

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Universal Service Contribution Methodology) WC Docket No. 06-122
)

**COMMENTS OF PUBLIC KNOWLEDGE AND THE NATIONAL HISPANIC MEDIA
COALITION**

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EXECUTIVE SUMMARY

Broadband internet access service is a vital tool for participation in the U.S. economy and society. As broadband and information technology become more tightly woven into the fabric of American life, demand for these services increases.

The objective of universal access to broadband and telephone service is not yet achieved. A significant “digital divide” exists in this country between those with affordable access to service and those without. More than twenty years ago, Congress directed the FCC to adopt policies that ensure that all U.S. residents, all educational institutions, and all healthcare facilities could gain access to necessary communication services at affordable rates. Members of Congress, the Administration, and even the current FCC leadership have said closing the digital divide is a pressing national priority. However, the Commission’s proposal to cap the USF undermines the nation’s longstanding universal service goals and jeopardizes the future of the universal service programs and those that depend on them. The FCC’s proposal will impede efforts to close the digital divide by creating a bureaucratic and political impediment to deploying universal service funds, placing the Commission in conflict with the plain text and intent of the Telecommunications Act of 1996.

Rather than capping the universal service fund, the Commission should take action that will actually address rising universal service contributions. The proposed cap will slow the effort to close the digital divide without stopping the shrinking support base from ultimately leading to higher fees for ratepayers. Instead, the FCC should reform the USF contribution mechanisms. By doing so the Commission can both fulfill its mandate to advance universal service for all Americans and help to ensure that the Fund has a sustainable and equitable base of support going forward.

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I. INTRODUCTION

Universal service has long been the core tenet of United States telecommunications policy. This commitment once ensured that remote areas and low-income families had access to telephone service. More recently, the Federal Communications Commission (“Commission” or “FCC”) has modernized the Universal Service Fund (“USF”) programs to support deployment of and access to broadband internet service.

Since the enactment of the Telecommunications Act of 1996 (“1996 Act”), the USF has supported four programs: High-Cost Support, which focuses on affordable access for high-cost areas; Lifeline, which subsidizes the cost of service for low-income households; E-Rate, which ensures access for schools and libraries; and Rural Healthcare, which supports access for rural health facilities. These four programs have separate budgets, designed to efficiently meet the needs of the specific program. These budgets have each been adjusted over time to meet demand, but always on an individual program basis, without affecting the other USF programs.

When the universal service programs were updated in 1996, the primary focus was on telephone service. Therefore, carrier contributions to the USF (which are passed on to consumers in the form of phone bill fees) were assessed based on the number of telephone lines the carrier provides. However, as more Americans abandon landline telephones in favor of mobile and fixed broadband, the pool of contributors is shrinking. As charges are dispersed to fewer customers, the cost to each consumer’s phone line goes up.

The Commission has watched this trend with concern for many years. In the meantime, the Commission has also modernized the USF programs to support access to broadband, increasing the financial demands on the USF. The FCC has also considered potential reforms to how the agency’s universal service programs are funded. However, instead of resolving the

central funding problem -- a dwindling number of landline telephone subscribers are subsidizing growing demand for support for broadband service -- the FCC's Notice of Proposed Rulemaking ("NPRM") proposes to cap the entire USF.¹ The Commission's proposal is counterproductive to the agency's universal service mission, fails to address the problem of high USF fees on telephone service, and does not serve the public interest.

II. A UNIVERSAL SERVICE CAP UNDERMINES THE NATIONAL GOAL OF CLOSING THE DIGITAL DIVIDE.

Access to broadband is critical to modern life. Those without affordable access to broadband are less able to fully participate in the U.S. economy or society. Elected and appointed leaders of both parties throughout the federal government share the objective of closing the "digital divide" that separates those without broadband from the rest of the nation. Ensuring advanced communications services are available to all Americans is the responsibility of the USF. The Commission's proposed USF cap runs counter to the federal government's policy objectives and the public interest.

A. Broadband is The Essential Communications Medium for the 21st Century.

Much like telephone service a generation ago, broadband is the essential communications medium of the digital economy.² Since the passage of the 1996 Act, Congress has understood that "advanced telecommunications capabilities" would be both essential for Americans in the

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¹ Universal Service Contribution Methodology, WC Docket No. 06-122, *Notice of Proposed Rulemaking*, FCC 19-46 (rel. May 31, 2019) ("NPRM").

² See e.g., 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, *Third Report and Order, Further Report and Order, and Order on Reconsideration*, FCC 16-38, 5-7 ¶¶ 12-17 (rel. Apr. 27, 2016) ("*Lifeline Modernization Order*"); Ralph B. Everett, Georgetown University Center for Business and Public Policy, *The Digital Economy and Closing the Opportunity Gap*, at 4 (June 2015), http://www.gcbpp.org/files/EPV/EPV_Everett_OpportunityGap62015.pdf.

21st century,³ and critical to preserving “vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.”⁴ The FCC has found, “Americans turn to broadband Internet access service for every facet of daily life, from finding a job to finding a doctor, from connecting with family to making new friends, from becoming educated to being entertained.”⁵ Without access to broadband service, Americans to whom broadband is not available or affordable lose out on opportunities to improve their lives and the lives of their children. “Modern society is an increasingly digital one, and accessing advanced services is essential to ensuring that all Americans can participate and thrive.”⁶

Education

Access to broadband Internet in the home is critical for students. Students increasingly need broadband Internet access to communicate with teachers, complete and upload assignments, and perform research. Students from low-income households and living in communities without internet access risk being left even further behind.

The benefits of connectivity at home are broadly known and well documented. In 2018, a Department of Education study reported “a consistent pattern of higher performance scores for students with home internet access in reading, mathematics, and science, and for students’

³ 47 U.S.C. § 1302(a).

⁴ 47 U.S.C. § 257(b).

⁵ 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. 14-126, *2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment*, 30 FCC Rcd. 1375, 1377 ¶ 2 (2015).

⁶ Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, GN Docket No. 18-238, *2019 Broadband Deployment Report*, FCC 19-44, 2 ¶ 1 (rel. May 29, 2019) (“*2019 Broadband Deployment Report*”).

knowledge of information and communication technology, than for their peers without home internet access”⁷ A 2018 report for the National Center for Education Statistics reported average reading scale scores for 8th graders with home Internet access as being approximately 10% higher than those without (267 compared to 242). The disparity in math was 284 for students with home internet compared to 261 for those without. Science had the largest relative divide, with students averaging 156 scale scores with home internet and 131 without.⁸

When students have access to such a powerful tool, teachers are quick to utilize it. As Commissioner Rosenworcel has noted, about seven in ten teachers assign homework that requires access to the Internet.⁹ However, because so many students lack access at home, some school districts decline to assign homework that requires Internet research. Educators are aware that a lack of Internet access at home puts students at a disadvantage with regard to completing classwork, and many face a no-win choice between assigning homework they know some students cannot complete, or leaving all of their students unprepared for life after high school if online learning isn’t emphasized.¹⁰

The number of school children coming from low-income households is immense. Last year, the Department of Education found that more than half of public school students are from

⁷ U.S. Dept. of Education National Center for Education Statistics, NCES 2017-098, *Student Access to Digital Learning Resources Outside the Classroom*, xiv (2018) (hereinafter *Dept. of Education Student Access to Digital Learning Report*).

⁸ *Id.* at 96-118.

⁹ Commissioner Jessica Rosenworcel, *Bridging the Homework Gap*, The Huffington Post (Jun. 15, 2015, updated June 15th 2016), http://www.huffingtonpost.com/jessica-rosenworcel/bridging-the-homework-gap_b_7590042.html.

