

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

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.

For over a year, I argued that there is a viable path to reform the Lifeline program in a way that garners bipartisan support at the Commission. The program would shift to include support for broadband service, but in the context of a firm budget and with additional measures to protect against waste, fraud and abuse.

Unfortunately, my office was shut out of the process to discuss and develop the policy decisions contained in the order. Requests for information about the item were denied until just prior to circulation. Once again, outside parties knew more about the terms than we did. And when we finally did receive the order, after press briefings were well underway, it was so slanted we assumed there was no interest in coming to consensus.

Then an unexpected ray of hope appeared. After months of asking the majority to discuss the budget, a Commissioner came to me the day before the Commission meeting to offer a compromise on the issue; one that was tough for me to accept but ultimately seemed to balance our differing concerns. For all the many process flaws that led us to where we were, I approached the table in good faith with the belief that I could trust the word of a Commissioner. We worked together to come to agreement and had finally reached an accord the morning of the Commission meeting. I think it is fair to say that everyone involved felt that they had moved considerably from their original positions in the spirit of collaboration and compromise. Now it seems even that basic foundation has gone out the windows of the Eighth Floor. What has happened will do irreparable harm to our ability to engage going forward.

The most disappointing part of watching the budget deal reversal was that it was attacked for all the wrong reasons. Contrary to the panicked claims that ensued when news of a deal was reported by press, a budget would not have harmed the program or recipients that depend on the subsidy for service. It could be accommodated while achieving the stated goal of shifting the program to broadband. It could reach *all eligible households that lack sufficient broadband* while staying within reasonable fiscal limits. It could help mitigate lingering concerns about waste, fraud, and abuse in the program. In other words, it could have put the program back on firmer footing, making it less likely to be challenged in the future.

Data from the FCC's universal service fund Administrator, USAC, proved it could be done. The filing noted that there are 13.701 million Lifeline eligible households with insufficient broadband.¹ That includes, for example, Lifeline-eligible households with school-aged children that the Commission wants to ensure are connected. Therefore, if the Commission wanted to shift the program to broadband and target those that need it, including key subgroups, that would seem to be the appropriate population.

Notably, in 2014, when Lifeline cost \$1.6 billion, there were 13.447 million Lifeline subscribers.² Therefore, even if all eligible households with insufficient broadband enrolled in the revised Lifeline program, the cost would be just slightly more than before. Of course, enrollment is likely to be much lower. It has hovered at 32 percent.³ So there would have been plenty of room within a \$1.6 billion

¹ Letter from Michelle Garber, USAC to Ryan Palmer, FCC, WC Docket No. 11-42 (filed Feb. 24, 2016) (USAC Lifeline Letter).

² Federal-State Joint Board on Universal Service, Universal Service Monitoring Report, CC Docket No. 96-45 et al., at Tables 2.1, 2.2 (December 2015), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0316/DOC-337019A1.pdf.

³ See USAC Lifeline Letter.

budget to accommodate all eligible households that actually want to enroll in the program, and even factoring in enrollment growth due to the increased outreach contemplated in the item.

I was even willing to go as high as \$2 billion—a significant concession and more than could be justified on the data alone—in order to obtain a long-overdue and fiscally responsible cap on the program. However, the majority was averse to set a firm budget at any level, even though all other universal service programs operate within a cap or budget. There is no reason to treat this program differently, especially since two of my Democratic colleagues worked extensively to establish a budget cap for Rate of Return carriers as part of Commission reforms just enacted last week.

Notably, there are entire communities that have no access to broadband because it is uneconomic to deploy networks even with a high-cost subsidy. There are no opportunities for low-income residents to receive discounted service because nobody has service. Period. But so called “consumer” groups say nothing. They have not participated in the high-cost program reform efforts during the more than two years that I have been at the Commission. The Remote Areas Fund is several years overdue but nobody seems to care about those consumers.

In contrast, if there’s the slightest chance that a person might not receive a Lifeline discount at some undefined future point in time, it is suddenly a source of grave concern and every alarm bell must be rung throughout town. What seems to be lost in the angst is that even if the Commission sets a cap, it always reserves the right to vote to increase it later should a future Commission decide it is warranted. This is the safety valve that some groups erroneously claim would be missing. Indeed, the Commission recently increased the cap on the E-rate program, proving that this can be done and that a cap does not impair the Commission’s flexibility to respond to changed circumstances. What it does do, however, is provide accountability because the Commission would need to affirmatively consider and explain why more money is needed. So outrage over a cap really seems to boil down to outrage over accountability.

