

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Safeguarding and Securing the Open Internet) WC Docket No. 23-320
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)

Comments of
National Consumer Law Center, on behalf of its low-income clients
Access Humboldt
Benton Institute for Broadband & Society
Center for Rural Strategies
Common Sense
Families for Freedom
The Greenlining Institute
Media Alliance
MediaJustice
Mississippi Alliance of Nonprofits and Philanthropy
NC Counts Coalition
New America's Open Technology Institute
Next Century Cities
National Hispanic Media Coalition
NTEN
[“The Affordable Broadband Groups”]

December 14, 2023

I. Introduction

The National Consumer Law Center, on behalf of its low-income clients, Access Humboldt, Benton Institute for Broadband & Society¹, Center for Rural Strategies, Common Sense, Families for Freedom, The Greenlining Institute, Media Alliance, MediaJustice, Mississippi Alliance of Nonprofits and Philanthropy, NC Counts Coalition, New America's Open Technology Institute, Next Century Cities, National Hispanic Media Coalition and NTEN (“The Affordable Broadband Groups”) submit these comments in response to the Federal Communication Commission’s (FCC’s or Commission’s) Notice of Proposed Rulemaking (NPRM) regarding the reclassification of broadband internet access service (BIAS) as a Title II service.²

The classification of BIAS as a Title I or Title II service has changed back-and-forth several times over the years³. These brief comments are limited to the impact of the proposed rulemaking on the ability of the FCC to address the availability of affordable broadband service for low-income households under Section 254 of Title II, 47 U.S.C. §254, where the FCC’s Universal Services Fund programs are housed. The Affordable Broadband Groups urge the Commission to maintain maximum flexibility regarding the future of the Universal Service Programs, including the ability to address universal service contributions associated with BIAS.

¹ The Benton Institute for Broadband & Society (Benton), is a non-profit, operating foundation. These comments reflect the institutional view of the Benton Institute for Broadband & Society, and, unless obvious from the text, is not intended to reflect the views of its individual officers, directors, or advisors.

² Federal Communications Commission, *Safeguarding and Securing the Open Internet*, WC Docket No.23-320, Notice of Proposed Rulemaking (FCC 23-83, rel. Oct. 20, 2023) (“*Safeguarding and Securing the Open Internet NPRM*”).

³ See e.g., Congressional Research Service, *Net Neutrality Law: An Overview*, R46973 (updated Oct. 18, 2022).

The Affordable Broadband Groups urge the Commission to refrain from forbearing from the exercise of Section 254(d) as this could prematurely hamper the ability of the Commission efforts to timely modernize and fund the Universal Services programs. While the policy path for funding universal BIAS for low-income households has not been settled, it is premature to take any options off the table.

II. Discussion

Universal service, the principle that “all the people of the United States” should have access to communications service, is a core mission of the FCC.⁴ The Telecommunications Act of 1996 established the Universal Services Fund (USF) programs as we know them today.⁵ The USF programs do not rely on an unpredictable annual appropriation from Congress. The USF provides stability for providers to make long-term investment decisions which affect services for low-income families and communities. The USF also offers assurance to low-income consumers, schools, libraries and rural healthcare systems that there will be uninterrupted support which facilitates access to affordable, continuous universal service. Section 254 sets forth the guiding principles for the USF programs including:

“(2) Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to

⁴ 47 U.S.C. §151 (The FCC is created “For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . .”).

⁵ Per the process set forth in Section 254 the FCC in consultation with the Federal-State Joint Board on Universal Service established four universal service programs: High Cost (now the Connect America Fund), Lifeline, Rural Health Care and the Schools and Libraries (also known as e-rate) program. See FCC’s website on Universal Services at <https://www.fcc.gov/general/universal-service>.

telecommunications and information services, including . . . advanced telecommunication and information services . . .

(4) All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.”⁶

The Commission proposes to forbear from the application of particular Title II provisions to BIAS using the 2015 Open Internet Order as the starting point for the scope of Title II provisions.⁷ The Commission seeks comment regarding their proposal to forbear “in part from the first sentence in section 254(d) and our associated rules ‘insofar as they would immediately require new universal service contributions associated with’ BIAS, as the Commission did in 2015”.⁸ This 254(d) sentence at issue is as follows:

“Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and non-discriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service.”⁹

USF contributions are calculated quarterly based on the ratio of projected quarterly cost of the USF programs to the contributors’ interstate and international telecommunications revenue. While the USF demand has remained relatively stable, the telecommunications revenue has decreased.¹⁰ There is an urgent need for the FCC to address the USF contributions mechanism, particularly as current deliberations in Congress on the funding for the Affordable Connectivity Program (ACP) are focused on a one-year timeframe.¹¹

⁶ 47 U.S.C. §254(b).

⁷ *Safeguarding and Securing the Open Internet NPRM* at ¶¶98-114.

