



N A R U C  
National Association of Regulatory Utility Commissioners

*NOTICE VIA ELECTRONIC FILING*

*February 18, 2016*

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

**RE: Notice of Written Ex Parte filed:**<sup>1</sup> *In the Matter of Lifeline and Link Up Reform and Modernization, WC Docket 11-42, Telecommunications Carriers Eligible for Universal Service Support, WC Docket 09-197, Connect America Fund, WC Docket 10-90.*

**Secretary Dortch:**

On February 10, 2016, the undersigned met with separately with **Travis Litman**, *Senior Legal Advisor to Commissioner Rosenworcel*, and later with **Gigi B. Sohn**, *Counselor to the Chairman*, **Jon Wilkins**, *Current FCC Managing Director and Chief Operating Officer and incoming Chief of the Wireless Telecommunications Bureau*, **Ryan B. Palmer**, *Chief, Telecommunications Access Policy Division, Wireline Competition Bureau*, and **Eric Feigenbaum**, *Office of Media Relations*. On February 12, 2016, the undersigned met separately with **Rebekah Goodheart**, *Legal Advisor, Wireline, to Commissioner Clyburn* and later with **Amy Bender**, *Legal Advisor, Wireline, to Commissioner O’Rielly*. On February 17, 2016, the undersigned met separately with **Ryan B. Palmer** again who was attending the NARUC winter meetings in D.C. The undersigned has also provided a copy of this *ex parte* to **Nicholas (Nick) Degani**, *Legal Advisor, Wireline, to Commissioner Pai*.

The meetings were requested to discuss recent *ex partes* filed by others arguing that the FCC can give lifeline funding to entities that have not been designated as essential telecommunications carriers under 47 U.S.C. 214(e), that the FCC can establish a federal “ETC” designation process that bypasses the 47 U.S.C. 214(e) requirement that States in the first instance conduct such designations, that the FCC can fund broadband without requiring the same carrier to provide voice – which is currently designated as a (if not the) supported service under 47 U.S.C. 254. The impetus for this seems to be the misguided notion that, by cutting States out of the process, it will somehow encourage cable providers of broadband services to focus on providing facilities based lifeline service at a discounted rate very close to the current lifeline subsidy rate.

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<sup>1</sup> NARUC respectfully requests any waivers needed to file this notice out-of-time. Good cause exists to grant this waiver. NARUC has very limited staff and our winter meeting started the business day before this notice was due. To comply with the FCC’s rules specifying the inclusion of all arguments raised - additional time was needed to locate the text in the cases cited during the discussion as well as to find specific statutory text referenced. I started the draft last Saturday but was unable to complete it until today.

During all these meetings, the undersigned generally made the following points responding to items that others proposed. NARUC is likely to refine the legal and policy arguments presented in a subsequent written ex parte filing.

The proponents of these approaches are wrong on all counts.

➤ **Legally, the statute does not allow the FCC to do any of the following:**

**Create a federal designation process that *ab initio* bypasses State commissions; or**

**Permit the FCC to give funds to entities that do not qualify as telecommunications service providers and are designated ETCs; or**

**Permit the FCC to give subsidies to carriers that are not offering all designated supported services.**

➤ **Moreover, it is also a bad idea from a policy perspective because:**

**Taking State Cops off the beat will inevitably result in additional fraud and abuse of the program;**

**It will undermine State efforts to promote the program and handle problems with service providers for lifeline customers;**

**It will likely result in fewer State matching programs – or at least provide an incentive for States not to provide matching programs; this federal-certification-only approach will also necessarily diminish significantly the resources and experts at the State level who advocate directly for consumers of lifeline programs and push for matching State programs; and**

**The apparent goal – getting Cable and other currently non-State certified carriers into the business of providing lifeline services seems unlikely to succeed. It certainly will undermine the program's service quality.**

#### **PRELIMINARY DISCUSSION – LEGAL ISSUES**

*The statute does not allow the FCC to create a federal designation process that *ab initio* bypasses State commissions.*

The plain text of 47 U.S.C. § 214 (e) is crystal clear.

