



N A R U C
National Association of Regulatory Utility Commissioners

March 20, 2016 ERRATA – Correcting March 17 filing to reflect 96 Commissioners & 37 States

The Honorable Thomas Wheeler, Chairman
The Honorable Mignon Clyburn, Commissioner
The Honorable Jessica Rosenworcel, Commissioner
The Honorable Ajit Pai, Commissioner
The Honorable Michael O’Rielly, Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

RE: Ex Parte: *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.*

Mr. Chairman and Commissioners:

Recent industry-driven *ex partes* argue the FCC can (i) establish an optional federal *eligible telecommunications carrier* (ETC) Broadband Lifeline designation process that ignores 47 U.S.C. § 214(e)’s mandate that States conduct such designations OR (ii) give Broadband Lifeline funds to entities that have not been designated ETCs. Both proposals eliminate crucial State oversight of the subject carrier’s Lifeline services. This optional bypass of the State role is reflected in the recently released FCC Fact Sheet. On its face, taking these State “cops” off the beat is an extremely poor policy choice – a choice which can only have three obvious repercussions:

First, it can only increase fraud and abuse of the Lifeline program.

Second, it can only undermine existing complementary State Lifeline programs.

Third, it can only result in the provision of substandard services to Lifeline consumers by some subsidized providers. Moreover, any rational look at the history of the Lifeline program and the economics of the current market indicate none of the proposed changes are likely to lure large facilities-based carriers into the Lifeline business. If, absent State designations, low margin Lifeline Broadband service was any kind of serious draw, interested facilities-based carriers currently not subject to State oversight would have already filed a single application for certification in all States that defer ETC designations and oversight to the FCC.

In any case, even if there *were* some marginal merit to either proposal, neither can be squared with the plain text of 47 U.S.C. §§ 254, 214(e), and other provisions of the Act.

The undersigned Ninety (96) State Public Utility Commissioners (from 37 U.S. Jurisdictions) strongly agree that both proposals (and the proposed optional bypass) must be rejected. NARUC’s July 15, 2015 Resolution on ETC Designations for Lifeline Broadband Service, August 31, 2015 comments, and February 15, 2016 ex parte clearly indicate both industry-driven proposals lack merit.¹

¹ NARUC’s August 31, 2015 comments are at: <http://apps.fcc.gov/ecfs/comment/view?id=60001199254>. NARUC’s February 15, 2016 *ex parte* is online at: <http://apps.fcc.gov/ecfs/comment/view?id=60001483371>.

Removing the State ETC Designation Role can only result in additional fraud and abuse.

Fraud and abuse divert funds from consumers Congress expects to benefit from the Lifeline program. State “cops” remain a significant barrier to such diversions through the conduct of ETC designations and thereafter by monitoring designated carrier activities.² Both industry-driven proposals, at the carrier’s option, take the State cops off the beat without providing any effective replacement.

The FCC can never access sufficient resources to fill the resulting deficit.

No one can seriously contend that funneling Broadband Lifeline ETC applications to the FCC can do anything but reduce the scrutiny imposed on any carrier’s “national” application and that carrier’s subsequent operations.³ It is, after all, no coincidence that all of the reforms to the program the FCC adopted to-date that have reduced fraud were based on pre-existing State mechanisms and Federal-State Joint Board recommendations.

To date, State oversight has been crucial. 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. At least six States responding to an informal 2015 survey have refused an application for ETC designation filed by a carrier. Seven respondents to that survey revoked designations for questionable practices and/or violating program rules.⁴ And at least two commissions have either rejected designations to carriers that provided substandard 911 services or their questions caused the carriers to withdraw the applications.

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. NARUC is not the only one to point out, for the record, the crucial oversight States provide via the designations process. Just last month, the Pennsylvania Commission told the FCC:

² NARUC often informally surveys States on relatively short turnarounds to provide context before filing testimony or comments. Participation in such surveys can be spotty. States responding to a March 2016 request for data, combined with responses from a 2015 survey, indicates that at least 18 States expect to conduct ETC designations for Lifeline Broadband providers. Another 11 believe they may be able to. Only five responding States indicated they were likely to default on their Section 214(e) statutory obligation to designate broadband only Lifeline providers. Cf., Order Approving Application of MidWest Energy Cooperative (at <http://efile.mpsc.state.mi.us/efile/viewcase.php?casenum=17861>).

