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**The Emergency Broadband Benefit:
A Possible Model for Future Lifeline Funding**

by

Andrew Long *

I. Introduction and Summary

As part of the \$900 billion COVID-19 relief package passed at the end of 2020, Congress entrusted the FCC with a substantial amount of taxpayer money – \$3.2 billion – to help connect, and keep connected, low-income Americans and those that have suffered financial hardships during the ongoing pandemic-fueled public health crisis. With effective agency execution, the emergency broadband benefit program could provide not only prompt pandemic-related assistance but also useful markers for reconceiving government-provided financial support of policy priorities relating to high-speed Internet access.

Success, however, requires that the Commission balance a number of competing objectives, including preventing waste, fraud, and abuse, as it moves with all due haste to stand up a program to reimburse participating Internet service providers (ISPs) that make available a monthly broadband benefit to eligible households – all the while keeping the focus on those in need, especially school-aged children at risk of falling behind and those that can benefit from telehealth offerings.

The FCC should adopt rules and procedures for the emergency broadband benefit program that not only protect against waste, fraud, and abuse but also ensure that the program is fiscally responsible. In that regard, the FCC probably will want to place some constraints on at least some of the eligibility criteria. For example, the criterion related to a "substantial loss of income" may need to be tightened to avoid having funds dispersed to those who don't need the support.

In addition, to justify its hefty price tag and maximize its effectiveness, the FCC should prioritize the following important objectives.

First, the program as implemented should do all that it can to maximize consumer choice. The greater the number of providers vying for customers able to afford Internet access as a result of the emergency broadband benefit, the more intense that competition will be – and more competition leads to lower prices, better service, and increased innovation.

Congress made clear that all broadband providers are eligible to opt in to the program, not just the subset of ISPs designated as Eligible Telecommunications Carriers and thus eligible to receive Universal Service Fund support. ISPs that are not so designated, however, uniquely must obtain Commission approval and access to verification databases and other resources. Those processes should not serve as barriers to widespread participation.

Second, and relatedly, the FCC should take care to establish a level playing field for all participating ISPs. ISPs designated as Eligible Telecommunications Carriers that elect to participate will be approved automatically. They also have substantial experience using the resources noted above. Such differences should not be allowed to result in a head start or other practical advantages. Eligible households likely will act quickly to receive the emergency benefit. To the extent that those not designated as Eligible Telecommunications Carriers are not presented as options on day one, overall consumer welfare will suffer.

Third, the agency should make sure that both providers and benefit recipients receive regular updates regarding the program's status. Congress specified that the program will conclude six months after the Secretary of Health and Human Services declares an end to the ongoing public health emergency or when the \$3.2 billion runs out, whichever comes first. Should a declaration by the Secretary be the trigger, the six-month grace period ought to afford ample opportunity to alert benefit recipients that prices soon will return to standard rates. In the event that the funds are depleted before that occurs, however, it is possible that both participating providers and benefit recipients are caught off guard. The Commission should implement at the outset a plan to publicize on a regular basis the remaining funding level, lest an abrupt end cast a shadow over broadband adoption specifically and government assistance programs generally.

Much is at stake here. Congress has concluded that prompt action is appropriate to mitigate the hardship caused by the COVID-19 pandemic. And it has specified a new approach to addressing concerns relating to broadband affordability, one that appropriately makes those elected by the people accountable for costly policy choices, empowers consumers to choose from a maximized array of providers competing in the marketplace, more efficiently utilizes scarce public resources, and avoids further burdens on the already strained existing Universal Service Fund.

As the implementing agency, the FCC faces considerable pressure to ensure the program's success.

Indeed, key features of a well-executed emergency broadband benefit program – provision of the benefit directly to the consumer and a direct discrete appropriation of funds by Congress to support the program – ought to be considered in connection with proposals to reform the Commission's various Universal Service Fund programs, especially including the Lifeline program. By the same token, it is important to emphasize that generally supporting the elements of the emergency broadband benefit program, and suggesting that key elements of the program could be a model for reforming existing Universal Service Fund programs, is not meant to imply, of course, that all elements of the emergency broadband connectivity fund, including the eligibility criteria and size of the benefit, should be transferable into non-COVID-related programs.

The FCC's Wireline Competition Bureau on an expedited basis has solicited public input regarding how best to implement this initiative, and interested parties recently filed comments. Reply comments are due later this month. Informed decision-making can assure that the emergency broadband benefit program is a success – one that possibly lays the groundwork for the future.

