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March 4, 2016

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

Re: Written Ex Parte Presentation, WC Docket Nos. 09-197,
Telecommunications Carriers Eligible to Receive Universal Service
Support; 11-42, Lifeline and Link Up Reform and Modernization.

Dear Ms. Dortch:

The Benton Foundation,¹ through its attorneys, Institute for Public Representation, file this written ex parte presentation regarding the Lifeline and Link Up Reform and Modernization docket.

¹ The Benton Foundation is a nonprofit organization dedicated to promoting communication in the public interest. This ex parte reflect the institutional view of the Foundation and, unless obvious from the text, are not intended to reflect the views of individual Foundation officers, directors, or advisors.

* DC bar membership pending. Practice supervised by members of the DC bar.

** Admitted to bars of Washington State, the United States Court of Appeals for the District of Columbia Circuit, and the United States District Court of the District of Columbia.

*** Admitted in Georgia.

The Federal Communications Commission (“FCC” or “Commission”) should expand the Lifeline Assistance Program to broadband Internet access and reduce the burdens associated with the eligible telecommunications provider (“ETC”) designation process. The 1996 Telecommunications Act (“1996 Act”) gives the FCC broad authority with respect to how it administers Lifeline and to implement the above changes. Further, the FCC will not violate any preemption or federalism concerns by implementing these changes.

Section 254 of the 1996 Act provides the FCC broad authority over Lifeline, including which entities may provide Lifeline Service.

Section 254 of the 1996 Act, titled “Universal Service,” provides the foundation for several universal service programs, including programs for health care providers, schools and libraries, and rural and high cost areas. The statute goes into great detail regarding those programs. However, Section 254 was intended to ratify and leave untouched the Lifeline program, which the FCC had promulgated many years prior to the 1996 Act under different authority. Section 254(j) states

Nothing in this section shall affect the condition, 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 such related sections of such title.²

Thus, the provision in Section 254(e) stating that “only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support”³ does not preclude extending Lifeline support to non-ETCs. While the FCC may choose to apply certain provisions to Lifeline, Section 254(j) states it is under no obligation to do so. Either way, Congress intended to provide the FCC deference with how best to achieve the goal of bringing low-income people onto America’s communications networks.⁴ Therefore, regarding important policy questions such as how to expand the number of providers eligible to provide Lifeline services, the FCC has substantial latitude.

The FCC has previously interpreted its authority consistent with this approach. In 1997, it stated that it had authority “under sections 1, 4(i), 201, 205, and 254 to extend

² 47 USC §254(j).

³ 47 USC §254(e).

⁴ See Conf. Rept. 104-230, 104th Cong., 2d Sess., 129-131 (1996); see Public Knowledge Ex Parte Notice, WC Dkt. 11-42 (Jan. 19, 2016).

Lifeline to include carriers other than eligible telecommunications carriers.”⁵ At the time, it chose not to extend Lifeline to non-ETCs.⁶ Irrespective of the approach the FCC takes with regard to ETCs in this proceeding, it should unequivocally clarify that its 1997 interpretation of its authority is binding and that nothing in the 1996 Act precludes extending Lifeline to non-ETCs. In doing so, it should clarify that any later decisions that appear to hold otherwise do not affect that determination and, to the extent necessary, disavow such decisions.⁷

Should the FCC ultimately decide against allowing non-ETCs to receive Lifeline funds, it should streamline the ETC designation process to encourage more participation.⁸ The streamlined approach could involve (1) forbearing from certain requirements in the statute and rules regarding ETC eligibility and obligations; and (2) establishing a national ETC designation process. These changes will help reduce the burdens on potential Lifeline providers and encourage more provider participation. In turn, consumers will benefit from the additional coverage and competition.

Establishing a national ETC process does not violate states’ rights or federalism principles.

The Communications Act of 1934 granted the FCC jurisdiction over interstate communications services.⁹ The Commission has long held that broadband is an interstate service and, as such, falls under its authority. The Open Internet Order, which reclassified broadband as a telecommunications service under Title II, further strengthened the FCC’s authority over broadband.¹⁰ Once Lifeline includes broadband service, the FCC will have unquestionable authority over the service.¹¹ Indeed, given its

⁵ Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCCRcd. 8776, 8971, ¶369 (1997).

⁶ *Id.*

⁷ See Petition of TracFone Wireless, Inc. for Forbearance from 47 USC §214(e)(1)(A) and 47 CFR §54.201(i), *Order*, 20 FCCRcd. 15095, 15096, ¶3 (2005); see also Lifeline and Link-Up, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCCRcd. 8302, 8330, ¶54 (2004).

⁸ As stated above, §254(j) grants the FCC substantial deference in crafting Lifeline.

⁹ Congress created the FCC “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio.” 47 USC §151.

¹⁰ See Protecting & Promoting the Open Internet, *Report and Order*, 30 FCCRcd. 5601, 5723-5724, ¶¶281-282 (2015).

¹¹ Even if Sections 254(e) and 214 applied to broadband service, Section 214(e)(6) states that the FCC may designate interstate ETCs.

interstate nature, it would not make sense to have states designate ETCs for broadband service.

Some parties have argued that taking the ETC designation away from states would somehow violate their rights.¹² This, however, is untrue. The FCC established Lifeline in the 1980s based on statutory authority that pre-dated the 1996 Act (as stated above, sections 1, 4(i), 201, 205). Section 254 of the 1996 Act expressly ratified and left untouched the FCC's Lifeline program. As part of the Lifeline program, the FCC has thus far allowed states to designate ETCs in areas within those states.¹³ However, the FCC itself granted that authority to states in its Lifeline rules. As with any other FCC rule, it may change its mind. States have no right to establish which entities can be ETCs under the Lifeline program (unlike, for instance, other universal service programs covered by Sections 254(e) and 214). Thus, there is no "preemption" issue with respect to ETC designation.

Conclusion

The FCC should expand Lifeline to broadband and should either allow non-ETCs to provide Lifeline service or it should ease the ETC designation burden by forbearing from certain ETC eligibility requirements and by establishing a national ETC designation process. It can do so without affecting states' rights.

Respectfully Submitted,

/s/

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¹² NARUC Ex Parte Notice, Dkt. 11-42 (Feb. 18, 2016) at 1-3; *see also* PA Public Util. Comm. Ex Parte Notice, Dkt. 11-42 (Feb. 22, 2016), at 2-3; CA Public Util. Comm. Ex Parte Notice, Dkt. 11-42 (Feb. 22, 2016), at 2; MI Public Util. Comm. Ex Parte Notice, Dkt. 11-42 (Feb. 8, 2016), at 1-2.

¹³ 47 CFR §54.201(b).