**Comments of**

**TechFreedom**[1]

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**In the Matter of**

*Lifeline and Link Up Reform and Modernization*

WC Docket No. 11-42

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## Introduction & Summary

Lifeline is a broken program: the fees that fund it, added to all phone bills, hurt the poor most, and yet the Federal Communications Commission ("FCC" or "Commission") has no idea how cost-effective Lifeline spending is. What is the trade-off between making everyone's communications services more expensive and connecting some who would not otherwise be connected at all? Is Lifeline really that — a way of bringing marginal consumers into the market, and connecting them to the rest of our increasingly digital society — or is it just another inefficient way of moving money from some poor people to other poor people, as well as the many opportunistic middle-men who take advantage of the program?

Unfortunately, the FCC is rushing headlong into expanding the program still further without any clear sense of how to address these questions,[2] despite an uncharacteristically scathing assessment of the situation in the Government Accountability Office ("GAO") report issued in March:

> Officials report that FCC has not conducted a program evaluation of Lifeline, noting that the program's structure makes it difficult to determine a causal connection between the program and the penetration rate. However, FCC officials referenced academic studies that evaluated the impact of Lifeline and suggest that the program may be a rather **inefficient and costly mechanism to increase telephone subscribership**. This suggested lack of efficiency is a concern, particularly since FCC has proposed expanding the pool of households eligible for Lifeline. Such actions may increase overall penetration, but might do so at a high cost because **households may enroll that already have phone service**. **Without evaluating the program, FCC does not have information on which to base program changes**, such as expanding eligibility requirements. Taking such actions without evaluating the program raises concerns about the Lifeline program's ability to meet its goals to increase telephone penetration rates among low-income households and to **minimize the contribution burden**.[3]

One of the two studies relied on by the GAO concludes that:

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[2] *See generally* Lifeline and Link Up Reform and Modernization, *Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order*, WC Docket No. 11-42 (June 22, 2015) ["*Second Lifeline FNPRM*" or "*Order*"], *available at* https://goo.gl/fGtZOR.

[3] Gov't Accountability Office, *Report to the Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate: Telecommunications — FCC Should Evaluate the Efficiency and Effectiveness of the Lifeline Program*, GAO-15-335, 35 (Mar. 2015) ["*GAO Report*"] (emphasis added), *available at* http://goo.gl/Wda19v.

> **only one out of eight** households that are enrolled in Lifeline is subscribed to telephone service because of the subsidy. The other seven would have a phone in the absence of the subsidies. … [And] only **one out of twenty** households that receive subsidies for wireless prepaid service subscribes to the telephone service because of the subsidy.[4]

These numbers are nothing less than shocking — yet not surprising given another shocking figure: 34% of Americans are now eligible for Lifeline subsidies.[5] Simply put, far too many people can claim Lifeline subsidies, which means that not enough attention is being paid on focusing that money where it should be going — to those who truly would not subscribe to communications services without a subsidy.

Instead of stepping back to fundamentally re-evaluate the program as a *prior* step to expanding it, the FCC feebly responds, in a footnote, that it "has been and continues to evaluate the Lifeline program using measurements described in the *Lifeline Reform Order* and peer reviewed third-party studies on the effectiveness of the program."[6] The FCC does not actually *cite* any such studies, nor do we see any evidence of their influence in the *Order*. Indeed, the two studies relied upon by the GAO are mentioned nowhere in the *Order*. Simply put, the FCC is in denial over its own institutional failure to perform a basic analysis of how it is spending other people's money. Worse still, it seems to have little awareness that the consumers who pay Lifeline fees may well hover around the margin of being able to afford service themselves — in other words, that raising Lifeline fees may force some previously able to stand on their own two feet into dependence upon government.