II. Effectively Implemented, the Emergency Broadband Benefit Program Can Serve as a Model for Future Government Subsidy Programs

As the just-released Fourteenth Broadband Deployment Report makes plain, the vast majority of Americans now have access to high-speed Internet connections. At the end of 2019, fixed terrestrial broadband service at speeds of 25/3 Mbps was deployed to roughly 96 percent of the total U.S. population,¹ and virtually all Americans – 99.9 percent – enjoyed mobile 4G LTE wireless network coverage with a minimum advertised speed of 5/1 Mbps.² During these trying times, however, the focus has expanded beyond deployment; adoption and affordability have taken on heightened policy importance. The ability to get online arguably is tantamount to the ability to engage. Remote learning and telehealth, in particular, comprise central functions during the ongoing public health crisis.

Then-FCC Chairman Ajit Pai's call in March 2020 for broadband ISPs to Keep Americans Connected generated substantial short-term, voluntary relief for impacted customers during the early stages of the pandemic.³ In fact, private sector providers did much more than what was

¹ See *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Fourteenth Broadband Deployment Report, GN Docket No. 20-269, FCC 21-18 (released January 19, 2021), available at <https://docs.fcc.gov/public/attachments/FCC-21-18A1.pdf>, at ¶ 33.

² See *id.* at ¶ 34, Fig. 2a.

³ See "Keep Americans Connected," available at <https://www.fcc.gov/keep-americans-connected> (noting that "[m]ore than 800 companies and associations signed the Chairman's pledge") (emphasis omitted). The Keep Americans Connected pledge, originally slated to expire on May 12, was extended through June 30, 2020. See News 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>.

asked.⁴ But as Chairman Pai testified before the Senate Commerce Committee last June, "broadband and telephone companies, especially small ones, cannot continue to provide service without being paid for an indefinite period of time; no business in any sector of our economy could."⁵ He therefore called for federal legislation "to ensure that doctors and patients, students and teachers, low-income families and veterans, those who have lost their jobs and livelihoods due to the pandemic and the accompanying lockdowns, those in our cities and those in the countryside – in short, all Americans – remain connected until this emergency ends."⁶

The \$900 billion COVID-19 relief package included in the Consolidated Appropriations Act, 2021 (the Act), which was signed into law on December 27, 2020,⁷ made nearly \$7 billion available for broadband-related initiatives.⁸ Almost half of that total – \$3.2 billion – was allocated to an Emergency Broadband Connectivity Fund (EBCF) that will provide financial assistance to those eligible.⁹ The FCC is tasked with creating within 60 days and operating an Emergency Broadband Benefit Program (EBBP) to distribute that money.¹⁰

Pursuant to the EBBP, eligible households will receive from participating broadband providers a discount of up to \$50/month (\$75/month on Tribal lands) off the standard rate for Internet access.¹¹ Those broadband providers, in turn, will be reimbursed by the Commission. The broadband providers also can receive up to \$100 for a single "connected device" (a laptop, desktop, or tablet) that they make available.¹² The EBBP will remain in operation until six months after the Secretary of Health and Human Services declares an end to the current public health emergency or the EBCF is depleted, whichever comes first.¹³

There are a number of reasons to commend the specific approach that Congress established. As discussed in greater detail below, two align well with legislative "best practices" I championed in a July 2020 *Perspectives from FSF Scholars*: (1) the broadband benefit is funded through an express congressional appropriation rather than contributions to the Universal Service Fund (USF), and (2) it does not limit participation to those providers that have obtained an Eligible

⁴ See "Companies Have Gone Above and Beyond the Call to Keep Americans Connected During Pandemic," available at <https://www.fcc.gov/companies-have-gone-above-and-beyond-call-keep-americans-connected-during-pandemic>. See also Andrew Long, "ISPs, FCC Rise to COVID-19 Challenge: Congress Can, Too," *Perspectives from FSF Scholars*, Vol. 15, No. 24 (May 13, 2020), available at <https://freestatefoundation.org/wp-content/uploads/2020/05/ISPs-FCC-Rise-to-COVID-19-Challenge-Congress-Can-Too-051320.pdf>.

⁵ News Release, "FCC Chairman Pai Urges Congress to Help Consumers Stay Connected Following End of Keep Americans Connected Pledge on June 30" (June 19, 2020), available at <https://docs.fcc.gov/public/attachments/DOC-365040A1.pdf>.