At the same time, there has been a misrepresentation of the functions of the program and its overall treatment by the Commission. Contrary to the misguided arguments by some people about social safety nets and their desire to treat it like an entitlement program, the Lifeline program is not one. As I have stated before, the Commission retains full right to limit or end the program without any legal claim by those currently eligible. We don’t need a change in the law or blessing from the courts. This simple fact should serve as a reminder to those who express outrage to my Democratic colleagues that the Commission dare consider an overall cap to bring fiscal sanity to a program woefully in need of one. If balancing the recipient benefits with the actual costs on those paying for the program is out of the question, than I shudder to think about whether they believe any limitation or budget is ever appropriate for any federal program. How can Lifeline not have a budget but NIH spending rightfully does? Why is there a Defense budget today in times of war and crisis in almost every part of the world?

Instead of a budget, the order creates a phony “budget mechanism” and sets an initial spending goal of \$2.25 billion. That’s a 50 percent increase over 2015 spending, with no analysis as to why that’s the right number. My proposal to set a cap at \$1.6 billion is grounded in real data. The Commission’s decision to set an illusory “budget” at \$2.25 billion, by contrast, is completely arbitrary.

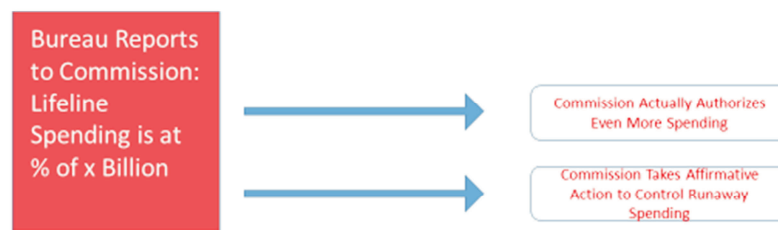
The order notes that it would accommodate more households—over 20 million—but there’s no explanation as to why that’s the right number, other than the fact that it conveniently matches the 20 million figure set forth in the Administration’s ConnectALL fact sheet, to which the Commission is not beholden. If the majority’s theory is that everyone currently “eligible” ought to be able to participate, whether they need the subsidy or not, then it is acknowledging 20 million is only half the distance to the nearly 39 million that are currently eligible. In other words, they concede not everyone eligible would be covered under their grandiose expansion formulation.

Or perhaps that’s why the “budget mechanism” is not actually a “budget”. Reaching the full participation level would require over \$5 billion a year. That would increase fees on consumers’ phone

bills from approximately 18 percent to over 26 percent. So the FCC needed a path to be able to get to \$5 billion while appearing to care about the size of the program. Enter the fake “budget mechanism.”

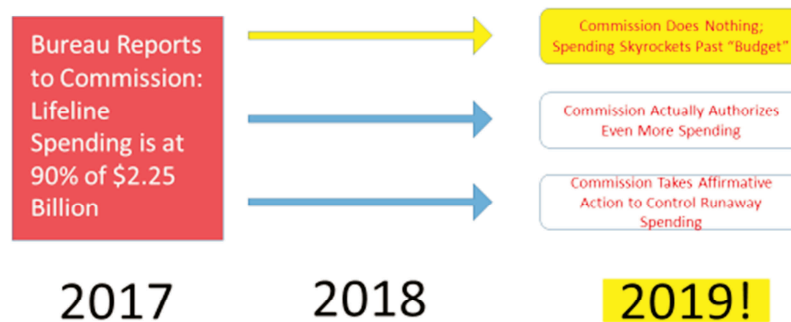
To illustrate the difference between a “budget” and a “budget mechanism”, I include two diagrams. First, we see a fair representation of what any reasonable person is talking about when they say the word “budget.” A number is set, and once spending approaches this level you have two options. Either act affirmatively to raise the budget, or act affirmatively to control the spending and keep it within the set budget. I know that the majority also understands this concept, because that was what we agreed on prior to the meeting.

How a Real Budget Works



Next, we see what the item refers to as a “budget mechanism,” which has been erroneously described and reported as a budget. The notable addition of the big yellow box is what transforms a budget into NOT-a-budget. When spending reaches 90 percent of the \$2.25 billion target, the Bureau would issue a report on Lifeline spending and the order “expect[s]” that the Commission would take “appropriate action to address the Lifeline budget”. An FCC official conceded that the earliest that the Commission could act would be early 2019. At that time, the Commission could choose to treat it as an actual budget and use one of the options already described. But critically, the yellow box offers a third option. If the Commission does absolutely nothing, spending blows right through the magic number and continues indefinitely. What does that make the magic number? A joke. Not a budget.

