



Officers
Chair
Judith L. Lichtman
National Partnership for
Women & Families
Vice Chairs
Thomas A. Saenz
Mexican American Legal
Defense and Educational Fund
Hilary Shelton
NAACP
Secretary/Treasurer
Lee A. Saunders
American Federation of State,
County & Municipal Employees

Board of Directors
Kevin Allis
National Congress of American Indians
Kimberly Churches
AAUW
Kristen Clarke
Lawyers' Committee for
Civil Rights Under Law
Alphonso B. David
Human Rights Campaign
Rory Gamble
International Union, UAW
Lily Eskelsen Garcia
National Education Association
Fatima Goss Graves
National Women's Law Center
Mary Kay Henry
Service Employees International Union
Sherrilyn Ifill
NAACP Legal Defense and
Educational Fund, Inc.
David H. Inoue
Japanese American Citizens League
Derrick Johnson
NAACP
Virginia Kase
League of Women Voters of the
United States
Michael B. Keegan
People for the American Way
Samer E. Khalaf
American-Arab
Anti-Discrimination Committee
Marc Morial
National Urban League
Janet Murguía
UnidosUS
Debra L. Ness
National Partnership for
Women & Families
Rabbi Jonah Pesner
Religious Action Center
Of Reform Judaism
Lisa Rice
National Fair Housing Alliance
Anthony Romero
American Civil Liberties Union
Maria Town
American Association of
People with Disabilities
Richard L. Trumka
AFL-CIO
Toni Van Pelt
National Organization for Women
Randi Weingarten
American Federation of Teachers
John C. Yang
Asian Americans Advancing Justice |
AAJC

President & CEO
Vanita Gupta

July 31, 2020

Chairman Ajit V. Pai
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WC Docket Nos. 17-287, 11-42, 09-197

Dear Chairman Pai and Commissioners Carr, O'Rielly, Rosenworcel and Starks:

On behalf of The Leadership Conference on Civil and Human Rights and its Media/Telecommunications Task Force, we submit these reply comments in response to the Federal Communications Commission's (FCC) request for comment of the impact on the Lifeline program of the D.C. Circuit's decision in *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).¹ The Leadership Conference is a coalition charged by its diverse membership of more than 220 national organizations to promote and protect the rights of all persons in the United States. A robust Lifeline program is a top priority for the civil and human rights coalition. We urge the Commission to: 1) adopt the strongest possible legal framework for Lifeline's support of broadband Internet access service (BIAS); 2) modify its previous position and ensure voice services receive enhanced Lifeline support in light of the COVID-19 public health crisis and 3) extend and establish other temporary measures to ensure Lifeline is accessible during COVID-19 public health emergency.

Support for Broadband and Voice Services are Urgently Needed

Access to voice and broadband services are essential for full participation in a 21st century economy. Communities rely on broadband for access to news and information, education, employment, and health care. However, now more than ever, the need to access these essential services digitally is paramount. As of June 30, the United States has more than 2.5 million cases of COVID-19 and 126,000 COVID-related deaths with death rates being disproportionately highest among Black and Indigenous communities.² Workers of color and low-wage workers, including many Hispanic people, are experiencing disproportionately higher rates of income loss and unemployment due to the pandemic.³ Stay-at-home orders, currently in place or being reimposed across the country, caused and will cause many schools and businesses to remain virtual for the foreseeable future, making the need for Internet access even more essential. The Internet has been an instrumental tool during the pandemic, helping people in the United States access telework, medical information, government resources, distance learning, and the latest health news about coronavirus.⁴

However, while many of the most privileged in our society have been able to transition their daily activities online, millions of Americans without access to home broadband services have been especially ill-equipped to weather this public health crisis.⁵

This pandemic has compounded the digital divide in this country. Low-income communities, rural communities, communities of color and other vulnerable groups were already less likely to have access to home broadband services due to cost barriers.⁶ Now, many of these same groups are facing heightened health and economic insecurity as a result of the pandemic. Moreover, local libraries, restaurants, and coffee shops have closed during the pandemic, cutting off public Wi-Fi options that many people without fixed broadband services relied on to participate in our society. Compounding the problem, the Commission's Keep Americans Connected pledge ended on June 30, cutting off additional sources of broadband access. The need for accessible broadband and voice services in the face of this pandemic is painfully apparent. We strongly urge the Commission to act immediately to expand the Lifeline program to support this essential service and meet the needs of vulnerable communities in the era of social distancing.

