N A R U C

National Association of Regulatory Utility Commissioners

May 29, 2018

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: NOTICE OF EX PARTE COMMUNICATION filed *In the Matter(s) of (i) 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 *(ii) Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, (iii) *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-79, (iv) *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Citing Policies, Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421; and (vi) *Misuse of Internet Protocol (IP) Captioned Telephone Service*, CG Docket No. 13-24, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123.

Dear Ms. Dortch:

In accordance with 47 C.F.R. § 1.1206(b), I am filing this notice of my meeting on May 25, 2018, with ***Amy Bender, Legal Advisor, Wireline, Office of Commissioner Michael O'Rielly***. During the meeting, I reiterated NARUC's views on two key issues in the pending Lifeline proceeding,[1] elaborated on NARUC's positions in the pending wireline and wireless broadband deployment proceedings,[2] and praised the FCC for certain aspects of the draft *Report and Order, Declaratory Ruling, Further Notice of*

[1] *See* *Initial Comments of the National Association of Regulatory Utility Commissioner, WC Docket No. 17-297, WC Docket No. 11-42, & WC Docket No. 09-197* (Feb. 21, 2018); *Reply Comments of the National Association of Regulatory Utility Commissioners*, WC Docket No. 17-287, WC Docket No. 11-42, & WC Docket 09-197 (March 24, 2018).

[2] *See* *Reply Comments of the National Association of Regulatory Utility Commissioners*, WC Docket No. 17-84 (Wireline) (July 17, 2017); *Reply Comments of the National Association of Regulatory Utility Commissioners*, WTC Docket No 17-79 (Wireless) (July 17, 2017); *Initial Comments of the National Association of Regulatory Utility Commissioners*, WC Docket No. 17-84 (Wireline) (June 6, 2017); *Comments of the National Association of Regulatory Utility Commissioners, WT Docket No. 16-421 (Mobilitie)* (March 10, 2017).

Proposed Rulemaking, and Notice of Inquiry, in CG Docket Nos. 13-24 and 03-123, released for possible consideration at the FCC's June 7, 2018 agenda meeting.[3]

[1] The FCC should confirm its tentative conclusion with respect to the Lifeline Broadband Provider category of Eligible Telecommunications Carriers and affirm that States' role in designations cannot, ab initio, be bypassed.

NARUC agrees with the Lifeline NPRM's recognition of the "important and lawful role of the states" assigned by Congress with respect to federal universal service programs.[4] We support the FCC's determination that the agency cannot create a designation process under 47 U.S.C. § 214 that bypasses *ab initio* State commissions.

[2] The FCC should reject the NPRM's proposal to eliminate non-facilities-based resellers from the Lifeline Program.

The proposal to eliminate non-facilities-based resellers from the federal Lifeline program will severely undermine the current program. Moreover, there is no record evidence that such elimination will increase investment in facilities.

Non-facilities-based carriers, currently serving 75 percent of eligible users, should continue to receive Lifeline funds, in part, because, even with a transition period, the potential to disrupt and even eliminate service to literally millions of eligible users is obvious. Indeed, in my review of the initial comments filed, I found only one set of comments directly supporting this limitation on resellers. The Lifeline NPRM suggests, in ¶ 63, that limiting Lifeline subsidies to facilities-based carriers 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. Indeed, this point is confirmed by expert testimony appended to CTIA's initial comments. According to the affidavit of Dr. John May attached to their comments, at 2:

> Facilities-based and non-facilities-based carriers (Mobile Virtual Network Operators or MVNOs) operate symbiotically to each provide economic value and enhance consumer welfare in the provisioning of modern communications services. The result of this relationship is enhanced capacity utilization and hence more investment than would happen in the absence of MVNOs.[5]

Also, simple economics suggest it is unlikely that the FCC's revised policy can be calibrated to provide adequate encouragement to current non-facilities-based service providers to either build their own

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[3] *See In the Matter(s) of Misuse of Internet Protocol Captioned Telephone Service*, CG Docket No. 13-24, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* CG Docket No. 03-123, Report and Order, Declaratory Ruling, Further Notice of Proposed Rulemaking, and Notice of Inquiry (Draft posted May 17, 2018).