⁶ John Eggerton, "FCC's Pai: Congress Needs to Take Up Keep Americans Connected Pledge," *Multichannel News* (June 24, 2020), available at <https://www.nexttv.com/news/fccs-pai-congress-needs-to-take-up-keep-americans-connected-pledge>.

⁷ Consolidated Appropriations Act, 2021, H.R. 133, 116th Cong. (2020), available at <https://www.congress.gov/bill/116th-congress/house-bill/133/text>.

⁸ See Andrew Long, "A Primer: The COVID Relief Bill's Broadband Funding Provisions," *FSF Blog* (December 26, 2020), available at <https://freestatefoundation.blogspot.com/2020/12/covid-19-relief-package-provides-682b.html>.

⁹ See generally Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, tit. IX, § 904 (2020) (*Act*).

¹⁰ See *Act* § 904(c)(1).

¹¹ See *Act* § 904(a)(7).

¹² See *Act* § 904(b)(5). See also *Act* § 904(a)(4) ("The term 'connected device' means a laptop or desktop computer or a tablet.").

¹³ See *Act* § 904(a)(7) (defining the "emergency period" during which the program will operate).

Telecommunications Carrier (ETC) designation from a state regulatory body or the FCC.¹⁴ It also is targeted to a well-defined and temporally specific public policy priority – that is, the duration (plus six months) of the public health crisis caused by the COVID-19 pandemic. And, by empowering recipients through choice, it incentivizes participating providers to compete with one another to win and retain customers eligible to receive the discount, thereby maximizing efficiency and making the most of the finite amount of money available.

In key respects, these positive attributes well position the EBBP to serve as a model for future government subsidy programs.¹⁵ But the FCC must demonstrate – quickly – that it can implement the program successfully. The ultimate success of the EBBP will be judged by how efficiently and cost-effectively it is managed, the extent to which it treats all providers – ETCs and non-ETCs alike – equally, and how it is communicated to the public, particularly with respect to its inevitable but undefined conclusion.

First, time is of the essence and the demand for relief is high, so the focus should be on making discounts available to eligible households as quickly as possible. While steps must be taken to protect against waste, fraud, and abuse, at the same time it is important to appreciate that approval processes need to be tailored narrowly and conducted expeditiously. In the same vein, the Wireline Competition Bureau, as described below, is wise to propose utilizing existing Lifeline verification and reimbursement processes, with any necessary modifications to address the EBBP's unique parameters, rather than creating a separate and untested bureaucracy specifically for this initiative.

Second, consumer benefit is directly proportional to the number of participating providers, so care must be taken to ensure a level playing field for all that wish to participate – that is, both ETC and non-ETC designees. ETCs possess institutional knowledge and experience with the Lifeline processes noted above. That familiarity ought not serve as a practical advantage over rival ISPs.

And third, the program, as designed, at an uncertain point will end, so preparations must be made at the outset to ensure a smooth and informed transition back to market-based pricing. Providers need to be kept in the loop as to the amount of money remaining in order to let discount

¹⁴ See Andrew Long, "Legislative 'Best Practices' to Expand and Accelerate Broadband Coverage," *Perspectives from FSF Scholars*, Vol. 15, No. 42 (July 29, 2020), available at <https://freestatefoundation.org/wp-content/uploads/2020/07/Legislative-Best-Practices-to-Expand-and-Accelerate-Broadband-Coverage-072920.pdf>.

¹⁵ See Letter from Jonathan Spalter, President and Chief Executive Officer, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 20-445 (filed January 4, 2021), available at <https://ecfsapi.fcc.gov/file/101042477924051/2021.01.04%20USTelecom%20Broadband%20Benefit%20Principles.pdf>, at 1 (stating that "this program could have substantial value as a pilot program for enhanced broadband support in the future"). See also Comments of NCTA – The Internet & Television Association, WC Docket No. 20-445 (filed January 25, 2021), available at https://ecfsapi.fcc.gov/file/1012564154472/NCTA_Comments_on_Emergency_Broadband_Benefit_Program_FINA_L.pdf, at 3 ("If successful, the Program could help inform ways to reform Lifeline, including by minimizing operational burdens and thereby encouraging broader competitive options for consumers."); Comments of TechFreedom, WC Docket No. 20-445 (filed January 25, 2021), available at <https://techfreedom.org/wp-content/uploads/2021/01/TF-Comments-to-FCC-Emergency-Broadband-Fund-1-25-21.pdf>, at 2 (pointing out that the EBBP "presents a rare opportunity to gain new information [on addressing the income-based digital divide] that can be applied more broadly").

recipients know well in advance when that relief will no longer be available. The FCC also has a responsibility to communicate directly to recipients. Absent effective messaging, participating households could be subject to sticker shock and unanticipated financial obligations. Consumer adoption of broadband, along with trust in government benefit programs, could suffer as a consequence.

