BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON D.C. 20554

In the Matter of	)	
	)	
Bridging the Digital Divide for Low Income Consumers	)	**WC Docket No. 17-287**
	)	
Lifeline and Link Up Reform and Modernization	)	**WC Docket No. 11-42**
	)	
Telecommunications Carriers Eligible for Universal Service Support	)	**WC Docket No. 09-197**

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

On February 21, 2018, the National Association of Regulatory Utility Commissioners (NARUC) filed initial comments in the above captioned proceedings.[1] These reply comments respond to some other filed initial comments on the Notice of Proposed Rulemaking (*NPRM*) included in the November 16, 2017 adopted Federal Communications Commission (FCC) *Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking (NPRM) and Notice of Inquiry.*[2]

---

[1] *Comments of the National Association of Regulatory Utility Commissioners* (February 21, 2018): https://ecfsapi.fcc.gov/file/1022185377406/18%200221%20NARUC%20Initial%20Lifeline%20NPRM%20cmts.pdf

[2] *See, In the Matter(s) of Bridging the Digital Divide for Low-Income Consumers, WC Docket No. 17-287, Lifeline and Link Up Reform and Modernization,* WC Docket No. 11-42, *Telecommunications Carriers Eligible for Universal Service Support,* WC Docket No. 09-197, FOURTH REPORT AND ORDER, ORDER ON RECONSIDERATION, MEMORANDUM OPINION AND ORDER, NOTICE OF PROPOSED RULEMAKING, AND NOTICE OF INQUIRY (FCC 17-155) (rel. December 1, 2017), available online at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-155A1.pdf.

This *NPRM*[3] seeks comments on proposals to modify the Lifeline program to, among other things, properly recognize the State's role in the federal process for designating Eligible Telecommunications Carriers (ETCs), correct the flawed analysis, and remove the illegal procedures included in the prior *2016 Lifeline Order*.[4]

The FCC cannot create a designation process under 47 U.S.C. § 214 that bypasses *ab initio* State commissions. NARUC initial comments applaud the *NPRM's* explicit recognition of the "important and lawful role of the states" assigned by Congress with respect to federal universal service programs.[5] They outline the legal reasons why the FCC's proposal to reverse its pre-emption of State authority to designate ETC's is correct. NARUC also specified that (i) non-facilities-based carriers that currently server 75 percent of eligible users should continue to receive lifeline funds, in part, because, even with a transition period, the potential to disrupt and even eliminate service to literally millions of eligible users is obvious, (ii) as a supported service, voice must remain part of any lifeline service package, and that (iii) if the FCC does establish a budget for this program, it should carefully balance the need to ensure current eligible subscribers "do not lose their lifeline benefit," with "reasonable and rational growth in the Lifeline fund to serve subscribers in an amount that does not exceed the current soft budget notification amount."

In these reply comments, NARUC will respond briefly to initial comments (i) suggesting the FCC should continue to bypass the State role in the ETC designation process and (ii) suggesting the FCC should limit lifeline subsidies to facilities-based carriers.

---

3 *NPRM* at ¶¶ 53-118

4 *In the Matter(s) of Lifeline and Link Up Reform and Modernization,* F.C.C. Rcd. 3962 (rel. April 27, 2016) (*2016 Lifeline Order*).

5 *NPRM* at ¶ 54.

I. The FCC cannot maintain the federal Lifeline Broadband Provider (LBP) designation Process.

The undersigned could only locate thirteen initial commenters that contend the FCC should maintain the federal Lifeline Broadband Provider designation process. None however provide the FCC with a sustainable legal rationale to justify the bypass of the 47 U.S.C. 214(e)(2) affirmative specification that States, in the first instance, shall designate ETCs.

Most did not even make the attempt.

These 13 commenters can be divided into three categories.

First, some simply include a conclusory statement that they oppose the change.[6] These commenters articulate a concern, but their comments provide no explanation of why the FCC's tentative conclusion to eliminate the illegal LPB designation procedure is bad policy. Nor do they discuss why or how the LBP designation is legal in the face of clear and contradictory statutory text of § 214(e).

In short they provide no basis or rationale for the FCC to adjust its tentative conclusion.

The second category of commenters purport to advance a policy rationale for maintaining the LPB designation, but like the first, nowhere address the legal frailties of their position or proffer a legal basis for its retention.