¹⁰ See Everett, *supra* note 2, at 3 (June 2015). See also Clare McLaughlin, *The Homework Gap: the Cruellest Part of the Digital Divide*, NEAToday Education Policy, Apr. 20, 2016, <http://neatoday.org/2016/04/20/the-homework-gap/>.

low-income households.¹¹ Data further suggests that these same low-income students are the least likely among their peers to have access to the Internet at home.¹² Research from Pew reports that approximately one-third of students from households with incomes under \$30,000 per year do not have reliable access to the Internet at home, compared with only 6 percent of students with family incomes over \$75,000 per year.¹³ Even more disturbingly, both Pew and the Department of Education found that this gap is noticeably more pronounced when factoring in race; Hispanic, African-American, and Native American students are less likely to have home Internet access than white students.¹⁴

The lack of home broadband access is creating a skills and achievement gap between those with and without access to broadband at home. In 2015, the Hispanic Heritage Foundation explained—“[a]s education delivery becomes more dependent on web-based technologies, students with less access to those tools are at a disadvantage,”—a situation that both creates and exacerbates a “skill and experience gap between those who are regularly connected, to those who are not.”¹⁵ This is even more true today. In 2018, the Connected Learning Alliance described digital literacy as “essential to a school’s success and a student’s lifelong improvement.” The

¹¹ Institute of Education Sciences, Public School Children Eligible for Free or Reduced-Price Lunch, *The Condition of Education 2018 (NCES 2018-144)*, Dept. of Education National Center for Education Statistics (Apr. 2018), <https://nces.ed.gov/fastfacts/display.asp?id=898>.

¹² *Dept. of Education Student Access to Digital Learning Report*, at xii. See also Monica Anderson and Andrew Perrin, *Nearly One in Five Teens can’t always finish their homework because of the digital divide*, Pew Research Ctr. (Oct. 26th, 2018), <https://www.pewresearch.org/fact-tank/2018/10/26/nearly-one-in-five-teens-cant-always-finish-their-homework-because-of-the-digital-divide/> (hereinafter *Pew Homework Gap Research*).

¹³ *Pew Homework Gap Research*.

¹⁴ *Dept. of Education Student Access to Digital Resources Report*, at 13; see also *Pew Homework Gap Research*.

¹⁵ Hispanic Heritage Found., *Taking the Pulse of the High School Student Experience in America: Research Findings, Access to Technology*, at 1-2 (Apr. 29, 2015), https://www.fosi.org/documents/142/Taking_the_Pulse_Phase_1_Research_Findings.FINAL.pdf.

Alliance explained, “educators must begin technological learning early on, continually improving teaching techniques to support student personal and career growth.”¹⁶

Truly frustrating is the fact that the educational benefits of broadband Internet access service are uniquely well-suited to help narrow the achievement gap between students from disadvantaged backgrounds and their more affluent peers. Research shows that if at-risk students gain ready access to appropriate technology and tools and use them in thoughtful ways, they can make substantial gains in learning and technological readiness.¹⁷

Employment and Job Training

Internet access is all but essential to find a job, apply for a job, and gain the skills needed for career advancement. In 2019, 98.2 percent of Fortune 500 companies—including major employers such as Wal-Mart, Target, Costco, and ExxonMobil—use applicant tracking systems that rely on applicants submitting online applications.¹⁸ The Federal Government itself requires job seekers to apply online in order to use the USAJobs service.¹⁹ The U.S. armed services have online application portals that help those interested in enlisting find information and begin the enlistment process.²⁰

¹⁶ Nancy R. Ruff, *How Important is Digital Literacy?*, Connected Learning Alliance (Aug. 31, 2018), <https://clalliance.org/blog/how-important-is-digital-literacy/>.

¹⁷ Everett, *supra* note 2, at 3-4.

¹⁸ *Over 98% of Fortune 500 Companies Use Applicant Tracking Systems (ATS)*, Jobscan Blog (Jun. 30, 2018) . <https://www.jobscan.co/blog/fortune-500-use-applicant-tracking-systems/>; *See also* Nat’l Telecomm. and Info. Admin. and Econ. Statistics Administration, U.S. Dept. of Commerce, *Exploring the Digital Nation: America’s Emerging Online Experience* (2013), http://www.ntia.doc.gov/files/ntia/publications/exploring_the_digital_nation_-_americas_emerging_online_experience.pdf (“*America’s Emerging Online Experience*”).

¹⁹ *See* U.S. General Services Administration, *Using USAJOBS*, <http://www.gsa.gov/portal/content/105310> (last accessed Jul. 20, 2019).

²⁰ *See e.g.*, U.S. Army, *Learn How to Join*, <https://www.goarmy.com/learn/apply.html> (last accessed Jul. 27, 2019).

As of 2015, 90% of American job-seekers used the internet to search for a job, and 84% submit applications online.²¹ Additionally, Internet access appears to have a positive correlation with improving employment prospects. According to the White House Council of Economic Advisors “[a]cademic research shows that using online job search leads to better labor market outcomes, including faster re-employment for unemployed individuals, yet because of a digital divide, low- income households are less able to use these tools than high-income households.”²² Labor force participation was found to be fully 18% higher among digitally literate Americans than non-digitally literate.²³

The Internet also provides immense benefits for flexibility and advancement in the workplace, and digital literacy itself is critical to competing in the modern job market. A 2016 Brookings report found that “Overall, digitalization is transforming the nation’s job rolls both by expanding the digital content of hundreds of existing jobs and shifting the overall job mix toward more digitally intensive occupations.” They found that 31 million Americans were then working in “highly digital jobs,” with 66 million working medium-digital jobs, and only 41 million working low-digital jobs. This trend was even more pronounced in newly created jobs, with fully two-thirds of new jobs requiring high- or medium-level digital skills.²⁴ It is no surprise, then, that Internet access and digital literacy are increasingly critical to both employed and unemployed individuals.

²¹ Aaron Smith, *The Internet and Job-Seeking*, The Pew Center, (Nov. 19, 2015), <https://www.pewinternet.org/2015/11/19/searching-for-work-in-the-digital-era/>.

²² Exec. Office of the President, *The Digital Divide and Economic Benefits of Broadband Access*, White House Council of Econ. Advisers Issue Brief (March 2016).

²³ U.S. Dept. of Education National Center for Education Statistics, *NCES 2018-161, A Description of U.S. Adults Who Are Not Digitally Literate*, 11 (2018).

²⁴ Mark Muro *et al*, Brookings Instit. Metro. Policy Program, *Digitalization and the American Workforce*, (Nov. 2017) 15.

Health Care

Broadband is increasingly how Americans access health care information and services. According to the Federal Communications Commission, “[t]oday, whether it's through remote patient monitoring or mobile health applications accessed via smartphones, tablets, or other devices, advances in broadband-enabled health technologies are allowing patients to receive care wherever they are located.”²⁵

Researching health plans and finding medical information are common online activities. Approximately 80 percent of Internet users look for health information online, according to a new report from Pew Research Center.²⁶ In 2017 the Journal of Marine Medical Society reported that 4.5 percent of all Internet searches were for health-related information, and more than 70,000 websites distribute health information.²⁷

Broadband service also allows users to remotely access health care resources. In 2017, GAO found that, “telehealth and remote patient monitoring can provide alternatives to health care provided in-person at a physician’s office, particularly for patients who cannot easily travel long distances for care.”²⁸ This month, while proposing a new telehealth pilot program, the FCC noted that “[t]elemedicine has assumed an increasingly critical role in health care delivery as technology and improved broadband connectivity have enabled patients to access health care

²⁵ Federal Communications Commission, Connecting Americans to Health (Accessed Jul. 24, 2019) [https:// www. fcc.gov/about-fcc/fcc-initiatives/connecting-americans-health](https://www.fcc.gov/about-fcc/fcc-initiatives/connecting-americans-health)

²⁶ Jane Weaver, “More people search for health online,” NBC News Telemedicine (Jul. 16, 2019), [http://www .nbcnews.com/id/3077086/t/more-people-search-health-online/#.XTToWji-ZNmA](http://www.nbcnews.com/id/3077086/t/more-people-search-health-online/#.XTToWji-ZNmA) (reporting on unreleased findings of new Pew study).

²⁷ Rengan L, Ray S., Nagpal D. Use of internet for accessing healthcare information among patients in an outpatient department of a Tertiary Care Center. J Mar. Med. Soc. 2017 19:15-7.

²⁸ U.S. Gov’t Accountability Off., GAO-17-365, Telehealth and Remote Patient Monitoring Use in Medicaid and Selected Federal Programs 1 (2017).

services even when they cannot access a health care provider’s physical location.”²⁹ The FCC’s Notice of Proposed Rulemaking goes on to specifically assert that “To the extent that lack of affordable and robust broadband Internet access service is an obstacle to the adoption of connected care services by health care providers and patients, we believe universal service support could help address that obstacle.”³⁰

Government Services

Americans regularly use the Internet to interact with government in myriad ways, such as renewing a driver’s license, searching for the nearest post office, communicating with elected officials, and submitting comments and letters to government agencies like the FCC.