Legal Authority

The Commission is seeking comment on its legal authority to direct Lifeline support to eligible telecommunications carriers (ETCs) providing broadband service to qualifying low-income consumers in light of the D.C. Circuit's decision in *Mozilla*⁷ to remand the FCC's failure to consider the impact on the Lifeline program of its decision to reclassify broadband Internet access services (BIAS).⁸ The Leadership Conference has always advocated for the Commission to adopt the strongest possible legal framework for the Lifeline program and we maintain this position.⁹ While under the statutory framework the FCC's authority is strongest if BIAS is classified as a Title II service, other legal theories supporting the Commission's authority have been endorsed by the federal courts and apply here.

The *Mozilla* court expressed concern that, because "only an eligible *telecommunications carrier* designated under section 214(e)" is eligible to receive universal service support, and an eligible telecommunications carrier ("ETC"), by definition, is designated under Title II, the FCC had not addressed how Lifeline support could be directed toward BIAS, now designated as a Title I service.¹⁰ While the *Mozilla* court raised the right question, it was not fully briefed before that court and the Commission has the opportunity to take it up thoroughly in this docket.

Other appellate courts have upheld the FCC's authority to require eligible telecommunications carriers (ETCs) to offer non-USF services in order to receive USF funds. In reviewing the FCC's 2011 intercarrier compensation reform decision, the 10th Circuit read 254(e) to authorize the FCC to impose obligations on carriers that receive support irrespective of the definition of universal service.¹¹ The Court noted Section 254(e) "mandate[s] that USF funds be used by recipients 'only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.'" It found that the FCC reasonably concluded that "Congress left a gap to be filled by the FCC, *i.e.*, for the FCC to determine and specify precisely how USF funds may or must be used."¹² This approach is similar to the proposals set forth in the 2017 Lifeline NPRM,¹³ but different in one critical respect: the 2017 NPRM incorrectly theorized that the FCC could limit support to facilities-based ETCs. But as the 10th Circuit made clear, Section 254(e) applies equally to facilities and services.¹⁴ Therefore, Lifeline can support BIAS for carriers that are not facilities-based, and any conclusion otherwise is incorrect.

The Commission drew on a similar analysis when it adopted Lifeline broadband pilot programs in 2012, concluding that Section 254 permits the FCC “to impose conditions on the support provided to ETCs,” and that the FCC has a duty and authority to accomplish the policies outlined in Section 254(b), including access to advanced information service and the need to meet low-income people’s needs.¹⁵ The Commission thereby concluded Section 254, in conjunction with the FCC’s general authority in Section 4(i), authorized the Lifeline broadband pilot program.¹⁶ There is no distinction between the temporary nature of that program and the current program for the purposes of the Commission’s analysis. Finally, the Commission can draw on Section 254(j), which acknowledges and preserves the FCC’s authority to create the Lifeline program before the program was codified in 1996 Telecommunications Act.¹⁷

Voice Support

We urge the FCC to help protect the health and welfare of low-income households and communities of color by immediately enhancing Lifeline support to meet the communications needs of low-income households that are sheltering at home in response to the COVID-19 public health crisis.¹⁸ The Commission should reinstate full Lifeline support at \$9.25 for voice-only services, which address a critical need for all low-income consumers and clearly meet the definition of telecommunications service under the Act. Without support for at least one telecommunications service, the Commission cannot condition support for broadband on receipt of USF funds.

No-cost voice-only service is extremely important for low-income consumers. Losing no-cost voice-only service leaves consumers without access to 911, and thus, access to reach first responders, as well as adequate communications with insurance companies, civic institutions, and loved ones after an emergency. For example, terrible devastation and loss of life occurred in Puerto Rico *after* hurricanes Maria and Irma passed through because of the lack of access to communication.¹⁹ Despite the importance of voice-only services, the Lifeline Modernization Order adopted a declining subsidy for these services starting in December 2019.²⁰ When the FCC sought comment on reinstating full financial support for voice-only service in rural areas, the record demonstrated strong support for full subsidies for voice services in all areas of the U.S.²¹ The most recent Universal Service Administrative Company data show that, as of February 2019, nearly 42 percent of Lifeline customers still subscribe to plans that qualify for Lifeline by virtue of meeting the minimum service standards for voice service.²² Without a pause, more than 3.8 million Lifeline subscribers will be negatively impacted.²³ At a bare minimum, the Commission should re-establish full voice support during the COVID-19 emergency and for six months thereafter.