---

[6] *See, e.g., Comments of Partners Bridging the Digital Divide, Inc*. (January 12, 2018) at 1 ("We oppose many aspects of the proposal, including the elimination of the Lifeline Broadband Provider designation created by the 2016 Lifeline Order."), at: https://ecfsapi.fcc.gov/file/1011290925139/FCC-Lifeline-Comments-201801.pdf; *Letter from Amy Gonzales Assistant Professor, Media School, Indiana University to FCC Chairman Ajit Pai* (February 21, 2018) at 1 ("Specific concerns include: The proposed outright elimination of the Lifeline Broadband Provider designation created by the 2016 Lifeline Order"), https://ecfsapi.fcc.gov/file/10222920818747/DOC-347452A1%20A.%20Gonzales%20Response.pdf.

Moreover, it is far from clear that this second category of commenters have any concern about whether the States or the FCC actually conduct the ETC designation. Instead, the arguments appear focused on eliminating the requirement to provide all supported services. They contend some category of Lifeline provider should not have to provide voice service. Most never even mention the process or the State's role.

For example, Mobile Beacon opposes elimination of the LBP designation because they want access to federal lifeline funds and they cannot offer voice. As proof elimination of the LBP designation is a bad idea they cite to their current and successful efforts to help close the digital divide – efforts that are thriving without access to federal lifeline subsidies.[7]

Another proposed justification for retention is an unsupported contention that eliminating the "standalone" LBP designation and "requiring the provision of voice services . . . *could* favor larger service providers such as the traditional telephone

---

[7] *Comments of Mobile Beacon* (February 21, 2018), at 2-3, available online at: https://ecfsapi.fcc.gov/file/10221188928069/Mobile%20Beacon%20-%20Lifeline%20Comments%20February%2021%202018.pdf; The same basic arguments are found in the *Comments of the National Digital Inclusion Alliance* (February 19, 2018) at 2- 3, (Discussing programs operated by "community-based organizations [that] are also examples of affordable home internet solutions that would have been eligible for LBP designation . . . prime examples of why the LBP designation should not be eliminated."), and the *Comments of the National Housing Conference* (February 14, 2018) at 2 ("[P]roposal to eliminate altogether the LBP designation process would undermine efforts to bring community based providers, like housing providers, into the program."), at: https://ecfsapi.fcc.gov/file/102141816023643/NHC%20comment_%20Lifeline%20Feb%202018.pdf; *See also, Letter from EveryoneOn CEO Chike Aguh* (February 21, 2018), at 1-2 ("EveryoneOn . . .objects to . . . . revocation of the LBP designation [because it] would strangle innovation . . . from small broadband carriers . . . any of the coalition members of the National Digital Inclusion Alliance, of which EveryoneOn is a member, that could have participated in the Lifeline program will be blocked from doing so.") https://ecfsapi.fcc.gov/file/1022281088352/2018.02.21%20Comments%20on%20FCC%2017-287.pdf

operators or the four major wireless carriers, disadvantage businesses willing to serve low-income populations, and provide fewer choices for consumers."[8]

Though they oppose elimination of the LBP designation, their arguments are limited to whether the company must also offer voice services. There is no reference to the State role in the designation procedure.

However, whatever the merits of these speculative policy arguments, which these commenters suggest "could" support a separate LBP designation, none include any legal analysis of the § 214(e) requirements to offer all supported services – including voice – as well as to provide a "telecommunications service" (not just "telecommunications.")

Which means not only do they provide no basis for retention of the LBP designation procedure, they also fail to make a legal case for the phase out of voice services.

The last category of commenters specifically target the Congressional requirement that State's, in the first instance, designate ETCs.

---

[8] *Comments of the City of New York* (February 21, 2018) at 2 (emphasis added), at: https://ecfsapi.fcc.gov/file/10221021835476/City%20of%20New%20York%20Comments_Lifeline%204th%20RO%20NOI%20and%20NPRM_Final.pdf; *See also* the *Comments of the Oregon Citizens' Utility Board* (January 30, 2018) at 2 ("[If] broadband providers fail to offer complementary voice service, participation as ETCs in the Lifeline program would no longer be possible. Elimination of LBP eligibility strongly favors larger, national providers and [harms customers seeking standalone broadband].") at: https://ecfsapi.fcc.gov/file/10130133519557/CUB_Lifeline_Comments_FINAL_013018.pdf and the *Comments of Saint Paul Neighborhood Network* (January 24, 2018) at 1 https://ecfsapi.fcc.gov/file/10205098139186/2018_01_23%20FCC%20Lifeline%20Comments%20from%20SPNN.pdf.

