

December 21, 2015

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

**Re:** Lifeline and Link Up Reform and Modernization, WC Docket No. 11-42  
Telecommunications Carriers Eligible for Universal Service Support, WC Docket No. 09-197  
Connect America Fund, WC Docket No. 10-90

Dear Ms. Dortch:

On December 17, 2015, Harold Feld, Phillip Berenbroick, and Dallas Harris of Public Knowledge (collectively, “Public Knowledge”), spoke via telephone with Trent Harkrader and Jodie Griffin of the Federal Communications Commission’s (“Commission” or “FCC”) Wireline Competition Bureau to discuss matters in the above-captioned proceeding.

Public Knowledge explained that the record overwhelmingly supports the Commission’s proposal<sup>1</sup> (“*Lifeline FNPRM*”) to modernize the Lifeline program to support broadband Internet access service.<sup>2</sup> Updating the Lifeline program is essential because, as the Pew Research Center recently found, “33% of American adults do not have broadband at home,” and these individuals cite the monthly cost of service as *the most important reason* why they do not have a home broadband subscription.<sup>3</sup> And, “66% of non-adopters point toward either the monthly service fee or the cost of the computer as a barrier to adoption.”<sup>4</sup> Modernizing the Lifeline program to support broadband Internet access service will help bring broadband within reach for millions of unconnected Americans.

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<sup>1</sup> 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; *Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, Memorandum Opinion and Order*, 30 FCC Rcd 7818, 7825 ¶ 10 (2015) (“*Lifeline FNPRM*”).

<sup>2</sup> See, e.g., Comments of Ralph Everett, WC Docket Nos. 11-42, 09-197, 10-90 (Aug. 31, 2015); Comments of Sprint Corporation, WC Docket Nos. 11-42, 09-197, 10-90 (Aug. 31, 2015); Comments of Common Sense Kids Action, WC Docket Nos. 11-42, 09-197, 10-90 (Aug. 31, 2015); Comments of Common Cause, WC Docket Nos. 11-42, 09-197, 10-90 (Aug. 31, 2015); Comments of Microsoft Corporation, WC Docket Nos. 11-42, 09-197, 10-90 (Aug. 31, 2015); Comments of Benton Foundation and Rural Broadband Policy Group, WC Docket Nos. 11-42, 09-197, 10-90 (Aug. 31, 2015); Comments of Legislative Black Caucus of Maryland, WC Docket Nos. 11-42, 09-197, 10-90 (Aug. 4, 2015); North Las Vegas Mayor Pro Tem Pamela Goynes-Brown, WC Docket Nos. 11-42, 09-197, 10-90 (Aug. 13, 2015); *Ex Parte* Letter from Houston Independent School District and San Diego Unified School District, WC Docket Nos. 11-42, 09-197, 10-90 (July 30, 2015); Comments of Charter Communications, WC Docket Nos. 11-42, 09-197, 10-90 (Aug. 31, 2015).

<sup>3</sup> JOHN B. HORRIGAN & MAEVE DUGGAN, PEW RESEARCH CTR., HOME BROADBAND 2015, at 6, 15-16 (Dec. 21, 2015), available at <http://www.pewinternet.org/files/2015/12/Broadband-adoption-full.pdf>.

<sup>4</sup> *Id.* at 15-16

Public Knowledge explained that to meet its goal of making broadband more accessible to Americans, the Commission’s modernization of the Lifeline program should include allowing broadband access providers that are not eligible telecommunications carriers (“ETCs”) to provide Lifeline-supported service. The *Lifeline FNPRM* sought comment on how to increase competition in the Lifeline program, and asked whether separating the process by which carriers participate in Lifeline from the ETC designation process would encourage broader participation by carriers.<sup>5</sup> Specifically, the Commission sought input on revisiting its 1997 decision not to provide Lifeline support to non-ETCs to increase participation by broadband access providers in the Lifeline market.<sup>6</sup>

