



## EXECUTIVE SUMMARY

Nearly 13 years ago, in the midst of a major economic and employment crisis, Congress enacted a law directing the Federal Communications Commission (“Commission”) to create a plan “to ensure that all people of the United States have access to broadband,” and to develop a strategy “for achieving affordability of such service.”<sup>1</sup> It may have taken an even-worse shock to the economy to get Congress to put the necessary resources behind that sentiment, but the millions of low-income families who’ve struggled to find affordable options in this concentrated market are finally seeing the real help they very much need.

With its creation of the Affordable Connectivity Program (“ACP”), Congress not only appropriated money to help make broadband more affordable for low-income households, it imposed a series of very strong consumer protections on broadband providers who choose to accept these public funds. Congress made it clear to the broadband industry that the success of the ACP is critical, and that any ISP who would seek to undermine the program should stay away. Congress empowered the Commission to carry out its vision and protect the integrity of the ACP and all of the low-income households that it is designed to help.

Therefore, as it moves to adopt rules for the ACP, the Commission must put carriers on notice that any abuses of the program or its participants will result in severe and long-lasting consequences. The agency not only has the mandate and duty to protect users generally; Congress set forth a number of protections the FCC must create, while leaving the specific details up to the Commission. In our comments below, we argue for the Commission to ignore the all-too-likely calls from certain pirates calling for the agency to adopt weak rules that would run counter to the plain language of the law.

For example, the statute prohibits ISPs from conducting credit checks as a condition for enrollment in the ACP. This is a key protection that is necessary to overcome the systemic biases against people of color that are built into the entire credit check industry. Therefore the Commission must prohibit ACP providers from requiring any credit checks as a condition for qualifying households to obtain internet access service, including the equipment that is necessary for its use.

The statute also prohibits ISPs and their agents from any “inappropriate upselling or downselling” of their services to prospective or existing ACP customers. As we discuss herein, in order to faithfully implement this prohibition, the Commission must bar all ACP carriers from subjecting customers to any upselling or downselling. Carriers can offer information, but the customer alone should be empowered to make the choices that are right for them, without any pressure from ISP representatives. We also agree with the Commission that it should prohibit ISPs from offering its agents sales commissions for enrolling ACP households, as this is a compensation structure that invites program abuse.

Congress also directed the FCC to adopt rules to protect users from unjust and unreasonable ISP actions. This authority is broad precisely because no one – not Congress, not even the Commission – can predict the universe of methods unscrupulous carriers might use to

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<sup>1</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 6001(k)(2), 123 Stat. 115, 516 (2009).

take advantage of broadband customers (both ACP customers and all others). Therefore the Commission does not need to pre-define a specific list of such practices *ex ante*; it has the authority and the processes to investigate allegations of such practices and adjudicate them *ex post*.

But Congress did not simply adopt a defensive posture with regard to the ACP's operation and oversight; it also adopted a number of proactive provisions that will ensure that ACP-supported households can fully participate in the broadband marketplace.

Congress made it clear that ACP customers should be afforded the opportunity to fully participate in the broadband market. Notably, Congress explicitly moved away from the Emergency Broadband Benefit ("EBB") program's statutory language that led to the Commission allowing participating ISPs to pick and choose which of their offerings qualify for support. Congress designed the ACP so that users are expressly permitted to apply their benefit towards whatever broadband internet access services fit their needs. In practice, this means that the ACP-supported services available at a given location are all the services and terms an ISP offers to any potential customer at that same location. This of course includes whatever promotional rates and terms an ACP-participating carrier offers to all potential customers at a given location.

The Commission also has a duty to codify rules that seek to minimize undue barriers to program participation. In practice this means allowing all members of economically-independent households that share a single address to participate in the ACP. It means that the Commission should retain certain EBB program policies that remove participation barriers, such as pre-qualifying households that reside in school districts that participate in the Community Eligibility Provision of the free and reduced price school meals program. And it means adopting reasonable methods for confirming continued service usage, not forcing participants to install privacy-violating spyware applications on their devices that monitor usage.

Finally, the long term success of the ACP requires detailed data collection, reporting and opportunity for public input. This means going well beyond the basic level of data the Commission disclosed for the Emergency Broadband Benefit Program. The Commission should release participation data that is of sufficient detail to be combined with the latest demographic data from the 2020 Census, so that analysts can offer the highest possible level of insight into the administration and impacts of the ACP. This data should not simply be ACP subscriber counts, but also include provider name and service type. And this data should be released at a frequency that enables meaningful analysis of trends, in order to discover any issues well before fund exhaustion.

