DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI

Re: *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42; *Telecommunications Carriers Eligible for Universal Service Support*, WC Docket No. 09-197; *Connect America Fund*, WC Docket No. 10-90.

My approach to this proceeding has been guided by two fundamental principles. First, modernizing the Lifeline program to support affordable, high-speed Internet access for our nation's poorest families is a worthy goal. And second, we must be fiscally responsible and clean up the rampant waste, fraud, and abuse in the program so that the dollars we spend go to those families.

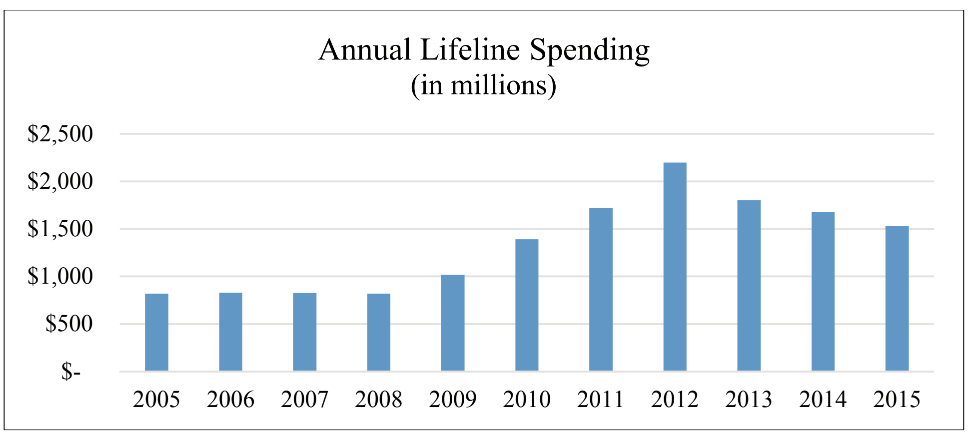
Consistent with these principles, I cannot support this *Order*. It is not fiscally responsible. It does not clean up the waste, fraud, and abuse. And it consigns Lifeline consumers to second-class broadband services for the foreseeable future. On top of this, the *Order* does not comply with federal law. For all these reasons, I dissent.

I.

Lifeline continues to be a fiscal nightmare. Before the start of the Obama Administration, Lifeline spending had held steady in a range of $820–829 million over the course of four years. Then, in 2009, free services and free phone giveaways became the norm. Unscrupulous operators devised new ways to exploit loopholes to line their pockets. Sales agents schemed with consumers (who no longer had skin in the game) to enroll them in Lifeline multiple times—even if the consumer never qualified in the first place.[1] Lifeline spending began to increase dramatically.

When spending jumped to $1.4 billion in 2010, the state members of the Federal-State Joint Board on Universal Service spotted the culprit. As the Chairman of the Oregon Public Utility Commission wrote, "several states have reported that a significant number (nearly half in some cases) of the Lifeline customers [subscribing to no-cost plans] are not eligible to receive support," and "[l]eft unchecked, the fund will easily reach $2 billion within the next two years."[2]

He was right. Lifeline spending hit $2.2 billion in 2012.



[1] *See, e.g.*, Remarks of FCC Commissioner Ajit Pai at the Citizens Against Government Waste Policy Breakfast at 2–3 (July 28, 2014) (Pai Lifeline Reform Speech) (explaining, among other things, that the "FCC identified 306 individuals, each of who had signed up for at least four Lifeline accounts"), *available at* http://go.usa.gov/cetmG.

[2] *Federal-State Joint Board on Universal Service; Lifeline and Link Up*, CC Docket No. 96-45, WC Docket No. 03-109, Recommended Decision, 25 FCC Rcd 15598, 15636 (Fed.-State Joint Bd. 2010) (*Joint Board Lifeline Recommended Decision*) (Statement of Chairman Ray Baum, Concurring in Part and Dissenting in Part).

And so, the FCC finally started to act to curb waste, fraud, and abuse in the *2012 Lifeline Reform Order*.[3] As a result of these reforms, we now know just how common abuse was. The year after their implementation, Lifeline claims fell $397 million. A full 29% of Lifeline subscribers had to be de-enrolled because they failed the recertification process.[4] Continued implementation has culled even more duplicate subscribers and ineligible households from the rolls. In all, it appears the Fund wasted up to $1.3 billion of taxpayer money during this Administration on Lifeline subscribers who later had to be de-enrolled.[5]

Unfortunately, systemic fraud continues. For example, in 2014, two years after the FCC's reforms, the CBS affiliate in Denver discovered multiple Lifeline providers distributing free phones "like Halloween candy" at a city intersection.[6] Sales agents knowingly signed up ineligible individuals. One even enrolled an undercover producer using someone else's food stamp card, and that producer was given a free phone on the spot. This is clearly illegal.

The Denver case is no anomaly.

Consider the case of Icon Telecom, whose owner was part of a scheme to defraud the Lifeline program out of more than $25 million.[7] Icon knowingly siphoned FCC funds for tens of thousands of phantom customers, with its rolls increasing from 2,200 to 135,000 in just over a year. Thankfully, the scheme was uncovered, and in early 2014 Icon's owner pleaded guilty to money laundering for transferring over $20 million from the company to his personal account.

Abuse of the program is still common. The "enhanced" subsidy on Tribal lands is case in point. Although the typical Lifeline subsidy is $9.25 per month, our rules give carriers serving Tribal lands an enhanced subsidy of $34.25 to facilitate the build out of infrastructure in Indian country. The problem? Tribal lands are not confined to remote regions—large cities like Reno, Nevada, and Tulsa, Oklahoma qualify too. That means carriers serving some big cities get an additional $300 per year per subscriber than carriers serving nearby rural areas where facilities are actually needed. That makes no sense.

The abuse is particularly acute in Oklahoma because the FCC treats virtually all of the state as Tribal land.[8] Of the 263,773 Oklahomans receiving Lifeline support at the end of 2015, only 793—0.3%—did not qualify for the enhanced Tribal subsidy. The $108 million in Lifeline funds bestowed upon Oklahoma in 2014 was the second highest of any state, despite the fact that Oklahoma ranks only 28th in population. Nationally, the Lifeline program spends $4.68 per person, but in Oklahoma, that spending jumps to $27.90, more than ten times the amount that neighboring Kansas receives. And if Lifeline spending in Oklahoma were only twice the national average, American taxpayers would save $72 million a year, or 4.8% of the total cost of the program.

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[3] *See Lifeline and Link Up Reform and Modernization et al.*, WC Docket Nos. 12-23, 11-42, 03-109, CC Docket No. 96-45, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656 (2012).

[4] *Wireline Competition Bureau Announces Results of the 2012 Annual Lifeline Recertification Process*, WC Docket No. 11-42, Public Notice, 28 FCC Rcd 5538, 5538, para. 2 (Wireline Comp. Bur. 2013).