This benefit runs both ways; broadband access allows Americans receive more prompt responses from government officials and agencies. For example, the Internal Revenue Service tells taxpayers that those who file electronic returns receive faster refunds, with direct deposit returns often arriving within twenty-four hours—instead of the four weeks required to process paper documents.³¹

Next year, the Internet will play a key role in the 2020 Census.³² The Census Bureau finds numerous advantages to taking responses over the Internet. Digital form-filling will improve the experience of the census-taker with things like enhanced non-English interfaces and a smooth user interface. They will lead to improved data quality due to features like the ability to

²⁹ Federal Communications Commission, In the Matter of Promoting for Low-Income Customers; WC 18-213, *Notice of Proposed Rulemaking*, FCC 19-64, 1-2 ¶ 1 (rel. Jul. 11, 2019) (“*Connected Care NPRM*”).

³⁰ *Id.* at ¶ 14.

³¹ Internal Revenue Service, Where’s My Refund?, <https://www.irs.gov/refunds> (last accessed Jul. 24, 2019).

³² Dept. of Commerce Econ. & Statistics Admin., Census Bureau, 2020 Census Operational Plan : A New Design for the 21st Century (Version 4.0 Dec. 2018)) 104.

accommodate larger households on the standard form, and data validation that automatically alerts census-takers of arithmetic errors, missed sections, etc. Perhaps most importantly, Internet response will be, in the Bureau’s words, “critical for cost-savings and major efforts are underway to minimize the amount of self-response via telephone, paper questionnaire, and in-person visits.”³³ In addition to actual online response, the Census Bureau intends to rely heavily on Internet campaigns to reach households and encourage responses to the Census, “delivering the right messages to the right audience, at the right time.”³⁴

Civic Engagement

Broadband is a key tool for fostering civic engagement and awareness of news and current events. According to the National Telecommunications and Information Administration (“NTIA”), 56 percent of Americans use the Internet to obtain news or other information that can influence civic engagement, and 22 percent of Americans cite the Internet as their primary news source.³⁵ Recent studies indicate that the Internet may be more effective than television in encouraging civic engagement, particularly when used as a primary news source.³⁶

Inclusive Media and Movements

In 2019, media and movements live and thrive online. Reliable access to the internet bypasses traditional media gatekeepers and empowers underrepresented communities to tell their own stories on their own terms. The benefits of internet access go beyond diverse, often crowd-sourced entertainment content; it provides a platform for grassroots movements to organize,

³³ *Id.*

³⁴ *Id.* at 100.

³⁵ *America’s Emerging Online Experience*, at 11-12.

³⁶ *Id.* at vi; *see also* U.S. Gov’t Accountability Off., GAO-15-473, Intended Outcomes and Effectiveness of Efforts to Address Adoption Barriers are Unclear, 10 (2015) (“GAO Report on Efforts to Address Adoption Barriers”).

inspire, and exercise civic obligation under the Constitution. In many ways, the internet is instrumental for civil rights victories in the last 20 years, but only for those who are fortunate enough to have access to it.

B. Closing the Digital Divide is a Policy Priority Across the Federal Government.

Closing the digital divide is the rare policy priority with consensus support from policymakers across the political spectrum. Members of Congress on both sides of the aisle have affirmed their commitment to universal broadband access.³⁷ Rebuilding infrastructure and economic and technical competitiveness featured prominently President Trump's 2016 campaign.³⁸ Since taking office, the current administration has said expanding broadband access is a priority.³⁹ Likewise, Chairman Pai often remarks that closing the digital divide is his top priority as FCC Chairman.⁴⁰

Congress

³⁷ See, e.g., Bill Esbeck, *Broadband has Bipartisan Support in Congress*, Madison.com (Jun. 9, 2019), available at https://madison.com/opinion/letters/broadband-has-bipartisan-support-in-congress---bill/article_a3cc925f-d09c-5bed-9f58-94339c1e7438.html

³⁸ See, e.g., Donald Trump, Remarks to the Economic Club of New York at the Waldorf Astoria of New York City, (Sep. 15, 2016), available at <https://www.presidency.ucsb.edu/documents/remarks-the-economic-club-new-york-the-waldorf-astoria-new-york-city>; Matt O'Brien, *What Donald Trump gets totally right about the economy*, Washington Post (August 15, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/08/15/what-donald-trump-gets-totally-right-about-the-economy/?utm_term=.3e005fbb6c10.

³⁹ Kelsey Guyselman, Gail Slater, and Matt Lira, *High-Speed Broadband Unlocks Opportunities for Americans*, The White House (Feb. 13, 2019), <https://www.whitehouse.gov/articles/high-speed-broadband-unlocks-opportunities-americans/>.

⁴⁰ Federal Communications Commission, About the FCC, <https://www.fcc.gov/about/overview> (last visited Jul. 12, 2019).

In 2009, Congress tasked the FCC with creating a National Broadband Plan that would ensure affordable broadband service is accessible for every American.⁴¹ Since 2009, Congressional calls for the Commission to complete the task of providing universal service have only grown louder. Public interest organizations and industry groups agree on the need to increase access to broadband.⁴² More than forty bills were introduced in the 115th Congress aiming to increase or expand access to broadband.⁴³ In 2018, Congress ultimately appropriated \$600 million to increase the availability of grants and loans to fund rural broadband deployment through the Department of Agriculture.⁴⁴

Despite the divided Congress in 2019, increasing Americans' access to broadband remains notable for its broad bipartisan support.⁴⁵ Numerous bipartisan bills have focused on the importance of closing the digital divide.⁴⁶ Leadership of the House Committee on Energy & Commerce has introduced legislation to allocate \$40 billion for broadband deployment to unserved and underserved communities.⁴⁷ The chairman of the committees of jurisdiction in both the House and Senate raised concerns about the number of Americans still lacking sufficient

⁴¹ American Recovery and Reinvestment Act of 2009, P.L. 111-5, Section 6001 (k)(2)(D).

⁴² *See, e.g.*, Tom Ferree, "A Better Approach to Universal Broadband," Morning Consult (Jun. 12, 2019), *available at* <https://morningconsult.com/opinions/a-better-approach-to-universal-broadband/>; Ernesto Falcon, "America Desperately Needs a 'Fiber for All' Plan," Electronic Frontier Foundation (Mar. 22, 2019), *available at* <https://www.eff.org/deeplinks/2019/03/us-desperately-needs-fiber-all-plan>; Jonathan Spalter, "DC Must Help Close the Rural Digital Divide," Multichannel (Jun.4, 2018), *available at* <https://www.multichannel.com/blog/d-c-must-help-close-rural-digital-divide>.

⁴³ Cong. Research Serv., RL30719, Broadband Internet Access and the Digital Divide (2009).

⁴⁴ Spalter, *supra* note 42.

⁴⁵ Esbeck, *supra* note 37.

⁴⁶ *See, e.g.*, Measuring the Economic Impact of Broadband Act, S. 1289, 116th Congress (2019); Broadband Interagency Coordination Act, S. 1294, 116th Congress (2019); RURAL Broadband Improvement Act, H.R. 2661, 116th Congress, 2019.

⁴⁷ Leading Infrastructure for Tomorrow's America Act, H.R. 2741, 116th Congress (2019).

broadband access during recent FCC oversight hearings.⁴⁸ Members of Congress have specifically expressed their concern about the impact the Commission’s proposed USF cap would have on the digital divide, both directly in communications to the FCC and through a FCC Appropriations bill that would preclude such a cap from taking effect.⁴⁹ Clearly, ensuring the FCC is fulfilling its mandate to ensure all Americans have access to broadband remains a pressing concern for Congress.

The Administration

The Executive Branch has also expressed a strong desire to achieve universal service in the United States. Since taking office, the Trump Administration has flushed out the President’s infrastructure agenda and specifically highlighted the need to improve broadband access. In the words of a report on STEM education from the President’s National Science & Technology Council:

The commitment to equitable access, including sufficient broadband for all, should transcend geography, race, gender, ethnicity, socioeconomic status, veteran status, parental education attainment, disability status, learning challenges, and other social identities so that all Americans may enjoy the benefits of, if not contribute to, further development of these advanced cyber-technologies.⁵⁰

⁴⁸ *FCC Oversight Hearing Before the H. Subcomm. on Communc’n & Tech.*, 116th Congress (2019) (statements of Rep. Doyle, Chairman, H. Subcomm. on Commc’n & Tech., Rep. Latta); *FCC Oversight Hearing Before the S. Comm. on Commerce*, 116th Congress (2019) (statement of Sen. Wicker, Chairman, S. Comm. on Commerce).

