

January 14, 2016

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 January 12, 2016, Phillip Berenbroick, and Dallas Harris of Public Knowledge (collectively, “Public Knowledge”), met with Travis Litman, Senior Legal Advisor to Commissioner Rosenworcel, to discuss matters in the above-captioned proceedings.

Public Knowledge explained that the record overwhelmingly supports the Federal Communications Commission’s (“Commission” or “FCC”) proposal<sup>1</sup> (“*Lifeline FNPRM*”) to modernize the Lifeline program to support broadband Internet access service.<sup>2</sup> Modernizing the Lifeline program to support broadband Internet access service will help bring broadband within reach for millions of unconnected Americans.

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>3</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>4</sup>

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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> *Lifeline FNPRM* at 7866 ¶ 132.

<sup>4</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

Public Knowledge emphasized that for the Commission to meet its goal of making broadband more accessible to Americans, modernization of the Lifeline program should include allowing broadband access providers that are not eligible telecommunications carriers (“ETCs”) to provide Lifeline-supported broadband service. The Commission has the requisite legal authority to increase competition and consumer choice for Lifeline subscribers by allowing non-ETCs to provide Lifeline-supported services. Further, numerous parties in the docket have explained that the Commission has the necessary authority to allow participation by non-ETCs.<sup>5</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>6</sup> In 1997, as the Commission implemented the 1996 Act and revised the Lifeline program in its Federal State-Joint Board on Universal Service Report and Order (“*Universal Service First R&O*”), the FCC “found that it had the authority to provide Lifeline support to include carriers other than ETCs.”<sup>7</sup> Additionally, the *Universal Service First R&O* also concluded that the 1996 Act, particularly section 254(j), provided the FCC with the flexibility to modify the Lifeline program if such changes serve the public interest.<sup>8</sup> Section 254(j) states, “[n]othing in [Section 254] shall affect the collection, distribution, or administration of the Lifeline Assistance Program.”<sup>9</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>10</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>11</sup> Thus, it is clear that the Commission has the necessary statutory authority to allow non-ETCs to provide Lifeline-supported services.

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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>5</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) (“ACA Comments”); 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>6</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>7</sup> *Id.* (citing *Universal Service First R&O* at 8971-72 ¶¶ 369-70).

<sup>8</sup> See *Universal Service First R&O* at 8956 ¶ 339.

<sup>9</sup> 47 U.S.C. § 254(j).

<sup>10</sup> AT&T Comments at 32.

<sup>11</sup> Conf. Rept. 104-230, 104th Cong., 2d Sess. at 129 (1996).

Although the *Universal Service First R&O* determined that the Commission had the authority to allow non-ETCs to participate in Lifeline, it stated it would adopt the recommendation of the Federal-State Joint Board on Universal Service to have a single unified funding mechanism and single criteria. In a single line, apparently as an afterthought, the Commission stated: “Furthermore, in deciding which carriers may participate in Lifeline, we note that Section 254(e) Universal Service support to be provided only to carriers deemed eligible pursuant to Section 214(e).”<sup>12</sup>

It is unclear whether the Commission was making a definitive statement as to the relationship between the limitations of Section 254(e) and the broad language of Section 254(j), or simply noting that it had avoided the question entirely and therefore was reserving the decision for another time. Even if one adopts the view that the Commission made a finding; however, rather than simply flagging a possible concern for the future, good reason exists now for the Commission to resolve the conflict and conclude that Section 254(e) does not prohibit payments from the general Universal Service Fund (“USF”) to non-ETCs in the Lifeline program.

The Commission's initial interpretation focused primarily on voice, a network with a very different architecture and different environment. The Commission at that time faced a world of regulated voice networks, generally monopolies in their service areas, and where it was expected that incoming competitors would need to go through an existing state franchising process simply to provide service. Also at the time, the vast majority of information services were provided by or over telephone lines, so that a telephone subscription gave you access to the Internet access of the day (dial up). Further, as between voice and dial up, it was voice that was the primary service necessary for participation in society and public safety. Accordingly, the comparative cost of requiring additional ETC certification was minimal, and the number of potential lifeline providers likely excluded from participation was relatively low.

Today, almost 20 years later, the world is radically different. Voice is now delivered as easily by Internet access, rather than the other way around. Broadband providers generally do not need to file either for a Certificate of Necessity and Public Convenience (“CN”) from the FCC or from the state. Even the traditional phone companies that still have state certification are shifting away from traditional voice service to IP-based service. Even providers seeking 214(e) certification now encounter lengthy delays due to budget cuts at the state public utility commissions, and the difficulties in customizing generic billing software and practices on a state-by-state basis to comply with the different state requirements for 214(e).

The record contains copious evidence that the burden of receiving 214(e) service – rather than being a modest and part of the general process of receiving a CN – now imposes such a significant burden that many providers would choose not to participate in the Lifeline program.<sup>13</sup> This is particularly true for cable operators, who have never been required to file for a CN and never previously participated in Lifeline, as well as the largest telephone providers, who are

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<sup>12</sup> See *Universal Service First R&O* at 8971-72 ¶¶ 369.