[5] Had Lifeline never enrolled subscribers that had to be de-enrolled through 2015, taxpayers would have likely saved $201 million in 2011, $680 million in 2012, $281 million in 2013, and $152 million in 2014. All those figures have been calculated using the "Universal Service Fund Activity – Fund Balance" reports that the Universal Service Administrative Company (USAC) files with the FCC each quarter. *See* http://bit.ly/1TsRZ1x.

[6] CBS4 Denver, *Government's Free Phone Program Riddled with Abuse, Fraud* (Nov. 6, 2014), *available at* http://cbsloc.al/1GwXqGV.

[7] Press Release, U.S. Attorney's Office for the W. Dist. of Okla., *Icon Telecom, Its Owner, and a Former Associate Charged In $25 Million Fraud In Federal Wireless Telephone Subsidy Program* (June 4, 2014), *available at* http://go.usa.gov/3V7mP.

[8] The FCC will no longer treat Oklahoma City as Tribal lands starting June 8, 2016, but that change will not affect other large cities in Oklahoma like Tulsa. *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, Order, 31 FCC Rcd 895 (Wireline Comp. Bur. 2016).

To top it off, independent reports suggest that Lifeline wastes an inordinate amount of taxpayer money. The nonpartisan Government Accountability Office (GAO), for example, "concluded that the Lifeline program, as currently structured, may be a rather inefficient and costly mechanism to increase telephone subscribership among low-income households."[9] A recent study by four respected, independent economists was even harsher: The program creates an "estimated $0.65 in Lifeline administrative costs for every one dollar expended by the 2015 Lifeline program in supported discounts and costs."[10] In other words, of the $1.53 billion spent on Lifeline in 2015, almost $1 billion went to cover administrative expenses, a deadweight loss to society.[11] What a waste.

So what does the Commission do to remedy these problems as it expands the Lifeline program to subsidize broadband? Practically nothing.

First, the *Order* does not adopt a meaningful budget. Since 2008, Lifeline spending has almost doubled, and the universal service tax rate on every American's phone bill has increased by 88%, rising from 9.5% to 17.9%—even as Americans' median income has stagnated. Yet Lifeline remains the *only one* of the four Universal Service Fund programs that does not have an enforceable budget.

Putting the Lifeline program on a budget is not a new or novel idea. The 2010 National Broadband Plan recommended the FCC "aim to keep the overall size of the fund close to its current size," *i.e.* $1.2 billion.[12] The *2012 Lifeline Reform Order* stated that the Commission "fully expect[ed] to have the information to determine an appropriate budget for the program" in 2013.[13] In 2014, I said that "placing a cap on Lifeline spending will prevent any future explosion in spending without direct Commission accountability."[14] At a March 2015 hearing of the Senate Committee on Commerce, Science, and Transportation, Senator Claire McCaskill asked all five Commissioners to "speak up for the record" if anyone opposed imposing a fiscal "cap" on the program—and four of the five Commissioners made no objection.[15] And in July 2015, Commissioner O'Rielly and Representative Marsha Blackburn reiterated the call to "set a spending cap for the program."[16]

Why has the budget been such a refrain from across the political spectrum? It's simple. A budget induces careful spending. This is as true for the federal government as it is for a family. With a budget the government must prioritize its spending and ensure that funds are directed where they are needed most. With a budget, the government has greater incentives to crack down on waste, fraud, and abuse. And as we expand the program to include broadband, a budget would "prevent a repeat of the unchecked increase in spending that was seen the last time the program was expanded."[17]

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[9] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-335, TELECOMMUNICATIONS: FCC SHOULD EVALUATE THE EFFICIENCY AND EFFECTIVENESS OF THE LIFELINE PROGRAM at 14 (Mar. 2015) (GAO 2015 REPORT).

[10] Nicol E. Turner-Lee, Ph.D., et al., MMTC, A Lifeline to High-Speed Internet Access: An Economic Analysis of Administrative Costs and the Impact on Consumers at 11 (2016).

[11] *Id.* at 13 ("[O]ur update to the FCC's estimate of provider versus FCC reported costs of the Lifeline program yields a more realistic estimate of more than $977 million."). In addition to the administrative cost borne by carriers, the Fund paid USAC $17.1 million to administer the program in 2015.

[12] National Broadband Plan at 150.

[13] *See 2012 Lifeline Reform Order*, 27 FCC Rcd at 6810, para. 359.

[14] Pai Lifeline Reform Speech at 4.

[15] CSPAN, Federal Communications Commission Oversight Hearing (Mar. 18, 2015), *available at* http://cs.pn/1BpUn41.

[16] Mike O'Rielly & Rep. Marsha Blackburn, FCC's Lifeline Program Ripe for Fraud, Abuse, *Politico* (July 12, 2015), *available at* http://politi.co/1PTWtJI.

[17] Letter from Senator Claire McCaskill to the Honorable Tom Wheeler, Chairman, FCC, et al. (Mar. 1, 2016).

There's another benefit to a real budget, one that automatically reduces payments to Lifeline carriers to stay on target.[18] It would deter carriers from abusing the program. That's because carriers are more likely to exploit the program, or turn a blind eye to fraud, when the profits from abuse are high and the costs are low. As spending nears a real budget, the FCC is likely to increase its oversight of the program, raising the risk of detection. And once spending hits the budget, the reduction in carrier payments will automatically reduce the profits from continued fraud. Faced with higher costs and lower profits, Lifeline carriers will incentives to cut down on abuse before it becomes a systemic problem.

But the *Order* doesn't contain an enforceable budget. Despite repeating the word "budget" 50 times, the *Order* does not constrain spending at all without further Commission action.[19] Instead, the *Order* contains only a reporting trigger—so that if Lifeline spending exceeds $2.025 billion in 2017 (or more in later years), a report must be drafted by July 31, 2018, and the Commission is expected to take "appropriate action" by January 31, 2019 (but none is required).[20] In other words, no matter how much is spent on Lifeline in 2016, 2017, and 2018, the *Order* does not anticipate Commission action until *2019*. That's not a budget—that's a fraud on the American taxpayer.

Second, the *Order* does not target limited Lifeline resources toward closing the digital divide. Our goal should be increasing broadband adoption—that is, helping Americans without Internet access cross the digital divide, not supporting those who have already made the leap.

Roughly one third of all households in the United States—38.9 million—are currently eligible for the Lifeline program. Of those households, 25.2 million already subscribe to broadband Internet access services.[21] If every one of these households subscribed to Lifeline, it would cost taxpayers $2.8 billion a year, dwarfing the current cost of the Lifeline program without increasing broadband adoption among low-income families one bit.