Congress has taken a bold step towards ensuring a more equitable broadband market. It is now up to the Commission to faithfully implement the law and ensure everyone has access to high-quality, affordable broadband telecommunications service, regardless of their income.

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## **I. Introduction**

The COVID-19 pandemic and our nation's collective reaction to it have imparted many important lessons. One of those lessons is that broadband internet access service is an essential utility service because it is indispensable for participation in modern life. While this is a lesson that should have been widely acknowledged for decades, better late than never. Another key lesson is that the precise details of how policy makers respond in times of crisis are critical to ameliorating the impact the crisis will have on individuals, our economy, our nation and the world at large. The job losses seen in Spring of 2020 were unfathomable, with a 15 percent decline in employment in just two months time, far more severe than the losses seen in the 11 other post World War II recessions.<sup>2</sup> However, because Congress acted differently than it did during the Great Recession of 2009 by sending money directly to people and to businesses to maintain their headcounts, the length of the COVID-19 recession was brief and the employment and economic recovery was rapid (though not yet complete).

The efficacy of a swift Congressional response is seen in areas other than employment too. Though we do not yet have enough data to tell the full story, we do know that despite the economic and employment collapse, 2020 was a record year for growth in home broadband subscriptions. Anecdotal evidence and commentary from ISPs suggests that a portion of this record growth came from new subscribers who were able to purchase much-needed at-home broadband services because of government financial support, and also because of industry's voluntary offerings specifically aimed at supporting adoption in low-income households and households with students. Indeed, the Emergency Broadband Benefit program saw its enrollment

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<sup>2</sup> U.S. Bureau of Labor Statistics, "All Employees, Total Nonfarm [PAYEMS]" (Dec. 7, 2021) (retrieved from FRED, Federal Reserve Bank of St. Louis).

increase from zero to more than 7 million households in just a few short months, exceeding the existing level of participation in the Lifeline program.

The pandemic is absolutely not in the rearview mirror. But the acute emergency has subsided. According to the Centers for Disease Control, as of December 6, 2021, 83.5 percent of the adult U.S. population has received at least one dose of the various COVID-19 vaccines, with 99.9 percent of the most-vulnerable age group (those 65 and older) having received at least one dose. Unfortunately daily cases are ticking back up, at levels near the early 2021 peak and just below the late summer 2021 peak. However, the vaccines are working, as the daily death rates are well below those seen in those prior two peak periods as well as the initial wave in spring 2020. This means that barring any unforeseen setbacks, future shutdowns and stay-at-home orders are unlikely.

Recognizing this progress and incorporating lessons learned during and prior to the pandemic, Congress enacted the Infrastructure Investment and Jobs Act (“Infrastructure Act”), sweeping legislation that funds many of our nations’ long-neglected infrastructure and essential services needs.<sup>3</sup> Among many things, the Infrastructure Act finally allocates meaningful funds that should eliminate the broadband deployment digital divide, and help to make subscribing to this essential service more affordable for millions of low-income households – not only where new networks may be built, but where today people already have access to high-speed broadband networks and yet cannot afford to subscribe. The Infrastructure Act seeks to accomplish the latter primarily through the transformation of the EBB program into the Affordable Connectivity

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<sup>3</sup> See Infrastructure Investment and Jobs Act, Pub. L. No. 117-58 (2021) (“Infrastructure Act”).

Program.<sup>4</sup> This is a subsidy program supported by a \$14.2 billion appropriation that offers up to \$30 per month in support for low-income households, and up to \$75 per month in support to eligible households in Tribal and high-cost areas, to apply to any broadband internet access service of their choosing from an ISP that opts into the program.

The primary differences between the EBB and the ACP are seen in the latter's breadth and explicit consumer protections. Congress clearly incorporated lessons from the EBB and applied them to the ACP, a program that while not funded in perpetuity, is intended to last for several years (or longer should Congress make future appropriations). As we discuss herein, Congress clearly intended the ACP to maximize user choice and protect participants from potential carrier abuses. Unlike the EBB – which focused on the emergency nature of the need facing the country and expediency in quickly establishing a program – the bipartisan bill establishing the ACP contains express pronouncements from Congress on these issues. The Infrastructure Act specifically required all ISPs that elect to accept ACP subsidies to then allow users to apply these funds to any of such carriers' offerings. Congress also recognized the need to explicitly direct the ACP administrator – the Federal Communications Commission – to protect users from unjust and unreasonable ISP actions. While the Commission of course could have taken similar actions with the EBB, ISPs that would otherwise lobby the Commission to adopt weaker rules now have less room to maneuver and less chance to abuse the ACP. The message from Congress is clear: the ACP is a voluntary program designed to make essential broadband service more affordable for low-income families; unscrupulous ISPs need not apply. Therefore the rules that the Commission adopts to implement the ACP must be faithful to Congress's

