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**ISPs, FCC Rise to COVID-19 Challenge:
Congress Can, Too**

by

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Introduction and Summary

The novel coronavirus has disrupted daily life to a degree unfamiliar to all but perhaps the most senior Americans. Essential workers, including front-line medical personnel and those who provide food and other necessities, risk their health in order to do their jobs. The fortunate rest of us have spent weeks in our homes in order to help "flatten the curve." Much of work, learning, healthcare, and social interaction in the blink of an eye was forced to transition from the real world to the virtual. The availability of broadband Internet access made that possible. Try to imagine how much more trying this ordeal would be without it.

Internet service providers (ISPs), with the commendable encouragement of FCC Chairman Ajit Pai and his fellow commissioners have taken unprecedented steps on a voluntary basis to respond to this crisis. These measures include not only signing on to the Keep Americans Connected Pledge, but also additional efforts like suspending data limits; increasing data allowances; providing free service to students and educators; and expanding programs targeting low-income households. Likewise, the Commission itself has risen to the occasion, providing

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interim regulatory relief in order to expand network capacity and facilitate participation in the Lifeline program for low-income consumers.

Nevertheless, for some in less populated parts of the country where service is not yet available, lack of high-speed connectivity is the unfortunate reality. As Congress, responding to an increased sense of urgency, takes up efforts to reduce the Digital Divide, it should not diverge from the sound economic principles that to date have fostered very successful marketplace-driven deployment efforts. The recently introduced "Serving Rural America Act" provides an instructive example of how government funding can supplement, rather than duplicate and discourage, private investment by targeting assistance to those areas that are both verifiably unserved and not already receiving public funding from other sources.

Broadband Providers Have Responded to the COVID-19 Challenge

The unprecedented circumstances in which we find ourselves are accelerating the economic and social transition, enabled by high-speed connectivity, from physical to virtual. Where just weeks ago there was a discernable line between online and offline activity, today seemingly everything takes place via Zoom.¹ As AT&T President and COO John Stankey recently noted, "[o]ur core wireless, broadband and enterprise networks are critical, valuable services at this time as they connect, inform and entertain our customers."²

Most people are spending far more time at home. Those who are able are working, learning, obtaining healthcare, socializing, and accessing content remotely. Existing broadband infrastructure is handling this dramatic and abrupt increase in traffic admirably.³ For those who have been impacted financially by the sudden economic downturn, the inability to go online potentially could make the current situation much worse. Fortunately, FCC Chairman Pai and his colleagues have encouraged broadband providers to take voluntary actions to minimize its impact. In many instances, they have done even more than what was asked.

As Chairman Pai recently asserted, "[d]uring an emergency, act like it's an emergency."⁴ On March 13, he challenged the broadband industry to take the Keep Americans Connected Pledge.⁵

¹ See, e.g., Julia Alexander, "Zoom became Saturday Night Live's breakout star in historic all-digital, remote episode," *The Verge* (April 12, 2020), available at <https://www.theverge.com/2020/4/12/21218052/saturday-night-live-remote-digital-episode-zoom-tom-hanks-kate-mckinnon-aidy-bryant> ("Live from Zoom, it's *Saturday Night Live*' isn't a phrase people ever assumed NBC's quintessential late-night show would ever open with, but then again, most people likely weren't using Zoom as daily vernacular a month ago.").

² Gina Narcisi, "AT&T Sees 'Unprecedented Volumes' Of Calls As COVID-19 Leaves Its Mark," *CRN* (April 22, 2020), available at <https://www.crn.com/news/networking/at-t-sees-unprecedented-volumes-of-calls-as-covid-19-leaves-its-mark>.

³ See, e.g., NCTA – The Internet & Television Association, "COVID-19: How Cable's Internet Networks Are Performing," available at <https://www.ncta.com/COVIDdashboard> ("The good news is that these broadband networks are performing well in the face of COVID-19, despite significant surges in online activity.").

⁴ Remarks of FCC Chairman Ajit Pai at the Interamerican Development Bank and the International Institute of Communications Online Workshop, "Regulation in Times of Pandemics: Lessons for the Future" (April 17, 2020), available at <https://docs.fcc.gov/public/attachments/DOC-363797A1.pdf> (as prepared for delivery).

⁵ See FCC, "Keep Americans Connected," available at <https://www.fcc.gov/keep-americans-connected>. See also *id.* ("Chairman Pai has also urged companies with low-income broadband programs to expand and improve them and those without them to adopt such programs. He called on broadband providers to relax their data usage limits in appropriate circumstances and take steps to promote remote learning and telehealth.").

