

**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 |
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Opening Comments Of

**National Consumer Law Center, on behalf of its low-income clients, and
the United Church of Christ, OC Inc.**

On the Notice of Proposed Rulemaking

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I. Introduction

On May 18, 2017, the Commission adopted this Notice of Proposed Rulemaking, In the Matter of Restoring Internet Freedom ("NPRM").¹ This NPRM proposes to reclassify broadband Internet service as an information service.² This proposal is fraught with peril for consumers as it jeopardizes an enforceable open internet and creates unnecessary uncertainty in the universal services program which affects not only the Lifeline program, but also the high cost program. These brief comments, which are submitted on behalf of the National Consumer Law Center's low income clients, and the United Church of Christ, OC Inc., explore the impact of reclassification on the Lifeline program. The lack of initial comment on

¹ In the Matter of Restoring Internet Freedom, WC Docket No. 17-108, Notice of Proposed Rulemaking (Rel. May 23, 2017)("NPRM").

² NPRM at ¶24.

other aspects of this NPRM should not be construed as support for the proposed reclassification.

II. Strong Public Policy Reasons to Support Broadband in the Lifeline

The NPRM proposes to maintain support for the broadband Lifeline program after reclassification.³ While we strongly support the retention of broadband service as part of a bundle or as a standalone service in the Lifeline program, we are wary of reclassification. The statutory support for the expansion of the Lifeline program to include broadband has been well-developed and articulated by the Commission under the current Title II classification. Reclassifying broadband as a Title I service would mean that this analysis would have to be redone, and could be challenged in the courts.

This does not necessarily mean that there would no longer be statutory authority to include broadband in the Lifeline program if it were classified as a Title I service, but only that the firm statutory footing that has already been established would no longer apply. There is too much at stake here, and broadband service should not be reclassified.

A. Broadband is the Modern Communications Service of the 21st Century

Broadband internet service is essential for modern life. It is essential for finding work, completing school work, engaging in life-long learning, and for accessing health information and healthcare services. Broadband access is essential for modern commerce, from banking to shopping to creating business opportunities. The internet is tied to more and more aspects of life, yet the significant discrepancies in broadband adoption. These discrepancies highlight the need for robust support for broadband in the universal service program so all have a fair shot at economic opportunities and that school children, the next generation, are not disadvantaged because income or geography impedes continuous access to affordable broadband service.

³ NPRM at ¶68.

Recent research has found that home broadband adoption has stalled at 67% of adults, with the lower rates of home broadband adoption correlating with minority race, low income, lower levels of education attainment and rural residence. Cost is cited as the main barrier.⁴ There is a corresponding increase among disadvantaged populations in reliance on mobile broadband for internet connectivity.⁵ Thus access to fixed and wireless broadband support is critical for the Lifeline program.

The Lifeline program is the country's key program to address these problems. It supports both fixed and wireless broadband service, both bundled and unbundled, and includes support for wireless providers that are resellers that do not own their own facilities.

B. Lifeline is a Targeted Program Designed to Address the Affordability Barrier

Lifeline is a long-standing universal service program targeted to help low-income consumers and families afford essential modern-day communications service. The majority of universal service funds are targeted at deployment (e.g., rural and hard to serve areas of the nation). Lifeline, which receives less than 20 percent of the universal service support⁶, is designed to address the public policy of affordability for low-income consumers.⁷ Lifeline is a targeted assistance program and has been recently updated to include broadband as a supported service. The Lifeline program currently supports, voice, bundled voice and broadband service and broadband as a standalone service.⁸

⁴ John B. Horrigan and Maeve Duggan, Home Broadband 2015, Pew Research Center (Dec. 21, 2015), available at <http://www.pewinternet.org/2015/12/21/home-broadband-2015>.

⁵ *Id.* at 2.

⁶ Derived from data from the USAC Annual Report for 2015 (Lifeline received \$1.5 billion in support in 2015).

⁷ 47 U.S.C. §254 (b)(3): "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, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas." (emphasis added).

⁸ 47 C.F.R. 54.400 *et seq.*; Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support, Connect America Fund, WC Docket Nos. 11-42, 09-197, 10-90, Third Report and Order, Further Report and Order, and Order on Reconsideration (Rel. Apl. 27, 2016) at ¶¶30-37.