³ See, e.g., February 22, 2016 Letter from California Public Utilities Commission members Catherine J.K. Sandoval, Carla J. Peterman, and Michel P. Florio to FCC Secretary, in WC Docket No. 11-42, (*California Ex Parte*) available online at: <http://apps.fcc.gov/ecfs/comment/view?id=60001484187> noting, among other things that “CPUC staff has found inaccurate and misleading statements in FCC-approved compliance plans regarding the technical capability of purported MVNO subject matter experts.” {emphasis added}

⁴ States responding to the 2015 survey indicating they had revoked a carrier’s ETC designation include: FL, KS, KY, MI, MN, WA, & WI. Florida revoked the designations of two companies for abuse of the Lifeline program, one of which faced 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.*

[A] State's withdrawal of an ETC designation is a timely and decisive policing method for preserving the integrity of the federal Low Income program.⁵

The same day, the California Commission also stated that:

CPUC staff evaluates the cost of proposed Lifeline service plans to comparable retail offerings and rejects Lifeline plans that cost a Lifeline customer more than comparable retail plans. {emphasis added}

A week earlier, the Michigan Commissioners filed an *ex parte* noting that:

The MPSC conducts a thorough review of each ETC application to ensure compliance with both federal regulations, as well as MPSC orders. The MPSC scrutinizes the information that is provided by the applicant... if this level of scrutiny is removed, it could potentially open the door for fraud and abuse. States like Michigan have more familiarity with the geographic areas and marketplace in which the ETCs are applying for designation. States generally know the provider and its business history in the state. States also communicate with each other regarding companies seeking ETC designations in an effort to be mindful of potential bad actors.⁶

On top of States' initial reviews of ETC applications, informal NARUC surveys indicate that *at least* 14 States have programs to periodically conduct compliance audits on ETCs and/or of Lifeline Recipients.⁷ Indeed, as the Michigan Commissioners also pointed out in their February *ex parte* that:

The MPSC re-certifies each year that the existing ETCs have provided the necessary and required information to be re-certified as an ETC for the next year. MPSC thoroughly reviews all of the submitted information to ensure the companies are complying with federal regulation and MPSC orders. The MPSC oftentimes has to follow-up with companies regarding information that was not provided or was provided incorrectly. The elimination of the states' authority could cause an increase in potential waste, fraud and abuse, errors in information filed, and the possibility of a [another] significant backlog at the FCC. {emphasis added} Id.

Many States, like Michigan, require ETCs to certify-- when they are seeking designation or submitting annual filings--that they are in compliance with all federal and State rules (as well as whether the provider's ETC designation has been suspended or revoked in any jurisdiction).

Legal considerations aside, it is difficult to understand why any advocate for Lifeline services would support either industry-driven proposal to permit a carrier's choice to eliminate crucial safeguards to the integrity of the program.

⁵ See, February 22, 2016 Letter from David E. Screven, Assistant Counsel for the Pennsylvania Public Utility Commission to Marlene Dortch, FCC Secretary, in WC Docket No. 11-42, available online at: <http://apps.fcc.gov/ecfs/document/view?id=60001515632>.

⁶ See, February 8, 2015 Letter from Michigan Public Service Commission Chairman Sally A. Talberg, and Commissioners John D. Quakenbush and Norman J. Saari to Marlene Dortch, FCC Secretary, in WC Docket No. 11-42, available at: <http://apps.fcc.gov/ecfs/document/view?id=60001424075>.

⁷ States responding to 2013, 2015, and 2016 surveys that have requirements for requiring periodic compliance audits on lifeline carriers or recipients include AK, CA, CO, FL, KS, MA, MO, MS, NE, NJ, OH, OR, WI, & VA.

Removing the State ETC Designation Role can only undermine existing State Matching programs.

The first telephone Lifeline programs in the United States started at State commissions which have a long history of supporting such vital social programs.⁸ State Commissions have promoted enrollment of Lifeline in a variety of innovative ways – including by creating and supporting the annual *Lifeline Awareness Week*. States have also long pressed for extending Lifeline to include broadband.⁹

In 1996, Congress made clear in 47 U.S.C. §§ 214(e),¹⁰ 253,¹¹ 254,¹² 1301-3,¹³ and other provisions of the Telecommunications Act, that it expected the States to continue to play a crucial role partnering with the FCC with respect to universal service and the promotion of advanced services like broadband. State Lifeline programs are a crucial part of that equation. Many State Lifeline programs provide support subsidies ranging from \$2.50 to well over \$10.00 per month to qualifying Lifeline recipients.¹⁴

⁸ Compare, *MTS and WATS Market Structure; Amendment of the Rules and Establishment of a Joint Board*, Order Requesting Comments, 50 FR 14727-01 (April 15, 1985) and *Re Moore Universal Tel. Serv. Act*, 14 CPUC 2d 616 (Apr. 18, 1984) (“The [1983] Act is intended to provide affordable local telephone service for the needy, the invalid, the elderly, and rural customers. The Act mandates that this Commission establish a subsidized telephone service funded by a limited tax on suppliers of intrastate telecommunications service.”); See also, *NARUC’s July 2000 Resolution regarding Universal Service for Low Income Households*.

