

January 19, 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 14, 2016, Harold Feld, Senior V.P, Kristine DeBry, V.P. Policy Strategy Center, and Dallas Harris, Policy Fellow, all of Public Knowledge (collectively “Public Knowledge” or “PK”) spoke with Jonathan Sallet, General Counsel, and Stephanie Weiner, Senior Legal Advisor, Wireline, to Chairman Wheeler, with regard to the above captioned proceedings.

**The Statutory Question: Can The Commission Use Funds Collected Under Section 254 for Lifeline without Requiring Certification As an Eligible Telecommunications Carrier, Without Regard To The Restriction of Section 254(e).**

For purposes of the conversation, Public Knowledge assumed that, based on the Federal Communications Commission’s (“Commission” or “FCC”) 1997 Universal Service Report and Order implementing Section 254 (“*1997 Order*”), the Commission can create a Lifeline program that does not require eligible telecommunications carrier (“ETC”) certification.<sup>1</sup> Public Knowledge then argued that, in light of the traditional canons of statutory construction, and in light of the existing legislative history, the broad language of Section 254(j) creates an exemption to the restriction in Section 254(e). Further, whether one reads the *1997 Order* as simply reserving the question for future determination, or actually making a determination, the Commission has ample reason to re-examine this question now and should find that the reading proposed by PK is both more consistent with the statute and better policy than reading that Section 254(e) governs.

By the Plain Language of the Statute, Section 254(j) Creates a Broad General Carve Out For Lifeline Programs.

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<sup>1</sup> See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order*, 12 FCC Rcd 8776, 8971-72 ¶¶ 369-70 (1997) (“*1997 Order*”).

<sup>2</sup> 47 U.S.C. § 254(e).

<sup>3</sup> 47 U.S.C. § 254(d).

<sup>4</sup> *AT&T Corp. v. Iowa Utilities Bd*, 525 U.S. 366, 395 (1999).

<sup>5</sup> 47 U.S.C. § 254(j) (emphasis added).

<sup>6</sup> 47 U.S.C. § 254(i) (emphasis added).

<sup>7</sup> 47 U.S.C. § 254(h)(1)(B)(ii) allows the FCC to fund what is now called the E-Rate and Rural Health funds without regard to Section 254(e). The exemption in Section 254(j) is significantly broader than that provided in Section

As always, the analysis begins with the plain language of the statute. Section 254(e) states, in relevant part:

After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support. 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. Any such support should be explicit and sufficient to achieve the purposes of this section.<sup>2</sup>

At first glance, the statutory language appears fairly straightforward. Once the Commission has established rules for programs funded pursuant to Section 254(d),<sup>3</sup> any program funded with money collected under Section 254(d) may only go to a carrier certified as an ETC under Section 214(e), and an ETC may only use the money received to maintain or upgrade the facilities or services for which the support is intended. On the basis of this interpretation, opponents have argued that the Commission can only distribute Lifeline funds to an ETC.

As the Supreme Court has cautioned, however, far from “a model of clarity,” the Telecommunications Act of 1996 is often “a model of ambiguity or indeed even self-contradiction.”<sup>4</sup> Section 254 proves no exception to this guiding principle. After establishing a general principle in Section 254(e), the statute proceeds to create numerous exceptions to this general rule. Most notably, Section 254(j) states:

Nothing in this section [*i.e.* Section 254] shall affect the ***collection, distribution, or administration*** of the Lifeline Assistance Program provided for by the Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title.<sup>5</sup>

The sweeping language creates a carve out for the Lifeline program, a program identified by its regulatory definition as providing funds to make telecommunications services available to those Americans otherwise unable to afford them. Under the plain language of the statute, Section 254(j) permits the Commission to amend its Lifeline program (identified as the program described 47 C.F.R. §69.117, and other relevant sections).

Additional Cannons of Statutory Interpretation Support The Plain Language Interpretation That The Commission May Fund Lifeline From Universal Service Support Collected Under 254(d), Without Regard to Section 254(e).

If the doctrine of plain meaning is considered insufficient, we arrive at the same result by applying the doctrine of *in paria material*. The broad reading of the exemption in 254(j) flows naturally from the preceding section, Section 254(i), which requires that both the FCC and the

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<sup>2</sup> 47 U.S.C. § 254(e).

<sup>3</sup> 47 U.S.C. § 254(d).

<sup>4</sup> *AT&T Corp. v. Iowa Utilities Bd*, 525 U.S. 366, 395 (1999).