There's reason to fear that most Lifeline funds in the expanded program will flow to households that already subscribe. A recent study of the existing Lifeline program, for example, found that 87.5% of Lifeline subscribers could afford and would subscribe to telephone service even without the subsidy.[22] And that will likely be the case for broadband Lifeline subsidies. After all, households that are already online have the computers and modems needed to get a connection and already understand the value of a home Internet connection. And every dollar spent on already-connected household is one dollar less that can be spent promoting actual broadband adoption, the whole goal of the expansion.

In contrast, targeting support appropriately has the potential to save taxpayers hundreds of millions of dollars each year. After all, a budget of $1.65 billion is sufficient for every single Lifeline-qualifying household without broadband Internet access to participate in the program—and that assumes that every such household chooses to subscribe through the program.[23] That's $600 million a year less than the "budget" number in the item, and $600 million that all consumers can expect to pay in universal service taxes because of the Commission's failure.

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[18] Say, for example, that the Commission projected spending to exceed the budget by 1%. In that case, the FCC would reduce carrier payments by 1% to keep spending in check.

[19] *Cf.* Inigo Montoya, *The Princess Bride* (Act III Communications 1987) ("You keep using that word. I do not think it means what you think it means.").

[20] *Order* at para. 402. Because the Bureau itself cannot propose new rules, presumably that "appropriate action" would be a Notice of Proposed Rulemaking, with several more months delay until final action.

[21] Universal Service Administrative Company, USAC Data on the federal Universal Service Lifeline Program at 4 (2016), http://go.usa.gov/cezUd.

[22] Olga Ukhaneva, Universal Service in a Wireless World at 18 (Nov. 17, 2015), *available at* http://bit.ly/1WcWrUQ.

[23] In 2015, Lifeline spent approximately $10.03 per month per subscribers, and 13.701 million Lifeline-qualifying households did not subscribe to broadband Internet access service.

Third, the *Order* does not address the real problem of excessive Lifeline spending on Tribal lands. It is one thing to give an enhanced subsidy to those living on sparsely populated, remote Tribal lands where costs are high and communications infrastructure is lacking. It's another to give a $34.25 subsidy to the residents of cities that have advanced telecommunications infrastructure and are in the top 50 in the United States in population, like Tulsa, Oklahoma (2010 Census population: 391,906). The *Order* gives no reason whatsoever why low-income residents of Tulsa, which lies in the most densely populated county in the entire state, require higher subsidies than those in, say, Labette County—a struggling rural county right across the border in Kansas where I grew up. And I can think of none. Nor does the *Order* explain how it will combat the programmatic abuse that such a high subsidy encourages. Directing the enhanced subsidy to Tribal lands in low-density counties would dramatically reduce the incentive for fraud and save taxpayers tens of millions of dollars a year—and yet the *Order*, without explanation, takes no action.

Fourth, the *Order* does not address known loopholes that let unscrupulous carriers exploit the program. For example, a GAO report from 2011 noted that the "current version of the form used by ETCs to make reimbursement claims from the USF does not provide USAC with enough information to perform validations crucial to preventing mistakes and abuse."[24] Five years later, that form still contains almost no information that would enable a meaningful audit: A Lifeline carrier need only identify the total number of subscribers it claims as well as the total subsidy it seeks.[25] And so genuine oversight of these filings—a critical deterrent to waste, fraud, and abuse—remains exceedingly difficult.

Or take the much-hyped National Lifeline Accountability Database (NLAD). Whatever good it has done (and it does appear to have reduced duplicate fraud to some extent), the NLAD is still designed to allow carriers to bypass its safeguards. For instance, the NLAD employs a third-party independent verifier to review each Lifeline subscriber's name, date of birth, and partial Social Security number. But carriers can and do override those checks with a push of a button.[26] Postal addresses are similarly checked—and can be overridden.[27] And same-household duplicates are checked—and can be overridden.[28] Each of these carrier overrides is an opening for fraud, and yet USAC does not verify in real time that these overrides are legitimate because the FCC has not told it to do so. Instead, the honor system rules, even when there's no reason to think a carrier is being honest.

Or consider the problem of misusing eligibility documentation. Some federal programs, like the Supplemental Nutrition Assistance Program (SNAP), distribute temporary cards that lack identifying participant information on their face.[29] Without such information on the card, a carrier can use it to validate anyone as Lifeline-eligible, and start receiving a subsidy for providing service. The *Order* recognizes the problem but defers action for further study—the Washington way of saying "we're not going to do anything about it."[30]

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[24] GAO 2015 REPORT at 35.

[25] FCC Form 497 (April 2012 Edition), *available at* http://bit.ly/1PUDdM7.

[26] *See* USAC, National Lifeline Accountability Database, Third Party Identity Verification (TPIV) Failure Resolution, http://bit.ly/1q78MND (visited Mar. 31, 2016) (explaining how carriers can override TPIV failures).

[27] *See* USAC, National Lifeline Accountability Database, http://bit.ly/1V9UTvd (visited Mar. 31, 2016) ("Q44: Why is the subscriber's address not being accepted?" "A44: . . . [Y]ou can override an AMS error by selecting one of the available 'A' codes in the 'Resolution Error Codes' drop box in the 'Subscriber Eligibility Information' section.").

[28] *See* USAC, National Lifeline Accountability Database, http://bit.ly/1V9UTvd (visited Mar. 31, 2016) ("Q42: How do I enroll a subscriber if I receive a 'Duplicate Address' error." "A42: . . . In the 'Subscriber Eligibility Information' section on the 'Enroll Subscriber' page, select 'Yes' for 'Independent Economic Household,' enter the date in 'IEH Certification Date,' then proceed with enrollment.").

[29] *See* U.S. Department of Agriculture, Food and Nutrition Service, Supplemental Nutrition Assistance Program (SNAP) (Aug. 21, 2015), *available at* http://go.usa.gov/ceSy3.

[30] *Order* at note 372.

Or consider the problem of Lifeline trafficking, where a Lifeline-qualifying individual gets a free phone and sells it to someone who does not qualify for the program. One safeguard against such abuse was a requirement to recertify subscribers who only had temporary addresses every 90 days.[31] Despite the fact that carriers easily complied with this requirement—indeed, only 6% of Lifeline subscribers have temporary addresses according to the NLAD—the *Order* eliminates the safeguard on the hope that other safeguards will be sufficient.[32]

Fifth, the *Order* cuts state commissions out of the Lifeline designation process, crippling their ability to guard against waste, fraud, and abuse.[33] That's a disaster in the making. We need more cops on the beat, not fewer. And the state commissions thus far have the best track record.