On January 4, 2021, the Wireline Competition Bureau released a Public Notice on the EBBP.¹⁶ The Public Notice seeks input on a number of issues relating to implementation, including ISP, household, service, and device eligibility; expedited approval of ISP applications; the reimbursement process; awareness promotion; and auditing, enforcement, and reporting requirements.

Comments were due by January 25, 2021. Reply Comments must be filed on or before February 16, 2021. Acting Chairwoman Jessica Rosenworcel on January 28 announced that the FCC will host a virtual roundtable discussion on February 12 to "allow interested parties an opportunity to share ideas on the important public policy and program administration decisions that will shape the Commission's approach to establishing the Emergency Broadband Benefit Program."¹⁷

III. Congress Took Decisive Action to Appropriate Funding Distinct From the Universal Service Fund

The EBBP differs from the existing Lifeline program. For one, it is open to a wider universe. In addition to low-income households, also eligible are those households that include an individual who receives benefits under the free and reduced school lunch program, has experienced a "substantial loss of income since February 29, 2020," has obtained a Federal Pell Grant during the current award year, or satisfies a participating provider's existing low-income of COVID-19 program's criteria.¹⁸ Moreover, and perhaps most significantly, it is not a Universal Service Fund program funded by surcharges on all interstate and international calls. As such, it does not further tax subscribers to telecommunications services. Instead, Congress rightly paid for this benefit via an express appropriation.

Free State Foundation President Randolph May recently criticized as "shocking" the ever-increasing USF contribution factor – set at a record 31.8 percent for the first quarter of 2021 – as a regressive consumer tax that especially burdens low-income subscribers. A better, and more sustainable, approach, he argued, would rely upon direct congressional appropriations.¹⁹ As noted above, the Act does just that, making up to \$3.2 billion available for these pandemic-specific discounts.

¹⁶ *Wireline Competition Bureau Seeks Comment on Emergency Broadband Connectivity Fund Assistance*, Public Notice, WC Docket No. 20-445, DA 21-6 (released January 4, 2021) (*Public Notice*).

¹⁷ News Release, "FCC Announces Roundtable on Emergency Broadband Benefit Program" (January 28, 2021), available at <https://docs.fcc.gov/public/attachments/DOC-369577A1.pdf>.

¹⁸ See Act § 904(a)(6).

¹⁹ See Seth L. Cooper, "MEDIA ADVISORY: USF Contribution Factor Tops 31% and May Be Nearing a Tipping Point," *FSF Blog* (December 16, 2020), available at <https://freestatefoundation.blogspot.com/2020/12/media-advisory-usf-contribution-factor.html>.

In addition, the Act, by rejecting the outdated ETC requirement, expands consumer choice by encouraging broader ISP involvement in the EBBP. Participating ISPs must either be designated as an ETC or be approved by the Commission. The Act further requires that the agency "automatically approve ... a broadband provider that has an established program as of April 1, 2020, that is widely available and offers internet service offerings to eligible households and maintains verification processes that are sufficient to avoid fraud, waste, and abuse."²⁰

IV. Successful Execution Requires Steps to Prevent Waste, Fraud, and Abuse

Even within the realm of government spending programs, \$3.2 billion is a large sum of money. It is imperative that the Commission structure and manage the EBBP in the most efficient and cost-effective manner possible under the circumstances. To the greatest extent practicable,²¹ money intended to benefit eligible households should not be squandered or allowed to end up in the wrong hands.