COVID-19 Response

In addition to voice support, two other temporary measures are necessary because the COVID-19 emergency has not abated. We welcomed the Commission’s previous actions to prohibit disconnections of Lifeline consumers. These included suspending automatic procedures that would otherwise disconnect Lifeline consumers and permitting consumers to demonstrate eligibility for the program even if they do not have documentation for a three-month period. These waivers are set to expire on August 31, 2020, and the Commission should extend them through at least the end of 2020.²⁴ Moreover, particularly in light of the pandemic, the Commission should also avoid last-minute decision-making with respect to the

next round of minimum standards changes due in December and act promptly to protect Lifeline consumers and ensure continued access to products that do not require a payment by the consumer.²⁵

Conclusion

The civil rights community is committed to ensuring that all members of society are connected to modern, advanced communications networks and services. The Lifeline program fills an important role in a comprehensive strategy for bridging the digital divide, as it lowers a major barrier to access due to cost. The FCC should ensure Lifeline can continue to support broadband service and should reverse its decision to phase out voice-only support. Should you require further information or have any questions regarding this issue, please contact Media/Telecommunications Task Force Co-Chair Cheryl Leanza, United Church of Christ, OC Inc., at cleanza@alhmail.com and Kate Ruane, American Civil Liberties Union, at kruane@aclu.org, or Corrine Yu, Leadership Conference Senior Program Director at yu@civilrights.org.

Sincerely,

The Leadership Conference on Civil and Human Rights
Asian Americans Advancing Justice | AAJC
American Civil Liberties Union
Common Cause
Communications Workers of America
Institute for Intellectual Property & Social Justice
MediaJustice
NAACP
National Consumer Law Center, on behalf of its low-income clients
National Disability Rights Network
National Hispanic Media Coalition
National Urban League
United Church of Christ, OC Inc.

¹ Wireline Competition Bureau Seek to Refresh Record in Restoring Internet Freedom and Lifeline Proceedings in Light of the D.C. Circuit's *Mozilla* Decision, WC Docket Nos. 17-108, 17-287, 11-42, DA 20-168 (February 19, 2020) ("PN").

² Ctr. of Disease Control and Prevention, *Cases in the U.S.* (updated June 30, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>. See Olivia Wein and Cheryl Leanza, *Affordable Broadband Service Is a Racial Equity and Public Health Priority During COVID-19*, Leadership Conference on Civil and Human Rights (June 29, 2020), <https://civilrights.org/blog/affordable-broadband-service-is-a-racial-equity-and-public-health-priority-during-covid-19/>; APM Research Lab, *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.* (July 8, 2020), <https://www.apmresearchlab.org/covid/deaths-by-race>.

³ See Chad Stone, *People Already Facing Opportunity Barriers Hit Hardest by Massive April Job Losses*, Ctr. on Budget and Pol'y Priorities: Off the Charts blog (May 12, 2020), <https://www.cbpp.org/blog/people-already-facing-opportunity-barriers-hit-hardest-by-massive-april-job-losses>. See also Steven Brown, *How COVID-19 Is Affecting Black and Latino Families' Employment and Financial Well-Being*, Urban Institute: Urban Wire blog (May 6,

2020), <https://www.urban.org/urban-wire/how-covid-19-affecting-black-and-latino-families-employment-and-financial-well-being>.

⁴ See Statement from Commissioner Geoffrey Starks, Federal Communications Commission, before the Committee on Commerce, Science, and Transportation, United States Senate “Oversight on the Federal Communications Commission” (June 24, 2020) <https://www.commerce.senate.gov/services/files/6078B26D-1BD5-4F89-9216-804BEAF0A471>, ¶ 2. See also Monica Anderson and Emily A. Vogels, *Americans Turn to Technology during COVID-19 Outbreak, Say an Outage Would be a Problem*, Pew Research Center (Mar. 31, 2020), <https://www.pewresearch.org/fact-tank/2020/03/31/americans-turn-to-technology-during-covid-19-outbreak-say-an-outage-would-be-a-problem/>.

⁵ See Statement from Commissioner Starks, *supra* note 2.