The FCC devotes just one of the nearly 300 paragraphs in the *Order* (109 of which are in the FNPRM section) to engaging with the GAO's criticisms, and even then, only to ask a series of sheepish questions:

> The Government Accountability Office has recommended that the Commission conduct a program evaluation to determine how well Lifeline is serving its intended objectives. For example, one of the goals that the Commission has set for the Lifeline program is increasing the availability of voice service for low-income Americans, measured by the difference in the

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[4] Olga Ukhaneva, *Universal Service in a Wireless World*, 2014 TPRC CONFERENCE PAPER, at 4 (Nov. 20, 2013) (emphasis added), *available at* http://goo.gl/pEH9Gy.

[5] *Second Lifeline FNPRM*, at 139 (Commissioner Pai, dissenting).

[6] *Id.*, ¶ 3, n. 12 (citing Lifeline and Link Up Reform and Modernization, *Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 11-42, 27 FCC Rcd 6656 (Feb. 6, 2012) ["*Lifeline Reform Order*" or "*Lifeline FNPRM*"], *available at* https://goo.gl/MPDNUq).

> penetration rate (the percentage of households with telephone service) between low-income households and households with the next highest level of income. Without a program evaluation, however, GAO reports that the Commission is currently unable to determine the extent to which Lifeline has assisted in lowering the gap in penetration rates. **We therefore seek comment on whether a program evaluation is needed to determine the extent to which Lifeline has contributed towards fulfilling its goals**, such as narrowing the gap in telephone penetration rates, and at what cost. Is this the right goal for Lifeline program or should it focus on affordability? Should we focus on measuring program efficiency by determining the amount of people who no longer need Lifeline? In measuring the effectiveness of Lifeline on low-income broadband subscribers, how can we capture the benefits that flow from getting consumers connected, such as the ability to obtain employment, education and improve their health care? How should a program evaluation be structured? How expensive would it be to implement? Moreover, if Lifeline is expanded to include broadband support, how could we evaluate the effectiveness of such an expansion? What metrics and timeframe should we use to determine whether such funds were being spent efficiently?[7]

Notably absent is any discussion of the Lifeline contribution burden and its effect on poor consumers. This is just one of many trade-offs raised in the *Order*.[8] How should the Commission balance the advantages of ensuring that recipients have "skin in the game" (in reducing fraud) with the risks of deterring participation? Should all recipients have to pay *something*? Or should only recipients over a certain income threshold have to pay for part of their service? Should that be a flat amount or a percentage of the total cost of service (that rises with income)? Should eligibility continue to be tied to participation in various federal and state welfare programs, or should it be tied solely to income? Should funds be delivered via voucher or paid directly to the provider? Should there be minimum quality levels for broadband service?

These are all inherently economic questions, which should be decided by economists analyzing robust data. Yet the FCC seems to lack both data and any clear role for economists in making decisions. It is *not* enough to ask a few vague questions about how to respond to the GAO report as part of an NPRM, and then proceed directly to a final rule.

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[7] *Second Lifeline FNPRM*, ¶ 157 (emphasis added).

[8] *See, e.g.*, *id.*, ¶¶ 106–10.

The FCC all too easily takes an approach that can aptly be described as: "Fire (make a major decision — here, to expand the program), ready (collect data), aim (analyze it)."

A more consistent, data-driven FCC would have initiated a Notice of Inquiry immediately after the release of the GAO study to collect more information — including the kind of "peer reviewed third-party studies" the FCC purports to be considering.[9] Having failed to do so (and thus regain the dignity that comes with quickly responding to constructive criticism), the FCC should, at a minimum, now use the comments produced by this proceeding to inform a Third FNPRM, and seek comment on that proposal, *before* issuing a final order.

