

Before the
Federal Communications Commission
Washington, DC 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 ACCESS NOW

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Access Now respectfully submits these reply comments in response to the Federal Communications Commission’s (the Commission) Further Notice of Proposed Rulemaking (FNPRM) on the Lifeline Program.¹ Access Now is a global human and digital rights nonprofit that defends and extends the digital rights of users at-risk around the world. Access to a high-speed internet connection is a foundational issue. Many human rights can only be enjoyed with an internet connection. The Lifeline program plays an integral role in helping bring low-income households online by addressing the need to make communications services more affordable, which is a statutory mandate.²

Access Now understands and supports reforming Lifeline in ways that will prevent waste, fraud, and abuse in the Lifeline program because companies and individuals should not be able to take advantage of Lifeline to enrich themselves. However, the FNPRM exemplifies an approach by the Commission’s to saddle low-income Lifeline customers with more burdens and privacy invasions in an effort to address fraudulent behavior by the Lifeline provider. Such proposals will only serve to prevent customers from signing up and using Lifeline rather than reducing waste, fraud, and abuse.

I. The Commission lacks authority, and it is unnecessary, to add a Lifeline goal focused on connecting consumers who, without Lifeline, would not subscribe to broadband.

The Commission proposes an additional goal for the Lifeline program, “increas[ing] broadband adoption for consumers who, without a Lifeline benefit, would not subscribe to broadband.”³ This goal is, of course, laudable and the Commission should be concerned with connecting everyone who is disconnected. However, the Commission should reject this proposal because it is contrary to other Universal Service Fund (USF) statutory goals and would be unnecessary.

First, the proposed goal would run counter to the separate statutory goal that requires funding mechanisms to be “specific, predictable and sufficient.”⁴ In general, the Commission lacks authority to adopt new goals that are not “necessary and

¹ Fifth Report and Order, Memorandum Opinion and Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, Dkt. No. 17-287 (Nov. 14, 2019) (“FNPRM”).

² 47 U.S.C. §254(b)(1).

³ FNPRM, ¶136.

⁴ 47 U.S.C. §254(b)(5).

appropriate for the protection of the public interest, convenience, and necessity and are [not] consistent with this chapter.”⁵ Customer-specific determinations over whether that customer can otherwise afford broadband is a subjective determination that is likely to change over time. In particular, low-income Americans’ earnings are often unreliable and unpredictable. Income may vary from month-to-month, both in amount and the time at which payment is received. Often, earnings are not guaranteed or regular, and can be described as “volatile.”⁶ As Low-Income Consumer Advocates argued, “[i]ncome volatility coupled with lack of adequate savings would mean that many low-income households would be denied service for the perverse reasons that they were able to afford service at one point in time. This limitation could harm those very households that are making sacrifices to obtain connectivity, but are having a hard time succeeding without assistance.”⁷ Thus, temporary income or a short term increase in savings may become ineligible for the service. On the other hand, the current eligibility standard is fairly predictable for both applicants and providers: if a consumer earns less than 135% of the Federal Poverty Guidelines, or is eligible for SNAP, Medicaid, or certain other federal benefits, then they are eligible for Lifeline. Adding another (subjective, elusive, and burdensome) hurdle to determine eligibility would add significant ambiguity into the program, and thus run counter to other statutory USF goals.

Adopting the proposed goal would also be inconsistent with the statutory goal of ensuring that “[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas” receive access to comparable communications services.⁸ In drafting this objective, Congress was clear that all “low-income consumers” should have access to affordable, comparable communications. It could have, but did not, frame the Commission’s goal as connecting “low-income consumers that cannot otherwise afford communications services.” Thus, the Commission lacks authority to impose this new goal.

Second, the Commission has failed to explain why adopting this new goal, which would impose new burdens on consumers and the Commission, is necessary. By asking an additional question, as proposed by the FNPRM, consumers would be forced to admit that, even though they earn less than 135% of the Federal Poverty

⁵ 47 U.S.C. §254(b)(7).