The issue posed by this NPRM is the uncertainty that the Commission would create by reclassifying broadband Internet service as a Title I information service and thereby making its clear Title II statutory authority to treat broadband as a Lifeline supported service no longer applicable. The Commission proposes to maintain support for broadband in the Lifeline program after reclassification by "requiring Lifeline carriers to use Lifeline support 'for the provision, maintenance, and upgrading' of broadband services and facilities capable of providing supported services."⁹ as was done in the Universal Service Transformation Order¹⁰ for high cost support. As discussed in more detail below, this is not the first time the Commission has turned to the treatment of broadband in the high cost program for guidance on the inclusion of broadband as a supported service in the Lifeline program.

III. Authority for Broadband Internet Service to be a Supported Service in the Lifeline Program

We urge the Commission not to reclassify broadband internet service as a Title I Information Service. If broadband internet service remains a Title II Telecommunications Service, it is on strong legal footing under Sections 254 and 214(e). Section 254(c) defines universal service as "an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services." The Title II framework provides a clear framework for universal services, e.g., for determining which services will be covered services¹¹ and which providers can receive universal service support as an eligible telecommunications provider (ETC)¹² in the high cost and low-income programs.

⁹ NPRM at ¶68.

¹⁰Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Inter-carrier Compensation Regime; Federal-State Joint Board on Universal Service Support; Lifeline and Link-Up; Universal Service Reform -- Mobility Fund; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92,96-45, GN Docket No.09-51, WT Docket No.10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd at 17663(2011) (USF/ICC Transformation Order), *aff'd sub nom, In re FCC 11-161*, 753 F.3d 1015(10th Cir. 2014).

¹¹ 47 U.S.C. §254(c).

¹² 47 U.S.C. §214(e).

The reclassification of broadband internet as a Title I information service adds uncertainty regarding the treatment of broadband-only service for the purposes of universal service, particularly the high cost and low-income programs.¹³ In the past, the Commission has found that it has the authority to support broadband internet service in the Lifeline program. In the Lifeline Reform Order of 2012, the Commission approved the use of support for a Lifeline broadband pilot program.¹⁴ The Commission relied on Sections 254 (coupled with §4(i)¹⁵) and 706 to fund bundled voice and broadband Lifeline service as well as standalone broadband service in a pilot program "to determine how best to bring advanced services to low-income consumers."¹⁶ The Commission cited the additional universal service principle from its USF/ICC Transformation Order: "[u]niversal service support shall be directed where possible to networks that provide advanced services as well as voice services."¹⁷

The Commission elaborated on its authority to support broadband in the Lifeline program using the USF/ICC Transformation Order as a template:

330. As we explained in the *USF/ICC Transformation Order and FNPRM*, section 254 provides express statutory authority to support telecommunications services that we have designated as eligible for universal service support. To the extent carriers offer traditional voice telephony service over traditional circuit-switched networks, our authority to provide support for such services is well-established. Section 254 also allows us to impose conditions on the support provided to entities designated as ETCs. Indeed, we have a "mandatory duty" to adopt universal service policies outlined in section 254(b), and we have authority to 'create some inducement' to ensure that those principles are achieved. 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. Also, the statute is clear that universal

¹³ We note that the 10th Circuit upheld the offering of a bundled voice and broadband offering in *In re FCC 11-161*, 753 F.3d 1015, 1046(10th Cir. 2014) .

¹⁴ Lifeline and Link Up Reform and Modernization, Lifeline and Link Up, Federal-State Joint Board on Universal Service, Advancing Broadband Availability Through Digital Learning, WC Dockets Nos. 11-42, 03-109, 12-23 and CC Docket No. 96-45, Report and Order and Further Notice of Proposed Rulemaking (Rel. Feb. 6, 2012)(2012 Lifeline Reform Order) at ¶¶328 -332

¹⁵ 47 U.S.C. §4(i)(providing Commission authority to "perform any and all acts . . . as not inconsistent with [the Communications Act] as may be necessary in the execution of its functions.").

¹⁶ 2012 Lifeline Reform Order at ¶328.