⁴⁹ H.R. 3351, 116th Congress (2019); Letter from Rep. Pocan, House of Representatives, et al., to Ajit Pai, Chairman, Federal Communications Commission, et al. (filed Jul. 9, 2019) (on file with author) (“*Rep. Pocan USF Letter*”).

⁵⁰ National Science & Tech. Council, Exec. Office of the President, *Charting a Course for Success: America’s Strategy for STEM Education*, (2018), at 21.

The President’s policy platform includes service for all Americans, the need to provide affordable rural broadband, and broadband access for educational purposes.⁵¹ The commitment to providing universal broadband and promoting educational and medical usage remains as strong in the Trump White House as it does in Congress.

The Commission

The Federal Communications Commission professes a strong commitment to providing universal service. Chairman Pai has consistently declared that his number one priority as Chairman is “closing the digital divide and bringing the benefits of the Internet age to all Americans.”⁵² The Chairman has also recognized the benefits of educational access to broadband and rural telehealth.⁵³ These ideas are reflected in the FCC’s 2018-2022 Strategic Plan, which lists “Closing the Digital Divide” as the first priority of the Commission, including making “advanced communications services available to all Americans.”⁵⁴ The Plan echoes America’s historic commitment to universal service, emphasizing “affordable broadband service in all areas of the country,” and the benefits of telecommunications service to education, and the potential of telemedicine to improve lives.⁵⁵ The statements of the Chairman and the Commission reflect alignment with the missions and objectives of the Universal Service Fund programs.

⁵¹ Guyselman, *supra* note 39; Michael Kratsios and Chris Liddell, *High Speed Broadband is Fostering a New Era of Innovation for Rural America*, The White House (Feb. 15, 2019), <https://www.whitehouse.gov/articles/high-speed-broadband-fostering-new-era-innovation-rural-america/>.

⁵² Federal Communications Commission, *Bridging the Digital Divide for All Americans* (accessed Jul. 13, 2019), <https://www.fcc.gov/about-fcc/fcc-initiatives/bridging-digital-divide-all-americans>.

⁵³ Ajit Pai, Remarks at the Kansas Broadband Conference, Wichita, Kansas (Sep. 21, 2017), <https://www.fcc.gov/document/chairman-pai-remarks-kansas-broadband-conference>.

⁵⁴ Federal Communications Commission, 2018-2022 Strategic Plan (2018), at 5.

⁵⁵ *Id.* at i, 5.

C. A Universal Service Fund Cap Interferes With Efforts to Close the Digital Divide and Deploy Broadband to All.

Capping the USF will obstruct the goal of universal service by creating an unnecessary bureaucratic and political hurdle for policy-makers to clear in order to respond to changes in demand or improve program functions. The Commission appears to have drastically underestimated the scale of the universal service challenges confronting the agency, and a cap on the USF program undermines the agency's ability to meet those needs. Ultimately, a budget cap could force each USF program – each designed to address a particular and acute universal service need – to compete with the others for funding, and potentially lead to cutting off or reducing funding for core FCC missions like promoting broadband access in schools, high-cost rural areas, and to low-income families.

Closing the digital divide and ensuring universal access to broadband is a primary mission for the FCC. With good reason. In May 2019, the FCC's *2019 Broadband Deployment Report* found that as of the end of 2017, more than 26% of those living in rural areas and 30% of those on Tribal lands still lacked access to fixed broadband, while more than 30% of rural Americans lacked access to mobile broadband with speeds of 10 Mbps download and 3 Mbps upload.⁵⁶ Approximately 44% of those living in rural areas were not served by both fixed broadband and 10/3 Mbps mobile broadband, whereas 91% urban residents had access to both services.⁵⁷ Notably, the FCC's report relied primarily on self-reported data from broadband providers,⁵⁸ which has been demonstrated to lack appropriate verification from the Commission

⁵⁶ *2019 Broadband Deployment Report*, at 16-19, Fig. 1, 2b.

⁵⁷ *Id.* at 20, Fig. 3b.

⁵⁸ *Id.*, at 12-13 ¶¶ 24-26.

and lead the FCC to overstate the availability of broadband service.⁵⁹ The FCC also excluded consideration of broadband availability in Puerto Rico in its findings.⁶⁰

While the Commission's findings paint a picture of insufficient and inequitable broadband deployment, the FCC's also appears to dramatically overstate the availability of broadband and underestimate scope of the universal service problem facing the U.S. According to Microsoft, more than 160 million people in the U.S. currently don't use the internet at speeds the FCC would classify as broadband.⁶¹ This number dwarfs the Commission's findings that approximately 25 million Americans don't have access to broadband. A recent study by NPD Group found that 31% of U.S. households do not have access to broadband at 25/3 Mbps speeds – roughly 100 million Americans, with the vast majority in rural areas.⁶²

Demand for each of the Universal Fund programs fluctuates year-to-year, but the total disbursements have more than doubled since 2001.⁶³ Nonetheless, the goal of universal service has not been fully achieved, and demand for each of the four programs may well increase in the

⁵⁹ See Letter from Free Press to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 18-238 (filed Mar. 5, 2019) (explaining broadband provider BarrierFree overstated its deployment on a Form 477 filing and this overstatement went unnoticed by the FCC).

⁶⁰ *2019 Broadband Deployment Report*, at 11-12 ¶ 23.

⁶¹ See Microsoft.com, Microsoft on the Issues, "Its Time for a New Approach for Mapping Broadband Data to Better Serve Americans" (Apr. 9 2019), <https://blogs.microsoft.com/on-the-issues/2019/04/08/its-time-for-a-new-approach-for-mapping-broadband-data-to-better-serve-americans/>.

⁶² Press Release, NPD Group, Inc. Thirty-One Percent of American Households Lack a Broadband Connection (Jul. 25, 2019), https://www.npd.com/wps/portal/npd/us/news/press-releases/2019/thirty-one-percent-of-u-s--households-lack-a-broadband-connection/?utm_source=homepage&utm_medium=version-A&utm_campaign=Thirty-One%20Percent%20of%20U.S.%20Households%20Lack%20a%20Broadband%20Connection

⁶³ *NPRM*, at 5 (Table: Disbursements and caps/budgets for Calendar years 2014-2018); Federal Communications Commission, Universal Service Monitoring Report (2016) at 19 (Table 1.10: Universal Service Fund Disbursements 2001-2015).

years to come. The Commission’s proposed USF cap unnecessarily increases the hurdles for the Commission to cope with increasing demand for USF support.

The NTIA’s biannual Computer and Internet survey tracks the digital divide, and its data indicates the potential for growth in the Lifeline and High-Cost Support programs.⁶⁴ The Survey finds that as of 2017 “54% of those with family incomes less than \$25,000 used the Internet at home compared with 82% of Americans with family incomes of \$100,000 or more.”⁶⁵ The Lifeline program has only a 28% participation rate as of 2017, meaning that 72% of Lifeline-eligible households do not currently benefit from the service.⁶⁶ The *2016 Lifeline Modernization Order* directed the Universal Service Administrative Company to obtain a third-party evaluation of the program by December 2020.⁶⁷ This evaluation should support ongoing Commission efforts to improve Lifeline enrollment to better serve more low-income households. The proposed cap creates another potential obstacle for Lifeline improvements to Lifeline utilization, compromising the FCC’s ability to make broadband more affordable and accessible for low-income families. Just last year, a broad array of consumer and public interest advocates, civil rights organizations, unions, farmers, facilities-based providers, and Lifeline resellers strongly weighed in against Commission proposals that could compromise access to Lifeline for eligible low-income households.⁶⁸ Those concerns are equally valid in this proceeding. In short, a USF

⁶⁴ Doug Kinkoph, *Five Digital Inclusion Trends in the United States*, National Telecom. & Info. Admin (Oct. 18, 2018).

⁶⁵ *Id.*

⁶⁶ Universal Service Administrative Company, Lifeline Participation Rates (2017).

⁶⁷ *Lifeline Modernization Order* 149, 151 ¶¶ 401, 409.