The New Lifeline “Budget Mechanism”



Of course, some have suggested that there is no need to set a hard budget now. I disagree. This is precisely the time that the Commission needs to impose fiscal and accountability measures. The program lost a great deal of trust and credibility when the Commission previously expanded it to include mobile voice without such measures and the program ballooned in size and fraud. Setting one now, at the start of the process to shift the program to broadband, would help limit any rapid increase in the program's size and would serve as a deterrent to providers and recipients to prevent oversubscription or abuse. Moreover, by imposing a cap, the Commission would finally be able to account for overall USF spending, balance the programs appropriately, and limit the total cost to consumers who pay to support universal service. Indeed, all of the federal subsidy programs should be on a budget as a matter of good government. Therefore, regardless of what happens to the program in the near-term, the Commission should have acted now to adopt a cap or firm budget.

I am also disappointed that the majority categorically refused to consider targeting the program to low-income households that do not have sufficient broadband service.⁴ In other words, the agency prefers to give away money to people who already have broadband while other hard-working Americans that sit just above the eligibility threshold pay ever higher fees to fund the program, possibly at the expense of being able to afford broadband themselves.

Even if my top requests had been accommodated, I would still have significant concerns about the order. Not surprisingly, one major concern is the legal authority for expanding the program to include broadband. The order relies on having classified broadband as a telecommunications service, in whole or in part. I disagreed with the Net Neutrality decision, and I do not condone its use here. Moreover, if that decision founders in court, this is yet another decision that will have to be reconsidered.

In addition, I have substantial misgivings about the ETC designation and forbearance analyses and processes. This section is incredibly complicated, which is likely an intentional effort to mask the unjustified disparate treatment of various types of providers. The order tries to structure participation so that only certain providers participate in the program, in some cases against their will. I find the entire exercise to be legally problematic and substantively divorced from reality.

I am very sympathetic to the desire to streamline burdens for providers, but the order absolutely mangles section 214 of the Act. To start, I do not think we have authority to completely bypass the statutorily-set state role in designating ETCs, as set forth in section 214.⁵ To the extent that these provisions should be changed, Congress is the proper venue to do so. Moreover, a requirement to provide broadband could impact a provider's ability to continue to provide legacy voice service, which doesn't seem to be properly addressed in the item.

With respect to the new national Lifeline Broadband Provider designation, the Commission would have been on much firmer ground if it had taken a shot clock approach like the one we adopted for the rural broadband experiments to bring non-traditional providers into the high-cost program.

Still, since the Commission asserts in this item and others that broadband is an interstate service, there should be absolutely no debate or question that VoIP is also interstate and the appropriate action is to foreclose state regulation of the service once and for all. To suggest otherwise would bring a whole new level of doublespeak: assuming the transmission and content can be separated (which I don't concede), how could the underlying network be interstate but a VoIP app running on top of it not be the

⁴ As I've said before, defining eligibility such that 1/3 of all U.S. households qualify, as is the case today, shows that the program is poorly targeted to those that need it most.

⁵ Oddly, the order also takes great pains to broadly interpret the statutory requirement to provide telephone exchange service and exchange access only to forbear from the requirement on the very next page.

same? Such a firm declaration is long overdue and remains necessary in light of ongoing state efforts to regulate VoIP as an intrastate telecommunications service.⁶

The order also doubles down on the losing argument that preemption is authorized under section 706 as a means to remove barriers to broadband deployment. Even worse, in this instance, the supposed “barrier” is the *statutory process* for designating ETCs. In other words, make believe section 706 “authority” is being used to trump a real provision in the Act.

I have to wonder whether the new Lifeline Broadband Provider (LBP) designation will even pan out. Contrary to what many expected, new providers would, in fact, be required to become ETCs. That means that they would be subject to any general purpose ETC requirements, including the requirement to provide service throughout their entire territory, and could always be saddled with additional obligations.

The possibility of future obligations is not an idle concern. Take for instance Rural Broadband Experiment participants, who previously received this assurance:

Recipients of support should offer a discounted broadband plan to low-income households, but we decline to mandate specific requirements for such plans. Rather, the experiments will be an additional learning opportunity to gather more information about the types of low-cost broadband offerings that providers receiving support to extend broadband are willing to offer to low-income households.⁷

Now we learn that recipients will be required to provide Lifeline-supported BIAS, as defined in this order, once they have deployed broadband-capable facilities to qualified low-income consumers. Surprise! I caution in advance any company jumping into the offering of Lifeline services under this new scheme.