## Modernizing Lifeline: Supporting Broadband Internet Access Service

It has been one of the purposes of the FCC, since its creation in 1934, to "make [communications services] available, so far as possible, to all the people of the United States[.]"[10] Along with the Connect America Fund, E-Rate, and Rural Health Care programs, Lifeline provides critical support to enable low-income households to afford these communications services. Traditionally, Lifeline supported only plain old telephone service ("POTS"), but the FCC now proposes to extend Lifeline support to broadband Internet access service, in addition to POTS, and giving subscribers the option of applying their Lifeline subsidy to either service.[11] Although we object to many of the recent steps taken by the FCC under the guise of "modernizing" and "updating" its regulatory scheme[12] — absent clear direction from Congress to that effect — we agree that Lifeline can and should be reformed, including by transitioning Lifeline funding to support broadband. However, we believe this can be done *within* the FCC's existing legal authority — without the need to invoke further claims of authority, each of which increases the risk of future FCC overreach and unintended consequences for consumers.

### Legal Authority under the Communications Act and Section 706

The FCC seeks comment on the legal basis for extending Lifeline support to broadband service.[13] This section is exceedingly brief, though, comprising a mere two paragraphs.

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[9] *Id.*, ¶ 3, n. 12.

[10] *See* Communications Act of 1934, Act of June 19, 1934, ch. 652, title I, § 1, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. § 151); *see also* 47 U.S.C. § 254 (providing the basis for Universal Service).

[11] *Second Lifeline FNPRM*, ¶¶ 17–33.

[12] *See, e.g.*, Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, GN Docket No. 14-28, at 315 (Mar. 12, 2015) [*2015 Open Internet Order*], *available at* https://goo.gl/QafQCE (Statement of Chairman Wheeler) ("This modernized Title II will ensure the FCC can rely on the strongest legal foundation to preserve and protect an open Internet. Allow me to emphasize that word 'modernized.'").

[13] *Second Lifeline FNPRM*, ¶¶ 61–62.

Such brevity is largely due to the FCC's reliance upon the *2015 Open Internet Order*, which, *inter alia*, reclassified broadband Internet access service as a "telecommunications service" under Title II of the Communications Act.[14] Following this reclassification, broadband can clearly be included as part of the Lifeline program under the FCC's authority in Section 254.[15]

However, reclassification was unnecessary for this purpose. Specifically, just as the FCC did with the *USF/ICC Transformation Order*, it could have invoked Section 706 not as a grant of authority but as a clear Congressional directive to promote broadband deployment, and a justification for using the regulatory tools of the Communications Act to promote broadband deployment by claiming authority reasonably ancillary to Section 254.[16] Even before reclassification, the 10th Circuit upheld spending USF money on broadband as being reasonably within the FCC's authority and adequately justified by the circumstances, and the Supreme Court's refusal to grant certiorari in that case suggests, at least implicitly, that this remains a viable legal option for the FCC to utilize going forward.[17] Thus, even if the D.C. Circuit and/or Supreme Court strike down reclassification or other key portions of the *2015 Open Internet Order* — as we expect they will — the FCC will still be able to continue supporting broadband via Lifeline and other Universal Service programs under its existing legal authority. But it should make that argument now — if only as the FCC's primary legal basis for expanding Lifeline (with Title II and Section 706 being alternative bases of authority).

### Defining Service Levels

In the *Second FNPRM*, the FCC proposes "to establish minimum service levels for fixed and mobile voice and broadband service that Lifeline providers must offer to all Lifeline customers in order to be eligible to receive Lifeline reimbursement[,]" and asks several questions as to how these minimum service levels should be set going forward.[18] The FCC

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[14] *2015 Open Internet Order*, ¶¶ 306–433.

[15] *See* 47 U.S.C. § 254(c) ("Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services.").

[16] Connect America Fund, *Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90 (Nov. 18, 2011) [*USF/ICC Transformation Order*], *available at* https://goo.gl/bu9TGK, *aff'd sub nom.* In re FCC 11-161, 753 F.3d 1015, 1054 (10th Cir. 2014) ("In other words, section 254 does not limit the use of USF funds to 'telecommunications services.'"), *cert. denied*, *United States Cellular Corp. v. FCC*, Case 14-610 et al. (May 4, 2015), *available at* http://goo.gl/UvV5AV.