⁹ 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*, *July 2011 Resolution Supporting Low-Income Broadband Adoption Program*, and *July 2009 Resolution Proclaiming National Telephone Discount Lifeline Awareness Week*.

¹⁰ 47 U.S.C. §214(e) (“State commission shall upon its own motion (or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier.”)

¹¹ 47 U.S.C. §253 (“(a) In general - No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. (b) State regulatory authority - Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”) {emphasis added}

¹² 47 U.S.C. §254 (“(b) Universal service principles - The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles . . . There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service...(e) Universal service support . . . only an eligible telecommunications carrier designated under section 214(e) of this title [by a State commission in the first instance] shall be eligible to receive specific Federal universal service support. . . (f) State authority A State may adopt regulations not inconsistent with the Commission’s rules to preserve and advance universal service. “){emphasis added}

¹³ 47 U.S.C. §1301. (“Congress finds . . . The Federal Government should also recognize and encourage complementary State efforts to improve the quality and usefulness of broadband data.”); §1302(a) (The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment. §1304. (captioned “Encouraging State initiatives to improve broadband”) {emphasis added}

¹⁴ States responding to last week’s informal request about monthly Lifeline subsidies, indicated , **Vermont** provides the greater of **\$7 or 50 % of the basic service charge**, **California** provides a **\$13.50** subsidy, **Connecticut** offers **\$10.42**, the **District of Columbia** between **\$6.50 & \$8.50**, **Kansas**, **\$7.77**, **Missouri**, **\$6.50**. Several other States offer **\$3.50/month**, including **Arkansas**, **Minnesota**, **Nebraska**, and **Oregon**. **Idaho’s** subsidy is **\$2.50** while New York’s subsidy varies.

For obvious reasons, State legislators are not likely to welcome any approach that limits States' ability to oversee, condition, and audit the use of State provided Lifeline subsidies. To access State funds will continue to require some sort of registration or qualification. If the FCC retains the structure Congress specified and permits States to continue in their current role, it seems more than likely that State Legislators (or Commissions) will migrate existing matching programs to mirror the federal structure.

If the FCC chooses instead to eliminate the State ETC designation role, even for just carriers that seek only a national designation, it will, at a minimum, undermine State programs and cause unnecessary diversions of FCC and State resources better directed towards serving deserving Lifeline consumers. In the worse case, it could, long term, sound the death knell for State matching programs. As one State Lifeline expert said last week in an e-mail to NARUC's General Counsel:

My biggest fear is that the largest carriers will only go for federal designation and decline the additional State funding because they don't want to have to deal with us in the first place. I believe that leaving the States out of the ETC designation process for BB Lifeline could essentially destroy nearly all the existing State programs.

Indeed. Both industry proposals purport to draw in large facilities-based carriers that clearly have no interest in any State oversight. It is logical to assume that any carrier that actually does seek national certification or direct access to federal funds will not be interested in submitting to any State oversight to get the extra State subsidy for their lifeline customers.

So, under either proposal, carriers will decide the amount of support subsidy their Lifeline customers may access. Even if some State matching programs survive, and even if some carriers actually seek the State subsidy for their customers (braving some level of State oversight), either proposal complicates things at the ground level significantly. As another State expert noted in an e-mail last week to NARUC's counsel – commenting on these two industry-driven proposals:

[State] is very concerned. We have spent a lot of time and effort to get a good system up and running. We were one of the states that received the opt-out of NLAD. [State] also gives a State discount to ETC's. It would be better for all ETC's (including Broadband) to give us monthly customer information for the matching and duplicative process.

In any case, if the FCC is determining eligibility for any carrier, the program will have to be delayed. 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.*¹⁵ Given this linkage, the notion of eliminating the State role vis-à-vis ETC designations is poor policy.¹⁶ After all, the federal eligibility database has yet to be constructed. And - what happens to States that already have opted out of the NLAD? Again, legal considerations aside, given the obvious likely reduction in State subsidies provided to Lifeline recipients for carriers that choose to avoid any State service quality/fraud oversight, it is difficult to understand why any advocate for Lifeline services would support an option to bypass State designations.