Furthermore, while the Commission does adopt streamlined relinquishment procedures, there are critical loopholes. The Commission can take a relinquishment petition off streamlining if more time is needed to transition consumers to other carriers. And there needs to be at least one other provider able to serve the consumers. So if a new entrant serves an area that is not fully overlapped by another provider, there is no automatic relinquishment. Even in areas currently served by other providers, I imagine new entrants would want to be cautious lest they end up being the last ETC standing.

Indeed, at the same time that the Commission makes a show of opening the program to new fixed broadband providers, it does everything possible to encourage mobile providers to exit. All Lifeline-only ETCs are automatically promoted to broadband ETCs, but can choose not to provide the new service simply by filing a notification with the Commission. Of course, since standalone voice service is being phased out, the order anticipates that Lifeline-only ETCs will choose to relinquish their designation to provide Lifeline voice service.⁸

This stands in sharp contrast to Lifeline/High-Cost ETCs, who are also automatically promoted to broadband ETCs but must provide Lifeline broadband wherever they receive ongoing high-cost support. The only exception is where they have not yet deployed 10/1 service. To receive this exception, however, they are subject to a new certification process.

⁶ See, e.g., MPRNews, Commerce Dept.: PUC ruling means VoIP providers must follow Minn. Law (May 10, 2015), <http://www.mprnews.org/story/2015/05/10/voip-vote>.

⁷ *Connect America Fund*, WC Docket No. 10-90; *ETC Annual Reports and Certifications*, WC Docket No. 14-58, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8769, 8786, para. 49 & note 87 (2014).

⁸ Strangely, the order “emphasize[s] that [such] ETCs have the option to seek relinquishment of only their Lifeline voice ETC designation” even though the process for opting out of Lifeline broadband is even easier for them – just a notification.

Moreover, the order concocts a completely arbitrary set of conditions that must be satisfied before these Lifeline/High-Cost ETCs may cease providing Lifeline voice service. In doing so, the Commission is tacitly acknowledging that it will never allow any incumbent wireline carrier to relinquish any part of its designation under the statutory process, which *requires* the FCC to permit relinquishment if there is *one* other provider in the area. Instead, the Commission will provide “conditional forbearance” where there are at least *three* other providers and additional competitive criteria are met. Additionally, providers must continue to serve existing Lifeline voice customers, meaning they can’t actually exit the program. Moreover, it will take up to 15 months to become effective, and any conditional forbearance is subject to reversal in subsequent years if the areas no longer meet the requisite conditions.

The resulting mishmash of designation and relinquishment standards is needlessly complex and damages the principles of competitive and technological neutrality – all in an effort to advance a vision for the Lifeline program that seems wholly unrealistic. For example, as I noted above, the order provides an exception for fixed broadband providers that do not meet the minimum standards, but mobile broadband providers have to go through a waiver process.⁹ This would include mobile broadband providers serving rural Alaska, where it can be difficult and cost prohibitive to provide even 2G service.

Additionally, while I am hopeful that a National Lifeline Eligibility Verifier will help reduce participating carriers’ administrative costs, the Bureau must keep a close eye on what could be a very expensive project for ratepayers. The cost of this undertaking does not appear to be included in the \$2.25 billion spending target and, given the complexity of the tasks outlined in the order, it could easily reach tens or even hundreds of millions of dollars.

The order also asserts that the National Verifier will help reduce fraud, but its ability to do so only extends so far. I remain concerned about waste, fraud, and abuse in some of the underlying programs and would not have included them all here. For example, HUD’s Federal Public Housing Assistance program was added back in at the last minute, for no apparent reason other than HUD asked nicely.

