

**DISSENTING STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *Bridging the Digital Divide for Low-Income Consumers*, WC Docket No. 17-287; *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42; *Telecommunications Carriers Eligible for Universal Service Support*, WC Docket No. 09-197

There is a simple question, I fear, that is too rarely asked in these quarters: Just who is a Lifeline subscriber? According to survey data, it is a she. She makes \$14,000 per year. She is middle-aged, single, and has a child within her care. She is trapped in systemic poverty and she has picked the only device and telephone plan she could afford. Or to state it more boldly, the plan has picked her.

That service is delivered primarily by a wireless reseller because she can only afford one form of communication. That service enables her to call 911; that service allows her to speak with her child's educators, and help her child with her homework; and that service enables her to stay on top of her full-time, or multiple part-time, but all too often dead-end minimum-wage shift schedule.

And just what has the FCC majority teed up for her today, in the final order that was circulated after this meeting was called to order: a more efficient, user-friendly means to bridge the communications divide? No. Before us is a carefully crafted proposal which is more likely to rip that phone from her hands, than provide her with enhanced service.

Now if I were to rename this agency the Federal Punitive Rulemaking Commission, you would accuse me of being over-the-top. But this Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking and Notice of Inquiry is in fact, a punitive rulemaking. And what should be most telling even to a casual observer, is that no filer in the docket thus far supports any of the specific policy proposals. There is a slight exception in the form of one filer who damns the proposal with the faintest of praise, but every other commenter is categorically against this item. Veterans groups, public interest groups, civil rights groups, carriers, Tribes, and more, all express deep concern about this rulemaking.

So I draped myself primarily in black this morning because I mourn for that mother and her prospects when it comes telephone service. I mourn because before us is an absurd proposal devoid of promise and empathy, and I mourn because I am forced to be critical of the majority that leads an agency I hold dear. I mourn, because the majority would rather toss out viable solutions already teed up when it comes to service reforms, more choice, and ensuring that low-income Americans can afford voice and broadband service.

The majority proclaims that the item is all about bridging the digital divide and has boldly labeled this item as such. But, this proposal does nothing to make the lives of those who qualify better, and no amount of Orwellian doublespeak in the docket's title will suggest otherwise. Make no mistake: this is the *Widen the Digital and Opportunity Divide* item.

This Administration goes on and on about the urgency of reducing regulatory barriers. Indeed, we have had before us, item after item over the past 10 months that purport to do just that. But when it comes to those most in need, the most they are willing to pay is lip service. For them, we have¹ and will² make it

¹ See *Telecommunications Carriers Eligible for Universal Service Support, Lifeline and Link Up Reform and Modernization*, Order or Reconsideration, 32 FCC Rcd 1095 (WCB 2017) (*LBP Revocation Order*) (revoking the designations of nine companies to provide Lifeline service, with no showing of wrongdoing); Statement of FCC Chairman Ajit Pai on the Future of Broadband in the Lifeline Program (Mar. 29, 2017) (refusing to let more broadband providers into the program and committing to undo Lifeline Broadband Provider process).

more difficult for providers to enter and stay in the Lifeline program. For those looking to serve economically poor people, this majority is quite comfortable attacking even blameless companies as they force them to divest customers,³ lose millions of dollars even after they have entered the market,⁴ and ensuring that it will take 25 years instead of one year to enter into the nationwide market.⁵

This Administration is all about ensuring that the Commission encourages innovative service offerings,⁶ but not if that offering is designed to help those who are economically poor. For those less fortunate, the majority is happy to dictate the exact type of facilities a provider must use to provide service,⁷ ignoring the Act,⁸ and the ability of the marketplace to respond and provide solutions that meet people where they are, and ignoring every other docket where they extol the benefits of a free and open market.

I could go on pointing out how this Administration enables providers to provide free data to consumers,⁹ but not if they are economically poor;¹⁰ How this Administration allows universal service benefits to flow in perpetuity for companies,¹¹ but not for the economically poor;¹² that this Administration praises competition and choice,¹³ but not for the economically poor;¹⁴ and that this Administration decries consumers having to pay a minimum fee for voice service,¹⁵ but for the economically poor, we are just fine with suggesting they do just that.¹⁶ Finally, we have raised budgets for

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² *Bridging the Digital Divide for Low-Income Consumers et al.*, Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry FCC (2017) (*Widen the Divide*).

³ *LBP Revocation Order*, paras. 15-16.

⁴ *See LBP Revocation Order*.

⁵ Remarks of Michael Flood, Vice President of Education Markets, Kajeet, MMTC Lifeline Update (Mar. 21 2017).

⁶ Chairman Pai Statement on Free Data Programs (Feb. 3, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0203/DOC-343345A1.pdf.

⁷ *Widen the Divide NPRM, passim* (proposing to limit Lifeline support to only fixed and mobile providers that provide last-mile service over Commission-specified technology and own or long-term lease last-mile facilities).

⁸ 47 U.S.C. § 214(e)(1) (explicitly contemplating resale as an option for ETCs).

⁹ Chairman Pai Statement on Free Data Programs (Feb. 3, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0203/DOC-343345A1.pdf.

¹⁰ *Widen the Divide NPRM*, paras. 112-15.

¹¹ No other universal service program limits the total amount of support an entity may receive over the course of their participation in the program.

¹² *Widen the Divide NOI*, paras. 130-31.

¹³ *See, e.g., Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, Twentieth Report, FCC 17-126 (2017).

¹⁴ *Widen the Divide NPRM, passim* (proposing to limit Lifeline support to facilities-based providers, even if there is no facilities-based Lifeline ETC in the area).