[17] *See id.*

[18] *Second Lifeline FNPRM*, ¶¶ 34–62.

has had to define certain service levels in various proceedings.[19] Here again, the *Order* asks whether it would "be appropriate to develop an objective, data-based methodology for establishing such levels[,]" and whether it can "establish an objective standard that could be updated on a regular basis?"[20] It would clearly be beneficial for the FCC to use objective criteria, based on robust and reliable data, and for those criteria to be updated on a regular, predictable basis going forward. It is simply a question of *how*.

In its Section 706(b) inquiries, the FCC has defined "advanced telecommunications capability" on the basis of throughput (*i.e.*, upload and download speeds), which has required the Commission to update its definition periodically as technology improves and throughputs increase.[21] The FCC has previously toyed with the idea of using more enduring metrics — such as adoption rates (*i.e.*, how many Americans subscribe to a certain level of service)[22] — but, despite receiving some favorable feedback on those ideas,[23] the FCC persisted with its essentially arbitrary speed thresholds, raising them from 4/1 Mbps to 25/3 Mbps.[24] Tellingly, the FCC solicited no further input on alternative benchmark criteria in its *Eleventh Section 706(b) NOI*, instead seeking input on other technical criteria — such as latency and packet loss — that can be used to bolster the speed threshold.[25]

Rather than asserting what consumers *should* do, the FCC should adopt a clear methodology for basing service metrics on some comparison to what consumers *actually*

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[19] *See, e.g.*, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, *Tenth Broadband Progress Notice of Inquiry*, GN Docket No. 14-126 (Aug. 5, 2014) ["*Tenth 706(b) NOI*"], *available at* http://goo.gl/6wLLBK.

[20] *Second Lifeline FNPRM*, ¶ 35.

[21] *See generally* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, *Eleventh Broadband Progress Notice of Inquiry*, GN Docket No. 14-126, ¶¶ 19–26 (Aug. 7, 2015) ["*Eleventh 706(b) NOI*"], *available at* http://goo.gl/I9yKLe (discussing the criteria and benchmarks for assessing consumer broadband).

[22] *Tenth 706(b) NOI*, ¶¶ 20–21.

[23] *See, e.g.*, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, *Comments of TechFreedom*, GN Docket No. 14-126, at 10–14 (Sept. 4, 2014), *available at* http://goo.gl/nqGUbL.

[24] Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, *2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment*, GN Docket No. 14-126, ¶¶ 45–55 (Feb. 4, 2015), *available at* https://goo.gl/KGC4f7.

[25] *Eleventh 706(b) NOI*, ¶¶ 31–46.

do — for instance, saying that Lifeline service speeds must be not less than some fraction of the average speed used by overall consumers during peak hours. Using this kind of flexible methodology, the FCC could update its benchmarks at consistent intervals (say, once every three years) based on a predictable trends grounded in real-world usage, not political whims. As the inputs to the formula changed, so too would the output, yet the formula could remain constant. This approach would also allow the FCC to avoid lurching from one threshold to the next in an attempt to keep up with ongoing increases in consumer demands, which are driven significantly by technical upgrade cycles in broadband capability.[26] But even if the FCC continues tinkering with criteria such as throughput and latency to define certain levels of service, it still can take steps to ensure those criteria are utilized in an efficient and reasonable manner. In the first instance, that simply means gathering robust and reliable data on which to base initial determinations, but the second order question of when (and how) to update those determinations is arguably more important. Merely using a notice-and-comment rulemaking cycle — even if conducted on an annual basis, as with the Section 706(b) inquiry — does not truly provide adequate notice for communications service providers, as decisions about when (and how) to upgrade their equipment to provide improved service quality to subscribers are generally made years in advance and rolled out over time. Thus, if the FCC persists in using technical criteria and speed benchmarks in defining service levels, it should at least establish a regular timeframe for updating its definitions — say, every three or five years — so that service providers can adequately plan their business affairs ahead of time, and not risk having the rug pulled out from under them because they were a few months too late in rolling out a new upgrade.