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<sup>4</sup> See *Wireline Competition Bureau Seeks Comment on the Implementation of the Affordable Connectivity Program*, WC Docket No. 21-450, Public Notice, DA 21-1453 (rel. Nov. 18, 2021) (“*Notice*”).

vision. This will ensure the program's success, through its transition from the EBB and long into the future.

## **II. The Commission Must Put Carriers on Notice that Any Abuses of the ACP Will Result in Severe and Long-Lasting Consequences.**

The ACP differs from the Commission's existing Universal Service Fund ("USF") in many ways, and two of those differences are key to note at the outset. ISPs must elect to participate in ACP, and do not need to be Eligible Telecommunications Carriers ("ETCs") to do so.<sup>5</sup> While all providers designated as ETCs are required to participate in USF, the ACP is a completely voluntary program for carriers, one that of course can help them continue to expand their businesses and increase their returns on invested capital. Because the program is voluntary, and because its appropriations are finite, the Commission has a duty to ensure that participating providers faithfully adhere to the program's central purpose of making broadband more affordable to low-income households. In practice this means not bending over backwards to accommodate every ISP request or concern, even and especially when those ISPs implausibly argue that sensible consumer safeguards will deter their participation. The ACP is not an emergency program; it is a voluntary program that should offer support for several years, potentially longer if Congress chooses to appropriate additional funding.

Most important, the voluntary nature of the ACP and its limited funding means that the Commission must keep out unscrupulous carriers who seek to abuse the program, and do so by making it clear that any actions that are contrary to the program's central intent will be met with

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<sup>5</sup> See 47 U.S.C. § 214(e)(1)(A) (describing the legal obligation for ETCs to "offer the services that are supported by Federal universal service support mechanisms under section 254(c)").

severe and long-lasting consequences.<sup>6</sup> All carriers are welcome to participate, but if their purpose in doing so is to walk up to and perhaps cross the line of acceptable behavior in order to pad their profits, they should stay away.

Because this is a new program that evolved from an existing, temporary program, we agree with the Commission's proposals to ease the path to participation in ACP for current EBB carriers.<sup>7</sup> However, all carriers, whether they currently participate in EBB or not, should be put on notice by the Commission that it intends to protect the program's integrity and will do so using all its available tools.<sup>8</sup> Current EBB carriers that are uncertain they can faithfully participate in the ACP without abusing the program should be allowed to exit now, and new carriers that are not willing to be good stewards of the public's investment need not apply.<sup>9</sup>

Furthermore, the ACP is not primarily an emergency program that has to be rushed to market, and the experience with EBB demonstrates a high level of ISP interest in free money. So it is absolutely necessary for the Commission to take all available steps to eliminate all

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<sup>6</sup> The Commission should make it clear that "limiting provider access to USAC systems or removing participating providers from the Affordable Connectivity Program in situations where there are concerns of waste, fraud, and abuse," *see Notice* ¶ 22, is the bare minimum of consequences that will follow for any actions counter to the program's spirit. Carriers should understand that the monetary costs of even attempting small abuses will be severe, far exceeding any potential profits from doing so. Indeed, carriers that abuse the ACP should face severe fines and be permanently barred from participating in any FCC-administered subsidy program.

<sup>7</sup> *See, e.g., id.* ¶ 9 (proposing that all current EBB providers would not need to file new applications to participate in the ACP); *id.* ¶ 11 (proposing to retain the EBB process for automatic approval of applications for certain non-ETC providers).

<sup>8</sup> Congress empowered the Commission to investigate and impose financial and other penalties for any abuses and non-compliance. *See* Infrastructure Act, div. F, tit. V, sec. 60502(a)(3)(B)(ii), adding Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, tit. IX, § 904(b)(9)(C)(ii) (2021) ("Consolidated Appropriations Act"); *see also* Consolidated Appropriations Act § 904(g).