In response, to date over 700 companies and trade associations have agreed not to cut off service to those unable to pay their bills as a result of the coronavirus pandemic; waive any associated late fees; and open their Wi-Fi hotspots to non-customers. On April 30, Chairman Pai extended the pledge through the end of June.⁶

Moreover, as the FCC has highlighted,⁷ many companies have gone above and beyond the steps set forth in that pledge, such as by lifting data caps and suspending overage fees. Some specific examples:

- Among other measures, **AT&T** is eliminating for 60 days data caps for all home wireline and fixed wireless customers; expanding eligibility for its limited-income household initiative, Access from AT&T, and offering two months of free service to new participants; and providing 60 days of free, unlimited connectivity to school-issued laptops, tablets, and Wi-Fi hotspots.⁸
- **Charter Communications** is providing to new subscribing households that include students or educators free cable modem service for 60 days and waiving installation fees.⁹ In the month of March alone, 119,000 households took advantage of this offer.¹⁰
- **Comcast** is making a number of related offers. These include: providing eligible new subscribers to its Internet Essentials service, which makes discounted Internet connectivity available to low-income households, with 60 days of access at no charge; delivering higher speeds – 25 Mbps versus 15 Mbps – to all Internet Essentials customers; offering university students two months of free service (in the form of a prepaid Visa card) and no up-front or installation fees; and suspending data limits for all Comcast customers through June 30.¹¹
- **T-Mobile** for 60 days is providing eligible customers with unlimited on-network smartphone data and increasing data allowances for mobile hotspots, Lifeline partner customers, and students and schools participating in its EmpowED program.¹²

⁶ See FCC Press Release, "Chairman Pai Extends Keep Americans Connected Pledge through End of June Due to Ongoing COVID-19 Pandemic" (April 30, 2020), available at <https://docs.fcc.gov/public/attachments/DOC-364090A1.pdf>. Originally the pledge was scheduled to expire on May 12. *Id.*

⁷ The FCC has compiled and made public a list of additional actions taken by ISPs. See FCC, "Companies Pledging to Keep Americans Connected During Pandemic Go Above and Beyond the Call," available at <https://www.fcc.gov/companies-pledging-keep-americans-connected-during-pandemic-go-above-and-beyond-call> (updated May 1, 2020).

⁸ See AT&T, "AT&T Consumer: Connected Together" (March 26, 2020), available at https://about.att.com/newsroom/2020/att_consumer_connected_together.html.

⁹ See Charter Press Release, "Charter Expands Free 60-Day Spectrum Broadband Internet and WiFi Offer to Include Educators Who Are New Spectrum Subscribers" (March 25, 2020), available at <https://corporate.charter.com/newsroom/charter-expands-free-60-day-spectrum-broadband-internet-and-wifi-offer-to-include-educators-who-are-new-spectrum-subscribers>.

¹⁰ See Charter Press Release, "Charter COVID-19 Update" (April 23, 2020), available at <https://corporate.charter.com/newsroom/charter-covid-19-update>.

¹¹ See Comcast, "Comcast Response to COVID-19," available at <https://corporate.comcast.com/covid-19>.

¹² See John Legere, CEO, T-Mobile USA, "A Message from our CEO to Customers: An Update on COVID-19," available at <https://www.t-mobile.com/brand/ceo-update-covid-19>.

- **Verizon's** efforts include: suspending data caps for wireline subscribers; increasing data allotments for wireless consumers by 15 GB in April and May; making educational resources available at no cost for 60 days; introducing on April 3 a new affordable broadband offering for low-income households; and waiving charges for Lifeline customers for 60 days.¹³

In addition, the Commission in a number of instances has provided temporary regulatory relief to address the demands of the present situation. These include:

- **Special Temporary Authority to Expand Mobile Carriers' Capacity via Unused Spectrum:** The FCC is allowing wireless operators – including T-Mobile,¹⁴ Verizon,¹⁵ and AT&T¹⁶ – to respond to increased demands upon their networks by allowing them to access, on a temporary basis, spectrum that currently is not being used. In some cases that spectrum has not been licensed, but in others the current licensees have agreed to share their resources.
- **Special Temporary Authority for Wireless ISPs to Make Use of 5.9 GHz Spectrum:** There is an open rulemaking proceeding before the agency that proposes to repurpose 45 MHz in the 5.9 GHz band – airwaves currently allocated to, but largely unused by, vehicle safety technology – for unlicensed use.¹⁷ On March 27, the FCC made that spectrum available on an interim basis to 33 fixed wireless broadband providers serving rural communities.¹⁸

¹³ See Verizon, "Verizon Response to COVID-19: Our Customers," available at <https://www.verizon.com/about/news/covid-response-customers>.