The Commission clearly has the requisite legal authority to increase competition and consumer choice for Lifeline subscribers by allowing non-ETCs to participate, and numerous parties have reiterated the Commission’s authority in the docket.<sup>7</sup> As the *Lifeline FNPRM* pointed out, the Lifeline program was created in 1985, predating the Telecommunications Act of 1996 (“1996 Act”). The Commission’s authority to create and amend the Lifeline program is rooted in its legal authority under sections 1, 4(i), 201, and 205 of the Communications Act.<sup>8</sup> In 1997, as the Commission implemented the 1996 Act and revised the Lifeline program, it “found that it had the authority to provide Lifeline support to include carriers other than ETCs.” At the time, the Commission decided “for administrative convenience and efficiency, it would only provide Lifeline support for ETCs,” yet, it also provided itself with flexibility to reassess this decision.<sup>9</sup>

The Commission’s finding in its 1997 Federal-State Joint Board on Universal Service Report and Order (“*Universal Service First R&O*”) that it had the legal authority to allow non-ETCs to participate in Lifeline is the controlling statutory interpretation of the Commission’s authority on the issue.<sup>10</sup> Additionally, the Commission’s *Universal Service First R&O* also found that the 1996 Act, particularly section 254(j), provided the FCC with the flexibility to modify the

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<sup>5</sup> *Lifeline FNPRM* at 7866 ¶ 132.

<sup>6</sup> *Id.* at 7868 ¶ 137 (In 1997, as the Commission implemented the Telecommunications Act of 1996 (“1996 Act”) and revised the Lifeline program, it declined to allow non-ETCs to participate in Lifeline. However, the Commission interpreted the 1996 Act as not limiting its authority to allow non-ETCs to participate in Lifeline. *Id.* at 7867 ¶ 135 (citing Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776, 8971-72 ¶¶ 369-70 (1997) (“*Universal Service First R&O*”))).

<sup>7</sup> *See, e.g.*, Comments of American Cable Association; WC Docket Nos. 11-42, 09-197, 10-90; at 11-12 (filed Aug. 31, 2015); Comments of AT&T; WC Docket Nos. 11-42, 09-197, 10-90; at 32-33 (filed Aug. 31, 2015) (“AT&T Comments”); Notice of *Ex Parte* of AT&T Services, Inc., WC Docket No. 11-42, Attachment, at 19 (filed Nov. 23, 2015); Comments of Comcast Corporation; WC Docket Nos. 11-42, 09-197, 10-90; at 10 (filed Aug. 31, 2015); Comments of Cox Communications; WC Docket Nos. 11-42, 09-197, 10-90; at 9-10 (filed Aug. 31, 2015); Reply Comments of ITTA; WC Docket Nos. 11-42, 09-197, 10-90; at 6-8 (filed Sept. 30, 2015); Notice of *Ex Parte* of ITTA; WC Docket Nos. 11-42, 09-197, 10-90; at 2 (filed Nov. 10, 2015); Comments of the National Cable & Telecommunications Association; WC Docket Nos. 11-42, 09-197, 10-90; at 4 (filed Aug. 31, 2015); Notice of *Ex Parte* of SpotOn Networks LLC; WC Docket Nos. 11-42, 09-197, 10-90; at 3 (filed Nov. 2, 2015); Comments of the United States Telecom Association; WC Docket Nos. 11-42, 09-197, 10-90; at 5 (filed Aug. 31, 2015).

<sup>8</sup> *Lifeline FNPRM* at 7866-67 ¶¶ 133-34 (citing 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, 941 ¶ 9 (Jan. 8, 1985)).

<sup>9</sup> *Id.* (citing *Universal Service First R&O* at 8971-72 ¶¶ 369-70).

<sup>10</sup> *See Universal Service First R&O* at 8971-72 ¶¶ 369-70.