Congress specifies that States designate carriers as ETCs before they can receive any federal universal service subsidy.

The FCC simply has no role in the ETC designation process unless the State cannot act as a result of State law.

Indeed, the FCC has acknowledged on many occasions that: “By statute, the states... are empowered to designate common carriers as ETCs.”<sup>2</sup>

As a matter of the federal act, Congressional intent is clear. In 47 U.S. § 1302, Congress specified that States are to “encourage deployment...of advanced telecommunications services.”<sup>3</sup> In U.S. § 254, Congress made clear it wanted States to have matching programs to support the federally designated “universal services” which of course includes advanced services. Indeed, Congress specified that a Federal State Joint Board provide recommendations to update designated services – and the expansion of the program to include broadband was based explicitly on that recommendation. The State role to conduct ETC designation is in no way linked by Congress to the “universal services” that the carrier is to offer. It is a separate State issue, decided by each State commission, if that state has enabling legislation to do the designation Congress specified.

***The statute does not permit the FCC to give federal USF funds to entities that do not qualify as telecommunications service providers and are designated ETCs.***

Again both the text of the statute and judicial precedent<sup>4</sup> are clear. The FCC cannot give any federal universal funds to entities that do not provide telecommunications services (and are therefore telecommunications service providers) or that have not been designated under Section 214(e) as ETCs: “...only an eligible

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<sup>2</sup> Specifying in the accompanying footnote 622 that: “[S]tates have primary jurisdiction to designate ETCs; the Commission designates ETCs where states lack jurisdiction. *See* 47 U.S.C. § 214(e).” See, In the Matter of Connect Am. Fund A Nat’l Broadband Plan for Our Future Establishing Just & Reasonable Rates for Local Exch. Carriers High-Cost Universal Serv. Support Developing an Unified Intercarrier Comp. Regime Fed.-State Joint Bd. on Universal Serv. Lifeline & Link-Up Universal Serv. Reform -- Mobility Fund, 26 F.C.C. Rcd. 17663 at 17798 (2011)

<sup>3</sup> Compare, Verizon v. F.C.C., 740 F.3d 623, 638 (D.C. Cir. 2014) (“Observing that the statute applies to both “[t]he Commission *and* each State commission with regulatory jurisdiction over telecommunications services,” 47 U.S.C. § 1302(a) (emphasis added), Verizon contends that Congress would not be expected to grant both the FCC and state commissions the regulatory authority to encourage the deployment of advanced telecommunications capabilities. But Congress has granted regulatory authority to state telecommunications commissions on other occasions, and we see no reason to think that it could not have done the same here. *See, e.g., id.* § 251(f) (granting state commissions the authority to exempt rural local exchange carriers from certain obligations imposed on other incumbents); *id.* § 252(e) (requiring all interconnection agreements between incumbent local exchange carriers and entrant carriers to be approved by a state commission).”

<sup>4</sup> Indeed, in 2014, before the FCC reclassified Broadband Internet Access Service as a “telecommunications service,” the 10<sup>th</sup> Circuit made clear that carriers must be designated as an eligible telecommunications carrier and have common carrier status to access funds. See, IN RE: FCC11-161, 753 F.3d 1015, at 1048-1049 (10<sup>th</sup> Cir. 2014):

[T]o obtain USF funds, a provider must be designated . . . as an “eligible telecommunications carrier” under 47 U.S.C. § 214(e). *See* 47 U.S.C. § 254(e) (“only an eligible telecommunications carrier designated under section 214(e) . . . shall be eligible to receive specific Federal universal service support.”). And, under the existing statutory framework, only “common carriers,” defined as “any person engaged as a common carrier for hire . . . in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy,” 47 U.S.C. §153(10), are eligible to be designated as “eligible telecommunications carriers,” 47 U.S.C. §214(e). Thus, under the current statutory regime, only ETCs can receive USF funds that could be used for VoIP support. Consequently, there is *no imminent possibility that broadband-only providers will receive USF support under the FCC’s Order, since they cannot be designated as “eligible telecommunications carriers.”* {emphasis added}