Two in this category purport to offer a legal justification for this position. As discussed below, Free Press (FP) and the National Hispanic Media Coalition (NHMC) comments actually present legal arguments that the FCC can bypass the Congressionally mandated State ETC designation procedure.[9] But, as discussed in more detail below, neither raises any new arguments, both fail to address the impact of the recent reclassification of broadband internet access services as "information services,"[10] and content themselves with regurgitating facially flawed arguments presented in the original *2016 Lifeline Order*.

The other two in this category provide no real legal justification for eliminating the State role. New America's Open Technology Institute (OTI), targets the State designation process specifically as slowing down and otherwise inhibiting entry.[11] But like those in category 2, *supra*, only present seriously flawed arguments for why voice services should be eliminated from the definition of universal service.

With respect to the State's role in designations, OTI offers an efficiency argument for why Congress should not have assigned States as the default designator. Though they use a lot of words, the basic argument is that it is easier and cheaper for carriers to go to the FCC than to multiple states. The Information

---

[9] *Comments of Free Press (*February 21, 2018) at 11-18, (FP Comments) at: https://ecfsapi.fcc.gov/file/1022121485501/Free%20Press_Feb%2021%202018%20Lifeline%20Comments.pdf; *Comments of the National Hispanic Media Coalition* (Feb. 21, 2018) at 11–15, (NHMC Comments): https://ecfsapi.fcc.gov/file/10221224839067/NHMC%20Lifeline%20Comments%20WC%20Docket%2017-287%2002.21.2018.pdf.

[10] Section 214 requires a carrier to provide a "telecommunications service" to qualify for a subsidy from the federal fund. By definition, a carrier only providing an information service cannot qualify.

[11] *Comments of New America's Open Technology Institute* (February 21, 2018) at 3 and 17-20, online at: https://ecfsapi.fcc.gov/file/10222114768626/OTI%20Lifeline%20Comments.pdf. *See also Letter to FCC Secretary Dortch from the Rev. Jesse Jackson, Sr., Rainbow PUSH Coalition* (February 21, 2018) at 3, which argues the FCC should find alternative or eliminate eligible telecommunications carrier designation requirements for providers, but provides no legal rationale that would permit the FCC to do so.

Technology and Innovation Foundation raises the exact same argument,[12] and, like the category two commenters referenced earlier, not much else.

OTI appears to meld unrelated statements with its efficiency policy argument, at 6 of its comments pointing out that because "universal service is an evolving level of telecommunications services" and creates a one-stop shop for carriers operating in several States, the FCC should retain the stand-alone designation.

Missing is any discussion of how their view of what constitutes a more efficient policy allows the FCC to ignore the law. The OTI comments include no discussion of (or attack upon) the State statutory role in the designation process - much less an explanation of the source of FCC authority to bypass that Congressionally specified role. Nor is there a discussion of the statute's requirement that a carrier at least offer all supported services.

Other OTI arguments are either illogical or evidence circular/flawed reasoning. For example, the OTI "argument" that the LBP designation must be retained because (i) universal service is "an evolving level of telecommunications services" (true) and (ii) broadband internet access service (an information service) is used by a "substantial majority" (also true) is a *non sequitur*.

Those arguments provide no basis to reject the State role in the Congressional scheme.

Moreover, conceding that broadband is used by a "substantial majority" and that Congress expected the definition of supported services to "evolve" over time -

---

[12] *See Comments of the Information Technology and Innovation Foundation,* at 3-4 (February 21, 2018)*(*"This mechanism allows carriers to provide Lifeline services nationwide after a single designation process, rather than navigating separate bureaucracies for each state. . . . A national designation should be maintained to encourage providers to operate at scale and reduce waste.") online at: https://ecfsapi.fcc.gov/file/1022132909733/ITIF%20Lifeline%20Comments%202018-02-21%20FINAL.pdf

in no way supports requiring standalone broadband service without an offer of voice services. After all, it is also true that an overwhelming (and a much larger) majority of U.S. citizens continue to use voice services. The proffered analysis provides no discernable principle to eliminate voice services from the federal definition of universal service.

OTI's policy argument on page 8 that lifeline customers might be required to pay for voice services they neither want nor need reflects a misunderstanding of what the statute requires. The statute requires ETC to offer all supported services. It does not specify how the FCC's lifeline subsidy must be allocated.