## Promoting Fiscal Responsibility & Reducing Waste, Fraud, & Abuse in the Lifeline Program

We urge the Commission to consider making three major policy changes to its proposal before issuing a final rule — the same two urged by Commissioners O'Rielly and Pai as their principal suggestions for reform.

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[26] *See, e.g.*, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, *Ex Parte by TechFreedom*, GN Docket No. 14-126 (Jan. 22, 2014), *available at* http://goo.gl/LE9afH (discussing the effects of upgrade cycles and iterative investments on communications network performance, and the good news story from the upgrades made in 2013 and 2014).

### Develop a Lifeline Budget

Lifeline is the only USF program without a budget or any cap. There is simply no excuse for this. This fact means USF fees will automatically increase each year to meet increased demand for the expanding program.

The FCC recognized the need to "ensure that adequate controls are in place as we implement any further changes to the Lifeline program to guard against waste, fraud, and abuse. We therefore, among other things, seek to revise our documentation retention requirements and establish minimum service standards for any provider that receives a Lifeline subsidy."[27] The (oblique) implication that setting minimum quality standards will control the growth of the program is preposterous and counter to basic economic logic. Requiring higher quality will make Lifeline service plans will be *more*, not less, expensive over time. The FCC will, of course, face constant pressure to increase the size of the program, whether by raising minimum standards and therefore also the monthly subsidy, or further expanding eligibility. Only a firm annual budget can force the FCC to make hard decisions about tradeoffs.

### Require Skin in the Game

The idea that Lifeline recipients might have to bear any part of the cost of service seems to embarrass the FCC. But until 2007, Lifeline never provided completely free service. President Reagan created the program to offer discounts for basic phone service, not free service. The difference is crucial: without skin in the game, fraud, waste and abuse are inevitable.

It *might* be the case that it does not make sense to charge any fee to consumers below a certain income level, either because even small fees will discourage their participation in the program (*e.g.*, if they do not have a bank card) or because the transaction costs involved are too small to bother with (say, $1–3/month). But the FCC should require hard evidence to establish such claims and, even then, should not abandon the general proposition that everyone should have to pay *something* for their service: completely free service should be made available only to the smallest possible number of the very lowest-income consumers; the rest should have to pay *something*.

## Data Retention

We commend the FCC for reducing the length of data retention from the ten year term it proposed in 2012 to the three term issued in the *Order*.[28] This will, to some degree, reduce

[27] *Second Lifeline FNPRM*, ¶ 3.

[28] *See id.*, ¶¶ 226, 236 (citing *Lifeline FNPRM*, ¶ 505).

the privacy and identity theft risks posed by large-scale storage of the sensitive financial information provided by Lifeline recipients in order to establish their eligibility. Yet this shortened term is a half-measure that does not change the fundamental fact that the FCC is forcing telecom companies to retain data about consumers they likely have no other business reason to retain. It creates a security vulnerability where none existed before — and then attempts to remedy that vulnerability by regulating the data security practices of Lifeline providers regarding this data.

This may be the best solution that can reasonably be implemented at this time. But the FCC should aim, in the next round of Lifeline review, for a better solution. We question the need for carriers to retain data at all, particularly now that they are no longer the ones making eligibility determinations. The purpose of data retention would seem to be to allow auditing of eligibility determinations — to ensure that companies are not giving away Lifeline service to ineligible customers (lest they lose a potential, subsidized customer).

The most privacy-protective way to process eligibility would be for a single clearinghouse to process all applications by, for instance, examining the eligibility data, making a determination, associating that with the social security number of the applicant, and discarding the supporting data completely. Without a financial incentive to water down eligibility standards, it should not be necessary to audit every determination made by the clearinghouse. But, if necessary to ensure some basic auditing accountability, the clearinghouse could retain at least some records in de-identified form. If subsequent audits reveal more than a certain percentage of false positives, the clearinghouse could be required to tighten its review processes. If applicants have to be recertified, say, every year, any who were erroneously deemed to be eligible could be weeded out within a year, thus minimizing the effects of eligibility errors.