Recall that it was the state commissioners on the Federal-State Joint Board—not the FCC—that identified the growing waste, fraud, and abuse in the Lifeline program in 2010. It was the Massachusetts Department of Telecommunications and Cable that audited TracFone, which "revealed that only 51 percent of those sampled could be recertified for Lifeline eligibility."[34] It was the Florida Public Service Commission that cracked down on carriers receiving Lifeline subsidies for consumers who never used the service.[35] It was the California Public Utilities Commission that established electronic verification procedures to reduce eligibility and duplicate-subscriber fraud.[36] And it was the Oklahoma Corporation Commission that "first identified fraudulent funding requests from Icon Telecom."[37]

States are still the best cops on the beat. It is the commissions in Florida, Kansas, Kentucky, Michigan, Minnesota, Washington, and Wisconsin that have revoked the designations of Lifeline carriers for abuse.[38] It is the Michigan Public Service Commission that recertifies Lifeline carriers each year to make sure they are complying with state and federal law.[39] It is the California Public Utilities Commission that "has found inaccurate and misleading statements in FCC-approved compliance plans."[40] Perhaps that's why the National Governors Association has stated that the FCC's scheme to neuter state commissions "would disrupt the existing state-federal partnership and preempt states' authority to protect consumer interest."[41] And perhaps that's why 96 state commissioners from 37 separate state commissions wrote us that cutting states out will "*only* increase fraud and abuse of the Lifeline program" and "result in the provision of substandard services to Lifeline consumers."[42]

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[31] *2012 Lifeline Reform Order*, 27 FCC Rcd at 6696–97, para. 89.

[32] *Order* at para. 437 & note 1091.

[33] *Order* at paras. 249–58.

[34] *Joint Board Lifeline Recommended Decision*, 25 FCC Rcd at 15627, para. 82.

[35] *Id.*

[36] *Id.* at 15629, para. 87.

[37] Letter from Steve Russell, Markwayne Mullin, Tom Cole, Jim Bridenstine, & Frank Lucas, Members of Congress, to the Honorable Tom Wheeler, Chairman, FCC, WC Docket Nos. 11-42, 09-197 (Mar. 25, 2016).

[38] Letter from Travis Kavulla, NARUC President & Commissioner, Montana Public Service Commission, et al., to the Honorable Thomas Wheeler, Chairman, FCC, et al., WC Docket Nos. 11-42, 09-197, at 2 n.4 (Mar. 20, 2016) (96 Commissioners Letter).

[39] Letter from Sally A. Talberg, Chairman, Michigan Public Service Commission, et al., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 11-42, 09-197, 10-90, at 2 (Feb. 8, 2016).

[40] Letter from Catherine J.K. Sandoval, Commissioner, California Public Utilities Commission, et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 11-42, Attach. at 1 (Feb. 22, 2016).

[41] NGA Urges FCC to Reject Proposal That Weakens States' Authority (Mar. 30, 2016), *available at* http://bit.ly/1oollmL.

[42] 96 Commissioners Letter at 1.

Against these critiques, the *Order* offers one retort: The FCC "will curb abuse in the program . . . by creating the National Verifier, which will transfer the responsibility of eligibility determination away from Lifeline providers."[43]

We've seen this song and dance before. In 2010, the *National Broadband Plan* recommended "a centralized database for online certification and verification, based on numerous such proposals in the record."[44] Later that year, the Federal-State Joint Board noted that a "national database could eliminate fraudulent and duplicate claims,"[45] and FCC Commissioners Mignon Clyburn and Meredith Attwell Baker both argued for moving forward with one.[46] And in the *2012 Lifeline Reform Order*, the Commission actually ordered the creation of a national eligibility database—at least for the three most popular Lifeline-qualifying programs—by the end of 2013.[47] But despite the Commission's directive, that national eligibility database still doesn't exist.

Despite the fanfare, this *Order* is more of the same. It does not establish a National Verifier. It does not establish a national eligibility database. And it does not adopt additional safeguards that will be in place once the *Order* is effective. Instead, it devotes paragraph after paragraph to describing all the decisions that still need to be decided at a later point in time (*e.g.*, how to populate the National Lifeline Eligibility Database,[48] how to determine eligibility electronically,[49] how to determine eligibility manually,[50] how to resolve disputes,[51] how to interact with Lifeline carriers and subscribers,[52] how to work with state and Tribes,[53] how to process payments,[54] and even whether the National Lifeline

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[43] *Order* at para. 7.

[44] National Broadband Plan at 173.

[45] *Joint Board Lifeline Recommended Decision*, 25 FCC Rcd at 15612, para. 38.

[46] *Id.* at 15631 (Statement of Commission Mignon L. Clyburn, Approving in Part and Concurring in Part) ("[T]he exploration of a national database that would allow for real-time eligibility and verification checks through electronic processes is promising, and I encourage interested parties to continue working on this proposal."); *id.* at 15635 (Statement of Commissioner Meredith Attwell Baker) ("One proposal in particular that merits additional study is the potential establishment of a national database for certification and verification.").

[47] *2012 Lifeline Reform Order*, 27 FCC Rcd 6753, para. 223 ("[W]e direct the Bureau and USAC to take all necessary actions so that, as soon as possible and no later than the end of 2013, there will be an automated means to determine Lifeline eligibility for, at a minimum, the three most common programs through which consumers qualify for Lifeline.").

[48] *Order* at note 368 ("USAC may propose to the Bureau how and whether the information in the NLAD can or should be used to populate the [Lifeline Eligibility Database].").

[49] *Order* at para. 135 ("We direct USAC to seek the most cost effective and efficient means to incorporate electronic eligibility certification into the National Verifier wherever feasible.").

[50] *Order* at note 372 ("We direct USAC to propose acceptable documentation for the manual review to the Bureau.").

[51] *Order* at note 378 ("We direct USAC to propose a process for dispute resolution to the Bureau for approval for the National Verifier.").

[52] *Order* at para. 138 ("We direct USAC to work with the Bureau to develop interfaces that promote the objectives of the National Verifier and serve the needs of users in a cost-effective and efficient manner."); *Order* at note 390 ("For example, the National Verifier *may* have an interface that is consumer-friendly and geared towards subscribers. It *may* have another interface that is geared toward providers that may allow application programming interfaces (machine-to-machine interaction)." (emphasis added)).

[53] *Order* at para. 142 ("[W]e direct USAC, as part of its development and operation of the National Verifier to consider opportunities to coordinate and partner with states. . . . Prior to initiating these Tribal or state partnerships, USAC must submit a proposed partnership plan to the Bureau indicating how it is congruent with the National Verifier and the Bureau must approve of establishing such a partnership as proposed by USAC.").

Eligibility Database will be a database![55]). The expectation is that USAC will come up with a plan by December 1, 2016, and that the National Verifier will be fully implemented by the end of 2019.[56]

In other words, the *Order* expands the Lifeline program to broadband now, fails to target that support now, maintains enhanced incentives for fraud on urban Tribal lands now, eliminates checks against waste, fraud, and abuse now—and hopes that a National Verifier will be up and running *in three years*. Given the FCC's failure to follow through on its promises on this front for almost half a decade, I doubt this time will be different.

II.

There's another problem with the *Order*: It consigns Lifeline consumers to second-class digital status for the foreseeable future.