<sup>9</sup> *See Notice* ¶ 13 (inquiring whether or not the Commission should adopt a formal process for EBB providers to relinquish their ACP eligibility).

incentives for providers to participate in the ACP in manners that result in wasteful spending, or worse, abuse or fraud. The Commission had a justification for not prohibiting providers from offering commissions to their employees or representatives for enrolling or processing EBB applications. Yet there is no plausible justification for allowing this corrosive practice in the ACP.<sup>10</sup> Sales commissions have no place in markets for essential services. The ACP is a program to make essential broadband service more affordable for low-income families, not a program for profiteering by ISPs and their representatives.<sup>11</sup>

**III. Congress Made it Clear that the ACP is a Subsidy Program that Must be Designed to Give Users Maximum Choice. The Commission Should Seek to Minimize Undue Barriers to Program Participation by Qualifying Households.**

**A. Congress’s Transformation of the Emergency Broadband Program into the Affordable Connectivity Program Makes Clear its Intention that Program Participants be Able to Fully Participate in the Broadband Telecommunications Services Market.**

In the *Notice*, the Commission asks a number of questions concerning the obligations it should adopt to comply with the Infrastructure Act’s requirement that ISPs participating in the ACP “allow an eligible household to apply the affordable connectivity benefit to any internet service offering of the participating provider, at the same rates and terms available to households that are not eligible households.”<sup>12</sup> For example, the Commission asks if it should “require a demonstration that the service offering was generally available for a specific period of time prior

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<sup>10</sup> *See id.* ¶ 20.

<sup>11</sup> Making this sentiment of “voluntary-with-consequences” the cornerstone of the ACP will address many of the Commission’s concerns about unjust profiteering, such as the potential for carriers to seek reimbursements for connected devices that they obtain at well-below market rates. *See, e.g., id.* ¶ 64.

<sup>12</sup> *Id.* ¶ 15 (emphasis added); *see also* Infrastructure Act, sec. 60502(a)(3)(B)(ii), adding Consolidated Appropriations Act § 904(b)(7)(A)(i).

to the submission of the election notice or the launch of the Affordable Connectivity Program?”<sup>13</sup> It asks how “promotional and contract rates [should] be evaluated for purposes of determining whether the supported service is offered on the same terms as those offered to non-eligible households?”<sup>14</sup> And it asks about the appropriate geographic area to make such a determination. Similar questions include how it should deal with the issue of some current subscribers not in the ACP or eligible for it being on legacy plans that would not be available to any new subscriber, including ACP-eligible households, and how that impacts the same rates and terms requirement.<sup>15</sup>

These are very important questions, precisely because Congress explicitly moved away from the EBB’s statutory language that led to the Commission allowing participating ISPs to pick and choose which of their offerings qualify for support. With the Infrastructure Act, Congress made it clear that it wants ACP participants to be treated equally to all other market participants, free to use their benefit towards whatever broadband internet access services fit their needs (at least so long as that particular choice is with a provider who voluntarily elected to participate in the ACP).

Therefore, we believe the Commission should design the ACP to function essentially as a voucher. In other words, the answers to the questions around which services would qualify, promotional rates, and geographic areas can be met with another single question: What services are available at the applicant’s address? Whatever those services offered by ACP-participating ISPs at a particular address are, they should be available to ACP-recipients at the same rates and

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<sup>13</sup> *Notice* ¶ 15.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* ¶ 53.

on the same terms. Operationally this means that if a potential customer were to enter their address into the ISP's website (or provide it to a call center representative), the resulting list of available services is the list of ACP-supported services. This means that whatever promotional rates and terms an ACP-participating carrier offers, as it holds itself out indifferently to serve all potential users at that address, those same rates and terms would qualify for ACP support. This includes of course whatever promotional rates are offered to that location at the time of the eligible recipient's inquiry.

Because grandfathered plans are no longer "offered" to the public at large (only to those customers who remain on those plans), they need not be available to ACP-supported customers. Likewise, the Commission need not be concerned with the plans a carrier might offer at some other geographic location; the relevant geography is the customer's location.