The Act endeavors to prevent waste,²² fraud, and abuse through a number of provisions. One caps reimbursement at the "standard rate" charged for a broadband offering, which is defined as "the monthly retail rate for the applicable tier of broadband internet access service as of December 1, 2020, excluding any taxes or other governmental fees."²³ It would appear that this is designed to prohibit a provider from inflating the cost of a tier beyond that which it normally charges in order to increase the amount it receives from the FCC.²⁴ The Public Notice proposes to require providers that wish to participate in the EBBP to submit documentation establishing what those standard rates are.²⁵

In addition, the Public Notice proposes to incorporate a requirement that non-ETCs "adopt a plan to combat waste, fraud, and abuse similar to the compliance plans required of non-facilities-based carriers seeking approval to participate in the Lifeline program."²⁶ As explained in the following section, the disparate treatment of ETCs and non-ETCs – the former need no

²⁰ Act § 904(d)(2)(B).

²¹ See Comments of Competitive Carriers Association, WC Docket No. 20-445 (filed January 25, 2021), available at https://ecfsapi.fcc.gov/file/10126110904499/CCA%20Comments%20re%20EBB%20Program_1-25-21.pdf, at 6-7 ("Preventing waste, fraud, and abuse is important here just as in other benefit programs, but the laudable goals of preventing waste, fraud, and abuse should not inadvertently lead to substantial barriers to participation to meet the urgent need occasioned by a once-in-a-lifetime pandemic.").

²² See Act § 904(i)(3) ("[T]he Commission may use not more than 2 percent of [the EBCF] to administer the [EBBP].").

²³ Act § 904(a)(13).

²⁴ See Act § 904(a)(9) (defining an "internet service offering" for which a participating provider may be reimbursed as "broadband internet access service provided by such provider to a household, offered in the same manner, and on the same terms, as described in any of such provider's offerings for broadband internet access service to such household, as on December 1, 2020").

²⁵ Public Notice at 3.

²⁶ *Id.* at 4 (citing *Wireline Competition Bureau Provides Guidance for the Submission of Compliance Plans Pursuant to the Lifeline Reform Order*, Public Notice, 27 FCC Rcd 2186 (2012)). See also Comments of Comcast Corporation, WC Docket No. 20-445 (filed January 25, 2021), available at <https://ecfsapi.fcc.gov/file/10125786118622/2021-01-25%20Comcast%20EBB%20Comments.pdf>, at 3-4 ("ISPs ... have strong incentives not to undermine their other profitable commercial offerings by making the program available to ineligible customers – all of which limits their availability to truly eligible customers and avoids waste, fraud, and abuse.").

additional approval to participate in the EBBP but the latter do – has the unintended potential to limit consumer choice. At the same time, appropriate steps to safeguard against waste, fraud, and abuse are necessary. The key is to recognize the potential that the approval process could lead to unequal treatment of rivals and to take steps to avoid that result.

Finally, in adopting rules and procedures to implement the EBBP, the FCC probably will want to place some constraints on at least some of the eligibility criteria in the interest of fiscal responsibility. For example, the criterion related to a "substantial loss of income" may need to be tightened to avoid having funds dispersed to those who don't need the support.²⁷

V. The FCC Should Maximize Consumer Choice By Ensuring That All Participating Providers Are Treated Equally

As explained in the previous section, the EBBP, unlike the Lifeline program and other subsidies that rely upon the Universal Service Fund, is not burdened with the statutory requirement that broadband providers obtain an ETC designation from a state regulatory agency or the FCC as a participation precondition.²⁸ This is pro-consumer. As I explained in a June 2020 *Perspectives from FSF Scholars*,²⁹ an ETC designation obligation discourages the participation of ISPs outside the Title II "telecommunications service" regulatory classification, thereby limiting artificially the number of choices available to consumers. In calling for its elimination, I pointed out that the FCC can address the ETC requirement's objectives – ensuring timely build-out and avoiding waste, fraud, and abuse – "more directly ... through a focus on legal, financial, and technical ability, construction milestones, and other means."³⁰ Congress wisely embraced a consistent approach here, one that paves the way for wide ISP participation.

However, the Act states that ISPs that are ETCs and choose to participate are approved automatically, whereas non-ETCs must obtain approval from the Commission.³¹ Although the Public Notice acknowledges that such approvals are to be granted on an expedited basis,³² given

²⁷ See Act § 904(a)(6) (defining an "eligible household"). Subsection (C) thereof states that a household is eligible in the event that "at least one member of the household has experienced a substantial loss of income since February 29, 2020, that is documented by layoff or furlough notice, application for unemployment insurance benefits, or similar documentation or that is otherwise verifiable through the National Verifier or National Lifeline Accountability Database." See also Public Notice at 6-7 n.40 ("We seek comment on how to define a 'substantial loss of income since February 29, 2020' and additional types of documentation that would demonstrate such a loss. *Id.* Should households with an income currently above a certain level be excluded from the program even if they have experienced a substantial loss of income? If so, how should that level be defined?") (citation omitted).