¹⁵ See June 2, 2015 Senate Subcommittee on Communications, Technology, Innovation and the Internet hearing on "Lifeline: Improving Accountability and Effectiveness," Testimony and archived video available online at: <http://www.commerce.senate.gov/public/index.cfm/hearings?id=58293C5D-2754-4B89-848D-124B3A2B8044>

¹⁶ It is likely to also undermine State universal Service program funding more directly – see, e.g., *Resolution to Deny the Request of Tracfone Wireless, Inc. (U-4231-c) to Be Designated As an Eligible Telecommunications Carrier (ETC) in California.*, 09-12-016, 2009 WL 5014044 (Dec. 17, 2009) - where denial of ETC certification was the enforcement tool to assure TracFone Wireless, Inc. paid public purpose surcharges and user fees [funding, *inter alia*, State Lifeline programs] on its intrastate telephone revenue.

Removing the State ETC Designation Role can only result in the provision of substandard services to Lifeline consumers by certain subsidized providers.

Service quality problems with Lifeline service and Lifeline providers will continue, as will disputes, and fraudulent schemes. Customers will have complaints.

Unfortunately, the FCC can never access sufficient resources to handle universal service policy – including Lifeline - alone. That, along with the desire to maintain strong State matching programs, is exactly the reason why Congress specified the role the States have today. If there is no State role with respect to the Lifeline Broadband designation, and therefore no State oversight authority, it will be difficult for any commission to justify assigning staff to either promote or protect users of such programs.

And there is no question that that is exactly what States do today. As the Pennsylvania PSC notes, at 3, in its February 2016 *ex parte*:

[S]eparating the ETC designation process from an entity's ability to participate and receive federal Lifeline support would undermine the ability of the States and the Commission to protect consumers for services supported by Section 254, as required by Section 254(i). The Commission and most stakeholders agree that States are best suited to address the consumer or competitor complaints and concerns sure to arise with services supported by Section 254 under the Section 214(e)(2) designation process. This State role is a welcome, not burdensome, feature of cooperative federalism under Section 254(i). This approach makes it easier for the Commission to focus on complex interstate matters, knowing that the States can utilize their ETC designation authority to ensure adequate consumer protection for services supported by Section 254.¹⁷

California provides similar examples, noting at 2-3 of the attachment to its *ex parte*¹⁸ that the State has rejected Lifeline plans "with wireless local loop service that did not reliably identify caller location when calling 911 and did not reliably complete calls," and "that cost a Lifeline customer more than comparable retail plans."

The CPUC also, where it has jurisdiction:

ensures compliance with FCC consumer protection rules. For example, one MVNO did not comply with CTIA handset unlocking policies, and staff withheld ETC designation approval until the company was in compliance.

The most likely result of these two industry-driven proposals: some carriers will provide substandard services that would have been either forestalled or corrected if States retain their current role. Also, Lifeline subscribers will not benefit from additional requirements for service some States add to the federal minimums.

It is easy to understand why a Lifeline-only carrier would want to avoid State service quality oversight. But, again, legal considerations aside, it is difficult to understand why any proponent of Lifeline services would support the industry-driven bypass proposal given the obvious likely reduction in service quality received by Lifeline consumers served by that carrier - along with the reduced options for those customers to have their concerns addressed or at least investigated.

¹⁷ See, footnote 5, *supra*.

¹⁸ See, footnote 3, *supra*.

None of the proposed actions are likely to lure new large carriers into the Lifeline business.

Trading State oversight that assures service quality and program integrity in exchange for speculation that the alternative procedure *might* lure currently non-State certified carriers into the Broadband Lifeline business is a poorly reasoned policy choice. The trade appears unlikely to spur significant additional participation by wireline participants in the Broadband Lifeline program. And it will unquestionably increase fraud/abuse and reduce service quality.

The large facilities-based incumbent local exchange carriers (ILECs) have never been big proponents of either Federal or State matching Lifeline programs. Most want to eliminate State carrier-of-last-resort obligations also. Interestingly, almost all of them are already designated as ETCs, but primarily to secure high-cost funds. Will the obligation to provide Lifeline for broadband services be imposed on the carriers that receive high-cost support for broadband? That is certainly what the statutory scheme suggests.

If Lifeline is, in fact, a tempting opportunity to increase revenues for larger facilities-based carriers – logically these already-designated ETC’s *should be* opposing efforts to eliminate State oversight to allow their direct competitors - cable and other non-certificated carriers - to quickly jump into this market.