Eliminating the State role in the designation process is on its face – inconsistent with the FCC’s 2011 decision addressed by the 10<sup>th</sup> Circuit in this appeal. If the States can and have designated carriers under this order – which clearly involves the provision of broadband services.

telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support.”<sup>5</sup>

***The statute does not permit the FCC to give federal USF funds to entities that do not offer designated supported services.***

It is one thing for the FCC to add to “supported services” based on the criteria outlined in the statute. It is quite another for the agency to decide that an ETC need only offer one supported service.

Sections 254 and 214(e)(1), and judicial precedent, are clear that carriers can only receive support and use it “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.”

Section 254 specifies:

[] the joint board is to recommend and the FCC is to implement rules to define the services “that are supported by Federal universal support mechanisms;”

[] that “Universal service” is an evolving level of telecommunications services; and

[] that the FCC can “designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h) of this section” but nowhere gives similar dispensation to subtract or add “additional services” for Lifeline services.

Section 214(3) specifies that “[a] common carrier designated as an eligible telecommunications carrier . . . shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received--(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c).”

The FCC could attempt to make a finding that conditions warrant removing voice services from the current list of “supported services” but, given the number of lifeline recipients receiving voice only service, it seems unlikely the agency could build a factual record to support such a finding.

Presumably, the FCC is not simultaneously suggesting that it can eliminate the State role re: ETC designations for voice services.

### **PRELIMINARY DISCUSSION – POLICY ISSUES**

The idea of either eliminating the ETC designation process – or ignoring explicit text specifying that States are to make those designations is also a bad idea from a policy perspective.

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<sup>5</sup> The term *telecommunications carriers* is defined at 47 U.S.C. §153 (51) as “any provider of *telecommunications services*.” {emphasis added} Section §153(51) specifies that a carrier “shall be treated as a common carrier under this chapter only to the extent it is engaged in providing telecommunications services.” Section 214(e) is in “this chapter.” Necessarily, therefore, common carriers can only be treated as having that status under §214(e) “to the extent they are engaged in providing telecommunications services.” Section 254(j) was placed in the statute to assure that the existing lifeline mechanism was maintained – as explained in the Conference Report (H. Rept. 104-458), at 233, “New Subsection 254(j) has been added to clarify that [Section 254] is not intended to alter the existing provision of lifeline services to needy consumers.” Lifeline has always been a shared responsibility. It is illogical to, 20 years after the act was passed, read this section as eliminating the certification process for carriers to receive funds and to effectively eliminate protections for consumers outlined elsewhere in the same provision. See, e.g. 47 U.S.C. §254(i).

***Removing the State ETC Designation Role will inevitably result in additional fraud and abuse of the program.***

The State “cops” remain a significant barrier to fraud and abuse via the ETC designation process and thereafter. Indeed, all of the reforms to the program the FCC adopted today that have reduced fraud were based on pre-existing State mechanisms. An earlier and somewhat incomplete NARUC survey indicates that at least 13 states have programs to periodically conduct compliance audits on ETCs and/or of Lifeline Recipients.<sup>6</sup> For example, California, in addition to financial and compliance audit provisions, has had annual renewal/recertification requirements since 2006.

In some cases, States have revoked or refused to grant an ETC designation pursuant to Section 214(e). This capability is a crucial component for policing the fund to eliminate bad actors. Six States responding to our survey have refused an application for ETC designation filed by a carrier. Seven others, including Florida, have revoked designations for questionable practices and/or violating program rules.<sup>7</sup> And I believe two commissions have either rejected designations to carriers that provided substandard 911 services or their questions caused the carrier to withdraw the application.