Another benefit of this Infrastructure Act requirement, that participating providers "shall allow an eligible household to apply the affordable connectivity benefit to any internet service offering of the participating provider at the same terms available" to non-eligible households, is that it should address the potential for arbitrage that the Commission identified with the EBB.<sup>16</sup> Arbitrage was a potential concern when carriers were permitted to pick and choose which of their service offerings qualified for EBB support. The obligation to treat the ACP benefit essentially as a reimbursable voucher for carriers who opt into the program means there is little if any opportunity to pursue the sorts of arbitrage schemes that the Commission inquired about in the *Notice*. Of course carriers could attempt arbitrage by raising the price for certain existing tiers, and/or reducing the speeds and bandwidth allowances of certain existing tiers. However because such changes would impact all of their existing customer base (likely including many

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<sup>16</sup> *Id.* ¶ 55.

customers not under contract) and their potential customer base too, the theoretical advantage from any such strategy is questionable. That said, the Commission is absolutely justified in being concerned about the potential for providers to attempt to engage in such egregious examples of arbitrage, such as doubling a \$15 plan to a \$30 plan (or launching an ACP-specific subsidiary to do just that).<sup>17</sup> To address the potential for this type of program abuse, we suggest that the Commission put ACP carriers on notice that they are volunteering to participate in this program, and that any such seemingly blatant attempts to abuse the program will be fully investigated, and that if evidence of ill-intent is found the consequences will be severe.<sup>18</sup>

Because broadband internet access services are sometimes sold in bundles with other non-telecommunications services (such as linear multichannel television), ACP-qualifying households may choose to purchase such a bundle. However, we fully agree with the Commission that as with EBB, the benefit should not go to supporting the full price of a bundled TV/telecom service offering.<sup>19</sup>

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<sup>17</sup> *See id.*

<sup>18</sup> The Commission also inquired about how it could “reduce the incentive for providers to enact pricing or offering strategies that may harm non-eligible households.” *Id.* ¶ 56. We suggest the concern about such behavior is yet another example of why the Commission should restore its general ability to protect all users in this highly concentrated essential service market, by properly interpreting the Communications Act and restoring the classification of broadband internet access service as a telecommunications service.

<sup>19</sup> *See id.* ¶ 58. Given that fixed and mobile wireless carriers do not generally offer such bundles, and that most wired ISPs offer standalone broadband services, administration of this requirement should not present any issues. The Commission’s proposal to offer full support for bundles of data, text and voice is reasonable, given the fact that wireless carriers that make these offerings do not generally offer standalone voice or standalone text packages, and also generally price their standalone broadband data packages (*i.e.*, “hot spot” packages) in a manner that makes them less competitive when viewed against their bundled voice/text/data offerings. However, were the Commission to only allow application of the ACP benefit to data services, it might have the effect of incentivizing ACP-qualifying households to apply the benefit to fixed broadband services.

**B. The Commission Should Allow Members of Economically-Independent Households that Share a Single Address with Other Economically-Independent Households to Participate in the ACP.**

As discussed above, the successful administration of the ACP will require the Commission to place the burdens of eliminating fraud and abuse primarily on the carriers who might otherwise seek to enrich themselves at the expense of the program. Households that desperately need the support ACP offers should not face a labyrinth of red tape in the name of curtailing fraudulent and abusive practices that history suggests would most likely be perpetrated by unscrupulous carriers. This is especially justified if the potential scenarios for program waste or abuse are unlikely to materialize beyond a few cases.

We agree with the Commission’s conclusion to continue the practices used in the Lifeline and EBB programs, which do not limit the number of participating independent households accessing ACP from the same address.<sup>20</sup> This approach recognizes that there are a number of situations in which an economically-independent person or group of persons in a single household may reside in a shared premise with another economically-independent person or group of persons. While some data sources indicate that nearly one-third of U.S. adults reside in a “roommate” arrangement,<sup>21</sup> it is likely that a good portion of these arrangements would not meet the definition of “independent economic household.”<sup>22</sup> Using 2019 Current Population Survey (“CPS”) census data, we estimate that as many as 11 percent of all U.S. households

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<sup>20</sup> See *id.* ¶ 29.

<sup>21</sup> See, e.g., Richard Fry, “More adults now share their living space, driven in part by parents living with their adult children,” Pew Charitable Trust (Jan. 31, 2018).

<sup>22</sup> See *Emergency Broadband Benefit Program*, WC Docket No. 20-445, Report & Order, 36 FCC Rcd 4612, 4632-34, ¶¶ 44-46 (2021) (“*EBB Program Order*”).

reside in a shared location but are economically independent.<sup>23</sup> According to this analysis, less than 2 percent of all U.S. households reside in a shared location, are economically independent from the others in that location, and have family incomes in the bottom income quintile (with 4 percent in the bottom two income quintiles). These estimates suggest both that the size of this potential ACP-qualifying multi-household/single address universe is not insignificant, but also not substantial enough to warrant additional application procedures beyond those already contemplated by the Commission.<sup>24</sup>

**C. The Commission Should Retain the EBB Program Policy of Pre-Qualifying Households that Reside in School Districts that Participate in the Community Eligibility Provision.**