OTI offers an efficiency policy rationale to urge bypass of explicit Congressional directives. It provides no legal basis for the FCC to reject its tentative conclusions in this *NPRM.*

FP and NHMC Arguments for rejecting the statutorily mandated State ETC designation role are flawed.

Both FP and NHMC raise the same basic argument that the FCC can preempt Congress raised in the *2016 Lifeline Order*.

The *NHMC comments* at 15 argue, that, the:

> Commission should retain its authority to designate broadband-only providers pursuant to Section 214(e)(6) of the Act, which states: In the case of a common carrier . . . that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph [214(e)(1)] as an eligible telecommunications carrier for a service area designated by the Commission. . . .As it looks to alter the structure of the Lifeline broadband-only options, the Commission must consider the "longstanding conclusion that broadband Internet access service is jurisdictionally interstate for regulatory purposes.

FP's comments, at pages 11-18, also contend that the idea that States "might exercise jurisdiction over carriers that solely provide interstate service – makes no sense."

What makes no sense is either of these arguments.

First, the federal statute specifies when States retain jurisdiction –whatever the character of the underlying traffic. And Congress has explicitly given States jurisdiction with respect to interstate services in § 214 and elsewhere.

Second the FCC cannot use a preemption analysis which only applies when (i) a State law or action is inconsistent with federal goals and (ii) it is impossible to comply with both the federal and the STATE law – to preempt FEDERAL law. It is obviously impossible to make the case that a State complying with a Congressional mandate is somehow acting in a manner that is inconsistent with Congressional goals. It is also nonsensical to claim it is impossible to comply with the federal law.

Both these commenters rely on the flawed analysis presented in the *2016 Lifeline Order.*

But the proper legal analysis is straight forward.

The gaps in the arguments from the *2016 Lifeline Order* are obvious.

[1] Section 214(e)(2) unambiguously specifies that States "shall" in the first instance designate ETCs.

Section 214(e)(2) specifies, as a matter of federal law, the States' authority to – *and mandates they shall* – designate ETCs:

> A 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 for a service area designated by the State commission.

47 U.S.C. § 214 (e)(2)

The text is clear. As a matter of federal law (i) Congress grants authority for States to conduct designations and (ii) States have to designate all ETCs, in the first instance, before they can receive any federal subsidy.

Even the *2016 Lifeline Order* does not claim anywhere that there is an ambiguity in this section. Indeed, the FCC has consistently acknowledged it provides State commissions with responsibility for ETC designations.[13] Even under the *2016 Lifeline Order*, States retained that primary responsibility for all but the newly-created Lifeline broadband ETCs.

[2] Section 214(e)(6) only permits the FCC to conduct ETC designations when a carrier is "not subject to the jurisdiction of a State Commission."

Until 1997, there was no way to get an ETC designation if a State could not do it. Federal statutes cannot grant a State commission authority the State itself denies. A State agency only has authority to act, if it has been given jurisdiction by its State legislature or constitution.

Congress did not recognize this as a problem in the 1996 Act.

But in 1997, Senator McCain did, stating §214(e) "does not account for the fact that State commissions in a few States have no jurisdiction over certain carriers."[14] He was responding to companies that could not get designated because the Arizona Corporation Commission lacked jurisdiction over them under State law. Arizona did designate other carriers. With a State designation, those carriers could not get federal high cost or lifeline universal service subsidies. McCain's amendment

---

[13] *In the Matter of Federal-State Joint Board on Universal Service*, 20 F.C.C. Rcd. 6371, 6374 ¶8 (Mar. 17, 2005); *see also, id.* at ¶61, noting "[§]214(e)(2) demonstrates Congress's intent that state commissions evaluate local factual situations in ETC cases." *See also*, *In the Matter of Connect America 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 note 622 that "[S]tates have primary jurisdiction to designate.")

[14] 143 Cong. Rec. S12568-01, S12568 (1997)

added §214(e)(6) which allows the FCC to designate only when the State lacks jurisdiction. However, the amendment "does nothing to alter" State commissions' "existing jurisdiction." *Id.* In the U.S. House of Representatives, sponsors of McCain's bill agreed "nothing in this bill is intended to *restrict* . . . the existing jurisdiction of State commissions over any common carrier."[15]

The FCC responded to the new law by requiring applicants to certify that they were "not subject to the jurisdiction of a state commission" as a matter of State law, before the FCC would consider them for designation.[16]

On their face, §§214(e)(2) and (6) make clear the FCC cannot conduct an ETC designation, unless the relevant State commission lacks State jurisdiction over the carrier.

