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**The ETC Requirement for Accessing Broadband Funds Should Be
Eliminated**

by

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Introduction and Summary

Work meetings over Zoom. Doctors' visits via telehealth. Remote learning opportunities for schoolchildren. Online game nights with friends. Americans' resilient response to the challenge of the last few months removes any lingering doubt: high-speed Internet access is now the center of our connected experience. Moving forward, policy efforts appropriately will focus on expanding broadband networks to those unserved – and thus unable to participate in this new, "virtual" reality.

The Universal Service Fund (USF), a product of the telephony-focused Telecommunications Act of 1996, has been retrofitted to support the expansion of broadband service with a certain degree of success. Its common carrier roots, however, inevitably lead to suboptimal outcomes. In particular, the requirement that those receiving broadband-specific funding be designated as eligible telecommunications carriers (ETCs) disincentivizes participation by Internet service providers (ISPs) outside the Title II "telecommunications service" regulatory tradition: cable operators, fiber- and wireless-based ISPs, satellite operators, and others. Many such

providers, however, have a proven track record in deploying broadband infrastructure – and instead should be *encouraged* to join in FCC-led efforts to bring broadband to unserved areas.

Whether through the exercise of the FCC's forbearance authority or enactment of legislation, such as the bill just introduced by North Carolina Congressman G. K. Butterfield (D), it is time to eliminate the legacy ETC requirement for USF programs targeting the expansion of broadband to unserved areas. ISPs providing interstate information services need not be required to subject themselves to state public utility commission (PUC) oversight in order to demonstrate their fitness and eligibility to receive such funding. The FCC ably has demonstrated in other contexts that it can address more directly concerns regarding timely build-out, waste, and fraud prevention through a focus on legal, financial, and technical ability, construction milestones, and other means.

And the Commission can adopt and make applicable to all participants whatever program-specific requirements and service parameters it concludes are appropriate to accomplish the goal of the particular USF support program, including the obligation to provide voice services. This approach to broadband funding would benefit consumers by expanding provider choice and driving down costs, thereby stretching limited USF dollars to cover additional unserved areas.

The ETC Requirement Conflicts with the Policy Priority of Ubiquitous Broadband

The last few months have confirmed the primary connective role that broadband Internet access plays in Americans' lives. From a regulatory oversight perspective, therefore, this Title I interstate information service no longer should be treated as a mere complement to Title II telephony and Title VI "cable." Rather, broadband Internet access now serves as the foundational platform for applications and services that enable the rapidly evolving digital experience: voice, videoconferencing, telecommuting, telehealth, remote learning, streaming content, online social interaction, and more. It therefore warrants tailored policies, not ill-fitting hand-me-downs from a bygone era. The ETC requirement for broadband funding eligibility falls squarely into that latter category.¹

Section 254(e) was added to the Communications Act of 1934, as amended, by the concededly voice-focused Telecommunications Act of 1996. It states that "only an [ETC] designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support."² Section 214(e), in turn, establishes the administrative processes by which state PUCs – or, where a common carrier is not subject to the jurisdiction of PUC, the FCC itself – designate common carriers as ETCs.³ It also requires ETCs to "offer the services that are supported by Federal universal service support mechanisms."⁴ In the recent,

¹ See, e.g., Comments of NCTA – The Internet & Television Association, *Rural Digital Opportunity Fund; Connect America Fund*, WC Docket No. 19-126, WC Docket No. 10-90, Notice of Proposed Rulemaking, 34 FCC Rcd 6778, at 6 (filed September 20, 2019) ("When the focus of the program is on providing broadband to unserved areas, it makes little sense to continue to require providers to be certified telecommunications carriers.").

² 47 U.S.C. § 254(e).

³ See 47 U.S.C. § 214(e)(2), (6).