²⁸ See 47 U.S.C. § 254(e) ("[O]nly an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support.").

²⁹ See Andrew Long, "The ETC Requirement for Accessing Broadband Funds Should Be Eliminated," *Perspectives from FSF Scholars*, Vol. 15, No. 34 (June 19, 2020), available at <https://freestatefoundation.org/wp-content/uploads/2020/06/The-ETC-Requirement-for-Accessing-Broadband-Funds-Should-Be-Eliminated-061920.pdf>.

³⁰ *Id.* at 2.

³¹ See generally Act § 904(a)(12), (d)(2).

³² See Public Notice at 2 ("Eligible telecommunications carriers designated pursuant to section 214(e) of the Communications Act may participate in the Emergency Broadband Benefit Program without seeking approval from the Commission. Providers that are not designated as eligible telecommunications carriers must meet the requirements established by and be approved by the Commission to participate in the Emergency Broadband Benefit Program.").

the emergency and time-sensitive nature of this coronavirus-specific subsidy, the disparate treatment of non-ETCs and ETCs potentially could favor the latter over the former. Care must be taken to avoid that outcome.

As the Public Notice acknowledges, "[t]he Commission is required to establish an expedited process for such approval and 'to *automatically approve* as a participating provider a broadband provider that has an established program as of April 1, 2020, that is widely available and offers internet service offerings to eligible households and maintains verification processes that are sufficient to avoid fraud, waste, and abuse.'"³³ But the devil, as we know, resides in the details. In order for non-ETCs to have an equal opportunity to participate in the EBBP, administrative deliberations – regarding whether an established program indeed is "widely available" and "verification processes ... are sufficient" – cannot be allowed to delay approval.³⁴ The goal is to provide prompt relief – and maximized choice – to consumers. If ETCs as a practical matter enjoy a head start over those non-ETCs that must obtain Commission approval, that goal will not be realized.

The non-ETC approval process is just one potential source of administrative delay. The Public Notice proposes to utilize existing mechanisms managed by the Universal Service Administrative Company ("USAC"),³⁵ including databases used to verify eligibility for participation in the Lifeline program³⁶ and reimbursement procedures,³⁷ rather than attempt to quickly reinvent the wheel in the scarce time available. But the practical fact is that ETCs that participate in the Lifeline program have experience with, and ready access to, these tools. Non-ETCs do not.

As a group representing non-ETCs recently explained in an *ex parte* submission, "[i]f non-ETCs are not able to sign up customers and receive reimbursement on the same terms as existing Lifeline providers from the start, consumers will be deprived of the variety and quality of services that Congress intended the program to provide."³⁸ It therefore is important that non-ETCs gain immediate access to these systems. Consumers rightfully will seek to take advantage of this emergency benefit as quickly as they can. Providers delayed by disparate administrative procedures will not be presented as competitive alternatives on day one.

³³ *Id.* (emphasis added) (citing *Act* § 904(d)(2)).

³⁴ *See id.* at 4 ("We seek comment on how these terms should be interpreted."); *see also id.* at 5 ("At a minimum, we expect the provider to explain the eligibility criteria and other pertinent information about a provider's existing low-income or COVID-19 program including with specificity that it was 'widely available' 'as of April 1, 2020.'") (citations omitted).

³⁵ *See id.* at 2 ("USAC is an independent, not-for-profit corporation designated as the permanent administrator of the Universal Service Fund by the Commission.") (citing 47 CFR §§ 54.701 *et seq.*).

³⁶ *See id.* at 3 ("The Consolidated Appropriations Act provides that the Commission 'shall expedite the ability of all participating providers to access the Lifeline National Eligibility Verifier (National Verifier) and National Lifeline Accountability Database for the purposes of determining whether a household is an eligible household.'") (citing *Act* § 904(b)(3); 5-8).

³⁷ *See id.* at 9 ("We propose that participating providers be reimbursed through the Lifeline Claims System administered by USAC, and subject to all the requirements of the Lifeline Claims System.") (citation omitted).