⁶ See *id.*; see also Reverend Al Sharpton et al., *Broadband Access Is A Civil Right We Can’t Afford To Lose—But Many Can’t Afford To Have*, Essence (June 17, 2020), <https://www.essence.com/news/broadband-access-is-a-civil-right-we-cant-afford-to-lose-but-many-cant-afford-to-have/>.

⁷ *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (“Mozilla”).

⁸ PN at 1.

⁹ See e.g., Leadership Conference Letter October 2010, <https://ecfsapi.fcc.gov/file/7020919251.pdf>.

¹⁰ *Mozilla*, 940 F.3d at 69.

¹¹ *In Re FCC 11-161*, 753 F.3d 1015, 1045-46 (10th Cir. 2014)(The court considered, specifically, the second sentence of 254(e), which states, “A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.”).

¹² *Id.*

¹³ *Bridging the Digital Divide for Low-Income Consumers et al.*, WC Docket No. 17-287 *et al.*, *Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry*, 32 FCC Rcd 10475, 10502-03, para. 77 (2017) (“2017 Lifeline NPRM”).

¹⁴ *Mozilla*, 940 F.3d at 69.

¹⁵ *2012 Lifeline Reform Order*, WC Docket Nos. 11-42, 03-109, 12-23, CC Docket No. 96-45, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 12-11 (Feb. 6 2012) at ¶330 (quoting *Qwest Corp. v. FCC*, 258 F.3d 1191, 1200, 1204 (10th Cir. 2001) (footnotes omitted)).

¹⁶ *Id.*

¹⁷ “Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title.” 47 U.S.C. § 254(j).

¹⁸ This request builds upon a much earlier emergency request for increased support to protect public head during the COVID-19 Crisis. See March 23, 2020, Emergency Request for Increased Lifeline Support During the COVID-19 Crisis, Docket Nos. 11-42, 09-197, 96-45, 17-287 (letter from over 250 groups).

¹⁹ Free Press, *Connecting the Dots: The Telecommunications Crisis in Puerto Rico* at 4 (May 2019).

²⁰ *Lifeline and Link Up Reform and Modernization et al.*, *Third Report and Order, Further Report and Order, and Order on Reconsideration*, 31 FCC Rcd 3962, 3986, ¶ 64 (2016).

²¹ See, e.g., Reply Comments of AARP, WC Docket No. 17-287, at 27-30 (filed March 23, 2018); Comments of Free Press, WC Docket No. 17-287, at 55 (filed Feb. 21, 2018); Comments of Low-Income Consumer Advocates, WC Docket No. 17-287, at 8 (filed Feb. 21, 2018); Reply Comments of the Open Technology Institute, WC Docket No. 17-287, at 8, 12-21 (filed March 23, 2018).

²² Joint Petition to Pause Implementation of 2019 Lifeline Minimum Service Standards Pending Forthcoming Marketplace Study, WC Docket 11-42 (filed June 27, 2019) (“Pause & Study Petition”) at note 23 (citing USAC, High-Cost and Low Income Committee Briefing Book, at 41 (April 29, 2019), Lifeline Business Update, App. A: Lifeline Program Trends (showing 27.81% of Lifeline customers taking bundled plans meeting the voice minimum standards and 13.8% of customers taking voice-only plans, available at https://www.usac.org/_res/documents/about/pdf/bod/materials/2019/High-Cost&Low-Income-Briefing-Book-April.pdf)).

²³ Pause & Study Petition at note 23 (citing calculations based on USAC, High-Cost and Low-Income Committee Briefing Book).



²⁴ See *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, Order, DA 20-577 (rel. June 1, 2020).

²⁵ See, e.g., Comments of the Leadership Conference, Docket Nos. 17-287, 11-42, 09-197 at 2 (filed Feb. 21, 2018), (products that do not require payment by the consumer are “ideal for the most economically fragile subscribers because they do not require a deposit, a credit check, late fees, or a checking account or some other means to make a monthly payment”) <https://www.fcc.gov/ecfs/filing/1022148429539>; Letter to Kris Monteith, Bureau Chief in support of Joint Petition to Pause Implementation of December 2019 Lifeline Minimum Service Standards Pending Forthcoming Marketplace Study, DA 19-617, WC Docket No. 11-42 (filed July 31, 2019), <https://www.fcc.gov/ecfs/filing/10731157924496>; Letter from John Heitmann, National Lifeline Association to Marlene Dortch, FCC Secretary, Docket Nos. 17-287 et al., at 3-4 (filed July 7, 2020).