¹⁷ 2012 Lifeline Reform Order at ¶329 citing 47 U.S.C. 254(c) and USF/ICC Transformation Order and FNPRM, FCC 11-161 at¶ 62.

service support should include addressing low-income needs. Using a discrete, time-limited broadband pilot program to determine whether the low-income program can successfully be used to increase broadband adoption among low-income consumers is therefore consistent with the purposes of 254.

Accordingly, we find authority under 254, as supported by section 4(i), to provide limited USF support through a Low-Income Broadband Pilot Program and to require ETCs receiving support through the Pilot Program to offer either a bundle of voice and broadband support or standalone broadband.¹⁸

In its 2012 Lifeline Reform Order, the Commission also relied on §706(a) and (b) for authority to support broadband internet service in the Lifeline program. Citing 47 U.S.C. §1302(d), the Commission stated that "Congress adopted a definition of 'advanced telecommunications capability' that is not confined to a particular technology or regulatory classification." Section 706 (a) directs the Commission to encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans. The Commission also noted that section 706 (b) requires it to determine whether advanced telecommunications are being reasonably and timely deployed, and if not to take immediate action to remove barriers. The Commission cited to its Seventh Broadband Progress Report in finding that "a key barrier to infrastructure investment is 'lack of affordability of broadband Internet access services'".¹⁹ The Commission determined that "[p]roviding federal support for low-income consumers' purchase of broadband services will expand the base of consumers able to purchase broadband services."²⁰ It noted that the revenues generated by these new consumers will thus remove a barrier to infrastructure investment.²¹

The Universal Service Transformation Order discussed above justified the provision of universal service support for broadband by conditioning the support on the provision of broadband capable networks. In 2016 the Commission adopted additional reforms for the rate of return universal service mechanism to allow for support to cover the costs of broadband-only loops, without regard for whether the loops are used to provide only voice or

¹⁸ 2012 Lifeline Reform Order at ¶330 (footnotes omitted).

¹⁹ 2012 Lifeline Reform Order at ¶332 (footnotes omitted).

²⁰ *Id.*

²¹ *Id.*

broadband-only service.²² Thus, movement in the recent universal service program modifications are in support of a broadband-only service. If the Commission retains the classification of broadband Internet service as a Title II telecommunications service, it possesses clear authority under Section 254 which requires support for telecommunications services.²³ Other theories are much more complex, relying on a chain of assumptions and untested interpretations, and thus are not as secure as Title II.

IV. Consumers Expect an Open Internet

Consumers expect an open internet, not one where their Internet Service Provider can alter, disrupt or interfere with the content consumers send and access on the Internet. The Commission has not provided a reasoned explanation for radically disregarding the extensive record that was the basis of the prior 2015 Open Internet Order²⁴ which has been upheld by the D.C. Circuit Court of Appeals.²⁵

There are strong reasons for concern regarding the Commission's ability to protect consumers from their Internet Service Provider blocking content, throttling select usage, or accepting paid prioritization of content if broadband internet service is classified as a Title I information service. In a prior attempt to rely on Title I authority for open internet rules, the Commission's anti-discrimination and anti-blocking rules were considered common carrier, Title II obligations and rejected by the D.C. Circuit.²⁶ Thus, the soundest path forward toward protecting consumer's expectations of free and open broadband internet service is to refrain from this dangerous reclassification exercise and to keep broadband internet service a Title II telecommunications service.

²² Connect America Fund, ETC Annual Reports and Certifications, Developing a Unified Intercarrier Compensation Regime, WC Docket Nos. 10-90, 14-58, CC Docket No. 10-92, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking (Rel. Mar.30, 2016).

²³ E.g., 47 U.S.C. §254(c) and §214(e).

²⁴ In the Matter of Protecting and Promoting the Open Internet, WC Docket No.14-28, Report and Order on Remand, Declaratory Ruling and Order, 30 FCC Rcd 5601(2015)("Open Internet Order").

²⁵ United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir 2016), reh'g en banc denied, No. 15-1063, 2017 WL 1541517, at *1 (D.C. Cir. May 1, 2017).

²⁶ Verizon v. FCC, Appeal No. 11-1355 (D.C. Cir. Jan 14, 2014).

V. Conclusion

For the reasons discussed above, we urge the Commission to retain Title II Classification for broadband internet service in order to ensure a strong, functional modern universal services program.

Respectfully Submitted,



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