in section 254 of the Act, the Commission has Title I ancillary jurisdiction to continue to support Lifeline broadband.

V. CONCLUSION

For the reasons discussed herein, NaLA asserts that Commission has the statutory authority to maintain support for Lifeline broadband. The Commission has an express statutory mandate and authority to support Lifeline broadband in section 254 of the Act, and Commission precedent supports providing broadband reimbursement to non-facilities-based Lifeline


⁶⁵ 47 U.S.C. § 154(i).

⁶⁶ *American Library Ass’n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005).

⁶⁷ 47 U.S.C. § 152(a) (“The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio....”).

⁶⁸ 47 U.S.C. § 254(b).

providers, including for standalone broadband services if and when support for Lifeline voice telephony service is phased out. In addition, the Commission has Title I ancillary authority to support Lifeline broadband because 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.

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