³⁸ Letter from Steven F. Morris, Vice President & Deputy General Counsel, NCTA – The Internet & Television Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 20-445 (filed January 28, 2021), available at <https://ecfsapi.fcc.gov/file/101280351509180/NCTA%20ACA%20WISPA%20INCOMPAS%20Ex%20Parte%20-%20EBB%20-WCB%20-%201-28-21.pdf>, at 2.

An approach has been suggested by non-ETC commenting providers to address this potential administrative head-start: a single start date for all qualifying partners.³⁹ However achieved, the FCC as implementing agency should prioritize the goal of equal opportunity for all providers that elect to participate, regardless of legacy regulatory classification. Congress took the first step toward the modernization of government subsidy programs through the establishment of a specific source of money for the EBBP, separate from the USF and its outdated focus on telecommunications providers. But it is up to the Commission to address the implicit historical advantages that ETCs still might enjoy.

Finally, while the Act appears on its face to be distribution-medium agnostic, incorporating by reference the general definition of "broadband internet access service" found in the Commission's rules⁴⁰ and eschewing specific speed or latency requirements, the FCC nevertheless should take care to make sure that, in defining the specifics of the EBBP, technological neutrality continues to serve as the lodestar. For example, the reference in the Public Notice to "modems and/or routers" as examples of "associated equipment" for which reimbursement might be made available should not be interpreted to exclude other types of end-user equipment that equally are "part and parcel" of the service.⁴¹ More providers utilizing a wide range of delivery technologies will benefit eligible households through choice and competition.

Likewise, while the Public Notice asks whether mobile phones "plainly are excluded as a connected device in the program,"⁴² the reality is that many Americans, and, in particular, low-income individuals, rely solely on smartphones for Internet access. Indeed, the Commission's *2020 Communications Marketplace Report*, released just at the end of last year, notes that, according to the Pew Research Center, nearly one in five American adults exclusively utilize smartphones to access the Internet.⁴³ The Public Notice recognizes that the appropriate focus during the pandemic is on a device's ability to "support video conferencing platforms and other

³⁹ See *id.* (advocating for "a single start date for all qualifying providers so that consumers are presented with a full array of competitive broadband choices"). See also Comments of Comcast Corporation, WC Docket No. 20-445 (filed January 25, 2021), available at <https://ecfsapi.fcc.gov/file/10125786118622/2021-01-25%20Comcast%20EBB%20Comments.pdf>, at 19 (arguing that "the Commission could establish a single start date as early as practicable when all participating providers can begin making the benefit available to eligible households").

⁴⁰ See 47 CFR § 8.1(b) ("Broadband internet access service is a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence or that is used to evade the protections set forth in this part.").

⁴¹ *Public Notice* at 8. See also Comments of TechFreedom, WC Docket No. 20-445 (filed January 25, 2021), available at <https://techfreedom.org/wp-content/uploads/2021/01/TF-Comments-to-FCC-Emergency-Broadband-Fund-1-25-21.pdf>, at 5 ("Antennas for fixed wireless systems and satellite systems need to be included in the Emergency Program, lest those delivery modes be hampered.... [T]he FCC should not discriminate against both providers and subscribers who rely on equipment other than a wire, a router, and a modem.").

⁴² *Public Notice* at 8.

⁴³ 2020 Communications Marketplace Report, *Communications Marketplace Report*, GN Docket No. 20-60, FCC 20-188 (December 31, 2020), available at <https://docs.fcc.gov/public/attachments/FCC-20-188A1.pdf>, at ¶ 28.

software essential to ensure full participation in online learning"⁴⁴ and concedes that it may be difficult to "distinguish between smaller tablets and larger mobile phones."⁴⁵ To the extent that a participating provider can make it possible for a student to participate in remote learning by providing a large-screen smartphone at a reduced cost, the Commission should allow it to do so.⁴⁶

VI. The Smooth Conclusion of the Emergency Broadband Benefit Program Requires Transparency and Communication From Day One

The EBBP will end once the earlier of the two following conditions come to pass: (1) the Secretary of Health and Human Services declares an end to the current public health emergency, or (2) the \$3.2 billion EBCF is depleted. Because the Act provides that the EBBP will continue for an additional six months beyond the former, such a triggering event should not present significant issues in terms of making discount recipients aware that the program will end. The latter, on the other hand, potentially could catch both individuals and participating broadband providers off guard. The Commission should provide timely updates as to the amount of money remaining so that providers can communicate effectively with their customers.⁴⁷ (It also should make that information known directly to participating households.) Otherwise, recipients of this relief may be unprepared for the resulting increase in monthly charges, angry at their provider and/or the FCC, and perhaps even reluctant to continue to subscribe to broadband service as a result.