The Commission also seeks comment on whether it should continue the EBB policy of deeming eligible for ACP support those households that are located in school districts participating in the Community Eligibility Provision (“CEP”) of the free and reduced price school meals program “regardless of whether anyone in the household applied for school lunch or breakfast assistance individually[.]”<sup>25</sup> Given that the FCC Office of the Inspector General (“OIG”) recently uncovered likely abuses of this provision, it is certainly warranted for the

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<sup>23</sup> According to our analysis of the 2019 CPS, there were 130 million non-institutional households, with 15 million unique households sharing the same primary household identifier but with a unique secondary householder identifier and “reference person.”

<sup>24</sup> USAC’s EBB Household Worksheet notes that a “household is a group of people who live together and share income and expenses (even if they are not related to each other),” and further notes that “[a] household shares expenses. Household expenses include, but are not limited to, food, healthcare expenses, and the cost of renting or paying a mortgage on your place of residence and utilities.” While it is not explicitly stated in the worksheet, another example of a shared expense could be when the residents of the address share the expense and use of a fixed internet access service. Were USAC to make this example explicit in the application, it might result in fewer instances of multiple mobile ACP subsidies going to otherwise economically-independent households residing at the same location but sharing and paying for the same fixed internet access service.

<sup>25</sup> Notice ¶ 31.

Commission to revisit its prior conclusion.<sup>26</sup> However, it is critical to note that the OIG’s findings are that “EBB providers’ sales agents are enrolling households by falsely claiming a dependent child attends a CEP school during the eligibility verification process . . . Evidence shows this is not consumer-driven fraud – enrollment data directly links certain providers and their sales agents to these enrollments.”<sup>27</sup>

This is the exact type of program fraud that the FCC can prevent before it occurs by putting carriers on notice that the ACP is a voluntary program, and any and all abuses will come with severe and long-lasting consequences.

However we note that the OIG report did not attempt to quantify the pervasiveness of such abuses, and therefore we have no way of knowing if its findings represent all instances identifiable using its investigation methods. Furthermore, it is possible that some or even many of the CEP “oversubscribed” households would have qualified via other means, and the ISPs’ agents simply took the path of least resistance when enrolling these households. In other words, the number of cases in which actual non-qualifying households were enrolled via CEP is unknown, because it is likely that a substantial number of these households would qualify via other routes given the general economic conditions of the households in these school districts.

Therefore we suggest that ending the method of qualifying for ACP via residing in a CEP district would be counterproductive to the overall goal of bringing this benefit to households who qualify and are very much in need of assistance. This doesn’t mean that the Commission should

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<sup>26</sup> “Advisory Regarding Fraudulent EBB Enrollments Based On USDA National School Lunch Program Community Eligibility Provision,” Federal Communications Commission, Office of Inspector General (Nov. 22, 2021).

<sup>27</sup> *Id.* (emphasis added). Notably, the fact that these fraudulent claims were based on falsely claiming that a dependent child attended a CEP school does not suggest that households who actually have a dependent child attending these schools were somehow improperly receiving EBB benefits.

ignore this potential for program abuse. Other modifications, such as prohibiting agent commissions and imposing severe consequences for carrier abuses, should minimize these types of program abuse without placing unnecessary burdens on ACP applicants.

**D. The Commission Does Not Need to Resort to Requiring ACP Recipients to Install Spyware Applications or Utilize Other Intrusive Methods in Order to Ensure Beneficiaries Are Using Their Supported Connections.**

In the *Notice*, the Commission asks if it should “mandate a third-party app on subscriber devices that confirms the subscriber is accessing its ACP-supported service so that records substantiating subscriber usage no longer need to be reviewed? Or could subscribers simply be required to contact USAC periodically, to confirm they want to continue with the service?”<sup>28</sup> These questions are asked in context with the Commission’s conclusion that it will impose a 30-day non-usage period for ACP recipients, with a 15-day period to cure their non-usage, before ending carriers’ eligibility for reimbursements for such recipients.

While these questions and policy considerations are important, we question the extent of this purported non-usage problem in the EBB, or what its extent will be in the ACP. We are aware of the case where Sprint’s – and now T-Mobile’s – Lifeline brand was found to be receiving Lifeline support for 885,000 households that were not using the service. This was, of course, a very large number of subscribers, and Sprint’s excuse that this was “due to a software programming issue” was an insufficient response in light of the scope of the problem.<sup>29</sup> However, it is critical once again to note that this case involved a carrier’s malfeasance, not any users’ wrongdoing. We believe that barring agent commissions, issuing a strong pre-participation notice

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<sup>28</sup> *Notice* ¶ 47.