⁶ See Comments of Low Income Consumer Advocates, at 6-7 (Jan. 27, 2020), https://ecfsapi.fcc.gov/file/10127937610733/NCLC%20LICA%20Lifeline%20comments_Jan%2027%202020_final.pdf.

⁷ *Id.* at 7.

⁸ 47 U.S.C. §254(b)(3).

Guidelines (or qualify through eligibility for other federal services), they are still otherwise potentially able to afford the service. However, affording the service would entail foregoing other necessities essential to provide for themselves and/or their family. In other words, this requirement would force the consumer to rank the importance of their broadband service against food, water, shelter, and other necessities, even though access to the internet is essential for employment, education, communication, and other areas of Americans' everyday lives.⁹ Forcing low-income Americans to make this determination is unfair and will lead to a reduction in Lifeline adoption, even by those who would substantially benefit from the program. The Commission would also burden itself with the highly-inappropriate role of second-guessing the veracity of customer statements. The Commission should not place itself in the position of policing low-income Americans' determinations of whether they would otherwise "not subscribe to broadband."¹⁰

Additionally, the Commission has not identified a problem that it seeks to solve by adopting this new goal. The Commission has not argued that it has found extensive use of the Lifeline service by low-income consumers who would otherwise subscribe to broadband. Even if it were able to make that claim, it is far from clear that this is a negative outcome that should be discouraged. The FNPRM's supposed desire for imposing the new goal is to "Increas[e] Broadband Adoption Among Consumers,"¹¹ yet focusing on a specific subset of eligible users would likely accomplish the exact opposite.

The Commission should, instead, focus on growing the Lifeline program.¹² Cost continues to be a powerful barrier to broadband adoption.¹³ Yet, Lifeline participation rates in 2018 varied by state from as low as 3% up to 59%.¹⁴ With participation rates

⁹ FNPRM, Statement of Commissioner Jessica Rosenworcel, Dissenting in Part, Concurring in Part, Dkt. No. 17-287 (Nov. 14, 2019), <https://docs.fcc.gov/public/attachments/FCC-19-111A1.pdf>.

¹⁰ FNPRM, ¶136.

¹¹ *Id.*

¹² See Comments of New America's Open Technology Institute and Public Knowledge, at 3-4 (Jan. 27, 2020), <https://ecfsapi.fcc.gov/file/10127292923671/OTI%20and%20PK%20Lifeline%20FNPRM%20Comments.pdf>.

¹³ Comments of Low Income Consumer Advocates, at 6-7 (Jan. 27, 2020), https://ecfsapi.fcc.gov/file/10127937610733/NCLC%20LICA%20Lifeline%20comments_Jan%2027%202020_final.pdf.

¹⁴ Program Data, Universal Service Administrative Company, <https://www.usac.org/lifeline/learn/program-data> (last accessed Feb. 13, 2020).

so low, there is little reason to further limit eligibility by giving preference to some eligible customers over others.

Further, the Commission could survey current Lifeline subscribers to determine how well the program is meeting their needs. For instance, the Commission could ask current Lifeline subscribers, not applicants, whether they have sacrificed other necessities in order to afford the remaining cost of their broadband service.¹⁵ The Commission could also ask current subscribers whether the minimum service standards are meeting their communications needs, particularly in the areas of employment and education.¹⁶ And finally, they could ask current subscribers whether they have accumulated telecommunications-related debt.¹⁷

II. The Commission should address the hypothetical usage requirement fraud it identified in the FNPRM through measures directed at providers, not users.

The FNPRM identifies an apparently hypothetical situation where a Lifeline provider attempts to circumvent the usage requirement by installing an app that mimics broadband usage, and then suggests the Commission itself develop an app to “confirm continued usage.”¹⁸ This rule change would be unnecessary and overly invasive.