Just two months ago, four commissioners agreed that "advanced telecommunications capability"—that is 25 Mbps/3 Mbps fixed broadband and 4G LTE mobile broadband—"is not being deployed to all Americans in a reasonable and timely fashion,"[57] with Americans lacking access more likely to live "in counties with the lowest median household incomes . . . and the highest poverty rate."[58] Having concluded as much, the statute tells us to "take immediate action to accelerate the deployment of such capability,"[59] which the agency proposed to do in part by expanding the Lifeline program to "improv[e] access to broadband for our nation's most vulnerable populations."[60]

FCC commissioners have not been shy about how important that metric is. For instance, Chairman Tom Wheeler has said the 25 Mbps "standard recognizes how consumers actually use broadband at home today, and is 'table stakes' in 21st century communications."[61] Commissioner Mignon Clyburn has said that broadband at speeds of 25 Mbps is necessary "to support the very technologies that promise to be both life altering and life-saving"—technologies "[w]e must ensure all consumers have access to."[62] Commissioner Jessica Rosenworcel has pushed a standard of 100 Mbps

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[54] *Order* at para. 143 ("We also direct USAC to propose to the Bureau and OMD improved methods of providing payment to the Lifeline providers that will reduce costs and burdens to the Fund and to Lifeline providers.").

[55] *Order* at note 386.

[56] *Order* at paras. 162, 164.

[57] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 15-191, 2016 Broadband Progress Report, 31 FCC Rcd 699, 701, para. 4 (2016) (*2016 Broadband Progress Report*).

[58] *Id.* at 739, para. 91.

[59] Telecommunication Act of 1996, § 706(b).

[60] *2016 Broadband Progress Report*, 31 FCC Rcd at 754, para. 131.

[61] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 15-191, Eleventh Broadband Progress Notice of Inquiry, 30 FCC Rcd 8823, 8854 (2015) (Statement of Chairman Tom Wheeler); *see also* Prepared Remarks of FCC Chairman Tom Wheeler at 1776 Headquarters, Washington, DC, "The Facts and Future of Broadband Competition" at 3 (Sept. 4, 2014).

[62] *Inquiry Concerning the Development of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 FCC Rcd 1375, 1482 (2015) (Statement of Commissioner Mignon Clyburn).

because "anything short of goals like this shortchanges our children, our future, and our digital economy."[63]

And yet, when it comes to actually delivering for America's low-income families and students, the Commission majority takes a far different tack. 10 Mbps fixed broadband is deemed sufficient for a poor family's home. 3G mobile broadband—service so slow the Commission *didn't even bother to measure it* in the *2016 Broadband Progress Report*—is all the impoverished need get. The *Order* goes out of its way to give Lifeline subscribers the opportunity to buy hotspot-enabled smartphones (for all the good that will do them over a 3G network).[64] But it doesn't do a thing to make sure that Lifeline subscribers have the option to purchase the 25 Mbps fixed and 4G LTE mobile broadband that many other Americans take for granted—and that the majority happily lectured us last year was a digital floor.

The way to ensure that Lifeline supports broadband for low-income Americans is to start supporting broadband for low-income Americans. So I implored my colleagues to increase the minimum standards. I asked that we ensure a timely transition to faster services. I requested that we at least give low-income consumers the option of directing their Lifeline subsidy to the higher-speed services. But despite high-minded rhetoric from some quarters that "we have a moral and statutory obligation to do better,"[65] my requests for equal digital opportunity were categorically rejected. For all the kerfuffle about fast lanes, the FCC has decreed that Lifeline subscribers will be stuck in the slow lane.

Making things worse, the Commission also limits the ability of Lifeline subscribers to switch carriers by adopting a "port freeze."[66] This locks each and every Lifeline customer into a one-year contract with his or her carrier—even if the service is lousy, even if a better deal comes along the next month, even if their phone breaks, and even if the subscriber never wanted a one-year contract in the first place.

What is more, the FCC says it will serve as an enforcer of these one-year lock-up contracts, giving Lifeline carriers a stranglehold on their customers that regular carriers cannot get with a real, signed contract. The Commission does this over the objection of our own Consumer Advisory Committee, which urged us to "enable Lifeline consumers to change service providers and technology platforms at their discretion."[67]

Let me put it one more way: The *Order* claims its goal is to make broadband more affordable so that low-income Americans can enjoy the digital opportunities that should be available for everyone. But the *Order* won't require carriers to offer the fixed speed available to 96% of urban Americans or the mobile speed available to 99% of all Americans. And it will force Lifeline subscribers into one-year contracts with carriers even if they don't want them. That will not close the digital divide and is hardly the kind of respect that low-income families and students deserve.

III.

Last but not least: Many of the *Order*'s decisions violate federal law.

Start with the Administrative Procedure Act. Hornbook law says that, before an agency can adopt rules through a notice-and-comment rulemaking, it must first propose rules—or more precisely "the terms . . . of the proposed rule" and a "reference to the legal authority under which the rule is proposed."[68]

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[63] *2016 Broadband Progress Report*, 31 FCC Rcd at 777 (Statement of Commissioner Jessica Rosenworcel).

[64] *Order* at paras. 377–78.

[65] *2016 Broadband Progress Report*, 31 FCC Rcd at 774 (Statement of Chairman Tom Wheeler).

[66] *See Order* at paras. 385–94.

[67] FCC Consumer Advisory Committee, Recommendation Regarding Modernization of the Lifeline Program, WC Docket No. 11-42 et al., at 2 (filed Feb. 19, 2016).

[68] 5 U.S.C. § 553(b)(2)–(3).

The adopted rules may be a "logical outgrowth" of the original proposal,[69] but the key question "is one of fair notice"[70]—that is, whether "persons are sufficiently alerted to likely alternatives so that they know whether their interests are at stake"[71] and whether those interested parties "should have anticipated" the adopted rule.[72]

That's a problem for the *Order*'s new one-year port freeze.[73] The *Notice* didn't propose a port freeze. It didn't seek comment on a port freeze. It didn't even *mention* a port freeze.[74] Instead, that proposal came from a coalition of wireless Lifeline carriers two months after the *Notice* was adopted.[75] But an agency "cannot bootstrap notice from a comment"; it "must *itself* provide notice of a regulatory proposal."[76]

That's also a problem for the *Order*'s Wi-Fi, hotspot, and tethering mandates.[77] The *Notice* didn't propose that Lifeline carriers distribute Wi-Fi enabled devices, it didn't seek comment on that idea, and it didn't suggest it had the legal authority to do so.[78] Nor did the *Notice* propose or seek comment on a requirement to offer hotspot-capable devices.[79] Nor did it propose or seek comment on a prohibition on tethering charges.[80] Indeed, the record is utterly barren on these issues—save for the reply comments of TracFone, which itself proposed the Wi-Fi mandate,[81] and scattered last-minute *ex parte* filings by affected carriers.[82] If the Administrative Procedure Act standard "is one of fair notice,"[83] it's fair to ask whether an agency may adopt a bevy of new mandates without any notice at all.