But they are not. Instead, they continue to argue to be relieved of current Lifeline duties.¹⁹

And, if Lifeline is, in fact, a tempting opportunity to increase revenues for other facilities-based carriers and State specific ETC certifications are the reason why those carriers have not entered the program, one would expect at least one thing to occur. At least one of the large currently non-certificated cable companies would seek - in a single FCC application – ETC designations for all States that cannot conduct ETC designations for them.²⁰

But no company has.²¹

Consider also the larger facilities-based wireless carriers that have also historically been uninterested in providing such services, absent the obligation to do that is linked to high-cost funding. T-Mobile withdrew from the Lifeline market with the phase-out of its high-cost funding. Cricket Wireless had significant numbers of Lifeline customers until the company was acquired by AT&T in a move to buy its way into the prepaid market. *AT&T then pulled the Cricket brand from the Lifeline market, forcing thousands of Lifeline customers to find another provider. See, e.g., AT&T’s Cricket to discontinue lifeline support* (Fiercewireless.com June 4, 2014).

¹⁹ See, *In the Matter of Connect Am. Fund*, Report and Order, 29 F.C.C. Rcd. 15644, ¶¶ 50-51, ¶ 70, rejecting an industry request to forbear from requiring, *inter alia*, the provision of Lifeline Service (rel. Dec 18, 2014) available online at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-190A1.pdf.

²⁰ There are two limited exceptions to State commission designation of ETCs. First, for unserved areas where no common carrier will provide supported services, the FCC may designate an ETC *with respect to interstate services*. The state commission would then be responsible for ETC designations only with respect to intrastate services. 47 U.S.C. §214(e)(3). Second, carriers not subject to a state commission’s jurisdiction may seek designation as an ETC for a service area designated by the FCC “in accordance with applicable Federal and State law.” 47 U.S.C. §214(e)(6).

²¹ Cox does offer lifeline in several States, but it has already complied with State designation procedures: *Application of Cox California Telcom, LLC (U5684c) for Designation As an Eligible Telecommunications Carrier*, CPUC 12-09-014, 2013 WL 5651911 (Oct. 3, 2013); *Application of Cox Nevada Telcom, LLC to Be Designated As an Eligible Telecommunications Carrier in the State of Nevada*, 12-09007, 2012 WL 6643764 (Nev.P.U.C.) (Nov. 19, 2012).

It is no accident that the biggest proponents of “free” lifeline services are all resellers bundling and reselling facilities-based wireless carriers’ excess capacity.²² Although Sprint (a facilities-based carrier) is in the Lifeline market, it participates largely through its separate Assurance Wireless division which offers only “free” Lifeline service. The success of the free offerings of Sprint and TracFone probably rely in part on the savings achieved by not having to bill customers, *i.e.*, offering services on a prepaid basis, and the ability to use the \$9.25 subsidy to cover the costs of providing limited voice service.

For the large carriers billing on a post-paid basis, however, there does not appear to be a compelling financial case for providing Lifeline in a way that will NOT undermine more profitable/higher margin bundled offerings. If history is any guide – one would predict any Lifeline services to get little attention from such carriers or their competitors in the long term. The limited exception might occur if the FCC were to require a particular carrier to specifically accept the Federal Lifeline subsidy via a merger condition or as a condition of receiving high-cost support.

Comcast currently does have an “Internet Essentials” program that had its genesis in a merger condition. But there was no “Lifeline” component. To qualify to get the service, one must (1) have a child that qualifies for the National School Lunch program, (2) not have an outstanding debt to Comcast less than 1 year old, and (3) not have subscribed to Comcast internet services within the last 90 days.²³

If we assume, as has been suggested, this program is successful and generates even a slender profit at the current \$9.95 rate, why would Comcast want to deal with any additional reporting or paperwork to seek federal reimbursement? More specifically, why would the company want to get a national certification – and thereafter have to comply with national minimum standards for the service which could become more onerous by rule at any time – just to recover part of the \$9.95 they already currently receive directly from each consumer? Unless the price of broadband services for everyone drops much closer to the federal subsidy level, even the most uninformed prognosticator can predict the outcome. As evidence of this challenge, even Assurance Wireless and TracFone – who actually have a desire and business plan to target low-income consumers - have indicated that the economics of the data market and current pricing for internet access would likely impede them from offering a competitive broadband Lifeline service.²⁴

²² According to the FCC’s *Federal State Joint Board Monitoring Reports* for 2015 (rel. 12/22/2015 Table 2.8) and 2014 (rel. 12/4/2014 Table 2.9), online at: <https://www.fcc.gov/general/federal-state-joint-board-monitoring-reports>, the number of low income subscribers (on non-tribal lands) taking service from facilities-based providers fell from 6,170,995 in 2013 to 4, 828,203 in 2014 while non-facilities based carriers added over 200,000 subscribers. Table 2.4 in the 2015 report notes that 86.3 % of all revenues goes to Competitive ETCs not ILECs.