¹⁴ See FCC Press Release, "FCC Provides T-Mobile Temporary Access to Additional Spectrum to Help Keep Americans Connected during Coronavirus Pandemic" (March 15, 2020), available at <https://docs.fcc.gov/public/attachments/DOC-363051A1.pdf> ("The FCC's Wireless Telecommunications Bureau today issued the 60-day special temporary authority to T-Mobile to use additional spectrum in the 600 MHz band to augment its ability to provide broadband service.").

¹⁵ See FCC Press Release, "FCC Grants Verizon Temporary Spectrum Access to Keep Americans Connected during COVID-19 Pandemic" (March 18, 2020), available at <https://docs.fcc.gov/public/attachments/DOC-363145A1.pdf> ("This STA will allow the company to operate for 60 days in spectrum licensed to Northstar Wireless LLC and SNR Wireless LicenseCo in the AWS-3 Band in order to provide additional capacity to Verizon customers across the country.").

¹⁶ See FCC Press Release, "FCC Grants AT&T and Verizon Further Temporary Spectrum Access to Keep Americans Connected during Coronavirus Pandemic" (March 20, 2020), available at <https://docs.fcc.gov/public/attachments/DOC-363211A1.pdf> ("Last night, AT&T was granted authority for 60 days to operate in AWS-4 Band spectrum licensed to DISH. Today, both AT&T and Verizon were granted similar authority to use AWS-3 spectrum currently held in the FCC's inventory.").

¹⁷ *Use of the 5.850-5.925 GHz Band*, ET Docket No. 19-138, Notice of Proposed Rulemaking, FCC 19-129 (released December 17, 2019). See also Comments of the Free State Foundation (filed March 6, 2020), available at <https://freestatefoundation.org/wp-content/uploads/2020/03/FSF-Comments-5.9-GHz.Final-030620.pdf>.

¹⁸ See FCC Press Release, "FCC Grants Wireless ISPs Temporary Access to Spectrum in 5.9 GHz Band to Meet Increase in Rural Broadband Demand during Pandemic" (March 27, 2020), available at <https://docs.fcc.gov/public/attachments/DOC-363358A1.pdf>. The FCC recently announced that it "has granted STAs to more than 100 WISPs, and many of those providers have reported that the spectrum is helping to address the increased demand for broadband associated with the COVID-19 pandemic." FCC Press Release, "5.9 GHz Band Boosts Consumer Internet Access during COVID-19 Pandemic" (May 4, 2020), available at <https://docs.fcc.gov/public/attachments/DOC-364138A1.pdf>.

- Waiver of Lifeline Requirements: The Commission has taken multiple actions to make it easier for low-income individuals to participate in the Lifeline program, which provides discounts on broadband and voice services, during this crisis. They include suspending rules that could lead to involuntary de-enrollment and waiving income-documentation requirements.¹⁹

Congress Should Limit Post-Pandemic Public Investment in Broadband Facilities to Unserved and Unfunded Areas

As we move beyond this immediate crisis and efforts, both voluntary and governmental, to provide short-term relief, the goal of ubiquitous broadband deployment undoubtedly will receive increased attention. We might expect, and certainly can hope for, the marketplace to respond to greater demand through an increase in private infrastructure investment. Nevertheless, there may remain places – in particular, rural and other low-population-density areas – where deployment does not occur at an acceptable pace. Chairman Pai recently spoke about the increased need to close the Digital Divide, stating that:

I would like to think that people have recognized now in the pandemic, if they didn't before, that connectivity really is the glue that is holding together so much of our daily lives. Telework, remote learning, you name it, all of this depends on access to digital communications. I'm hopeful that working with Republicans and Democrats in both the House and Senate we'll be able to make progress on this issue.²⁰

Heightened urgency need not lead to the abandonment of sound principles of policy. As Congress considers providing funding for the construction of facilities, it should take care to direct finite taxpayer money exclusively to truly unserved areas – and only those to which public funding has not been provided already. Because of private financing, the vast majority of Americans have been gifted the benefit of competitive options on a rapid timeline for which no historical comparison exists. In order to maximize consumer welfare going forward, policymakers must act in ways that maintain industry incentives to invest.