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69 *Crawford v. FCC*, 417 F.3d 1289, 1295 (D.C. Cir. 2005).

70 *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

71 *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 170 (2d Cir. 2013) (internal quotation marks omitted).

72 *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) (per curiam) (internal quotation marks omitted).

73 *See Order* at paras. 385–94.

74 *Lifeline and Link Up Reform and Modernization; Telecommunications Carriers Eligible for Universal Service Support; Connect America Fund*, WC Docket Nos. 11-42, 09-197, 10-90, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818, 7846, 7848, 7861–62, 7865–66, paras. 65, 70, 116, 121, 127 (2015) (*Notice*) (discussing several other topics, but not a port freeze); *see also Order* at para. 386 (pointing to these same paragraphs as offering notice that the Commission was proposing to adopt a port freeze).

75 Joint Commenters Comments at 16 (seeking a one-year port freeze to reduce churn among the Lifeline subscriber base).

76 *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) (emphasis in original).

77 *See Order* at paras. 374–78.

78 *Notice*, 30 FCC Rcd at 7834–35, para. 29 (discussing public safety issues regarding Lifeline, but not a Wi-Fi mandate); *id.* at 7830–33, paras. 19–26 (discussing the "homework gap" and the need for data on Lifeline-eligible households with students, but not a Wi-Fi mandate); *id.* at 7865–66, paras. 129–30 (discussing licensed and unlicensed spectrum, but not a Wi-Fi mandate); *see also Order* at para. 374 ("Lifeline providers who make devices available with or without charge for use with a Lifeline-supported fixed or mobile broadband service must ensure that all such devices are Wi-Fi enabled.").

79 *Order* at para. 374 ("Lifeline providers who make devices available with or without charge for use with a Lifeline-supported mobile broadband service must also offer devices that are capable of being used as a hotspot.").

80 *Order* at para. 377 ("[B]ecause of the importance of tethering to bridging the 'digital divide,' providers may not impose an additional cost on tethering service for tethering that does not exceed the relevant minimum service standard for mobile broadband data usage allowance.").

81 TracFone Reply at 8.

82 *Order* at note 932 (citing two *ex parte* filings on these mandates, each filed in late March 2016). The *Order* also plucks out of obscurity two comments that mention hotspots. *See Order* at note 925. No cigar—they say nothing

And that's a particular problem for the *Order*'s new, federal eligible telecommunications carriers (ETC) designation process. That new process allows the FCC, and not state commissions, to designate Lifeline broadband providers. And the *Order* justifies this process under section 214(e)(6) of the Communications Act, which gives the FCC authority to designate ETCs 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."[84]

The *Order* traces a 10-step path—bear with me—to reach this result. The *Order* (1) reinterprets that section to mean that ETCs need not offer all supported services,[85] (2) reinterprets that section to suggest state commissions have no authority to designate ETCs with respect to supported interstate services,[86] (3) makes Lifeline broadband support a "separate element of the Lifeline program,"[87] and (4) then preempts state commissions from designating ETCs for that separate element.[88] Next, the *Order* reinterprets the limit on FCC authority that an FCC-designated ETC must be a "common carrier providing telephone exchange service and exchange access" to mean (5) that the supported service need not be telephone exchange service or exchange access,[89] (6) that the carrier itself need not provide telephone exchange service or exchange access,[90] (7) that the carrier need not have any facilities to provide telephone exchange service or exchange access,[91] (8) that the carrier need not have any customers for telephone exchange service or exchange access,[92] and (9) that the carrier need not provide telephone exchange service or exchange access for any length of time beyond when the carrier's ETC application is pending at the Commission.[93] For good measure, the *Order* also (10) forbears from that same limit on the FCC's authority.[94]

The *Notice* neither proposed, nor sought comment on, any of this. The *Notice* did not propose preempting state authority over ETC designations nor any of the four legal steps it takes to get there; instead it recognized that "state commissions have primary responsibility for designating ETCs."[95] The *Notice* never sought comment on reinterpreting section 214(e)(6)'s limits to give the FCC broader authority nor the five different way it does so; instead it acknowledged those limits forthrightly.[96] And the *Notice* never once suggested using forbearance to expand the FCC's authority.[97]

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about a mandate, which is hardly the kind of discussion one might expect if commenters knew that Wi-Fi, hotspot, and tethering mandates were on the table.

[83] *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

[84] 47 U.S.C. § 214(e)(6).

[85] *See Order* at paras. 242–46.

[86] *See Order* at paras. 240–42, 247.

[87] *Order* at para. 248.

[88] *See Order* at paras. 249–58.

[89] *See Order* at para. 261.

[90] *See Order* at para. 262.

[91] *See Order* at para. 264.

[92] *See Order* at para. 263.

[93] *See Order* at para. 265.

[94] *See Order* at paras. 266–73.

[95] *Notice*, 30 FCC Rcd at 7880, para. 185.

[96] *Id.* at 7863, note 250; *id.* at 7880–81, para. 185.

[97] *See id.* at 7917, para. 298 (citing several provisions as authority for adopting the *Notice*, but omitting section 10 of the Communications Act, which contains the FCC's forbearance authority).

The *Order* responds with two defenses, both unconvincing. *First*, the *Order* tries to sew together a patchwork quilt of snippets from the *Notice*.[98] But many of these snippets come from a section of the *Notice* where the Commission sought comment on "creating a process to participate in Lifeline that is entirely separate from the ETC designation process"[99]—a proposition that the *Order* thoroughly rejects as in conflict with "the existing, statutorily compelled paradigm" of requiring Lifeline carriers to be ETCs.[100] The remainder come from a section asking how to "design a more streamlined ETC designation process for federal default states"[101] and "what measures could be adopted to encourage state commissions to adopt a similar streamlined approach."[102] In other words, the *Notice* made clear that the FCC would work with state commissions, not oust them, if the FCC stuck to the statutory framework.

Second, the *Order* attempts to locate the notice for this proposal in the comments one party filed five years ago—comments that were cited in a footnote in the *2012 Lifeline Reform Order*.[103] And the *Order* correctly explains that ViaSat discussed preemption of state regulation on page nine of its 2011 comments.[104] But the *2012 Lifeline Reform Order* did not seek comment on ViaSat's proposal. It did not mention ViaSat's proposal. And it did not even cite the relevant page of ViaSat's comments.[105] Instead, it cited different parts of ViaSat's comments as support for a different proposition on which it did seek comment—a proposition that the *Order* affirmatively rejects.[106] And unfortunately for the *Order*, this failure is fatal because, as I noted earlier, an agency "cannot bootstrap notice from a comment"; it "must *itself* provide notice of a regulatory proposal."[107]

The lack of notice is not the only legal flaw with the *Order*'s new, federal ETC designation process.