²³ See, *Internet Essentials from Comcast: Affordable Internet at Home for Eligible Families*, Webpage online at: <https://apply.internetessentials.com/#> (last accessed March 7, 2016).

²⁴ See, March 2, 2016 *Ex Parte Notice to FCC Secretary Dortch, from TracFone’s Mitchell F. Brecher*, in WC Docket No. 11-42, at: <http://apps.fcc.gov/ecfs/document/view?id=60001527011> pointing out just on the wireless side that: “The cost of providing unlimited wireless voice services significantly exceeds the \$9.25 subsidy. Those costs include transmission plus other operational and administrative costs,” and that, for TracFone “[t]he retail price for even 1 GB of wireless data services significantly exceeds the \$9.25 subsidy.” See also, March 2, 2016 *Ex Parte Notice to FCC Secretary Dortch, from Sprints Norina T. Moy*, in WC Docket No. 11-42, at: <http://apps.fcc.gov/ecfs/document/view?id=60001526777>, pointing out that:

[A] broadband-centric Lifeline program which includes overly ambitious performance standards will almost certainly involve out-of-pocket payments by Lifeline subscribers, both for monthly service and for the purchase of a broadband-capable device. There is no support in the record that a monthly subsidy of \$9.25 would cover the cost of providing broadband service (much less the cost of a device). Sprint reported that most broadband plans available today are priced far above \$9.25 – for example, Sprint’s Boost affiliate offers 2 GB of prepaid service for \$35 per month, a payment level that is likely unaffordable for the vast majority of Lifeline customers, and in particular the millions...who opt for a free service option.

It appears some companies may be willing to at least suggest - if they can assure a long term tactical goal of undermining all State oversight - they *may* get into the business and expand significantly the existing Lifeline program. But given the economics of the current market and the overriding imperative to maximize profit, it is certainly not obvious why the largest carriers would voluntarily participate. The data clearly indicates that the low-cost prepaid wireless providers have driven lifeline subscribership, not the large carriers that continue to see erosion of Lifeline customers applying the federal subsidy to their services.

Policy-makers, who have seen such promises before, need to think this through carefully with an eye towards history. Some have also suggested that just having large companies involved in the Lifeline program will provide additional protections from change going forward. But this seems at best faulty reasoning. After all, quite a few very large companies – like AT&T, CenturyLink, and Frontier - are already involved in the Lifeline program, albeit begrudgingly as a condition for receiving high-cost funds. There appears to be little financial incentive for these, or other, large carriers to voluntarily offer Lifeline services, especially given the imperative to maintain high margins on broadband services and market to consumers that can afford it. It is not the additional protections for both Lifeline recipients and the integrity of the program that State oversight provides that keep these companies away. It is the fact that it does not present the best opportunity to earn a return for them. There is nothing in the Fact Sheet that suggests this can or will change.

But even if there were some compelling rationale, the FCC simply lacks authority to create a designation process that *ab initio* bypasses State Commissions.

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

The plain text of 47 U.S.C. § 214(e) is crystal clear. As the FCC has acknowledged on numerous occasions:

Section 214(e)(2) of the Act provides state commissions with the *primary* responsibility for performing ETC designations.²⁵

The nature of the service does not matter.²⁶

²⁵ *In the Matter of Fed.-State Joint Bd. on Universal Serv.*, 20 F.C.C. Rcd. 6371, 6374 ¶ 8 (Mar. 17, 2005). {footnotes omitted}, See also, *Id.* at ¶ 61, noting: “We believe that section 214(e)(2) demonstrates Congress’s intent that state commissions evaluate local factual situations in ETC cases and exercise discretion in reaching their conclusions regarding the public interest, convenience and necessity, as long as such determinations are consistent with federal and other state law.” See also, *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) (“By statute, the states... are empowered to designate common carriers as ETCs” and specifying in the accompanying footnote 622 that: “[S]tates have primary jurisdiction to designate ETCs.”

²⁶ 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).”

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.

AT&T has again raised the specious argument that § 254 (j) permits the FCC to distribute funds to non-ETCs and ignore the other specific requirements of § 254 and §214.²⁷

The FCC has already rejected this faulty analysis.

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 signed, 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). In 2012, the FCC, responding to this AT&T argument, agreed:

In the *Lifeline and Link Up NPRM*, the Commission sought comment on whether funding for the Pilot Program should be limited to ETCs, or whether non-ETCs could be eligible for funding. Section 254(e). . . provides that only ETCs designated pursuant to section 214(e) are eligible for universal service support. Given that the Fund will be used for the Pilot Program, only ETCs will be eligible . . . Carriers that seek to participate in the Pilot Program must be ETCs in the areas for which they propose to offer service . . . If a carrier is contemplating becoming an ETC to participate in the Lifeline program . . . it should act promptly to begin the process. The Commission will make every effort to process such ETC applications in a timely fashion, and we urge the states to do likewise.²⁸

Nothing has changed since the FCC wrote those words. States retain the primary role as designator assigned by Congress.