⁶⁸ *See e.g.*, WC Docket No. 17-287, Comments of TracFone at 58-61, Sprint at 2-8, Cox at 9-10, USTelecom at 8-9, INCOMPAS at 12-14, ITIF at 7-8, Free Press at 49-56, New America’s Open Technology Institute at 29-30, National Hispanic Media Coalition at 23-25, Multicultural Media, Telecom and Internet Council and Lifeline Supporters at 14- 15, National Housing Conference at 3, New York State Public Service Commission at 2, City of New York at 6, Oregon Citizens’

cap that could ultimately curtail access to Lifeline for eligible families would widen, not narrow the digital divide, harming the public interest and contravening the Commission's universal service mandate.

The NTIA Computer & Internet Use Survey data indicates that only 65% of rural Americans use the Internet at home, compared to almost 73% of urban residents.⁶⁹ Affordable rural broadband continues to be the universal service issue of greatest interest for members of Congress and the Administration, and the focus of numerous recent pieces of legislation.⁷⁰ Congressional attention is rightly focused on the lack of accurate, granular data about the number of U.S. households lacking broadband access. Commissioner Starks is correct that it is irresponsible to cap the USF when so much is still unknown about the rural digital divide.⁷¹ Capping the USF while the FCC appears oblivious to the extent of the universal service problem is foolhardy and contrary to the Chairman's oft-stated goal that his priority is closing the digital divide.

The proposed USF cap is also counterproductive to ongoing efforts to improve E-Rate service to schools and libraries. In recent years the E-Rate program, like Lifeline, has had a sufficient budget to cover its disbursements, with some headroom for growth. An E-Rate Applicant Survey conducted by Funds for Learning "confirmed the urgent need for category 2

Utility Board at 3, Randy May at 6, Asian Americans Advancing Justice at 2-3, National Association for the Advancement of Colored People at 2, Letter from Rainbow PUSH Coalition at 2, Letter from National Grange at 3, Letter from National Association of American Veterans at 2, Letter from America's Health Insurance Plans at 3, Letter from LGBT Technology Partnership at 3.

⁶⁹ Kinkoph, *supra* note 64.

⁷⁰ *See, e.g., supra* note 46; *supra* note 48; Kratsios *supra* note 51.

⁷¹ *NPRM*, at 55 Dissenting Statement of Commissioner Geoffrey Starks.

funding, and that schools and libraries rely on E-Rate for broadband access.”⁷² Funds for Learning also confirms that demand for E-Rate continues to grow, with 88% of applicants expecting their broadband needs to increase in the next three years.⁷³ The FCC’s proposed USF cap could compromise the agency’s ability to address ongoing and growing funding needs in the E-Rate program, compromising broadband access for school children across the U.S.

The likelihood of growth in the Rural Healthcare program is evident based on the program’s past annual disbursements, which have risen steadily from 2001 to 2018 and increased by more than 150% in the last five years.⁷⁴ This trend is likely to continue as rural populations receive improved access to broadband in their homes and begin to take advantage of more telemedicine services from rural facilities.⁷⁵ We should also recall that, as described above, just this month the FCC rolled out a new pilot telehealth program, stating that ““To the extent that lack of affordable and robust broadband Internet access service is an obstacle to the adoption of connected care services by health care providers and patients, we believe universal service support could help address that obstacle.”⁷⁶

The Commission’s Notice of Proposed Rulemaking presents a cap of \$11.42 billion, equal to the current combined budgets of the four Universal Service Fund programs.⁷⁷ It has been noted that there is a \$3 billion gap between the budgets of the current programs and their current

⁷² Sara Friedmand, *FCC Seeks to Modernize E-Rate Program*, The Journal (7/11/2019), <https://thejournal.com/articles/2019/07/11/fcc-seeks-to-modernize-e-rate-program.aspx?m=1>

⁷³ *Id.*

⁷⁴ *NPRM*, at 5 (Table: Disbursements and caps/budgets for Calendar years 2014-2018); Federal Communications Commission, *Universal Service Monitoring Report (2016)* at 19 (Table 1.10: Universal Service Fund Disbursements 2001-2015).

⁷⁵ Peter L. Stenberg, *Rural Individuals Telehealth Practices: An Overview*, United States Dep’t of Agric. Econ. Info. Bulletin 199 (Nov. 2018).

⁷⁶ *Connected Care NPRM*, at 6 ¶ 14.

⁷⁷ *NPRM*, at 4 ¶ 9.

disbursement levels.⁷⁸ However, there is increasing pressure from policymakers to close the digital divide. The Commission has dramatically underestimated the scale of the digital divide and appears unprepared to even acknowledge the disparity between reality and its preferred narrative. Ultimately, the FCC will need to leverage the USF to address the persistence of the digital divide, as well as its true size and scope. There is growing demand for broadband, and there are likely to be increasing demands on all four USF programs.

In short, it would be imprudent to assume that USF program disbursements will remain the same or decrease in years to come. Even if the Commission were to impose a cap higher than the \$11.42 billion proposed by the NPRM and indexed to adjust for inflation, there is a very real possibility that the four USF programs could outgrow this cap. If that occurred, the cap will act an unnecessary political and bureaucratic impediment to the FCC's ability to complete its core mission and close the digital divide.

Due to the likely growth in demand for USF support in the future, the NPRM's proposed USF cap is likely to result in pitting the four USF programs against each other in competition for funding. The text of the NPRM itself clearly envisions such competition.⁷⁹ The proposal makes clear that if a cap is imposed the Commission will take "a more holistic view when considering future changes to the universal service programs and their impact on overall USF spending."⁸⁰ By capping the Fund, the Commission "seek[s] to promote a robust debate on the relative effectiveness of the programs."⁸¹ The Commission also proposes several methods for keeping expenditures beneath the cap, including "reduc[ing] expenditures automatically consistent with

⁷⁸ *Id.* at 52 Statement of Commissioner Michael O'Reilly.

⁷⁹ NPRM, at 4 ¶ 9.

⁸⁰ *Id.*

⁸¹ *Id.*

the Commission's universal service goals and consistent with the legal imperative to remain within the cap."⁸² The Commission explicitly asks "[w]hat criteria should be used in prioritizing reductions of one program against reduction in another?" when faced with disbursements that may exceed the cap.⁸³ Clearly, establishing competition between the distinct and equally important USF programs is a feature of proposed policy.⁸⁴

The proposed USF will compromise the agency's ability accommodate USF program growth and utilization, create red tape to constrain the FCC's ability to address universal service challenges, and pit USF stakeholders against one another for limited resources instead of working together to close the digital divide. Members of Congress who have weighed in on this matter agree, writing, "it is detrimental to the goal of universal service to put the various USF programs in direct competition for USF funds."⁸⁵

The mission of the Universal Service Fund is ongoing. Demand for the programs is high, the scope and scale of the problem is unknown and largely underestimated, and closing the digital divide is a growing priority American policy-makers consider an economic and moral imperative. Capping the USF will create an unnecessary and detrimental additional layer of political bargaining between the programs and their mission. The result will likely be infighting between stakeholders within the four USF programs, which would be counterproductive considering that the programs should complement each other and help improve the availability and affordability of broadband to the American people. The proposed USF cap does not serve the public interest and should be rejected.

⁸² *Id.* at 6 ¶ 12.

⁸³ *Id.* at 7-8 ¶ 18.

⁸⁴ *Id.* at 4, 8 ¶¶ 9, 19.

⁸⁵ *Rep. Pocan USF Letter.*

III. A UNIVERSAL SERVICE FUND CAP DOES NOT REFLECT THE INTENT OF THE TELECOMMUNICATIONS ACT OF 1996.

The 1996 Act created the Universal Service Fund in its modern form, capping years of effort. The 1996 Act affirmed the nation's ongoing commitment to providing affordable access to advanced telecommunications across the country. The plain text of the 1996 Act lays out a set of priorities, values, and commitments that are fundamentally irreconcilable with the NPRM. Congress made clear its absolute (rather than the Commission's limited, conditional) commitment to universal service in the explanatory documents at the time of the Act's creation. Furthermore, Congressional debates reveal that lawmakers weighed the same concerns raised in the NPRM. However, Congress affirmatively chose to reinforce the nation's historic commitment to universal service, whereas the NPRM proposes an eventual retreat from the Commission's universal service mandate. In short, Congress has already considered and rejected the policy pathway the Commission is currently proposing. The Commission should reject the NPRM's proposal to cap the USF.