For one, Congress gave primary authority for ETC designations to the states, relegating the Commission to a subordinate role. The text of section 214 of the Act makes that clear: State commissions "shall . . . designate" ETCs (paragraph (e)(2)), whereas the FCC may only do so "[i]n the case of a common carrier providing telephone exchange service and exchange access *that is not subject to the jurisdiction of a State commission*" (paragraph (e)(6)).[108] So does section 214's legislative history. Congress did not even assign the FCC this role in the Telecommunications Act; it adopted paragraph (e)(6) a year later to resolve what Senator John McCain called an "oversight" that Tribal carriers were not

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[98] *See Order* at para. 233.

[99] *Notice*, 30 FCC Rcd at 7866, para. 132; *see also id.* at 7866–69, paras. 132–41.

[100] *Order* at para. 223.

[101] *Notice*, 30 FCC Rcd at 7863, para. 122.

[102] *Id.* at 7863, para. 124.

[103] *Order* at para. 234.

[104] *Id.*; ViaSat April 22, 2011 Comments at 9 ("Notably, federal law and policy preempt state regulation where such regulation would stand[] as an obstacle to the accomplishment and execution of the full objectives of federal policy, and any assertion of state jurisdiction over satellite broadband services necessarily would conflict with federal policy, and thus be subject to preemption." (footnotes omitted)).

[105] *2012 Lifeline Reform Order*, 27 FCC Rcd at 6856, para. 504 & n.1226.

[106] *Order* at para. 223 (rejecting proposition that carriers could participate in Lifeline without being designated ETCs).

[107] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) (emphasis in original).

[108] *Compare* Communications Act § 214(e)(2) ("A State commission shall upon its own motion or upon request designate a common carrier . . . ."), *with* Communications Act § 214(e)(6) ("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 . . . ." (emphasis added)).

subject to the jurisdiction of any state commission.[109] And our own precedent frames the section as giving "state commissions . . . the primary responsibility for the designation of eligible telecommunications carriers."[110] Where Congress itself has given prime responsibility to state commissions, not the FCC, we have no power to reverse course based on our own notions of what is the best federal policy.

In turn, nothing in the Act, its legislative history, or our precedent suggests that state commissions lose their authority to designate ETCs with respect to interstate services. Congress expressly chose to limit state authority to intrastate services only in unserved areas: "If no common carrier will provide [supported] services . . . to an unserved community . . . *the Commission, with respect to interstate services* or an area served by a common carrier to which paragraph (6) applies, or a *State commission, with respect to intrastate services*, shall determine which common carrier . . ." (paragraph (e)(3)).[111] In other words, Congress knew how to draw a jurisdictional line in section 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.

For another, the FCC cannot rely on section 706 of the Telecommunications Act of 1996 to overcome the clear lines of section 214 of the Communications Act.[112] As I have explained elsewhere, that section confers no authority on the FCC, let alone preemption authority.[113] And it's "a commonplace of statutory construction that the specific governs the general,"[114] especially "where . . . Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions."[115] Because section 214 specifically assigns the authority for ETC designation to state commissions and section 706 says nothing whatsoever about that authority, the former must trump the latter.[116]

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[109] *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas et al.*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12257, para. 98 & n.236 (2000) (discussing the legislative history of section 214(e)(6)).

[110] *Id.* at 12255, para. 93; *see also, e.g.*, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 20 FCC Rcd 6371, 6374, para. 8 (2005); *Virgin Mobile USA, L.P. Petition for Forbearance from 47 U.S.C. § 214(e)(1)(A) et al.*, CC Docket No. 96-45, Order, 24 FCC Rcd 3381, 3383, para. 5 (2009); *Notice*, 30 FCC Rcd at 7880, para. 185.

[111] *See* Communications Act § 214(e)(3) (emphases added).

[112] *See Order* at paras. 253–54.

[113] *City of Wilson, North Carolina Petition for Preemption of North Carolina Statute Section 160A-340 et seq.; the Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601*, WC Docket Nos. 14-115, 14-116, Memorandum Opinion and Order, 30 FCC Rcd 2408, 2511–18 (2015) (Dissenting Statement of Commissioner Ajit Pai).

[114] *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

[115] *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2070 (2012) (internal quotation marks omitted).

[116] The *Order* responds that section 214(e) isn't more "specific" than other provisions because it is not "an affirmative grant of authority to states to perform ETC designations." *Order* at note 685. Of course it is! In section 214, Congress invented the term "ETC," defined the requirements to be an ETC, and held that states "shall . . . designate" ETCs. *See* Communications Act §§ 214(e). The grant of authority could not be clearer. *Cf.* Letter from Tom Wheeler, Chairman, FCC, to the Honorable Anna G. Eshoo, Representative, U.S. House of Representatives (Mar. 18, 2016) ("Section 629 of the Communications Act is explicit: 'The Commission *shall* . . . adopt regulations to assure the commercial availability, to consumers of multichannel video programming'" of set-top boxes

For yet another, the results of the *Order*'s preemption analysis make no sense. One might think that if "states are preempted from exercising authority to designate Lifeline Broadband Providers,"[117] then state commissions would not be able to oversee, impose conditions on, or revoke the designation of Lifeline broadband ETCs. But that's not the case. States may still oversee, impose conditions, and revoke the designation of existing Lifeline ETCs—who may become Lifeline broadband ETCs without seeking FCC designation.[118] Apparently, states may still oversee even federally designated Lifeline broadband ETCs.[119] States may still designate high-cost broadband ETCs[120]—who by definition must be Lifeline broadband ETCs. And if a Lifeline broadband ETC wants to participate in a state-level Lifeline fund, the *Order* makes clear the state can require "ETC designation from the relevant state commission."[121] In other words, the *Order* preempts state designation—except when it doesn't. Such convoluted reasoning finds no support in the Act, and I cannot think of any reason to believe that such an unsteady and arbitrary framework actually makes good federal policy.

On one last point, the *Order* effectively ignores a major limit Congress placed on the FCC's ETC-designation authority: the designated carrier must be "providing telephone exchange service and exchange access."[122] In sum and substance, the *Order* says a carrier can qualify for federal designation so long as it considers reselling telephone service to someone, somewhere while its application for federal ETC designation is pending.[123] But even this Commission cannot transmogrify "providing" into "possibly considering to someday think about providing." That renders the statutory language utterly meaningless, a total nullity—and violates the canon that we should be "reluctant to treat statutory terms as surplusage in any setting."[124]

Recognizing this legal vulnerability, the *Order* then pivots to forbear from the requirement entirely. But the statute limits our forbearance authority to applying provisions of the Act to *carriers*, not to the FCC itself.[125] And for good reason. If the FCC could override limits on its own authority using forbearance, all the constraints Congress placed on the FCC in the Act would be meaningless. Despite much searching, I cannot find a single decision where the Commission has exercised forbearance to

(emphasis in original)). Although the *Order* suggests that reading makes section 214(e)(6) "surplusage because section 214(e) would itself supply the state jurisdiction," *Order* at note 685, it forgets that Congress cannot commandeer state actors to execute federal law, *see Printz v. United States*, 521 U.S. 898, 933 (1997), and so even with a federal grant of authority, a state can deny its own commission the jurisdiction to carry out the ETC designation process.