Additional Issues- Funding for Coordinated Data Bases

At its most recent meetings last month in Washington DC, NARUC passed another resolution²⁹ restating the obvious. Specifically noting, *inter alia*, that: “The Lifeline program for low-income households [is] a shared responsibility of federal and State regulators;” *and* “A carrier must be designated as an Eligible Telecommunications Carrier (ETC) to participate in the Lifeline program;” *and* “States play a key role today in the Lifeline program and are on the front lines in the fight against waste, fraud, and abuse.”

²⁷ There is no question Lifeline is a universal service program. Indeed, in this very FNPRM the FCC is planning to designate broadband as a supported service under §254(c). (“[I]ncluding broadband Internet access service as a supported service for Lifeline purposes is consistent with Congress's principles for universal service. Moreover, defining broadband Internet access service as a supported service is also consistent with the criteria in section 254 (c)(1)(A)-(D).” *In the Matter of Lifeline & Link Up Reform & Modernization*, 30 F.C.C. Rcd. 7818 (June 22, 2015)) Neither §254(j) or §1302 can give the FCC authority to simply ignore the specific requirements/oversight structure established in §§ 214(e), 253(b), 254(e) (f) & (i) and other sections of the statute. Indeed, as the FCC acknowledges in the FNPRM at ¶ 137, by its own terms, section 254(j) applies only to changes made pursuant to section 254 itself. It has no impact on other requirements in the statute.

²⁸ *In the Matter of Lifeline & Link Up Reform & Modernization Lifeline & Link Up Fed.-State Joint Bd. on Universal Serv. Advancing Broadband Availability Through Digital Literacy Training*, 27 F.C.C. Rcd. 6656, 6800, at ¶ 334 (2012)

²⁹ NARUC’s February 17, 2016 *Resolution on Reform of Lifeline Program* is appended to this *ex parte*.

The resolution was focused on the June 22, 2015 FNPRM's proposals to move the responsibility of verifying end-user eligibility for the lifeline program to a third party such as the Universal Service Administrative Company. As part of that proposal, the FCC has suggested a "Coordinated Enrollment/De-enrollment" process to allow consumers to establish or verify eligibility for Lifeline at the same time that they sign up for other qualifying low-income assistance programs at a State agency. However, to facilitate such centralized registration for low-income benefits, State agencies may require additional federal funds to compensate for costs associated with verifying the eligibility of a consumer to participate in Lifeline in addition to verifying the consumer's household eligibility for other qualifying assistance programs. Accordingly NARUC encourages the FCC to help States defray any cost associated with making customer eligibility information available to the centralized database.

The February resolution also urges the FCC to continue the State role in federal universal service required by federal law. It asks that States be included in any newly-reformed federal Lifeline "Coordinated Enrollment/De-enrollment" process, such as the centralization of those functions with State or federal expert agencies. More generally, the resolution suggests the relevant State and federal agencies consider and cooperate in centralizing administration of that program to both lower overall costs for the Lifeline program and reduce instances of carrier abuse.

If you have questions about this letter, please do not hesitate to contact NARUC's General Counsel – Brad Ramsay at 202.898.2207 (w), 202.257.0568(c) or at jramsay@naruc.org.

Sincerely,

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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

Appendix A - NARUC 2016 Resolution on Reform of Lifeline Program

WHEREAS, The National Association of Regulatory Utility Commissioners (NARUC) has previously demonstrated its commitment to advancing the availability and adoption of broadband services in low-income communities across the United States in resolutions adopted at the February 2008 Winter Meetings, February 2009 Winter Meetings, July 2011 Summer Meetings, and July 2015 Summer Meeting; *and*

WHEREAS, The Universal Service Fund (USF), and the Lifeline program for low-income households, are a shared responsibility of federal and State regulators; *and*

WHEREAS, Reform proposals now before the Federal Communications Commission (FCC) (FCC WC Dockets Nos. 11-42, 09-197, and 10-90) include adding Internet access service as an eligible program, thereby expanding choices for which low-income consumers may receive discounts; *and*

WHEREAS, A carrier must be designated as an Eligible Telecommunications Carrier (ETC) to participate in the Lifeline program; *and*

WHEREAS, In most States the ETC (whether wireless or wireline) has the obligation to verify if a consumer is eligible for the Lifeline benefit; *and*