Lifeline program if such changes serve the public interest.<sup>11</sup> Section 254(j) states, “[n]othing in [Section 254] shall affect the collection, distribution, or administration of the Lifeline Assistance Program.”<sup>12</sup> As AT&T correctly asserted, “in Section 254(j) Congress explicitly gave the Commission the flexibility to permit non-ETCs to participate in its low-income programs.”<sup>13</sup> Further, the legislative history of the 1996 Act explained that Section 254(e) “is not intended to prohibit support mechanisms that directly help individuals afford universal service.”<sup>14</sup> Thus, it is clear that the Commission has the necessary statutory authority to allow non-ETCs to provide Lifeline-supported services.

Public Knowledge also addressed claims in the docket that section 254(e) of the Communications Act precludes the FCC from allowing non-ETCs from participating in Lifeline.<sup>15</sup> As one commenter pointed out, the Commission’s 2004 Lifeline and Link-Up Report and Order (“*Lifeline and Link-Up R&O*”) found that allowing non-ETCs to participate in Lifeline would be inconsistent with section 254(e).<sup>16</sup> Similarly, the Commission’s 2005 Order responding to Tracfone’s petition for forbearance from section 214(e)(1)(A) of the Communications Act and section 54.201(i) of the FCC’s rules (“*Tracfone Forbearance Order*”) concluded that only ETCs are eligible for universal service support.<sup>17</sup> Public Knowledge explained that although these orders contradict the Commission’s finding in the *Universal Service First R&O* that it possesses the legal authority to allow non-ETCs to participate in Lifeline, neither order clearly overruled the FCC’s prior precedent. In both the *Lifeline and Link-Up R&O* and the *Tracfone Forbearance Order*, the Commission failed to state that it was departing from its prior interpretation of section 254.<sup>18</sup> Interpreting section 254 to require Lifeline providers be designated as ETCs without deliberately announcing that it departed from the Commission’s prior statutory interpretation

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<sup>11</sup> See *id.* at 8956 ¶ 339.

<sup>12</sup> 47 U.S.C. § 254(j).

<sup>13</sup> AT&T Comments at 32.

<sup>14</sup> Conf. Rept. 104-230, 104th Cong., 2d Sess. at 129 (1996).

<sup>15</sup> See, e.g., Comments of the Massachusetts Department of Telecommunications and Cable; WC Docket Nos. 11-42, 09-197, 10-90; at 2 (filed Aug. 31, 2015); Comments of Pennsylvania Public Utility Commission; WC Docket Nos. 11-42, 09-197, 10-90; at 30-31 (filed Aug. 31, 2015); Comments of WTA-Advocates for Rural Broadband; WC Docket Nos. 11-42, 09-197, 10-90; at 14 (filed Aug. 31, 2015); Comments of Tracfone Wireless, Inc.; WC Docket Nos. 11-42, 09-197, 10-90; at 44-45 (filed Aug. 31, 2015).

<sup>16</sup> See Reply Comments of Budget Prepay, Inc.; WC Docket Nos. 11-42, 09-197, 10-90; at 15 (filed Sept. 30, 2015)(citing Lifeline and Link-Up, *Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 03-109, FCC 04-87 ¶ 54 (rel. Apr. 29, 2004) (“*Lifeline and Link-Up R&O*”)).

<sup>17</sup> Federal-State Joint Board on Universal Service, Petition of Tracfone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. 54.201(i), *Order*, CC Docket No. 96-45, FCC 05-165 ¶ 3 (rel. Sept. 8, 2005) (“*Tracfone Forbearance Order*”).