117 *Order* at para. 256.

118 *Order* at paras. 299, 310 (noting existing ETC designations, state and federal, are sufficiently broad to enable participation in Lifeline broadband program).

119 *Order* at note 697.

120 *Order* at para. 257.

121 *Order* at para. 288.

122 Communications Act § 214(e)(6).

123 *See Order* at paras. 260–65. At one point, the *Order* points to several dictionaries to define the word "provide" and selects what appears to be the broadest meaning (to "make available") as the appropriate definition. *Order* at note 710. The *Order* fails to recognize that a carrier with no facilities, no customers, no sales, and no service is hardly making telephone exchange service and exchange access available, let alone providing it.

124 *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal brackets and quotation marks omitted).

125 Communications Act § 10(a) ("[T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets . . . .").

expand its own authority rather than to relieve a carrier from an obligation.[126] The reason is obvious: The statute does not permit it.

* * *

The truth is, it didn't have to be this way. Despite my many concerns with the *Order*, I believed that a bipartisan compromise was possible, and I offered one to all four of my colleagues on March 25.[127]

One day before the vote, my office finalized a bipartisan compromise with Commissioner Mignon Clyburn and Commissioner Mike O'Rielly on a way to modernize the Lifeline program while staying faithful to our core principles. It was not an easy agreement to reach. Our three offices began working on a compromise on March 30. My staff worked with theirs through the night revising the *Order* in order to implement that bipartisan agreement. At 9:49 a.m. on March 31, the morning of the vote, all three offices formally agreed to a document on the official chain that memorialized the compromise.

At 10:30 a.m., when the Commission's meeting was scheduled to start, that agreement remained in place—but the Chairman delayed the meeting's start until 12:00 p.m. At noon, when Commissioner O'Rielly and I came to the Commission meeting room and were ready to vote, that agreement remained in place—and the Chairman again delayed the meeting. By the time the meeting finally began at 2:00 p.m., Commissioner Clyburn had backed out of the agreement.

Why?

It turns out that since early that morning, perhaps even late the night before, Chairman Wheeler and his staff were actively working to unwind that bipartisan compromise. Those efforts started with leaking nonpublic information to the press.[128] The Chairman's Office then encouraged lawmakers and stakeholders, from the usual gaggle of left-wing, Washington special interests to former FCC Commissioners, to blast the deal before the votes could be cast—indeed, before they even knew what the deal was.[129]

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[126] In response, the *Order* points to the *Section 652 Forbearance Order*, which forbore from enforcing a provision that prohibited competitive local exchange carriers from merging with cable operators. *See Order* at notes 715–16; *Petition For Declaratory Ruling To Clarify 47 U.S.C. § 572 In The Context of Transactions Between Competitive Local Exchange Carriers and Cable Operators; Conditional Petition For Forbearance From Section 652 of the Communications Act For Transactions Between Competitive Local Exchange Carriers and Cable Operators*, WC Docket No. 11-118, Memorandum Opinion and Order, 27 FCC Rcd 11532, 11542–43, para. 22–24 (2012). The relevant provision there clearly prohibited certain conduct by outside parties and the forbearance in no way expanded the FCC's jurisdiction. Accordingly, I do not see its relevance to the case at hand.

[127] That proposal consisted of a $1.75 billion budget; a mechanism to ensure the FCC stayed within that budget; reform of the "enhanced" subsidy that created incentives for waste, fraud, and abuse; and minimum, "table stakes" standards for fixed and mobile broadband service under the Lifeline program. Statement of FCC Commissioner Ajit Pai on Modernizing the Lifeline Program in a Fiscally Responsible Way (Mar. 29, 2016), *available at* http://go.usa.gov/cHbk4.

[128] Margaret Harding McGill, FCC delays meeting for last-minute Lifeline negotiations, *Politico Pro Technology Whiteboard* (Mar. 31, 2016 10:47 a.m.) ("The FCC delayed its monthly meeting this morning to vote on the revamp of the Lifeline phone subsidy program to also support broadband after a Democratic commissioner reached a last-minute deal with Republicans on a program budget"). I look forward to seeing the Chairman's written authorization for his office's disclosure of this nonpublic information, as required under our rules. 47 C.F.R. § 19.735-203.

[129] *See, e.g.*, Notice of Ex Parte by Office of Commissioner Clyburn, WC Docket No. 11-42 et al. (Mar. 31, 2016), *available at* http://go.usa.gov/cHjCk (describing calls that "morning and early afternoon" with the offices of Representatives Nancy Pelosi, Mike Doyle, Anna Eshoo, Doris Matsui, and Jerry McNerney and Senators Richard Blumenthal, Cory Booker, Claire McCaskill, and Chris Murphy); Letter from Representatives G.K. Butterfield, Doris Matsui, Frank Pallone, Jr., Anna G. Eshoo, Michael F. Doyle, Yvette D. Clarke, Bobby L. Rush, Jerry McNerney, and Ben Ray Lujan, to the Honorable Tom Wheeler, Chairman, FCC (Mar. 31, 2016) ("We write to express concerns that the Commission is considering establishing a hard cap on the Lifeline program, We urge the Commission to reject a cap when it votes at the Agenda meeting today.").

It is one thing to refuse to work toward bipartisan compromise—a trait that, for some reason, the Chairman wears with a badge of honor that distinguishes him from everyone else, Republican and Democrat alike, who has ever held that seat. It is quite another thing to launch a political campaign to force a Democratic FCC Commissioner to renege on a bipartisan compromise on her signature issue.

I have spent the vast majority of my career in public service. I have worked as a staffer on the Senate Judiciary Committee on controversial issues like immigration with Democrats like Barack Obama. I have worked as a staffer at the Justice Department on controversial issues like reauthorization of the Patriot Act with Democrats like Dianne Feinstein. I have worked as a staffer and now as a Commissioner at the FCC with Democrats on many more controversial issues. The common thread of my work for many years has been to find common ground—because I believe common ground exists and it just takes work to find it.

And so it gives me no pleasure to state the obvious: This agency in this proceeding represented the worst of government. A bipartisan agreement that would have delivered digital opportunity to millions of Americans was thrown away and even a Democratic commissioner was bulldozed simply because the Chairman could get away with it.

The Commission's failure to clean up the waste, fraud, and abuse in the Lifeline program puts the entire enterprise in jeopardy. It will take a future agency, one whose members work in good faith and believe in good policy, to decide what comes next.

I dissent.