⁴ 47 U.S.C. § 214(e)(1)(A).

though pre-pandemic, February 2020 *Rural Digital Opportunity Fund Order (RDOF Order)*, the Commission once again reiterated that "support recipients, like all other high-cost ETCs, will be required to offer standalone voice service...."⁵ The agency also acknowledged that "some interested parties may prefer not to become ETCs with all of the associated obligations" – but nevertheless chose to "continue to require service providers to obtain ETC status to qualify for universal service support."⁶

I submit that the intervening COVID-19 public health crisis makes plain the critical importance of universal broadband connectivity – and the consequential imperative to reorder policy priorities. To be more precise, the primacy of high-speed Internet access necessarily means that legacy voice-specific requirements ought not discourage capable providers from participating in programs designed to expand broadband to unserved areas. ISPs therefore should no longer be disincentivized by the antiquated requirement that they be designated as ETCs by state PUCs (or the FCC) in order to receive broadband-specific universal service funding.

Past performance predicts future success. Any universal service funds allocated to broadband network construction in unserved areas therefore should flow where possible to those with a proven track record in delivering reliable high-speed Internet access.⁷ As a practical matter, this includes cable operators, fiber- and wireless-based ISPs, and satellite providers. Yet as things currently stand, the legacy ETC requirement forecloses many successful broadband providers from participating in programs that seek to expand broadband access to unserved areas, including the upcoming RDOF reverse auction of up to \$16 billion in funding. As Commissioner Michael O'Rielly explained in a June 18, 2020, blog post arguing for the removal of the ETC requirement:

While requiring ETC status doesn't bar participation by certain providers on its face, it serves as a major obstacle for many companies in practice. Getting the designation itself can be a time-consuming and resource-intensive process, especially depending on the state jurisdiction in question. However, that pales in comparison to the added regulatory burdens and litigation risks that come with being subject to state telecom regulation.... [A] nationwide provider with streamlined practices would potentially become subject to a patchwork of regulations – in certain cases, upwards of 40 different regulatory regimes – even though many of the rules entirely pre-date the modern broadband networks that our auctions are trying to subsidize, often, by several decades.⁸

⁵ *Rural Digital Opportunity Fund; Connect America Fund*, WC Docket No. 19-126, WC Docket No. 10-90, Order, 35 FCC Rcd 686, at ¶ 42 (2020) (*RDOF Order*).

⁶ *Id.* at ¶ 92. See also "A Common Sense Fix to Speed Broadband Deployment to Unserved Communities," NCTA – The Internet & Television Association (June 15, 2020), available at <https://www.ncta.com/whats-new/a-common-sense-fix-speed-broadband-deployment-unserved-communities> (describing the process to obtain an ETC designation as "unnecessary and burdensome").

⁷ Nothing in this paper should be construed as an endorsement of the parameters of any particular universal service program or its implementation.

⁸ Commissioner Michael O'Rielly, "Removing Unnecessary Barriers and Maximizing Competition in USF Auctions" (June 18, 2020), available at <https://www.fcc.gov/news-events/blog/2020/06/18/removing-unnecessary-barriers-and-maximizing-competition-usf-auctions>.

This reduces consumer welfare in two ways. One, it constrains artificially the number of choices available. Less competition can lead to higher prices and lower levels of innovation. Two, it results in less efficient buildouts. Greater per-project costs combined with a fixed amount of funding inevitably reduces coverage.

This is not to say that the viability of potential broadband funding recipients need not be confirmed. To be sure, safeguards are needed to avoid waste, fraud, and abuse. Rather, my point is that the outdated ETC requirement is not the appropriate way to do so.

A better approach: direct inquiry by the FCC into an applicant's legal, technical, and financial fitness prior to entrusting it with USF funds. The agency certainly has experience in this area. Even in the *RDOF Order*, the Commission, among other things, required (1) applicants to provide: ownership information,⁹ operational history,¹⁰ audited financials,¹¹ and proof of spectrum access;¹² and (2) winning bidders to provide: certifications regarding their financial and technical capability¹³ and funds availability¹⁴ as well as letters of credit obligations tied to the achievement of deployment milestones.¹⁵ Such information goes to the heart of a provider's ability to satisfy broadband buildout commitments and deliver promised benefits, whereas the ETC requirement at best does so indirectly and inefficiently.¹⁶

Section 10 Forbearance and Recently Introduced Legislation Are Two Potential Paths to Elimination of the ETC Requirement

One possible way to remove the ETC requirement is through forbearance under Section 10 of the Communications Act, as amended.¹⁷ Another is legislation, such as the bill just introduced in the House by North Carolina Representative G. K. Butterfield (D). The ETC requirement interferes with achievement of the goal of universal broadband by discouraging participation by capable and competent providers. No matter the vehicle, consumers will benefit from its retirement in the context discussed in this paper.