I am also troubled by waste, fraud, and abuse in the Supplemental Nutritional Assistance Program (SNAP) program. The Commission is keenly aware of how fraud in the SNAP program can taint the Lifeline program.¹⁰ Nonetheless, the order seeks to “leverage” the SNAP program due to its “low eligibility error rate” and “high level of accountability”. Yet OMB continues to identify SNAP as a “high error” program with \$2.6 billion in improper payments annually.¹¹ While improper payments may be due to a variety of reasons, according to a GAO Report:

[A]fter studying the cause of these errors, USDA officials stated that over 90 percent [of the improper payments] were due to verification errors. These types of errors occur when an agency fails to or is unable to verify recipient information—including earnings, income, assets, or work status—even though verifying information exists in third-party databases or other resources. Examples of verification errors include an agency not confirming a recipient’s reported earnings or work status through

⁹ One of the reasons given for this disparate treatment actually undercuts the justification for a permanent Mobility Fund. It states: “We find the exception is only appropriate for fixed broadband because fixed broadband is the mode for which there are still significant areas of the country in which locations do not have access to the minimum fixed broadband standards. While we acknowledge that some areas do not have mobile broadband coverage meeting the minimum standards, there are far fewer of these areas.” Specifically, the order notes that “99.9% of the non-rural population lives in census blocks with mobile LTE coverage, as does 97.9% of the rural population.”

¹⁰ See *Total Call Mobile, Inc.*, File No.: EB-IHD-14-00017650, Notice of Apparent Liability, FCC 16-44 (rel. Apr. 7, 2016).

¹¹ Payment Accuracy, High-Error Programs (last visited April 5, 2016), <https://paymentaccuracy.gov/high-priority-programs>.

existing databases, or the recipient failing to provide an agency with information on earnings.”¹²

In short, the Lifeline program will be providing subsidies to people on the basis that they receive SNAP even though their payments from the SNAP program may have been improper due to inadequate verification procedures. Lovely.

That does not even capture outright fraud in the program, which is not sufficiently monitored or detected at the federal or state level. According to GAO, “state agencies are responsible for addressing SNAP recipient fraud under the guidance and monitoring of [the U.S. Department of Agriculture’s Food and Nutrition Service (FNS)].”¹³ However, “FNS does not have consistent and reliable data on states’ anti-fraud activities” and the states GAO reviewed “experienced mixed success investigating and pursuing cases to combat potential [SNAP] recipient fraud.”¹⁴ This could further impact the Lifeline program. For example, illegal trafficking in cards can result in otherwise ineligible consumers receiving SNAP benefits.¹⁵ Those consumers could then qualify for Lifeline subsidies. No one should assume that fraud, waste and abuse will not continue to ravage the Lifeline program since it is piggybacking off of programs loaded full of illegal activities today.

Not surprisingly, I also object to the extensive delegations to the Bureau and directions to USAC. The tasks handed over to them go far beyond basic implementation and administration of the program. For example, they will oversee all aspects of the LBP designation process and the National Verifier. The order also includes the catchall delegation section that is found only in controversial items. And while I have very limited ability to influence Bureau-level decisions, I have absolutely no input when it comes to USAC. I find it very troubling that a corporation that is treated as “intra-agency” for some purposes is insulated from input and oversight by actual FCC Commissioners. How convenient.

Finally, I find it remarkable that the Commission claims to be looking out for low-income consumers, but is perfectly content to take away the true Lifeline service that has served so many when emergencies have arisen. I believe that any minimum standards must be reasonably set to generate practical and useful products and service offerings, as we need to stretch our funding to meet many needs. The Commission, however precludes support for basic mobile voice or broadband service that does not meet its vision for what a Lifeline service ought to be. Here again, the agency takes a paternalistic approach, telling recipients what they need rather than letting consumer decide whether a more affordable option would be sufficient. Some recipients might want a broadband connection to fill out a job application. But others might just want a simple voice service to use in case of an emergency—the original purpose of the program. The Commission calls such basic offerings “second class” service, but I imagine that those who will end up with no service at all might call them a Lifeline.

For all of these reasons, I dissent.

¹² GAO, SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: Enhanced Detection Tools and Reporting Could Improve Efforts to Combat Recipient Fraud at 5 (August 2014).

¹³ *Id.* at 1

¹⁴ *Id.*

¹⁵ *See, e.g.*, Department of Justice, U.S. Attorney’s Office, District of Massachusetts, Worcester Woman Charged in \$3.6 Million Food Stamp Fraud (Sept. 28, 2015), <https://www.justice.gov/usao-ma/pr/worcester-woman-charged-36-million-food-stamp-fraud>. Even FNS concedes that the rate of trafficking by retailers is 1.3 percent. USDA Food and Nutrition Service, USDA Releases New Report on Trafficking and Announces Additional Measures to Improve Integrity in the Supplemental Nutrition Assistance Program (last modified April 1, 2016), <http://www.fns.usda.gov/pressrelease/2013/fns-001213>. That amounts to over 900 million per year.