This proposal is, of course, entirely notional; the exact details would have to be addressed by encryption experts, economists, and other relevant experts. The immediate point is simply that there *are* ways to ensure the accountability of the program without requiring creation of a massive honeypot of sensitive financial data — and the attendant need for the FCC to get into the tricky business of regulating data security regarding sensitive financial data.

## Inventing Data Security Authority & the FCC's Emerging "Common Law of Consent Decrees"

Like Commissioner O'Rielly, we "continue to object to the practice of citing NALs as if they have precedential value. They do not. They are not final orders and are often challenged vociferously by the affected parties."[29] Specifically, we object to the FCC's citation to the Notice of Apparent Liability ("NAL") it issued last year to TerraCom and TracFone, in which it reinterpreted Sections 222(a) and 201(b) as general bases for the FCC to use in regulating the data security practices of telecommunications carriers — beyond the specific requirements of CPNI regulations issued under Sections 222(b) and (c).[30] While the FCC here cites Section 706 only as an additional basis for expanding Lifeline subsidies to broadband, and not as a basis for regulating data security with regard to Lifeline data, the *2015 Open Internet Order* and the Commission's recent *Eleventh Section 706(b) Notice of Inquiry* both allude to Section 706 as an additional legal basis for requiring telecommunications carriers to have "reasonable" data security.[31]

We object to all three interpretations as unwise, legally problematic and, in this case, unnecessary.[32] The FCC should have done what it used to do — before its expansive claims of authority under these provisions made it so analytically lazy: establish why regulating the data security practices of Lifeline providers was "reasonably ancillary to the effective performance of the Commission's various responsibilities."[33] This should not have been a difficult task. Yet the very act of going through this analysis is important: it appropriately constrains the FCC's ability to regulate beyond clear grants of authority. By contrast, there are no clear limiting principles for Sections 201(b) or 222(a), let alone Section 706. As Commissioner O'Rielly said in his dissent in *Terracom*, "if data protection falls within the ambit of 201(b), then I can only imagine what else might be a practice 'in connection with' a communications service."[34] Invoking these provisions — even in the service of the relatively uncontroversial proposition that, if the FCC is going to require retention of sensitive data, it should also require the security of that data — opens the door to broader FCC micromanagement of Lifeline and other USF programs in ways that are difficult to anticipate today.

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[29] *Id*., at 143 (Commissioner O'Rielly, dissenting).
[30] *Id*., ¶ 85, n. 191.
[31] *See 2015 Open Internet Order*, ¶¶ 464–67; *Eleventh 706(b) NOI*, 49–52.
[32] *See generally* Berin M. Szoka & Thomas W. Struble, *Out of the Frying Pan & Into the Fire: The FCC Takes Over Privacy Regulation*, 2015 TPRC CONFERENCE PAPER (Aug. 15, 2015), *available at* http://goo.gl/ElrKN1 (detailing the FCC's recent actions with regard to privacy regulation, and offering recommendations for both the FCC and Congress going forward).
[33] United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968).
[34] In re TerraCom, Inc. and YourTel America, Inc., *Notice of Apparent Liability for Forfeiture*, File No.: EB-TCD-13-00009175, at 29 (Oct. 24, 2014) (Commissioner O'Rielly, dissenting), *available at* https://goo.gl/jRBvYO.

## Conclusion

The FCC owes it to the consumers who pay for Lifeline — including, most notably, those just above the eligibility threshold — to carefully weigh the trade-offs involved in any expansion of Lifeline, and the details of how to reform the program to make it work more effectively. There may never have been a clearer case where careful application of cost-benefit analysis would also serve social justice — ensuring that the FCC does not rob poor Peter to pay slightly poorer Paul. We urge the FCC to go back to the drawing board, revise its proposal, and issue a Third FNPRM before proceeding to a final order.