But these numbers do not tell the whole story. In many cases, a carrier whose ETC application or existing ETC designation is being challenged will withdraw its application or relinquish its ETC status once it becomes clear it will not be granted or may be revoked. Such actions are not reflected in any statistics. Florida, for example, has had 19 ETC filings withdrawn. Moreover, many States require ETCs to certify-- when they are seeking designation or submitting annual filings--that it is in compliance with all federal and State rules and whether the provider’s ETC designation has been suspended or revoked in any jurisdiction.

***Removing the State ETC Designation Role will undermine State efforts to promote the program and handle problems with service providers for lifeline customers.***

NARUC has a long history of support Lifeline as a vital social program.<sup>8</sup>

Indeed, State commissions, through NARUC, started Lifeline Awareness Week.<sup>9</sup>

State Commissions have historically promoted use of the program through a variety of methods at the State level.

And we have also long pressed for expanding the service to include broadband.<sup>10</sup>

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<sup>6</sup> States responding to either the 2013 or 2015 surveys that have requirements for requiring periodic compliance audits on lifeline carriers or recipients: CA, CO, FL, KS, ME, MA, MO, MS, NE, NJ, OH, OR, WI.

<sup>7</sup> States responding they had revoked a carrier’s ETC designation: FL, KS, KY, MI, MN, WA, WI. Florida revoked the designations of two companies for abuse of the Lifeline program, one of which faces criminal charges in Tampa federal court last summer (2015). See Florida PSC Docket No. 080065, *Investigation of Vilaire Communications, Inc.'s eligible telecommunications carrier status and competitive local exchange company certificate status in the State of Florida*, and Docket No. 110082-TP, *Initiation of show cause proceedings against American Dial Tone, Inc., All American Telecom, Inc., Bellerud Communications, LLC, BLC Management LLC d/b/a Angles Communication Solutions, and LifeConnex Telecom, LLC for apparent violations of Chapter 364, F.S., Chapters 25-4 and 25-24, F.A.C., and FPSC Orders*.

<sup>8</sup> See, NARUC’s July 2000 Resolution regarding Universal Service for Low Income Households.

<sup>9</sup> See, July 2009 NARUC Resolution Proclaiming National Telephone Discount Lifeline Awareness Week.

States were requiring the provision of discounted services to schools, non-profits and others long before the federal program started in 1985.

States are also, in many instances, the only ones that can effectively handle service quality problems and related concerns for lifeline recipients.

If there is no role with respect to the Lifeline broadband designation, it will be difficult for any commission to justify assigning staff to either promote or protect users of such programs. Moreover, carriers will argue incorrectly, as they already do today, that Congress expected States to have no role with respect to any oversight of broadband services. This in spite of the clear requirements of, *inter alia*, 47 U.S. §§ 214(e), 251, 253, 254, & 1302, and the Broadband Data Improvement Act.

***Removing the State ETC Designation Role is likely to result in fewer State matching programs – or at least provide a strong incentive for States not to provide matching programs. It will complicate the picture for States that do.***

As noted earlier, any federal-certification-only approach will necessarily diminish significantly the resources and experts at the State level who advocate directly for consumers of lifeline programs and push for matching State programs.

If State continue as the ETC designator, the likelihood is those States that have matching programs on the voice side are likely to at least consider expanding their programs to cover broadband.

Assuming a State already has such a broadband subsidy, if a lifeline customer wants a matching state subsidy for services, unless the carrier also registers separately with the State, they cannot get it.

No State legislature is going to allow State programs without State conditions and oversight.

This federal designation only idea can only provide incentives for States not to provide matching programs and/or to drop the programs they have.

From a process perspective, it is not clear how this could work, given that States will retain the designation role for voice services. At least as long as voice lifeline services are provided and “voice telephony”, as the FCC specified in the earlier cited November 2011 “transformational order” is the *sine qua none* for ETC status it seems unlikely. For it to work, a Court will have to decide on appeal that the FCC can specify that a federally certified BIAS service provider does not have to at least offer voice services.