<sup>18</sup> The Commission also failed to consider the context of the statute, and ignored that section 254(e) only applies to “specific universal service support.” In the *Lifeline and Link-Up R&O*, the FCC did not consider section 254(e) in light of section 254(j) as it did in the *Universal Service First R&O*. Moreover, in the *Tracfone Forbearance Order*, the Commission overlooked the fact that section 254(e) states that an ETC designation is required for carriers to be eligible to receive “specific” universal service support. As a result, the Commission incorrectly implied that all providers of universal service programs must be ETCs. This interpretation of the statute’s requirements is incorrect considering that both the E-Rate and the Rural Health Care Program do not require service providers to be designated as ETCs. See *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2480, 2149 (2010) (stating that when determining whether the language of a statute is plain, the Court will read the words “in their context and with a view to their place in the overall statutory scheme.”)

would be arbitrary and capricious.<sup>19</sup> Therefore, because the Commission never deliberately acknowledged and departed from its interpretation of its authority in the *Universal Service First R&O*, the Commission’s interpretation of its statutory authority continues to be that it may allow non-ETCs to participate in Lifeline.

Public Knowledge also explained that because the Commission’s rules do limit receipt of Lifeline support to ETCs, the Commission has two avenues to allow non-ETCs to participate in Lifeline. The Commission may either revise its rules to allow non-ETCs to provide Lifeline-supported services, or it may forbear from its existing rules.

To amend its rules, the Commission must, in accordance with the Administrative Procedure Act, provide notice of the proposed rule and allow comment by interested parties.<sup>20</sup> The *Lifeline FNPRM* clearly satisfies these requirements. And, when courts consider a challenge to an agency’s rules, the Supreme Court has found that the review should be narrowly focused, examining whether the agency evaluated the relevant data and articulated a satisfactory explanation for its action.<sup>21</sup>

Alternatively, the Commission may forbear from its current rules that prevent non-ETCs to participate in Lifeline.<sup>22</sup> To do so, it must find that 1) enforcement of the regulation is not necessary for fair pricing, 2) enforcement is not necessary for consumer protection, and 3) forbearance is consistent with the public interest.<sup>23</sup> As the National Cable & Telecommunications Association explained, each of the forbearance criteria is met here. First, the ETC requirement is not necessary for fair pricing. In fact, forbearance from the ETC designation requirement would permit more providers to participate in the program, increasing competition in the Lifeline marketplace, and giving consumers more choice. Second, the ETC requirement is not necessary to protect consumers. No such requirement exists for providers in the E-Rate or Rural Health Care Program and the Commission is able to protect consumers in those programs. Finally, allowing non-ETCs to participate in the Lifeline program serves the public interest by promoting greater participation in the Lifeline program, thereby furthering Congress’ goal of providing low-income consumers with greater access to advanced telecommunications services.<sup>24</sup>

Lastly, the Commission may root a decision to forbear from its ETC designation requirements in its authority under section 706 of the Communications Act to forbear from rules to remove barriers to infrastructure investment.<sup>25</sup> Permitting non-ETCs to provide Lifeline-supported services could create incentives for these carriers to provide broadband Internet access services to unserved and underserved areas.

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<sup>19</sup> See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 512 (2009) (“[a]n agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. See *United States v. Nixon*, 418 U. S. 683, 696 (1974). And of course the agency must show that there are good reasons for the new policy.”).

<sup>20</sup> See 5 U.S.C. § 553.

<sup>21</sup> *Fox Television Stations, Inc.*, 556 U.S. at 512.

<sup>22</sup> 47 C.F.R. § 54.201(a)(1).

<sup>23</sup> 47 U.S.C. § 160(a).

<sup>24</sup> Reply Comments of the National Cable & Telecommunications Association; WC Docket Nos. 11-42, 09-197, 10-90; at 2-3 (filed Sept. 30, 2015).

<sup>25</sup> 47 U.S.C. § 1302(a).

In accordance with Section 1.1206(b) of the Commission's rules, this letter is being filed with your office. If you have any further questions, please contact me at (202) 861-0020.

Respectfully submitted,

/s/ Phillip Berenbroick

Counsel, Government Affairs  
Public Knowledge  
1818 N. St., NW  
Suite 410  
Washington, D.C. 20036  
(202) 861-0020

Cc: Trent Harkrader  
Jodie Griffin