<sup>13</sup> See Comments of Comcast Corporation; WC Docket Nos. 11-42, 09-197, 10-90; at 9-10 (filed Aug. 31, 2015) (“requiring providers to undertake the regulatory burdens of full-blown ETC designation proceedings may be ‘an impediment to broader [provider] participation in the Lifeline program.’” citing *Lifeline FNPRM* at 7866 ¶ 132); ACA Comments at 10, n.15 (filed Aug. 31, 2015).

transitioning their systems as part of the broader tech transition to IP-based systems which – with the exception of voluntary 214(e) certification, have been deregulated by state law. There is a very real concern that millions of Americans in need of Lifeline assistance – particularly in urban markets where national providers dominate the residential market – might not have access to a provider participating in the program. If the FCC did not require 214(e) certification, new and innovative entrants would likely emerge to provide broadband Lifeline in underserved communities. Accordingly, the Commission should conclude that it is impossible to provide the goal of the Lifeline reform program, particularly with regard to the principles in 254(b)(2) and (b)(3). As a result, the Commission should reexamine its previous determination in this area.

The Commission should observe that its consideration of what Section 254(e) actually requires was cursory in the extreme. Only a single commenter raised the issue of forgoing a Section 214(e) certification for Lifeline participation.<sup>14</sup> Indeed, the Commission did not even consider the impact of 254(j) on 254(e). The enormously changed circumstances and the potential inability to attract sufficient program participants to insure Lifeline support for broadband to all Americans surely provide sufficient reason for the Commission to revisit this single line of casual reasoning – especially in light of its conclusion that it has the basic authority to relieve Lifeline participants of the ETC requirement.

Public Knowledge also explained that because the Commission’s current 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>15</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>16</sup>

Alternatively, the Commission may forbear from its current rules that prevent non-ETCs from participating in Lifeline.<sup>17</sup> To do so, the FCC 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>18</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

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<sup>14</sup> Perhaps nothing so illustrates the changed nature of the world today that in 1997 was the California Public Utility Commission (“CPUC”) which urged the Commission to allow all carriers, not simply ETCs, to participate in Lifeline, while today the CPUC has become one of the most ardent opponents of allowing participation by non-ETCs. *See Universal Service First R&O* at 8971 ¶ 369, n.927; Comments of California Public Utility Commission; WC Docket Nos. 11-42, 09-197, 10-90; at 38 (filed Aug. 31, 2015).

<sup>15</sup> *See* 5 U.S.C. § 553.

<sup>16</sup> *Fox Television Stations, Inc.*, 556 U.S. at 512.

<sup>17</sup> 47 C.F.R. § 54.201(a)(1).

<sup>18</sup> 47 U.S.C. § 160(a).

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>19</sup>

Moreover, 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>20</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.

Public Knowledge also emphasized that the Commission can protect the integrity of the Lifeline while modernizing the program to support broadband Internet access service and expanding consumer choice and competition by allowing participation by non-ETCs. First, it is clear that requiring providers of Lifeline-supported services to be ETCs was not a particularly successful safeguard against waste, fraud, and abuse. For instance, under the current regime that limits participation to ETCs, the Commission found it necessary to reform the Lifeline program to eliminate waste stemming from duplicative enrollment.<sup>21</sup> The data show that the Commission's 2012 reforms have been successful in wringing excesses and abuses out of the Lifeline program. In 2015, the Government Accountability Office reported that even though some of the Commission's reforms remain in progress or incomplete, those that have been implemented have already resulted in disbursements declining from \$2.2 billion in 2012 to \$1.7 billion in 2014.<sup>22</sup> And, the FCC has continued to propose improvements to the subscriber verification process and further improve the program's integrity.<sup>23</sup>

In addition to the reforms the Commission has already implemented, those that are in progress, and those proposed in the *Lifeline FNPRM*, Public Knowledge has proposed added safeguards that will ensure that broadband providers participating in Lifeline program offer high-quality products, consumers are empowered to choose the service that best meets their needs, and USF dollars are wisely spent. First, Public Knowledge, along with AT&T, the National Consumer Law Center, and others, proposed that the Commission should ensure that Lifeline-supported broadband services made available only to Lifeline subscribers meet minimum standards so that they are not substandard.<sup>24</sup> Second, Public Knowledge proposed that the Lifeline benefit should

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<sup>19</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>20</sup> 47 U.S.C. § 1302(a).

<sup>21</sup> See 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; *Report and Order and Further Notice of Rulemaking*; WC Docket Nos. 11-42, 03-109, 12-23, CC Docket No. 96-45; 27 FCC Rcd 6656, 6734 ¶ 180 (2012).

<sup>22</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-335, FCC SHOULD EVALUATE THE EFFICIENCY AND EFFECTIVENESS OF THE LIFELINE PROGRAM at 11 (2015).

<sup>23</sup> See *Lifeline FNPRM* at 7845 ¶ 63.

<sup>24</sup> Comments of Public Knowledge, Appalshop, and Center for Rural Strategies; WC Docket Nos. 11-42, 09-197, 10-90; at 23-24 (filed Sept. 1, 2015) ("Public Knowledge Comments"). See AT&T Comments at 10; Comments of National Consumer Law Center, et. al.; WC Docket Nos. 11-42, 09-197, 10-90; at 3, 6 (filed Aug. 31, 2015);

be portable so that subscribers may spend the Lifeline subsidy on the service that best meets their needs. Making the benefit portable will promote competition between carriers, leading to better services and rates for customers and greater value for universal service contributors. And, allowing non-ETCs to provide Lifeline-supported services will expand the pool of competitors to help drive quality and choice up and prices down. Lastly, the Commission should make certain that Lifeline subscribers can seamlessly change service providers. Doing so will encourage broadband providers to offer higher quality products at competitive rates, providing customers with better service to and more value for every universal service dollar.<sup>25</sup>

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,

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Comments of Members of the Rural Broadband Policy Group; WC Docket Nos. 11-42, 09-197, 10-90; at 18 (filed Aug. 31, 2015).

<sup>25</sup> Public Knowledge Comments at 21-23.