But the *2016 Lifeline Order*, like the FP and NHMC comments, ignored the plain text, the legislative history, and the FCC's own precedent to claim that §214(e)(6) permitted the FCC to "preempt" the role Congress specifies States conduct.

That 2016 order relied heavily on a tortured exegesis of §214(e)(6) to "preempt" §214(e)(2). Basically it suggested the provision gives the "FCC authority to designate where States lack jurisdiction," *2016 Lifeline Order* at ¶4, regardless whether the State has, as a matter of State law, jurisdiction to act.

But Congress already decided.

Or to use another *2016 Lifeline Order* formulation, at ¶285 n. 685, the FCC is free to preempt:

---

[15] 143 Cong. Rec. H10807-02, H10807-08 (1997).

[16] *Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6)*, 12 F.C.C. Rcd. 22947 (1997)

> any otherwise-existing state law authority to perform ETC designations based on conflicts with federal policy, including the policy objectives identified in section 254 of the Act and section 706 of the 1996 Act and the Commission's implementing rules.

That approach directly conflicts with the statutory text – as well as other declarations in the *2016 Lifeline Order*. (*See* Point [3], *infra*).

Congress has already decided in §214(e)(2) that – as a matter of federal law – States have jurisdiction to conduct all designations. That's why the McCain amendment was necessary.

The *2016 Lifeline Order* was not free to make a contrary determination – as a matter of federal law – based on §214(e)(6).

Like §214(e)(2), §214(e)(6), lacks ambiguity:

> In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the Commission consistent with applicable Federal and State law.

On its face, the section only permits the FCC to conduct ETC designations as a default to States specifically where the carrier is "not subject to the jurisdiction of a State Commission." This text must refer to whether the State actually has jurisdiction *as a matter of State law*, because, as noted *supra*, Congress has already decided States do have jurisdiction *as a matter of federal law*. This reading is also consistent with the §214(e)(6) requirement for the service area to be "consistent" with applicable State law.

[3] The *2016 Lifeline Order* concedes that, as a matter of federal law, States have jurisdiction to designate ETC's involving broadband/broadband Lifeline service.

The *2016 Lifeline Order* argued it could use §214(e)(6) to say the States lack jurisdiction and "preempt" Congress §214(e)(2) mandate. But §214(e)(6) doesn't say "where the FCC finds State jurisdiction to be inefficient." It says where the carrier is "not subject to the jurisdiction of a State Commission."

In ¶¶239-273, the *2016 Lifeline Order* tried to rationalize why it could "preempt" because the States "lack jurisdiction." But there is no reason to wade through this dystonic rationale because, the same *2016 Lifeline Order* also explicitly conceded that States DO have jurisdiction as a matter of federal law over Lifeline Services and even over standalone Lifeline broadband services, at ¶287 specifying:

> Nothing in this Order preempts states' ability to create or administer such State-based Lifeline programs that include state funding for Lifeline support to support voice service, [broadband service], or both.

And at ¶286 stating:

> Nor does the creation of the [FCC Lifeline broadband] designation disturb states' current processes for designating non-[FCC designated Lifeline Broadband] ETCs, *where they retain jurisdiction*."

(emphasis added)

Note the italicized reference to the same State jurisdiction the *2016 Lifeline Order* claimed to have preempted elsewhere.

By definition, "non-Lifeline-only" and some "Lifeline only" ETCs designated by States referenced in the 2016 decision will provide broadband services.[17]

The *2016 Lifeline Order* confirmed, what §214(e)(2) requires: that each State Commission, as a matter of federal law, has jurisdiction over broadband services. Clearly, without such authority, States could not "create or administer" a State program to support lifeline broadband service on a standalone basis or certify any ETCs that receive federal Lifeline subsidies for providing broadband service.

[4] The characteristics of specific "supported services" cannot override §214(e)(2)'s requirement that States conduct all ETC designations.

The *2016 Lifeline Order* clearly conceded that, as a matter of federal law, States have jurisdiction sufficient to create their own broadband Lifeline programs and manage high cost carriers providing broadband services. But the *2016 Lifeline Order* then inconsistently implied that the character of broadband service as "interstate" somehow limits Congress's ability to specify that States, in the first instance, conduct all ETC designations.