¹⁵ *Connect America Fund, et al.*, Report and Order, 29 FCC Rcd 7051 (2014) (Statement of Commissioner Pai) (criticizing policy where the “FCC sets a minimum price that telephone companies can charge their customers for local telephone service”).

¹⁶ *Widen the Divide NPRM*, paras. 112-15.

other universal service programs, but here we are seeking comment on halving (or worse) the amount we spend bringing the vulnerable online.¹⁷ Could it be because these consumers are the economically poor?

The impact of these actions and proposed actions will be severe, but the actions themselves are heartless. Over 70% of wireless Lifeline consumers will be told they cannot use their preferred carrier and preferred plan, and on top of that, they may not have a carrier to turn to after that happens. And just where is the analysis of where these customers will go, or how we can ensure that they continue to be able to afford connectivity? The item contains no analysis of this sort. And at a time when eligible telecommunications carriers are actively relinquishing their designations,¹⁸ or have elected forbearance from the obligation to provide Lifeline service,¹⁹ just where will these consumers turn?

As I have said before and will repeat today, the federal Lifeline Program is not, nor should it be, an infrastructure program. It is certainly a complement to infrastructure programs, but ultimately it is an affordability program. Even when the Commission has said that additional Lifeline monies would have the effect of spurring infrastructure deployment in the context of Tribal Lifeline,²⁰ it has said that the “primary goal is to reduce the monthly cost of service”²¹ and went on with a detailed analysis of how that additional funding would impact affordability.²² It has never suggested that affordability is an infrastructure problem and it never should.

Most disheartening, however, is the immediate impact this proposal will have on Tribal lands, and that it is occurring during Native American Heritage Month, is most distressing. During my travels in New Mexico last year, I met Lucienda, a young Navajo woman. She told me that without the Lifeline program her community would “really be living in the 1800s.” Unfortunately, many other Tribes are plagued by a disproportionate share of their citizens living in poverty, and some of them lack the basics, like electricity and running water. What this means is that their Lifeline phone is their only real connection with the outside world, and sometimes, it is their only functioning utility. The Tribes²³ have told us that losing enhanced Lifeline support would be devastating, because very few wireless ETCs actually provide Lifeline service on Tribal lands. And for some inexplicable reason, this item prohibits satellite service from participating in Lifeline on Tribal lands. As if all of this were not painful enough, this item offers no transition or phase-down period, unlike what we have done in the past for multiple other universal service and disability programs when we change rate and subsidy structures.

Process-wise, this item fails. Making radical changes without engaging Tribes is contrary to our own best practices. While the draft re-circulated yesterday makes reference to mapping-related consultation completed over a year ago in the last Administration, there is no mention of any consultation that this Administration has done. We have an internal Office of Native Affairs and Policy - were they consulted during this process? If not, that is truly bad process.

¹⁷ *Id.* at paras. 104-10.

¹⁸ For example, one large ILEC has relinquished their designations in several states. Others have done the same.

¹⁹ Over 80 carriers filed to opt-out of offering Lifeline service. NECA, Carriers Seeking Forbearance from Lifeline BIAS requirements, <https://prodnet.www.neca.org/publicationsdocs/wwpdf/12116lifelinebias.pdf> (last visited Nov. 16, 2017).

²⁰ *Federal-State Joint Board on Universal Service et al.*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, 12231, para. 44 (2000).

²¹ *Id.* at para. 44.

²² *Id.* at paras. 41-51.

²³ *See, e.g.*, Letter from Jefferson Keel, President, National Congress of American Indians, to Marlene H. Dortch, Secretary, FCC (filed Nov. 8, 2017).

At a minimum, we should have sought further comment on this and actively consulted with Tribes on these issues as we said we would.²⁴ And, like many others on the agenda today, this item does not include a cost-benefit analysis unlike what the FCC majority repeatedly demanded of the previous Administration.

It did not have to be this way. I was willing to meet my colleagues half-way, I have shown in the past that I would vote for Notices that seek comment even on things that I do not believe in, particularly if it would result in an Order that saves low-income Tribal consumers from losing service once it is effective. But unfortunately, this was not to be.

Days after the item was first circulated, my office began a conversation with the Chairman's office about potential edits. In the interest of compromise, I suggested that we pump the brakes a bit and build a record on the major changes in this item, like the elimination of resellers from the program and changes to Tribal Lifeline. That suggestion was flatly rejected. I proposed that we retain a streamlined, LBP-like process for states that do not certify Lifeline-only ETCs. That suggestion was flatly rejected. I suggested that we not re-open the door to fraud by eliminating the port freeze right now, seeking comment before proceeding. That proposal was flatly rejected. I asked that we seek comment on alternative legal authority so that we do not prejudge our discussion of whether only facilities-based providers should be allowed in the program. That was flatly rejected. And I suggested that we not hamstring the program through an ill-advised budget cap methodology. You guessed it: flatly rejected.

It is inevitable that someone will bring up my admittedly failed attempt at compromise on one item: the budget. Let me speak to this. We have a budget mechanism for Lifeline now, that may not go as far as the punitive cap the majority seeks comment on here. Indeed, the lead sentence in the paragraph that seeks comment on the budget, suggests an \$820 million cap. Irrespective of my past attempt at compromise, leading with a proposal that would cut the program's current budget by more than half is not something I can ever support.

This item does not bridge the digital divide as it purports, it is a bridge to nowhere. It proposes to shirk one of the four pillars of our universal service promise – affordability – but I can only hope that this Commission and its majority sees the error of its ways before it does further harm to those Americans trapped in economic distress.

I dissent.

²⁴ *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078, 4078, para. 2 (2000).