A. A Universal Service Fund Cap Does Not Reflect the Plain Text of the Telecommunications Act of 1996, the Conference Report, or Congressional Intent.

The concept of a USF cap and combining the E-Rate and Rural Healthcare runs counter to the 1996 Act in several ways. The Commission's proposal sets out a limited vision, under which the Commission will pursue universal access to broadband service, while limiting expenditures and balancing the allotment of resources to different programs.⁸⁶ However, while the Commission should absolutely strive for efficient management and fiscal responsibility in the administration of each distinct program, Congress has already provided clear benchmarks for

⁸⁶ NPRM, at 2, 4 ¶¶ 3, 9.

each program, independent of the progress of the others.⁸⁷ Congress's directed the FCC to achieve each of these benchmarks as efficiently as possible, not to pull up short or prioritize them relative to one another.⁸⁸ Additionally, Congress demonstrated its determination that schools and libraries and healthcare facilities had distinct universal service needs by creating distinct provisions within the Act addressing the commitments to schools and libraries and the commitment to healthcare facilities.⁸⁹ Finally, the proposed USF cap and the resulting competition between programs threatens Congress' clear mandate to provide clear, predictable, and sufficient funding mechanisms for universal service programs.⁹⁰

1. Congress Expressed an Absolute Commitment to the Goals of Rate Parity, Universal Affordability, and Universal Access for Designated Institutions.

Section 254(b) establishes principles to govern the Commission's universal service policies. These principles include,

[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.⁹¹

Two distinct benchmarks arise from this principle: rate parity for high-cost areas and universal affordability for low-income subscribers. These commitments are expressed in absolute terms; Congress did not merely direct the Commission to bring rates in high-cost areas closer to the rates available in urban areas. Congress did not instruct the FCC to bring broadband closer to

⁸⁷ 47 USC §§ 254(b), 254(c), 254 (g), 254(i); Sen. Rep. No. 103-230, at 131-133 (1996) (Conf. Rep.).

⁸⁸ *Id.*

⁸⁹ 47 USC § 254(h)(1); Sen. Rep. No. 103-230, at 133.

⁹⁰ 47 USC §§ 254(b)(5), 254(c)(3), 254(e).

⁹¹ 47 USC § 254(b)(3).

affordability for only some low-income subscribers. Rather, Congress' stated intent in the plain text of the 1996 Act is that access to advanced telecommunications services are a necessary part of modern life that must be equally available to all consumers in all regions of the U.S.; in the words of Senators Hollings, the FCC must ensure the "widest availability" of advanced telecommunications services.⁹²

Subsection 254(g) reinforces this principle, requiring geographic rate averaging and rate integration to ensure that rural and high-cost subscribers across the country have access to rates "no higher than those paid by urban subscribers."⁹³ Section 254(i) reiterates the demand that service be universally affordable.⁹⁴ Furthermore, 254(j) was specifically added, in the words of the Conference Committee, "to clarify that this section is not intended to alter the existing provision of Lifeline Service to needy consumers."⁹⁵ While the structure of the Lifeline program has since been brought under the USF, Subsection 254(j) remains relevant in the context of today's proposal. A cap on the overall USF may very well impede provision of Lifeline to needy customers.

Section 254(b)(6) explains that schools, libraries, and healthcare facilities should have access to advanced telecommunications services. The law does not does not qualify this commitment to serving anchor institutions by mandating service only for "some" facilities or "as many as feasible."⁹⁶ The intention for truly universal connectivity is explicit in the structure Congress describes for disbursing support. This structure requires providers to, upon request for "any of its services that are within the definition of universal service under subsection (c)(3),

⁹² 142 Cong. Rec. 2010.

⁹³ 47 USC § 254(g); Sen. Rep. No. 103-230, at 132.

⁹⁴ 47 USC § 254(i).

⁹⁵ Sen. Rep. No. 103-230, at 134.

⁹⁶ 47 USC § 254(b)(6).

provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties.”⁹⁷ The Act charges the Commission with determining the discount rate as is “appropriate and necessary to ensure affordable access to and use of such services by such entities.”⁹⁸ If there are schools and libraries without affordable access to and use of such services, the agency’s mandate is not fulfilled. The proposed USF cap will likely impede the FCC’s ability to comply with Congress’ command.

Congress’ charge to the Commission under Section 254(b)(6) to providing necessary services to rural healthcare facilities is as absolute as the mandate to connect schools and libraries.⁹⁹ In establishing the FCC’s charge to ensure connectivity for rural healthcare facilities, Section 254 requires that providers “shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care services ... [at] reasonably comparable to rates charged for similar services in urban areas in that State.”¹⁰⁰ The language echoes the text of 254(b)(3) governing the High-Cost program. Congress commanded provided the Commission to ensure rural healthcare facilities can access the same services at the same rates as their urban counterparts. The proposed USF cap is likely to conflict with the Commission’s ability to comply with this clear congressional directive.

The 1996 Act is Congress’ clearest guidance to the FCC regarding how to carry out the agency’s universal service mission. Congress stated unequivocally that it wanted the Commission to use the funding mechanisms it provided to achieve rate parity between high-cost

⁹⁷ 47 USC § 254(h)(1)(B).

⁹⁸ *Id.*

⁹⁹ 47 USC § 254(b)(6).

¹⁰⁰ 47 USC § 254(h)(1)(A).

and urban areas, affordability for all Americans, access to advanced services for all classrooms and libraries, and access to advanced services for rural healthcare facilities at rates equivalent to their urban counterparts. If Congress had intended to limit those goals, or give the Commission greater discretion to determine which goals were reasonable and which were not, it would have said so. Under the language of the 1996 Act and the Conference Committee’s guidance, any attempt to cap the USF in ways that undermine the FCC’s ability to achieve Congress’ goals or to set up a prioritization conflict between the USF programs, “flies in the face of Congress’s direction to the FCC.”¹⁰¹

2. The Proposed Cap Could Prevent the Commission From Providing Specific, Sufficient & Predictable Mechanisms as Congress Intended.

The Commission’s proposed USF cap also conflicts with Section 254(b)(5), which requires “[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.”¹⁰² A USF cap may make it impossible for the Commission to provide sufficient funding for the USF programs in the future. The NPRM explicitly considers how prioritize cuts to the various programs in the event that the cap is likely to be exceeded, in contrast to the 1996 Act’s explicit language that funding be sufficient to advance Congress’ universal service goals.¹⁰³

Meanwhile, some mechanisms proposed by the Commission to ensure none of the programs exceed the cap could lead to unpredictability in funding levels and whether the USF can actually meet the FCC’s universal service obligations. The NPRM explains, “unexpected increases in demand in one program could affect the funding levels of other programs that have

¹⁰¹ *NPRM*, at 54, Dissenting Statement of Commissioner Geoffrey Starks.

¹⁰² 47 USC § 254(b)(5).

¹⁰³ *NPRM*, at 4 ¶ 19.

not experienced similar unexpected increases in demand,”¹⁰⁴ unambiguously spelling out that a USF cap would make funding unpredictable if programs experience greater than anticipated utilization. As a result, it appears clear that programs will not know whether or not cuts may be necessary until it becomes evident that the cap will be exceeded.¹⁰⁵

The mandate to provide clear, sufficient, and predictable support is extremely important to prevent funds from being suddenly withdrawn from program applicants and recipients relying on those funds for current spending or investment. This potential outcome appears likely under some of the control mechanisms proposed by the Commission.¹⁰⁶ Regardless of any precautions the Commission may design to prevent unpredictable changes to program funding, Congress’s demand the FCC provide for sufficient USF funding reinforces Congress’ intent to ensure affordable advanced telecommunications services are available to all, and precludes the kind of cuts and prioritization the Commission envisions.

B. Congress Rejected Arguments for Limiting Universal Service While Debating the Telecommunications Act of 1996.

The Commission cites concern for the costs universal service imposes on ratepayers as its primary reason for the proposed cap.¹⁰⁷ Specifically, the Commission claims a USF cap is justified because of the tendency of higher USF contribution rates to disproportionately hurt lower-income subscribers.¹⁰⁸ While the growing burden on ratepayers, particularly low-income ratepayers, is cause for concern, this is an issue Congress considered and resolved when considering the 1996 Act. The Commission must not substitute its judgement for Congress’.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 2 ¶¶ 3-4, 51-52 Statement of Commissioner Michael O’Reilly.