But the nature of the underlying service is irrelevant. It cannot limit Congress. It makes no sense to suggest otherwise.

Congress can and did specify that States conduct ETC designations for all supported services. At the same time, it also specified in §254(b)(2)&(c) that such "supported services" will continue to evolve and must include "[a]ccess to advanced telecommunications and information services." Indeed, the order implementing §214(e) specified that universal service support mechanisms would, as Congress intended, support a suite of designated services – including voice grade access to

[17] "ETCs that are not [certified by the FCC] may also be eligible to receive reimbursement for offering Lifeline-supported broadband Internet access service" *2016 Lifeline Order,* ¶8n.4. (emphasis added).

"interexchange" service (which includes interstate services). *In the Matter of Federal State Joint Board on Universal Service,* 12 F.C.C. Rcd at 8810-8011(1997).

Even the structure of §214(e) confirms what the text of subpart (2) requires. As Commissioner Pai pointed out in his dissent to the *2016 Lifeline Order*, at p. 4175:

> Congress expressly chose to limit state authority to intrastate services only in unserved areas . . . In other words, Congress knew how to draw a jurisdictional line in §214, but chose not to do so outside of unserved areas. And that same paragraph makes another thing clear: In unserved areas, the FCC can designate *both* a carrier with respect to interstate services *as well as* a "carrier to which paragraph (6) applies," i.e., a carrier not subject to the jurisdiction of a state commission. That parallel construction means Congress viewed the questions as separate and distinct—not one and the same. So to now draw another line around state commission jurisdiction would be to rewrite subsection 214(e), not reinterpret it.
>
> (footnote omitted; emphasis in the original)

But §214(e) is not the only place Congress gives States authority over interstate services in the 1996 Act. For example, in *Verizon v. F.C.C.*, 740 F.3d 623, 638 (D.C. Cir. 2014), the D.C. Circuit observed that §1302(a)/(§706(a)) applies to both the FCC

> *and* each State commission with regulatory jurisdiction over telecommunications services.' (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.

WWC Holding Co. v. Sopkin, 488 F.3d 1262, 1271–72 (10th Cir. 2007) provides another example:

> Congress was well aware that mobile services, "by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure". . .Yet, at the same time, Congress decided to permit a state to regulate the "other terms and conditions" of a mobile service provider, with no explicit limitation on whether a state's regulations affect the provision of interstate service.

There is no reason to carry this investigation further.

However, the *2016 Lifeline Order* attempted to muddy the waters, at ¶255, by pointing out the agency has previously found broadband Internet access service is "jurisdictionally interstate for regulatory purposes." At ¶240 it argued:

> The circumstances in which a carrier is "not subject to the jurisdiction of a State commission" under section 214(e)(6) is ambiguous regarding whether the carrier must be entirely outside the state commission's jurisdiction or only outside the state commission's jurisdiction with respect to a particular service supported by universal service mechanisms, even if subject to state commission jurisdiction in other respects.

But §214(e)(6) is not ambiguous given the clear specification in §214(e)(2) that, as a matter of federal law, States do the designations. If the service is supported by the federal mechanisms, States do the designations.

The FCC's purported ability to otherwise, in appropriate cases, preempt some aspects of State oversight of mixed services cannot translate into the ability to preempt Congress.

Assuming *arguendo*, this FCC diversion is worth closer scrutiny, the flaws only increase. Even absent §214(e)(2) and the FCC concessions cited, *supra,* States

have jurisdiction with respect to broadband. Even the *2016 Lifeline Order*, at ¶255, recognized State have jurisdiction to collect data regarding broadband services. And as the *Verizon* decision notes, 47 USC §1302(a) specified that "each State commission with regulatory jurisdiction over telecommunications services shall" encourage the deployment of "advanced services" though *substantive* measures.

Even if these §1302 and §214(e)(2) Congressional specifications were not enough, broadband is jurisdictionally mixed,[18] containing both inter- and intrastate communications.[19] If there are intrastate transactions, States have jurisdiction.[20] In other contexts *not implicated here,* to the extent the traffic cannot be "severed", i.e., identified as either interstate or intrastate, the FCC may have the option, but does not have to, preempt State polices under the so-called "impossibility exception."[21] A series of FCC rulings about so-called nomadic Voice over Internet protocol services provide a clear example.[22] These nomadic services use the public internet to complete voice calls. According to the 8th Circuit:

> [T]he "impossibility exception" of 47 U.S.C. § 152(b) allows the FCC to preempt state regulation of a service if (1) it is not possible to separate the interstate and intrastate aspects of the service, and (2) federal regulation is

---

[18] *See*, *Ex Parte from NARUC General Counsel filed In the Matter of Protecting and Promoting the Open Internet*, GN Docket No. 14-28 (February 19, 2015).