***Trading State oversight to assure service quality and to block fraud and abuse to lure Cable and other currently non-State certified carriers to provide broadband lifeline services seems a poorly designed policy choice, as it certainly will undermine the program’s service quality long term – and appears unlikely to spur significant additional cable participation in the program.***

The large facilities based incumbent local exchange carriers have never been big proponents of the lifeline program. Indeed, the larger facilities based companies, where presumably economies of scale and scope would make lifeline a more profitable proposition have historically been uninterested in providing such services.

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<sup>10</sup> See, e.g., NARUC’s February 2008 *Resolution to Support Equal Access to Communication Technologies by People with Disabilities*, February 2009 *Resolution on Lifeline and Link-Up Program Support for Broadband Internet Access Services and Devices*, November 2009 *Resolution on Legislation to Establish a (Permanent) Broadband Lifeline Assistance Program*, and July 2011 *Resolution Supporting Low-Income Broadband Adoption Program*.

It is no accident that the biggest proponents of “free” lifeline services are all resellers bundling and reselling facilities-based carriers’ excess capacity.

Unless there is a compelling financial case for providing lifeline for broadband – in a way that will NOT undermine their more profitable/higher margin broadband/video services – if history is any guide – one would predict broadband lifeline services to get little attention in the long term.

It appears some companies may be willing to at least suggest if they can assure a long term tactical goal of undermining state oversight, they may get into the business and expand significantly the existing program. Policy-makers, who have seen such promises before, need to think this through carefully with an eye on history.

The FCC can never access sufficient resources to handle universal service policy alone – service quality concerns arise, as do disputes, and fraudulent schemes. That, and the desire for strong State matching programs, are exactly the reasons why Congress specified the role the States have today.

Moreover, as GAO’s witness at a June 2, 2015 Senate hearing pointed out during the Q&A, *the data the FCC needs to confirm eligibility resides at the State level.*<sup>11</sup> Given this linkage, the notion of eliminating the State role vis-à-vis ETC designations is poor policy. As NARUC’s July 2015 *Resolution on ETC Designations for Lifeline Broadband Service*, points out specifically the FCC should “refrain from disrupting the existing Federal-State partnership in the provision of Lifeline Services by preempting the authority of States to designate ETCs for the provision of advanced telecommunications services to low-income consumers in their States.”<sup>12</sup>

*I have attempted to cover all of the arguments I presented extemporaneously during a wide ranging discussion. I will provide all of the attendees with a copy of this filing. If there is a point or argument I have inadvertently omitted, upon notification I will file a revised letter covering any omission. If you have questions about this letter, please do not hesitate to contact the undersigned at 202.898.2207 (w), 202.257.0568(c) or at jramsay@naruc.org.*

Sincerely,

James Bradford Ramsay  
NARUC General Counsel

cc **Gigi B. Sohn, Counselor to the Chairman**  
**Jon Wilkins, FCC Managing Director and Chief Operating Officer**  
**Eric Feigenbaum, Office of Media Relations.**  
**Rebekah Goodheart, Legal Advisor to Commissioner Clyburn on Wireline**  
**Travis Litman, Senior Legal Advisor to Commissioner Rosenworcel**  
**Nicholas Degani, Legal Advisor to Commissioner Pia on Wireline**  
**Amy Bender, Legal Advisor to Commissioner O’Reilly on Wireline**  
**Ryan B. Palmer, Chief, Telecommunications Access Policy Division, Wireline Competition Bureau**

<sup>11</sup> See June 2, 2015 Senate Subcommittee on Communications, Technology, Innovation and the Internet hearing on “Lifeline: Improving Accountability and Effectiveness,” archived video available online at: <http://www.commerce.senate.gov/public/index.cfm/hearings?id=58293C5D-2754-4B89-848D-124B3A2B8044>

<sup>12</sup> See also, *Comments of the National Association of Regulatory Utility Commissioners*, filed August 31, 2015 in the proceedings captioned: *In the Matter of 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, available online at: <http://apps.fcc.gov/ecfs/comment/view?id=60001198799>.