¹⁰⁸ *Id.*

Congressional debates from 1995 reflect that Congress was mindful of many of the issues considered by the NPRM while it considered and passed the 1996 Act.¹⁰⁹ In fact, Congress unequivocally rejected the proposals advanced by the FCC and made clear that closing the digital divide, not merely narrowing it, was a major Congressional priority, and one of the most enduring measures of the 1996 Act.¹¹⁰

The Commission attempts to justify a USF cap as “mindful of our obligation to safeguard the USF funds ultimately paid by ratepayers . . .”¹¹¹ The NPRM interprets the agency’s universal service mission as one of “balanc[ing] the need for fiscal responsibility and predictability with the benefits that come from universal service funding.”¹¹² The NPRM cites concern that “too much subsidization could negatively affect the affordability of telecommunications services for those consumers who ultimately provide the support for universal service.”¹¹³ The Commission summarizes its statement of purpose: “capping the Fund overall will strike the appropriate balance between ensuring adequate funding for the universal service programs while minimizing the financial burden on ratepayers and providing predictability for program participants.”¹¹⁴ Congress plainly addressed and rejected these issues when it considered the 1996 Act.

In 1995, the Senate weighed numerous amendments to the 1996 Act to remove, limit or otherwise alter the bill’s universal service sections. Proponents of those amendments relied on many of the same arguments that the Commission advances today.¹¹⁵ Congress examined the fact

¹⁰⁹ See, e.g. 141 Cong. Rec. 15343-45, 15378, 15632.

¹¹⁰ See, e.g. 141 Cong. Rec. 15340, 15376-77, 142 Cong. Rec. 2010, 2012, 2014, 2016, 2033, 2224, 2227.

¹¹¹ NPRM, at 2 ¶ 3.

¹¹² Id. at 2 ¶ 4.

¹¹³ Id.

¹¹⁴ Id. at 4 ¶ 9.

¹¹⁵ See, e.g. 141 Cong. Rec. 15343-45, 15378, 15632.

that “[t]he bill allows the FCC to force all telecommunications companies to pay into the universal service fund an amount necessary to subsidize such services. And, yes, these costs, the costs of paying federally mandated access, will be passed on to the consumer.”¹¹⁶ Members of Congress voiced concern about cross-subsidization¹¹⁷ and the regressive potential of universal service contribution mechanisms to burden lower-income subscribers.¹¹⁸ Congress was not blind to these concerns when it passed the 1996 Act. The Commission’s present day concerns works would have been familiar to the drafters of the 1996 Act. However, those positions were rejected in 1996 and should be rejected again today.

Congress also weighed proposals to limit universal service support. One proposed amendment would have removed the support for schools, libraries, and rural healthcare facilities.¹¹⁹ Another suggestion, more relevant to the current discussion, sought to impose a statutory cap on the universal service fund that would have made it much more difficult to increase universal service support.¹²⁰

However, Congress was not swayed by these proposals, and did not adopt these limitations. Instead, it laid out a broad commitment to universal service, without reservation. Congress considered limits to its universal service commitment, including a USF cap. Ultimately, Congress rejected this approach by declining to cap the USF and passed the 1996 Act with overwhelming support.¹²¹ In doing so, Congress affirmed its firm commitment to universal

¹¹⁶ 141 Cong. Rec. 15345.

¹¹⁷ 141 Cong. Rec. 15632.

¹¹⁸ 141 Cong. Rec. 15633.

¹¹⁹ Congress.gov, *S.Amend. 1285 to S.652*, [https://www.congress.gov/bill/104th-congress/senate-bill/652/amendments?q={%22search%22:\[%22\%22Telecommunications+act+of+1996\%22%22\]}&r=4&s=9&pageSize=250](https://www.congress.gov/bill/104th-congress/senate-bill/652/amendments?q={%22search%22:[%22\%22Telecommunications+act+of+1996\%22%22]}&r=4&s=9&pageSize=250).

¹²⁰ 141 Cong. Rec. 15345.

¹²¹ 142 Cong. Rec. 2044, 2242.

service that was, in the words of Representative Underwood, “an important statement of principle.”¹²² Senator Dorgan described the strong universal service protections as “the most important provision in this legislation.”¹²³ In light of the significant consideration that the 104th Congress gave this issue, and of the fact that concern about the need to close the digital divide has only grown more prominent it is inappropriate for the Commission to second-guess the 1996 Act and undermine decisions made by Congress by adopting the NPRM’s proposal to cap the USF.

IV. THE PROPOSED CAP RUNS COUNTER TO THE FEDERAL-STATE JOINT BOARD’S IMPLEMENTATION OF UNIVERSAL SERVICE FUND PROGRAMS.

The current NPRM also runs counter to several recommendations of the Federal-State Joint Board (“Joint Board”), the Congressionally-mandated body tasked with implementing the Universal Service Fund programs.¹²⁴ While the Joint Board and Commission did establish an interim USF cap, they took extreme care to emphasize it was only done on a temporary basis in order to govern the unpredictable transition period from the pre-1996 regime, and it was not a long-term policy.¹²⁵ Additionally, the Joint Board and Commission designed the E-Rate and Rural Healthcare programs to best serve the distinct needs of schools and libraries, on the one hand, and healthcare facilities, on the other.¹²⁶ To this end, the Joint Board and Commission ordered separate accounting and allocation systems (and actually considered entirely separate

¹²² 142 Cong. Rec. 2237.

¹²³ 141 Cong. Rec. 15340.

¹²⁴ 47 USC § 254(a).

¹²⁵ Federal Communications Commission, In the Matter of Amendment of Part 36 of The Commission's Rules And Establishment of a Joint Board, CC 80-286, *Report & Order*, FCC 93-549 at ¶ 3, 13 (rel. Dec. 23, 1993) (“*Interim Cap Report & Order*”).

¹²⁶ *See, e.g.*, Federal Communications Commission, In the Matter of the Federal-State Joint Board on Universal Service, CC 96-45, *Recommended Decision*, FCC 96J-3 ¶¶ 9, 439, 440, 450, 611, 686, 687 (rel. Nov. 8, 1996) (“*Recommended Decision*”).

Universal Service Funds) for the E-Rate and Rural Healthcare programs out of respect for their distinct structures.¹²⁷ This recognition of the distinct needs of E-Rate and Rural Healthcare is not reflected in the NPRM's proposal to combine the two programs under one cap.¹²⁸

A. The Board & Commission Implemented an Interim Cap for a Specific Purpose & Limited Time, But Decided Against a Permanent Cap.

The Joint Board and the Commission initially implemented a temporary cap on the old Universal Service Fund system prior to 1996. Following the passage of the Act, they extended this cap during the pendency period of the new programs.¹²⁹ However, both the Board and the Commission made clear that they were doing this for a limited time and to serve a specific purpose unique to that point in time.¹³⁰

The Board and Commission were initially concerned about erratic growth in the high-cost support mechanisms at a time when they were being reevaluated, and did not want instability during the pendency of the new system to “ significantly impede efforts to reevaluate the high cost assistance rules.”¹³¹ It is worth noting for comparison that the erratic growth in question varied far more drastically year-to-year, and resulted in a much greater annual average growth, than the Fund has seen at any time since the implementation of the modern programs in 2001.¹³²

¹²⁷ *Id.* at ¶¶ 611, 686, 687.

¹²⁸ *NPRM*, at 9 ¶ 23.

¹²⁹ See Federal-State Joint Board on Universal Service, CC 96-45, *Report & Order*, FCC 96-281 (rel. June 26, 1996).

¹³⁰ *Interim Cap Report & Order*, at ¶¶ 3, 17, 18, 24.

¹³¹ *Id.* at ¶ 9.

¹³² Growth rates during the period in question varied from only 1 percent to more than 19 percent annually, and reached 60 percent growth over the course of a four-year period. *Id.* at ¶ 22. By contrast, the 18 years of data since the implementation of the new system show an average 5.02% growth annually with only two years in the early stages of the program surpassing 10% growth. *NPRM*, at 5 (Table: Disbursements and caps/budgets for Calendar years 2014-2018); Federal Communications Commission, *Universal Service Monitoring Report 19 (2016)* (Table 1.10: Universal Service Fund Disbursements 2001-2015).