[19] 47 U.S.C. §153(28) defining interstate and, by exclusion, intrastate services.

[20] *See,* 47 U.S.C. §151 limiting the FCC's jurisdiction to interstate and in §152(b) confirming that limitation by reserving State jurisdiction over intrastate services.

[21] *Louisiana Public Service Commission v. F.C.C.,* 476 U.S. 355, 368 (1986) ("Pre-emption occurs . . . when there is outright or actual conflict between federal and state law . . . where compliance with both federal and state law is in effect physically impossible.")

[22] *In the Matter of Universal Service Contribution Methodology*, 25 F.C.C. Rcd. 15651, 15657–58, ¶15(2010). (FCC found "no basis at this time to preempt states from imposing universal service contribution obligations on providers of nomadic interconnected VoIP service.")

> necessary to further a valid federal regulatory objective, i.e., state regulation would conflict with federal regulatory policies. [23]

But the impossibility exception, like the earlier-referenced citation to the Supremacy Clause, has no application here because, the FCC is not trying to preempt State regulation. It is trying to block a Congressionally-specified designation procedure.

But even if the exception did apply, how can the FCC plausibly argue that a State following the §241(e)(2) Congressional mandate conflicts with federal policy.

The answer is obvious – it cannot.

The FCC properly proposed to reject this flawed analysis in this *NPRM*.

The overwhelming majority of the commenters either, like NARUC, explicitly endorse the FCC's revised approach to the LBP designation, or took no position on it.

No commenter provided any cogent legal rationale that could support any other action.

II. The Record does not support limiting lifeline subsidies to facilities-based carriers.

Of all the initial comments filed in this proceeding since mid-January 2018, the undersigned could only locate one that supports this proposed limitation on

[23] *Minnesota Public Utilities Commission v. F.C.C.*, 483 F.3d 570, 578 (8th Cir. 2007)

resellers. Like NARUC's initial comments, many explain how that change will undermine the purpose and functioning of the program. The *NPRM* suggests in ¶ 63 that limiting Lifeline subsidies to facilities-based carriers might spur additional investment in infrastructure. However, there is also no credible evidence that eliminating non-facilities-based service will spur additional investment in voice-and broadband-capable networks. After all, it seems unlikely that any network owner would be selling unused airtime in large blocks to Lifeline resellers if that sale was not profitable and thus did not also contribute to the maintenance and improvement of the "resold" facilities. Indeed, this point is confirmed by expert testimony appended to CTIA's initial comments. According to the affidavit of Dr. John May attached to their comments, at 2:

> Facilities-based and non-facilities-based carriers (Mobile Virtual Network Operators or MVNOs) operate symbiotically to each provide economic value and enhance consumer welfare in the provisioning of modern communications services. The result of this relationship is enhanced capacity utilization and hence more investment than would happen in the absence of MVNOs.[24]

Also, simple economics suggest it is unlikely the FCC's revised policy can be calibrated to provide adequate encouragement to current non-facilities-based service providers to either build their own wired facilities or overbuild other facilities-based providers – particularly in underserved/low population areas.

[24] *See Comments of CTIA* (February 21, 2018) at 3 ("[Non-facilities-based resellers] presence in the market increases incentives for network investment, citing the Exhibit A "Declaration of Dr. John May at 2.) at: https://ecfsapi.fcc.gov/file/1022132549976/180221%20CTIA%20Lifeline%20Comments.pdf.

CONCLUSION

Reversal of the flawed legal constructs in the *2016 Lifeline Order* and continued FCC fidelity to the 1996 Act are crucial steps towards maintaining effective oversight at both the federal and the State level. Assuring that existing carriers serving the bulk of lifeline subscribers can continue to do so is essential to Lifeline program goals.

Respectfully submitted,

James Bradford Ramsay
General Counsel
National Association of Regulatory Utility Commissioners
1101 Vermont Avenue, Suite 200
Washington, DC 20005
PH: 202.898.2207
E-MAIL: jramsay@naruc.org

Dated: March 24, 2018