¹⁹ See FCC Press Release, "FCC Waives Lifeline Program Rules to Help Low-Income Consumers during Coronavirus Pandemic" (March 17, 2020), available at <https://docs.fcc.gov/public/attachments/DOC-363104A1.pdf> ("In today's Order, the Wireline Competition Bureau waives the Lifeline program's recertification and reverification requirements for participating low-income consumers for 60 days. The Bureau also waives for 60 days the 2019 *Lifeline Order's* requirement that participating carriers' enrollment representatives register with the Lifeline program administrator, the Universal Service Administrative Company."); FCC Press Release, "FCC Acts to Keep Low-Income Americans Connected during Coronavirus Pandemic" (March 30, 2020), available at <https://docs.fcc.gov/public/attachments/DOC-363379A1.pdf> (announcing that "the FCC's Wireline Competition Bureau waived several rules that could otherwise result in de-enrollment of subscribers from the Lifeline program"); FCC Press Release, "FCC Eases Lifeline Enrollment Process for Americans Who Have Lost their Jobs during COVID-19 Pandemic" (April 29, 2020), available at <https://docs.fcc.gov/public/attachments/DOC-364070A1.pdf> (publicizing that "the FCC's Wireline Competition Bureau temporarily waived the requirement that consumers seeking to qualify for the program based on their income must provide at least three consecutive months of income documentation").

²⁰ Jeff Williams, "FCC Chairman Sees Need to Add to Digital Divide Efforts," *TR Daily* (April 23, 2020), available at <http://www.trdailyonline.com/online/trd/2020/td042320/index.htm> (subscription required).

Legislation recently introduced in the House by Representatives Rob Wittman (R - VA) and Bill Johnson (R - OH) offers a useful roadmap for such an approach. The "Serving Rural America Act," H.R. 6456, would create and fund a \$500 million, five-year pilot program, to be administered by the FCC, that would finance the construction of broadband facilities in unserved and unfunded areas.²¹ It includes specific provisions to so confine its reach – and expressly states that the FCC:

[S]hall not award a grant, or other assistance for the deployment of broadband-capable infrastructure by a service provider that would be used to provide retail fixed terrestrial broadband service and that would overbuild or otherwise duplicate broadband-capable infrastructure that another service provider is using to provide retail fixed terrestrial broadband service in that same area.²²

With respect to unserved areas, grants would be provided only where:

[F]ixed terrestrial broadband service capacity, including any planned capacity or any capacity under construction in accordance with applicable deadlines imposed by a State or political subdivision, is not available within the proposed service area at 25 megabits per second downstream transmission capacity and 3 megabits per second upstream transmission capacity or greater.²³

Regarding existing public funding, grants may be provided only if "any Federal, State, or local government agency is not already providing financial support in that area to a broadband service provider (including the internet service provider applicant or any affiliate thereof) to deploy and offer broadband service capacity to locations in such area."²⁴

Deliberate and well-considered efforts such as this, which confine non-duplicative public expenditures narrowly to those places where high-speed Internet access in fact is not available, can address the public policy goal of ubiquitous coverage while at the same time preserving private-sector incentives to invest.

Conclusion

Overnight, the novel coronavirus radically upended the social and economic day-to-day American experience. High-speed Internet access greatly mitigates that impact, enabling consumers to work, learn, access healthcare, shop, and interact from the safety of their homes.

²¹ See John Eggerton, "New Rural Broadband Funding Bill Introduced in House," *Multichannel News* (April 8, 2020), available at <https://www.multichannel.com/news/new-rural-broadband-funding-bill-introduced> ("The legislation would encourage broadband providers to get together to determine where service is or isn't available, a big issue on the Hill, and to make sure there is no overbuilding of existing plant by limiting support to one provider in a rural area.").

²² Serving Rural America Act, H.R. 6456, 116th Congress, § 3(d), available at <https://www.congress.gov/bill/116th-congress/house-bill/6456/text>. ISPs specifically, and members of the public generally, would be provided an opportunity to inform the Commission that a proposed project would overbuild existing facilities. *Id.* § 3(e).

²³ *Id.* § 3(c)(4)(A)(i). It also would limit funding to partnerships that include "at least 1 internet service provider who provides retail fixed terrestrial broadband service and is unaffiliated with the political subdivision of a State." *Id.* § 2(4)(A)(ii).

²⁴ *Id.* § 3(c)(4)(A)(ii).

The broadband ecosystem – both providers and the FCC – has recognized the essential nature of connectivity during this difficult time and, responding to the severity of the moment, gone to great, voluntary lengths to keep people online. As lawmakers plan for a post-pandemic future, they should recognize the value of marketplace-driven deployment efforts and make sure that governmental intervention to promote connectivity in unserved areas does not discourage the private investment which has made U. S. broadband policy so successful.

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