<sup>5</sup> 47 U.S.C. § 254(j) (emphasis added).

states ensure that universal service is available at rates that are “just, reasonable *and affordable*.”<sup>6</sup> The freedom given to the FCC to structure the Lifeline program so as to maximize the affordability of Universal Service pursuant to the exception in 254(j) follows naturally as a means of implementing Section 254(i), and contrasts favorably with the far more limited exception in 254(h)(1)(B)(ii).<sup>7</sup>

Additionally, the reading of Section 254(e) in its entirety makes application of this provision to Lifeline difficult in the extreme. Section 254(e) requires, in addition to ETC certification, that carriers receiving funds paid from the Universal Service support mechanism collected under Section 254(d) “shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.” It makes no sense to apply this requirement to Lifeline, which addresses the question of affordability by providing a subsidy to qualifying applicants. Lifeline enables the purchase of a covered service. Unlike, for example, the High Cost fund, Lifeline is not designed to reduce the cost of particular facilities or subsidize upgrades. Application of this provision of Section 254(e) to Lifeline makes no sense, further reinforcing the interpretation that Congress intended to give the Commission discretion in determining how best to fund and administer the Lifeline program.<sup>8</sup>

The Contrary Reading Violates The General Cannon That When Congress Intends To “Freeze” A Regulation, It Does So Explicitly.

The only counter argument to Public Knowledge’s reading of the statute is that because Section 254(j) references the Lifeline program by Code of Federal Regulations (“CFR”) section, Congress intended to exempt only the Lifeline program as it existed at the time. Under this argument, while the Commission would be permitted to continue its Lifeline program as it existed prior to February 2, 1996, the broad language of Section 254(j) would not apply to any effort to modernize the Lifeline program as part of the express goals of Section 254 generally – but could only apply to the complex system of indirect subsidies that existed prior to passage of the Act.

Generally, however, when Congress wishes to freeze an administrative program as it exists at the time of passage of the Act, Congress says so explicitly. When Congress merely identifies a provision by the date of an agency rulemaking, or a provision in the CFR, it is presumed that Congress does so solely for purposes of identification.<sup>9</sup> Had Congress intended the

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<sup>6</sup> 47 U.S.C. § 254(i) (emphasis added).

<sup>7</sup> 47 U.S.C. §254(h)(1)(B)(ii) allows the FCC to fund what is now called the E-Rate and Rural Health funds without regard to Section 254(e). The exemption in Section 254(j) is significantly broader than that provided in Section 254(h), preempting any limit imposed anywhere in Section 254 on the “collection, distribution or administration of the Lifeline program.” It is axiomatic that a broadly sweeping exemption in one Section includes the narrower exemption in another section.

<sup>8</sup> Additionally, as explained below, the legislative history supports the interpretation that Section 254(e) was intended to apply to specific Universal Service programs such as high cost, which subsidize construction and maintenance of facilities, and was never intended to apply to Lifeline.

<sup>9</sup> For example, the Spectrum Act of 2012, Pub. L. 112-96, Sec. 6403(i)(2) states that nothing should be construed to alter the Commission’s authority to implement the TV white spaces “Second Report and Order and Memorandum Opinion and Order (FCC 08-260) adopted November 4, 2008.” This has always been understood to include any subsequent rulemakings by the Commission with regard to the service created by the relevant Order, and not a Congressional command to undo the subsequent Order adopted in 2010 (25 FCC Rcd 18661 (2010)), or the Report & Order on Reconsideration adopted in 2012 after passage of the act.

broad language of Section 254(j) to apply only to the Lifeline program as it existed prior to passage of the 1996 Act, Congress would have stated “under regulations set forth in Section 69.117, etc. *on February 2, 1996*,” or “as they exist on the date of enactment,” or some other specific language to convey the intent of Congress to limit the otherwise broad language of Section 245(j) to the Lifeline program (and Lifeline funding mechanism) as it existed prior to enactment of Section 254.

#### The Legislative History Further Supports The PK’s Statutory Interpretation

The legislative history of Section 254 similarly supports Public Knowledge’s reading of the statute that Congress intended Section 254(j) to give the Commission broad scope in shaping the Lifeline program, including the freedom to disregard the limitations of Section 254(e). As explained in the Conference Report, the Senate initially proposed the predecessor of Section 254 for the purpose of shifting from a complicated system of implicit subsidies and complicated federal and state collection mechanisms to a simplified system of explicit subsidies collected under what would become Section 254(d).<sup>10</sup> Under the initial Senate draft, what would become Section 254(e) was intended to restrict support to “essential [rather than “eligible”] telecommunications carriers” with regard to support for physical infrastructure. The legislative history of the Senate version was explicit that 254(e) was “not intended to prohibit support mechanisms that directly help individuals afford universal service.”<sup>11</sup>

The House version included numerous changes that the Conference ultimately rejected.<sup>12</sup> Accordingly, unless the legislative history makes clear that the conferees intended a different outcome, the Senate understanding of the purpose of section 254(e), including that Section 254(e) did not impact the ability of the Commission to fund Lifeline with Universal Service support mechanisms, should be considered conclusive.