⁸ *Safeguarding and Securing the Open Internet NPRM* at ¶105.

⁹ 47 U.S.C. 47 U.S.C. §254(d).

¹⁰ Congressional Research Service, *The Future of the Universal Service Fund and Related Broadband Programs*, R47621 (July 11, 2023) at 8.

¹¹ See e.g., the INCOMPAS ex parte on October 5, 2023 in WC Docket Nos. 21-450, 21-476 and 06-122 (re support for the Affordable Connectivity Program and USF contributions reform).

The broadband affordability landscape has changed since 2015 and the need for enforcement of Section 254 under Title II is substantially more important than it was some eight years ago. The COVID-19 pandemic demonstrated the need for adequate broadband service for all Americans, and elevated the importance of BIAS as an essential service for modern life as education, work, healthcare and commerce were delivered and made accessible digitally.¹² BIAS was the mechanism for households, communities and institutions to navigate through the pandemic safely. Telemedicine evolved from a novelty to a necessity. The pandemic made it clear that the digital divide has a significant impact on those struggling with the digital divide and the institutions serving them.¹³

The lessons of COVID-19 were not lost on Congress. It responded to the urgent demand for BIAS with historic investments in programs such as \$3.2 billion for the Emergency Broadband Program (EBB)¹⁴ and later \$14.2 billion for the Affordable Connectivity Program (ACP)¹⁵ which modified the EBB. The sheer magnitude of the demand for universal and affordable BIAS can be seen in the over 22 million households that are participating in ACP, with more new subscribers joining every day. The demand for ACP could result in the spend out of funds by the spring of 2024 resulting in calls from public interest and civil rights advocates¹⁶

¹² Titilayo Tinubu, Sumit Chandra, Sujith Cherukumili, *et al*, *Looking Back, Looking Forward: What it will take to permanently close the K-12 digital divide* (2021), available at https://www.commonsensemedia.org/sites/default/files/research/report/final_-_what_it_will_take_to_permanently_close_the_k-12_digital_divide_vfeb3.pdf.

¹³ Kelsey Clark, Amina Fazlullah, Drew Garner, et al, *Closing the Digital Divide Benefits Everyone, Not Just the Disconnected: An analysis of how universal connectivity benefits education, health care, government services, and employment* (2022), available at <https://www.commonsensemedia.org/research/closing-the-digital-divide-benefits-everyone-not-just-the-unconnected>.

¹⁴ Consolidated Appropriations Act, 2021 (P.L. 116-260) Div. N, tit. IX, §904 (2020).

¹⁵ Infrastructure, Investment and Jobs Act, tit. V (P.L. 117-58) Div. J, tit. IV(2021).

¹⁶ See e.g., May 10, 2023 from 166 civil rights and public interest organizations to Senate Appropriators and Committee of Jurisdiction at <https://civilrightsdocs.info/pdf/policy/letters/2023/Leadership-Conference-Letter-Support-Affordable-Connectivity-Program.pdf>.

industry,¹⁷ state governments,¹⁸ local governments,¹⁹ members of Congress, and the Administration²⁰ to Appropriators and Congressional leadership to provide one-year of additional appropriations for ACP to allow time for a permanent funding mechanism to be developed. Senators Luján, Thune, Klobuchar, Capito, Peters, and Moran have formed a Universal Service Fund (USF) Working Group regarding the future of USF.²¹

While the policy path for funding universal BIAS for low-income households has not been decided, it is premature to take any options off the table. This is clearly an all-hands-on-deck moment regarding finding a permanent solution for funding affordable, universal BIAS. Thus, the Affordable Broadband Groups urge the Commission to step back from its proposal to forbear from the first sentence in section 254(d) as doing so could prematurely hamper the ability of the Commission to timely modernize and fund the Universal Services programs.

¹⁷ See e.g., October 30, 2023, WHAT THEY ARE SAYING: Wide Range of Community Advocates and Industry Applaud President Joe Biden’s Efforts to Extend the Affordable Connectivity Program at <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/what-they-are-saying-wide-range-of-community-advocates-and-industry-applaud-president-joe-bidens-efforts-to-extend-the-affordable-connectivity-program>.

¹⁸ See e.g., November 13, 2023 letter from 26 governors (bi-partisan) to House and Senate Leadership.

¹⁹ See e.g., November, 6 2023, White House, Counties Urge Congress to Extend Affordable Connectivity Program at <https://www.naco.org/news/white-house-counties-urge-congress-extend-affordable-connectivity-program>.

²⁰ October 25, 2023, Fact Sheet: White House Calls on Congress to Support Critical Domestic Needs at <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/25/fact-sheet-white-house-calls-on-congress-to-support-critical-domestic-needs/>.

²¹ For information on the Senate USF working group see <https://www.lujan.senate.gov/usf/>.