WHEREAS, The potential exists in some States for ETCs to take advantage of the current system by failing to rigorously verify eligibility; *and*

WHEREAS, Verifying eligibility requires State agencies or participating carriers to collect sensitive consumer information, including social security numbers, financial information, and/or other confidential data and thus raises privacy and data security concerns; *and*

WHEREAS, The proposed reforms offered by the FCC would limit waste, fraud and abuse by ending the administrative role of the ETCs in verifying eligibility and, instead, centralize those functions in a third party such as the Universal Service Administrative Company (USAC) with FCC oversight or with the States; *and*

WHEREAS, A General Accountability Office witness at a 2015 U.S. Senate Commerce Committee hearing on the Lifeline program stated that the data needed to confirm consumer eligibility reside at the State level; *and*

WHEREAS, States play a key role today in the Lifeline program and are on the front lines in the fight against waste, fraud, and abuse; *and*

WHEREAS, Nearly half of the States have implemented databases that allow eligible telecommunications carriers or the States to verify the eligibility of an applicant for the Lifeline program before such applicant is enrolled in the program; *and*

WHEREAS, These databases have proven to be a strong and effective tool against waste, fraud, and abuse by ensuring that only eligible applicants receive Lifeline benefits; *and*

WHEREAS, One of the several proposals to improve program administration seeks to adopt a “Coordinated Enrollment/De-enrollment” process that would allow consumers to establish or verify eligibility for Lifeline at the same time that they sign up for other qualifying low-income assistance programs at a State agency; *and*

WHEREAS, With centralized registration for low-income benefits, the State agencies may require additional federal funds to compensate for costs associated with verifying the eligibility of a consumer to participate in

Lifeline in addition to verifying the consumer's household eligibility for other qualifying assistance programs; *now, therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened at its 2016 Winter Committee Meetings in Washington, D.C., urges the FCC to continue the State role in federal universal service required by federal law to any newly-reformed federal Lifeline "Coordinated Enrollment/De-enrollment" process, such as the centralization of those functions with State or federal expert agencies, and thereby reducing waste, fraud and abuse; *and be it further*

RESOLVED, That expert State and federal agencies consider administering the program at a central source seeking to lower overall costs for the Lifeline program and reduce instances of carrier abuse; *and be it further*

RESOLVED, That NARUC encourages the FCC and the States to cooperate to facilitate access, directly or indirectly, to State social service databases for the purpose of verifying a Lifeline service applicant's eligibility for the program; *and be it further*

RESOLVED, That NARUC encourages the FCC to help the States defray any cost associated with making customer eligibility information available to the centralized database.

Sponsored by the Committee on Telecommunications

Adopted by the NARUC Board of Directors on February 17, 2016

Appendix B – NARUC 2015 Resolution on ETC Designations for Lifeline Broadband Service

WHEREAS, The National Association of Regulatory Utility Commissioners (NARUC) has previously demonstrated its commitment to advancing the availability and adoption of broadband services in low-income communities across the United States in resolutions adopted at the February 2008 Winter Meetings, February 2009 Winter Meetings, and July 2011 Summer Meetings; *and*

WHEREAS, Several States have implemented policies to promote the availability of affordable broadband services to low-income consumers; *and*

WHEREAS, States have a long history of managing Lifeline Service programs to make telephone service more affordable for the nation's low-income consumers by designating Eligible Telecommunications Carriers (ETCs) to provide a discount on local telephone service; *and*

WHEREAS, On June 22, 2015, the Federal Communications Commission (FCC) released a Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order (WC Docket Nos. 11-42, 09-197, and 10-90 (Second FNPRM and Report and Order)), that seek s comments on "our efforts to modernize the Lifeline program so that all consumers can utilize advanced networks"; *and*

WHEREAS, The Second FNPRM and Report and Order seeks comments on whether the national designation of ETCs for Broadband Lifeline Service would be preferable to the State-by-State ETC designation process used currently for Lifeline Services (see para. 140, pg. 51); *and*

WHEREAS, Section 214 of the Telecommunications Act of 1996 and the FCC rules (47 C.F.R. §54.210) provide that States have the primary authority to designate ETCs; *and*

WHEREAS, The FCC has a backlog of 38 pending wireless carrier ETC designation petitions for default States dating from December 29, 2010; *and*

WHEREAS, This backlog of pending wireless carrier ETC designation petitions for default States has limited the competitive market for Lifeline Services; *now, therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its 2015 Summer Meetings in New York, New York, urges the FCC to 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.

Sponsored by the Committee on Telecommunications
Adopted by the Board of Directors July 15, 2015