Looking to the Conference Report explanation of the changes to Section 254(e), nothing indicates any intention to change this understanding. To the contrary, the sparse explanation of the changes demonstrates that they are directed at preventing any sort of cross-subsidization between one physical infrastructure or service fund and another – and clarifying explicit lines of subsidy rather than continuing to rely on hidden and implicit subsidies.

This is the only rational explanation for the emphasis on the word “specific” in both the statute and the legislative history. If Congress had intended to include Lifeline in the scope of Section 254(e), it would simply have prohibited non-ETCs from receiving “Universal Service support.” Instead, Congress chose to include the word “specific” as a modifier for the phrase “Universal Service support” – a turn of phrase consistent with the idea to making subsidies explicit. Nothing here suggests, however, a retreat from the previous Senate understanding that Section 254(e) was not intended to include affordability programs such as Lifeline.

The legislative history of Section 254(j) itself is terse: “New subsection 254(j) has been added to clarify that this Section is not intended to alter the existing provision of Lifeline service

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<sup>10</sup> Conf. Rept. 104-230, 104th Cong., 2d Sess. at 131 (1996).

<sup>11</sup> *Id.* at 129.

<sup>12</sup> *Id.* at 130 (stating, “the House recedes, with modifications.”).

to needy consumers.”<sup>13</sup> Does the word “existing” mean an intent to limit 254(j) merely to a continuation of the program as it existed in February 1996? Or does “existing provision of Lifeline service to needy consumers” mean the broader Lifeline program to support affordability?

In light of the previous Senate history, which clearly intended to exempt affordability programs from the restriction of Section 254(e), and given that the House receded from the Senate version, it seems much more consistent to read the legislative history of Section 254(j) as clarifying the original intent of the Senate that Congress did not intend the restrictions of Section 254(e) to apply to Lifeline and other affordability programs than to presume an intent to freeze the Lifeline program as it existed in February 1996.

### **Reading 254(j) As Exempting Lifeline from 254(e) Is Also Better Policy.**

The Commission recognized in its Further Notice of Proposed Rulemaking (“*Lifeline FNPRM*”) that additional competition in the Lifeline program may be desirable, and sought comment on how to increase competition and whether separating the process by which carriers participate in Lifeline from the ETC designation process would encourage broader participation by carriers.<sup>14</sup> Specifically, the Commission sought input on increasing participation by broadband Internet access providers in the Lifeline program by revisiting its decision in the *1997 Order* not to provide Lifeline support to non-ETCs.<sup>15</sup> In response, numerous parties have explained that the Commission has the necessary authority to allow participation by non-ETCs.<sup>16</sup>

At worst, the question of statutory interpretation is ambiguous. As the Supreme Court observed in *Iowa Utility Bd.*, “Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency.”<sup>17</sup> Public Knowledge’s reading of Section 254 is not merely a better reading of the plain language of the statute under the canons of statutory construction. It is also better policy.

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<sup>13</sup> *Id.* at 134.

<sup>14</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, 7866 ¶ 132 (2015) (“*Lifeline FNPRM*”).

<sup>15</sup> *Id.* at 7868 ¶ 137 (citing *1997 Order* at 8971-72 ¶¶ 369-70).

<sup>16</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); Notice of *Ex Parte* of AT&T Services, Inc., WC Docket No. 11-42, Attachment, at 19 (filed Nov. 23, 2015); Notice of *Ex Parte* of AT&T Services, Inc., WC Docket No. 11-42, at 1, 4 (filed Dec. 21, 2015); Comments of Comcast Corporation; WC Docket Nos. 11-42, 09-197, 10-90; at 10 (filed Aug. 31, 2015) (“Comcast Comments”); 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 the Schools, Health, and Libraries Broadband Coalition; WC Docket Nos. 11-42, 09-197, 10-90; at 1 (filed Jan. 11, 2016); 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>17</sup> *Iowa Utilities Bd.*, 525 U.S. at 397.

The Commission's initial interpretation in the *1997 Order* 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 consumers 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>18</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 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 achieve its goals of making broadband universally accessible and affordable to all Americans, particularly with regard to the principles in 254(b)(2) and (b)(3), if additional broadband providers do not or cannot participate in Lifeline. 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>19</sup> Indeed, the Commission did not even

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<sup>18</sup> See Comcast Comments at 9-10 (“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).

<sup>19</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,

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.

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/ Harold Feld

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while today the CPUC has become one of the most ardent opponents of allowing participation by non-ETCs. *See 1997 Order* 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).