As an initial matter, the Commission’s proposal appears to be a solution that won’t work to a problem that does not exist. Without identifying a problem, it is difficult to craft a solution. The FNPRM provides no evidence that providers are circumventing the usage rule by installing apps to mimic data use in an effort to defraud the program.

Even if such evidence existed, the proper way to address the problem would be to investigate and take enforcement action against the providers for engaging in fraudulent behavior, rather than burdening the customer who took no fraudulent action. The usage rule already requires action “by the subscriber,” and if a provider were to develop such an app, it would violate that rule. The recent actions by the Commission and the Oregon Public Utility Commission should serve as a deterrent against such

¹⁵ Comments of Low Income Consumer Advocates, at 10 (Jan. 27, 2020), https://ecfsapi.fcc.gov/file/10127937610733/NCLC%20LICA%20Lifeline%20comments_Jan%2027%202020_final.pdf.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ FNPRM, ¶¶146-148.

behavior.¹⁹ As in that case, enforcement against the wrongdoer is the proper way to address this hypothetical problem.

It would be improper for the Commission to address this supposed problem by saddling low-income customers with an app, essentially government spyware, that tracks their broadband usage. An app would undermine the privacy and security of Lifeline users. The Commission does not address questions such as the kinds of data the app would access and collect, with whom the data would be shared, and whether users would have any control over the app. Nor does the Commission ask any questions about how such an app would comply with the Privacy Act of 1974.²⁰ Other questions abound. Would the Commission be in the role of determining what types of usage were sufficiently legitimate to meet the usage requirement? What would its criteria be? Would the app undermine encrypted services like Signal or websites that use HTTPS? Would the app constantly run in the background, hogging valuable resources on the phone? How extensively would the app expose the user to security and privacy vulnerabilities? These are just a few questions that this app presents. With no answers and little reason to believe the app would be effective, the Commission should not move forward with this proposal.

Lifeline phones already have had privacy, security, and spyware problems. Researchers at Malwarebytes Lab recently reported that Virgin Mobile’s Assurance Wireless program’s UMX U686CL phones provided to Lifeline subscribers came pre-installed with unremovable spyware. According to Malwarebytes, the phones included an app that is a “variant of Adups, a China-based company caught collecting user data, creating backdoors for mobile devices and . . . developing auto-installers.”²¹ The phones also included malware that can install adware and unwanted apps without the user’s permission.²² These apps were unremovable and have greatly undermined the security of Lifeline phones; the Commission should not further undermine security with another app that collects information on Lifeline subscribers.

¹⁹ Press Release, FCC Learns that Sprint Received Tens of Millions in Lifeline Subsidies— But Provided No Service, Sept. 24, 2019, <https://docs.fcc.gov/public/attachments/DOC-359820A1.pdf>.

²⁰ 5 U.S.C. §552a.

²¹ Nathan Collier, *United States government-funded phones come pre-installed with unremovable malware*, Malwarebytes Lab (Jan 10, 2020), <https://blog.malwarebytes.com/android/2020/01/united-states-government-funded-phones-come-pre-installed-with-unremovable-malware>.

²² *Id.*

III. Requiring providers to maintain detailed usage records creates unnecessary privacy and security risks for customers.

The Commission proposes to mandate more detailed record-keeping on providers to “document compliance with the usage requirement.”²³ Such an additional requirement would create unnecessary privacy and security risks for customers.

With this proposal, the Commission would subject Lifeline customers to more privacy and security vulnerabilities because of hypothetical provider malfeasance. Again, without identifying an actual problem, it is difficult to craft a solution. And again, this proposal raises more questions about the type and extent of data collection and retention, and the extent to which the proposal will lead to unintended consequences for customers’ privacy and security. Creating and storing more data on Lifeline customers will necessarily put them at greater risk of unauthorized access to data and data breaches.