<sup>29</sup> *In the Matter of Assurance Wireless USA, LP (f/k/a Virgin Mobile USA, L.P.), Sprint Corporation, and T-Mobile US, Inc.*, File No.: EB-IHD-19-00028966, Order and Consent Decree, 35 FCC Rcd 12679, 12685, ¶ 12 (2020).

to carriers that any and all of their abuses of the program will come with severe consequences, and placing the primary burden for ensuring adherence to the non-usage policy on carriers, will collectively mitigate non-usage program abuses. Carriers are more than capable of identifying non-usage on their systems without resorting to the installation of what essentially amounts to spyware, something that could result in unintended privacy consequences. Indeed, while unlimited plans abound, the fact that many participating providers continue to – often unreasonably – meter or cap some of their data plans indicates an underlying ability to detect usage.

**IV. The Commission Must Adopt Strong Rules that Codify The Infrastructure Act’s Consumer Protections in Order to Protect ACP Participants and to Ensure Carriers Do Not Engage in Any Activities that Undermine the Purposes of the Program.**

The Consolidated Appropriations Act (the legislation establishing the EBB) contains several consumer protections particularly relevant to the program’s emergency nature. Most notable is the prohibition against EBB-participating carriers denying service to qualifying applicants who have current or prior arrearages with any carrier.<sup>30</sup> The law also bars ISPs from charging EBB customers early termination fees (“ETFs”).<sup>31</sup> The Infrastructure Act retains these and a number of other EBB consumer protections, indicating that Congress recognized the importance of these protections outside of an emergency environment.

But in expanding upon the consumer protections in the EBB program, Congress indicated that the EBB’s consumer protections in the earlier statute and adopted by the Commission are not enough to ensure the ACP’s success in the face of carriers that may have incentives to abuse ACP recipients. Though the EBB can rightly be characterized as a success, particularly given the

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<sup>30</sup> See Consolidated Appropriations Act § 904(a)(6).

<sup>31</sup> See *id.* § 904(b)(6)(B)(ii).

rapid pace at which it was stood up and administered, there were a handful of stories that demonstrated areas for improvement. With the creation of the ACP, Congress is trying to address these issues.

**A. The Commission Must Prohibit ACP Providers from Requiring Any Credit Checks as a Condition for Qualifying Households to Obtain Internet Access Service and the Equipment Necessary for its Use.**

Our research demonstrates that the broadband industry’s standard practice of subjecting potential customers to credit checks is an important factor contributing to the racial or ethnic digital divide.<sup>32</sup> Recognizing the potential for credit checks to undermine the ACP, Congress explicitly barred participating ISPs from requiring eligible households undergo such checks. In the *Notice*, the Commission asks how it should ensure that providers are in compliance with this requirement.<sup>33</sup> We believe that self-certification, monitoring of compliance through regular review of consumer complaints for relevant misconduct, and severe penalties if the carrier is untruthful would suffice.

The statute states that a participating provider “may not require the eligible household to submit to a credit check in order to apply the affordable connectivity benefit to an internet service offering of the participating provider.”<sup>34</sup> The Commission inquired if it should “allow providers to use the results of a credit check to determine which equipment or devices may be offered to a household so long as the household has access to equipment or devices necessary to

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<sup>32</sup> See, e.g., S. Derek Turner, Free Press, *Digital Denied* at 68-69, 77-78, 82-83, 128-130 (Dec. 2016) (describing in part how wired home broadband providers generally do not offer prepaid services that do not require credit checks, and instead require their potential customers to “undergo credit checks or make cash deposits – practices that contribute to the digital divide by exacerbating existing racial disparities in credit scoring, housing and other economic sectors.”).

<sup>33</sup> See *Notice* ¶ 81.

<sup>34</sup> Infrastructure Act sec. 60502(a)(3)(B)(ii), § 904(b)(7)(A)(ii).

use the ACP-supported service?”<sup>35</sup> We suggest that the answer to that question is no, and that Congress here required ACP-supported households to be able to acquire and use broadband service without facing a credit check. Were the Commission to permit a credit check for equipment that is required in order for the household to use the internet access service, it would completely eviscerate the prohibition on credit checks.