However, even in the context of these major fluctuations in growth at the time, the Joint Board and Commission emphasized that this temporary measure was only appropriate in order to protect the ongoing process of evaluating and overhauling the system.¹³³ They took care to ensure the interim cap would not adversely impact the Fund's recipients.¹³⁴ The Board and Commission were also careful to point out and reiterate that this decision should not prejudice the issue for purposes of permanent rulemaking.¹³⁵ Finally, and most importantly, they of course ultimately did not recommend or implement a permanent cap for either the pre-1996 system or the modern USF programs.¹³⁶

B. The Joint Board Mandated Separate Accounting and Allocation Systems to Best Serve the Distinct Needs of the E-Rate and Rural Telehealth Programs.

Unlike Lifeline and High-cost Support, the Joint Board had to design the E-Rate and Rural Healthcare programs from the ground up. The Joint Board's directive from Congress required it to "take into account the particular needs of hospitals, K-12 schools and libraries,"¹³⁷ and this is reflected in their work. Specifically, the Joint Board recognized that each type of institution had a distinct set of needs and considerations that should be reflected in the funding structures of the two programs.¹³⁸

To this end, the Joint Board considered creating two entirely separate Universal Service Funds, one to fund E-Rate and one to fund Rural Telehealth.¹³⁹ It ultimately decided against this

¹³³ *Interim Cap Report & Order*, at ¶ 9.

¹³⁴ *Id.*

¹³⁵ *Id.* at ¶¶ 3, 13.

¹³⁶ *See Id.* at ¶ 21; *Recommended Decision*.

¹³⁷ *See Recommended Decision*, at ¶ 635.

¹³⁸ *Id.*, X.-XI. *See, e.g.*, ¶¶ 458, 460, 582, 635, 636, 650.

¹³⁹ *Id.*, at ¶¶ 611, 612, 686, 687.

plan, solely because separate funds would “impose unnecessary administrative costs.”¹⁴⁰ However, the Joint Board assured commenters at the time that “proper accountability and targeting of funds . . . is achievable” without needing separate funds.¹⁴¹ The Joint Board and Commission concluded, “separate funding mechanisms would be expensive and unnecessary but that separate accounting and allocation systems would be more efficient because the two groups have different requirements under the 1996 Act”¹⁴² Clearly, the Joint Board and the FCC recognized that administrative tidiness was ideal, but should not be achieved at the expense of the Commission satisfying its universal service mandate. Throughout its work, the Joint Board returned to the theme that the two programs had distinct needs and that the USF framework should allow maximum flexibility to institutions in order to maximize the impact of funding.¹⁴³ When concluding “that maximum flexibility will satisfy the goals of section 254”¹⁴⁴

The FCC’s current proposal discusses similarities between the recipients of E-Rate and Rural Healthcare funding.¹⁴⁵ The NPRM points out both programs serve anchor institutions, and both types of institutions often apply through consortia in order to cut administrative costs.¹⁴⁶ However, these are ultimately superficial similarities that have little to do with the very different ways that each program is structured and the very different demands of each type of institution. Seeking to combine E-Rate and Rural Healthcare funding under one cap may be tidy

¹⁴⁰ *Id.*, at ¶ 612.

¹⁴¹ *Id.*, at ¶ 611.

¹⁴² *Id.*, at ¶ 687.

¹⁴³ *Recommended Decision*, at X.-XI. *See, e.g.*, ¶¶ 458, 460, 582, 635, 636, 650.

¹⁴⁴ *Id.* at ¶ 458.

¹⁴⁵ *NPRM*, at 9-10 ¶ 23.

¹⁴⁶ *Id.*

administratively, but does less to fulfill the statutory mandate of serving the needs of the institutions and “maximiz[ing] the value generated by universal service support.”¹⁴⁷

Overall, the Joint Board and Commission hewed closely to Congress’s mandate by setting up the programs in such a way as to most effectively achieve Congress’ goals for each of the USF programs. Today’s Commission should not interfere with that structure by imposing a blanket cap across the four programs.

V. THE COMMISSION SHOULD REFORM UNIVERSAL SERVICE FUND CONTRIBUTION MECHANISMS.

If the FCC is concerned about the USF’s burden on ratepayers, the most responsible policy is to make a good-faith attempt to correct outdated aspects of the USF contribution mechanisms, rather than merely capping the amount that can be spent. In recent years, the USF contribution factor has risen dramatically. However, addressing the burdens on ratepayers by undermining the agency’s ability to fulfill its universal service mandate is not the answer.

The total USF disbursements have grown over the last two decades, certainly, but no more than could be expected based on the growing interest in connectivity.¹⁴⁸ The FCC’s own research has concluded that the problem has resulted from a gradual expansion in demand for the USF that has been met by a corresponding decline in the rate base.¹⁴⁹ This is not an unforeseen problem. While the 1996 Telecommunications Act was being debated, Senators Kerrey and McCain discussed the proposal that “it should not be just the phone companies or should not just

¹⁴⁷ *Recommended Decision*, at ¶ 458.

¹⁴⁸ *NPRM*, at 5 (Table: Disbursements and caps/budgets for Calendar years 2014-2018); Federal Communications Commission, *Universal Service Monitoring Report (2016)* at 19 (Table 1.10: Universal Service Fund Disbursements 2001-2015); Pew Research Center, *Internet & Technology, Internet/Broadband Fact Sheet* (accessed on 07/20/19) ([https:// www.pewinternet.org /fact-sheet/internet-broadband/](https://www.pewinternet.org/fact-sheet/internet-broadband/)).

¹⁴⁹ *Universal Service Contribution Methodology*, WC 06-122, *Further Notice of Proposed Rulemaking*, FCC 12-46, at 3, 13-15 ¶¶ 3, 4, 20 (rel. Apr. 30, 2012) (“*Contribution FNPRM*”).

be the existing entities that are making a contribution to the universal service fund; that, in fact . . . these new information services should be making a contribution” in order to “broaden the base.”¹⁵⁰

A cap will do little to solve the overall problem, since a dwindling base of contributors is a larger problem for the fund’s affordability than the growth in expenditures. If the FCC capped the USF at \$11.42 billion and never raised it, strangling the growth of the programs in the process, the rate paid by subscribers in support of the fund may still continue to rise if current trends in the number of contributors were to continue.¹⁵¹

There are myriad possible ways to reform the Universal Service Fund contribution mechanisms, many of which the FCC itself has proposed.¹⁵² As the National Association of Regulatory Utility Commissions points out in 2014, the FCC has “not reformed the contribution methodology even though it has sought comment several times over the past decade.”¹⁵³ The FCC could consider (and has considered) broadening the classes of carriers required to pay in. They could require payments on a per-connection basis, rather than a per-phone line basis. They could require a percentage of all broadband revenue to be added to the USF. By greatly increasing the base contributing to universal service support, these reforms would ensure the sustainability of the program and alleviate the burden on ratepayers in a way that merely capping the program does not. While selecting the proper fix or fixes for the contribution mechanisms may be difficult, it is the Commission’s responsibility to take it on.

¹⁵⁰ 141 Cong. Rec.15348.

¹⁵¹ *Contribution FNPRM*, at 3, 13-15 ¶¶ 3, 4, 20.

¹⁵² *Id.* at 3-4 ¶¶ 5, 6.

¹⁵³ National Association of Regulatory Utility Commissioners, Resolution Supporting Reform of the Federal Universal Service Fund Contribution System, (2014) *available at* <https://pubs.naruc.org/pub.cfm?id=53A0D85C-2354-D714-51AB-7D2FC829961F>

The Commission is not wrong to be worried about the current financial trend of the USF, but the solution that satisfies its universal service mission is to broadening the contribution base, thereby lowering the contribution rate.

VI. CONCLUSION

The Commission has proposed an unnecessarily blunt approach to address a complex problem. The agency's proposal that ignores the policy demands of the nation, the Commission's Congressional mandate, and the longstanding design of the USF. In the long run, capping the USF will prevent the Commission from continuing its work to close the digital divide. Thus, the Commission should not to place a cap on the USF, nor should it combine the E-Rate and Rural Telehealth programs.

Respectfully Submitted,

/s/ _____

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PUBLIC KNOWLEDGE

/s/ _____

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