VII. Conclusion

As then-Chairman Pai noted when the Act became law, the Emergency Broadband Benefit Program will build upon the Keep Americans Connected pledge and "go a long way to ensuring that low-income American families and veterans are connected during the pandemic, and that students can engage in remote learning with support from the program's funding for connected devices ... while also guarding against waste, fraud, and abuse."⁴⁸

⁴⁴ *Public Notice* at 9.

⁴⁵ *Id.* at 8.

⁴⁶ See Comments of CTIA, WC Docket No. 20-445 (filed January 25, 2021), available at <https://ecfsapi.fcc.gov/file/1012566888957/210125%20CTIA%20EBB%20Comments.pdf>, at 10 (arguing that 4G and 5G mobile devices with sufficiently large screens to support video conferencing should qualify as "tablets" and that "[b]y providing a definition that is focused on functions that the statute requires and consumers need, rather than arbitrary technical parameters, the Commission can entrust consumers with the ability to determine what devices will best enable them to access the broadband services that they need and apply the EBB to those devices").

⁴⁷ See *Public Notice* at 13 ("[H]ow should the Commission keep stakeholders informed during the duration of the program regarding the funds remaining in the Emergency Broadband Connectivity Fund?"). See also Comments of AT&T Services, Inc., WC Docket No. 20-445 (filed January 25, 2021), available at <https://ecfsapi.fcc.gov/file/1012567002301/ATT%20Comments%20EBB%20%20WC%20Docket%2020-445%20012521%20final.pdf>, at 6 ("[T]he Commission or USAC should publish a *weekly notice* that includes a running total of the number of subscribers enrolled in the Program, weekly and year-to-date disbursements, and an estimate of when the funds will be depleted.") (emphasis in original).

⁴⁸ News Release, "FCC Seeks Public Input on New \$3.2 Billion Emergency Broadband Benefit Program" (January 4, 2021), available at <https://docs.fcc.gov/public/attachments/DOC-369043A1.pdf>.

Time, however, is of the essence. With each passing day, students without Internet access fall further behind. It is critical that benefits be made available during the remaining months of the current school year. Other populations – the elderly, the sick, those seeking new employment opportunities after pandemic-driven lay-offs – likewise should not be made to wait.

Members of Congress, performing the policymaking role intended for those directly accountable to the American public, made the difficult decision to appropriate \$3.2 billion to connect (or keep connected) low-income households and others impacted by the pandemic. The FCC should expeditiously take all necessary steps so that this assistance quickly reaches only those that are eligible; every broadband ISP that so chooses is able to participate in this program on equal terms, regardless of regulatory classification; and processes are in place on day one that guarantee transparency and sufficient advance notice of the program's eventual conclusion. These actions will make this program a success and can inform a reconceived approach to Universal Service Fund programs such as Lifeline.

* Andrew Long is a Senior Fellow of the Free State Foundation, an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland.

Further Readings

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Andrew Long, "[FCC Seeks Input on COVID-19 Broadband Discount Program](#)," *FSF Blog* (January 5, 2021).

Andrew Long, "[A Primer: The COVID Relief Bill's Broadband Funding Provisions](#)," *FSF Blog* (December 26, 2020).

Seth L. Cooper, "[MEDIA ADVISORY: USF Contribution Factor Tops 31% and May Be Nearing a Tipping Point](#)," *FSF Blog* (December 16, 2020).

[Comments of the Free State Foundation](#), *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 20-269 (September 18, 2020).

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Andrew Long, "[Legislative 'Best Practices' to Expand and Accelerate Broadband Coverage](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 42 (July 29, 2020).

Andrew Long, "[FCC, House Pursue Different Approaches to Keeping Americans Online](#)," *FSF Blog* (May 19, 2020).

Andrew Long, "[ISPs, FCC Rise to COVID-19 Challenge: Congress Can, Too](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 24 (May 13, 2020).

Seth L. Cooper, "[Chairman Pai Talks Rapid Responses to COVID-19 and More in New Teleforum](#)," *FSF Blog* (April 9, 2020).