[4] *NPRM* at ¶ 54.

[5] *See Comments of CTIA* (February 21, 2018) at 3 ("[Non-facilities-based resellers] presence in the market increases incentives for network investment, citing the Exhibit A "Declaration of Dr. John May at 2.) at: https://ecfsapi.fcc.gov/file/1022132549976/180221%20CTIA%20Lifeline%20Comments.pdf.

facilities or overbuild other facilities-based providers – particularly in underserved/low population areas. In addition, as NARUC pointed out in its initial comments, at 31, 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.[6] This is not a surprise as 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.

[3] In both the WC 17-79 Wireless and the WC 17-84 Wireline deployment proceedings, the FCC should respect clear limits on its authority set by Congress.

The FCC lacks statutory authority to take most of the actions that were originally implied in both these proceedings. The texts of 47 U.S.C. §§ 253, 332, and 224 are clear and unambiguous. None support broad FCC preemptive power vis-à-vis pole attachments in States that have reverse preempted, rights-of-way, or city owned structures.[7]

Pursuing distorted constructions of clear statutory text is a bad idea. In this docket, imposing a complex top-down regulatory regime found nowhere in the statute will require significant distortions. Indeed, the FCC's past successes with strained and sometime contradictory readings of its statutory authority have done nothing but provide useful legal precedent for future Commissions that the 1996 Act

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6 Verizon only offers wireless Lifeline in parts of four states. *See* Verizon's "*Discounted Wireless Lifeline Program Phone Service*" webpage, online at: https://www.verizonwireless.com/solutionsand-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:

> [T]he 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.tmobile.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.

7 *See* note 2, *supra*.

does not really limit the agency's authority to either deregulate or regulate.[8] Every time any agency successfully expands its authority beyond the plain text of the statute, it necessarily results in less long term certainty for the legal rules and regulations that will be applied by a future FCC. Each successful expansion necessarily increases the FCC's ability to act in the future in areas and in ways that Congress never intended.

[4] Any FCC order that changes the assessment base for the IP CTS program, "must provide that TRS costs caused by interstate and intrastate jurisdictions are each recoverable from the subscribers of their respective jurisdictions."

Although NARUC has not taken any specific positions with respect to the draft *Report and Order, Declaratory Ruling, Further Notice of Proposed Rulemaking, and Notice of Inquiry*, in CG Docket Nos. 13-24 and 03-123, the FCC should be commended for acknowledging in ¶ 107 that 47 U.S.C.A. § 225 specifically requires attention to the jurisdictional separations of costs.

I am providing a copy of this ex parte to Ms. Bender. I have attempted to fairly cover the arguments I presented. If Ms. Bender informs me that this notice fails to cover an additional advocacy point raised during this meeting, I will immediately revise and refile this notice to cover the cited deficit.

If you have any questions, please do not hesitate to contact me at 202.898.2207 or jramsay@naruc.org.

Sincerely,

James Bradford Ramsay
NARUC General Counsel

cc: Amy Bender, Legal Advisor, Wireline, Office of Commissioner O'Reilly

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8 *Compare*, Judge Edward's dissent in *American Council on Education v. F.C.C.*, 451 F.3d 226 at 236–37 (D.C. Cir. 2006). That case involved an appeal of the FCC's application of the Communications Assistance for Law Enforcement Act (CALEA) to "information services." Even though Congress specified in 47 U.S.C. § 1002(b)(2)(a) (2000), that CALEA's assistance capability requirements "do not apply to [ ] information services," the FCC won on appeal. Judge Edward dissented:

> The FCC apparently believes that law enforcement will be better served if broadband Internet providers are subject to CALEA's assistance capability requirements. Although the agency may be correct, it is not congressionally authorized to implement this view. In fact, the "information services" exemption prohibits the FCC from subjecting broadband service providers to CALEA's assistance capability requirements. If the FCC wants the additional authority that Congress withheld, it must lobby for a new statute. Until Congress decides that the "information services" exemption is ill-advised, the agency is bound to respect the legislature's will and we are bound to enforce it.