Pursuant to Section 10:

[T]he Commission shall forbear from applying ... any statutory provision or regulation if it determines that: (1) enforcement of the provision or regulation is not necessary to ensure that the telecommunications carrier's charges,

⁹ *RDOF Order* at ¶ 70.

¹⁰ *Id.* at ¶¶ 73-79.

¹¹ *Id.* at ¶ 80.

¹² *Id.* at ¶¶ 82-83.

¹³ *Id.* at ¶ 88.

¹⁴ *Id.* at ¶ 91.

¹⁵ *Id.* at ¶¶ 96-113.

¹⁶ See Commissioner Michael O'Rielly, "Removing Unnecessary Barriers and Maximizing Competition in USF Auctions" (June 18, 2020), available at <https://www.fcc.gov/news-events/blog/2020/06/18/removing-unnecessary-barriers-and-maximizing-competition-usf-auctions> ("I cannot think of any ongoing policy reason to maintain the requirement: the Commission already imposes its own legal, technical, and financial requirements on auction winners....").

¹⁷ 47 U.S.C. § 160.

practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement of the provision or regulation is not necessary to protect consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.¹⁸

The FCC exercised its Section 10 forbearance authority to eliminate the ETC requirement on a temporary basis in the wake of Hurricane Katrina.¹⁹ And although it rejected calls from numerous commenters to forbear similarly in the *RDOF Order*,²⁰ it did not appear to shut the door on that option.²¹ Nevertheless, there are some who believe that the FCC lacks the necessary authority to do so on a permanent basis. In his June 18 blog post advocating for the ETC requirement's removal, Commissioner O'Rielly pointed out that, while the claim that Section 10 empowers the agency to forbear "may have some merit, taking such action would likely be litigated by those state commissions that retain some role over telecom issues. Rather, this is the type of issue that might be better settled by Congress."²²

To the extent that a legislative fix is needed, on June 11, 2020, Representative Butterfield introduced a bill that would do exactly that. The "Expanding Opportunities for Broadband Deployment Act,"²³ if it passes, would amend Section 254(e) so that "[a] provider of

¹⁸ *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, WC Docket No. 07-267, Report and Order, FCC 09-56, at ¶ 2 (2009). It "also must consider 'whether forbearance from enforcing the provision or regulation will promote competitive market conditions.'" *Id.*

¹⁹ *See In the Matter of Federal-State Joint Board on Universal Service et al.*, Docket Nos. 96-45, 02-6, 02-60, 03-109, Order, 20 FCC Rcd 16883, at ¶ 20 (2005) ("We find the requirements of section 10(a) are met to forbear from the ETC requirement until March 1, 2006, because of the limited and temporary nature of the support as well as the narrow application of the universal service support to only Lifeline customers."). *See also* Access Now, *et al.*, *Emergency Request for Increased Lifeline Support During the Covid-19 Crisis*, Docket Nos. 11-42, 09-197, 96-45, 17-287 (March 20, 2020), available at <https://mediajustice.org/wp-content/uploads/2020/03/Lifeline-Emergency-Request-Covid-19-3-20-20.pdf> (urging the FCC to provide an emergency Lifeline broadband benefit of \$50 per month during the COVID-19 public health emergency and "forbear from the obligations that broadband providers be designated ETCs").

²⁰ *See RDOF Order* at ¶ 92 n.261. *See also* Comments of NCTA – The Internet & Television Association, *Competition in the Communications Marketplace*, GN Docket No. 20-60 (filed April 27, 2020), available at <https://ecfsapi.fcc.gov/file/1042700221723/042720%2020-60%20NCTA%20Comments%20On%202020%20Competition%20Report%20-%20FINAL.pdf>, at 10 (arguing that "the Commission should forbear from the ETC requirement for all future support programs where it otherwise would apply" and asserting that "[e]ach of the three statutory criteria for forbearance is met").