Lifeline subscribers already are no strangers to privacy and security violations. In 2014, the Commission found YourTel America, Inc. and TerraCom, Inc. violated the Communications Act’s privacy provisions by, among other missteps, failing to protect the confidentiality of Lifeline subscriber data when storing private personal information (social security numbers, home addresses, and financial account information) of Lifeline applicants on an unsecured server.²⁴ Such careless behavior can lead to identity theft or create other unnecessary burdens on Lifeline customers. The proposal here would create additional opportunities for Commission and provider negligence that places low-income individuals at risk.

IV. The Commission should not prevent or otherwise limit the availability of free handsets.

The Commission proposes to limit the distribution of free handsets when signing up for Lifeline.²⁵ The FNPRM seeks comment on prohibiting, or imposing a fee for, distribution of handsets at enrollment. Here, the Commission actually cited one data point to illustrate this problem. In 2014, a CBS reporter obtained a free cell phone when the Lifeline representative they spoke to used someone else’s eligibility

²³ FNPRM, ¶148.

²⁴ Notice of Apparent Liability for Forfeiture, FCC 14-173, File No. EB-TCD-13-00009175 (Oct. 24, 2014), https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-173A1.pdf.

²⁵ FNPRM, ¶¶151-53.

documentation for registration.²⁶ Despite this data point, it is still inappropriate for the Commission to reach its hand into the Lifeline market and prevent providers from providing this benefit to customers or requiring providers charge a fee.

Preventing carriers from providing this benefit to customers, or requiring them to impose a fee on devices, would likely discourage eligible customers who cannot afford the cost of a device from signing up for the service. Customers want free phones, and providers are able to give them out at enrollment. USF money is not being used to provide those devices. The market is working and the Commission should refrain from upsetting or distorting that market, which would cause significant detriment to Lifeline consumers.

The Commission should not rush to make such extensive changes to Lifeline (in pursuit of “preventing waste, fraud, and abuse”) that the changes undermine the program itself. The Lifeline program has undergone significant reforms since the incident in 2014, and the Commission should allow those reforms to take effect and then study and determine their effectiveness at reducing fraud and abuse in the program. For instance, the National Verifier and the carrier API are two reforms that will likely reduce the friction in identifying eligible recipients, yet the National Verifier is not yet nationally implemented. The Order, attached to the FNPRM, itself imposes new rules that prohibit providers from paying commissions based on the number of submitted applicants or approved enrollments.²⁷ It also requires enrollment representatives to register with USAC to ensure further accountability.²⁸ These measures are more appropriately targeted at the source of the enrollment fraud. The Commission should allow these new rules and processes to take effect before evaluating whether further measures are needed.

Thus, with limited benefits and extensive costs on low-income customers, the Commission should not adopt this policy.

²⁶ Brian Maas, *Government’s Free Phone Program Riddled With Abuse, Fraud*, CBS Denver (Nov. 6, 2014), <https://denver.cbslocal.com/2014/11/06/governments-free-phone-program-riddled-with-abuse-fraud>.

²⁷ FNPRM, ¶¶68-77.

²⁸ FNPRM, ¶¶78-81. The registration requirement creates a privacy problem that is wholly unaddressed by the Commission in the FNPRM. Namely, registration information will be stored at providers and the Commission and it is unclear how the Commission plans to address the privacy concerns associated with that data collection and retention. See Comments of National Urban League, Dkt. 17-287, at 2-3 (Jan. 27, 2020), <https://ecfsapi.fcc.gov/file/10127899918969/Lifeline%20comments.FINAL.pdf>.

Conclusion

Waste, fraud, and abuse by providers in the Lifeline program should be dealt with through enforcement of the Lifeline rules against the fraudulent providers. Several proposals in this FNPRM are designed to address provider fraud but actually burden Lifeline subscribers by making their lives much more difficult. The proposals may even force some subscribers off or prevent certain subscribers from being able to take advantage of the program. These proposals should not be adopted.

Respectfully submitted,

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