²¹ *See RDOF Order* at ¶ 92 ("We decline to forbear from the ETC requirement.") (emphasis added).

²² Commissioner Michael O'Rielly, "Removing Unnecessary Barriers and Maximizing Competition in USF Auctions" (June 18, 2020), available at <https://www.fcc.gov/news-events/blog/2020/06/18/removing-unnecessary-barriers-and-maximizing-competition-usf-auctions>. *See also* Mike O'Rielly (@mikeofcc), *Twitter* (March 11, 2020, 8:40 AM), <https://twitter.com/mikeofcc/status/1237750218445201408> ("Everyone should want as many providers to compete for @FCC's \$16 billion in RDOF funds. Yet, arcane ETC designation is major obstacle for some companies most advanced & best positioned to bring Americans access. This likely requires fix by Congress. Put me down as supportive!").

²³ H.R.7160, 116th Congress (introduced June 11, 2020), *see* <https://www.congress.gov/bill/116th-congress/house-bill/7160?s=3&r=72>. *See also* Congressman G. K. Butterfield Press Release, "Butterfield Introduces Expanding Opportunities for Broadband Deployment Act" (June 11, 2020), available at <https://butterfield.house.gov/media-center/press-releases/butterfield-introduces-expanding-opportunities-for-broadband-deployment> ("Many unserved areas lack broadband access in part because experienced and highly qualified broadband providers who are not designated as ETCs are not permitted to participate in the USF High

broadband service, and any affiliate thereof, that has not been designated as an eligible telecommunications carrier ... shall be eligible to receive specific Federal universal service support for the provision of broadband service, if such provider or affiliate meets the applicable Commission legal, financial, and technical requirements for receiving such support."²⁴ It also would (a) designate broadband "as supported by the Federal universal service support mechanisms,"²⁵ and (b) define how providers may demonstrate to the FCC their financial viability (for example, through letters of credit, performance bonds, credit ratings, 10-Ks, and audited financial records).²⁶

Conclusion

The challenge of the last several months has brought greater attention to the central role that broadband plays in Americans' lives. Today, more than ever before, consumers require access to high-speed Internet service. Not as a complement to, or a means of transport for, regulated voice services, but as an ever-evolving platform for the multitude of services and applications enabling an increasingly connected existence. The utility of funding programs to expand broadband's reach almost certainly will be increased by the participation of all those providers best able to deliver that capability quickly and reliably. The ETC requirement, however, serves as a disincentive to many ISPs with proven track records. The result is a reduction in both consumer choice and broadband coverage.

To be sure, safeguards that ensure timely buildouts and reduce waste and fraud remain vital. The FCC has a demonstrated ability to evaluate directly broadband providers' legal, technical, and financial fitness – as well as the authority to adopt, and apply to all participants, those program-specific requirements and service parameters it concludes are appropriate, including the obligation to provide voice services. In other words, the goals underlying the ETC requirement, to the extent they remain relevant, can be accomplished through alternative, less problematic means.

Accordingly, it is time for the elimination of the legacy ETC requirement in connection with the distribution of USF support for building out broadband infrastructure, whether through the exercise of the FCC's little-used forbearance authority or the enactment of legislation, such as the Expanding Opportunities for Broadband Deployment Act, which would amend the Communications Act.

And, as FCC Commissioner Michael O'Rielly suggests, perhaps consideration of eliminating the ETC requirement with respect to USF funding will provoke a discussion regarding broader reform of the ETC designation for all providers that currently hold such status. That would be worthwhile too.

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Cost program. Expanding eligibility to non-ETCs would enable more efficient deployment of broadband infrastructure spurring greater competition.").

²⁴ Expanding Opportunities for Broadband Deployment Act, § 2(e)(2).

²⁵ *Id.*, § 2(a)(3)(A).

²⁶ *Id.*, § 2(e)(3).