Therefore the Commission must explicitly prohibit the use of credit checks in concert with administration of the ACP, full stop. Given that many ISPs include necessary equipment for “free” with the purchase of service, or charge an additional unavoidable monthly equipment fee for mandatory equipment rentals, this prohibition on a credit check for necessary equipment should not be an issue.<sup>36</sup> We note that many providers that do charge mandatory equipment fees in general but also administer their own voluntary low-income programs do not charge additional equipment fees for low-income program participants.<sup>37</sup> We would hope that all providers who choose to participate in the ACP waive all of their otherwise mandatory equipment fees, and a suggestion from the Commission that they do so would certainly carry substantial weight.

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<sup>35</sup> *Notice* ¶ 82.

<sup>36</sup> For example, AT&T requires AT&T Fiber customers to pay a \$10 monthly equipment fee that they cannot avoid, even if they are willing to provide their own off-the-shelf equipment. In contrast, Charter offers new subscribers a “free” cable modem and customers are able to supply their own additional equipment, such as wireless routers.

<sup>37</sup> AT&T’s low income “Access” program offers participants free installation and equipment, which consists of the necessary “gateway” device that acts as a modem/Wi-fi terminal. Similarly, Comcast’s Internet Essentials low-income program comes with a modem and Wi-fi router at no additional cost. Carriers clearly can make this equipment available as a part of the underlying service without imposing additional fees, and certainly without requiring a credit check.

**B. ACP Households Should Not be Subjected to Any Upselling During and After the Enrollment Process.**

The Infrastructure Act bars carriers from “inappropriate” upselling or downselling, and directs the Commission to promulgate rules to enforce this prohibition.<sup>38</sup> The Commission asks if there are ever “instances where [upselling or downselling] are beneficial to the consumer.”<sup>39</sup> We are highly skeptical that there would be any such instances in the case of upselling, particularly given the existing industry structure where customer service representatives usually have a script that requires such practices regardless of the reason that the customer or potential customer is contacting the carrier. For example, carriers are known to direct customers who call in complaining about not receiving their advertised transmission speeds towards more expensive speed tiers, even if the likely cause of the customer’s issue is a poorly provisioned Wi-fi network. It is also standard ISP practice to push their highest-speed (and highest-priced) tiers, whether or not a household needs gigabit-level transmission capability. These practices are generally underhanded, and especially inappropriate in the administration of a subsidy program for an essential service. Of course this does not mean that any communication of information about higher-speed and higher-priced tiers is inappropriate, much less that eligible households choosing to apply their benefit to such plans is alone evidence of upselling.

Downselling is on the other hand an uncommon practice in the ISP industry. Where it exists, it is likely an information exchange where the customer is requesting a lower-priced service. However, in the context of a subsidy program, there is potential for carriers to push customers into inferior or inadequate tiers that may not meet a customer’s needs. This could for example involve a Local Exchange Carrier (“LEC”) ISP downselling a customer requesting

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<sup>38</sup> See Infrastructure Act, sec. 60502(a)(3)(B)(ii), § 904(b)(11)(A)(i).

<sup>39</sup> Notice ¶ 93.

fiber-to-the-home (“FTTH”) service into a DSL service, in order to avoid the costs associated with installing FTTH at a new customer location. Or an ISP who imposes data caps might downsell the customer into a tier with lower caps in order to generate higher revenues from overage fees.

Therefore we suggest that the Commission generally prohibit all acts of upselling or downselling.<sup>40</sup> ACP-participating ISPs should simply offer potential (or existing) customers information on what tiers are available to the customer at their location, the total price of those services, the out-of-pocket cost after the application of the subsidy, and the basic information about each tier’s functional characteristics. As we discuss below, the Commission can use data collection and the consumer complaint process to identify compliance with this requirement, and issue additional advisories to ensure providers understand how to comply.

**C. The Commission Does Not Have to Pre-Define All Unjust or Unreasonable Acts Or Practices that Undermine the ACP.**

The Infrastructure Act requires the Commission to issue rules that protect ACP customers from “unjust and unreasonable acts or practices that undermine the purpose, intent, or integrity of the Affordable Connectivity Program.”<sup>41</sup> To the extent that the Commission can contemplate any such practices now, it of course should codify the prohibition of those practices in its rules.

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<sup>40</sup> In the *Notice*, the Commission notes that the “Infrastructure Act states that the Commission must craft these particular [consumer protection] rules ‘after providing notice and opportunity for comment in accordance with section 553 of title 5, United States Code,’ which is the Administrative Procedure Act (APA). At the same time, section 904(h) provides an exemption from APA requirements for ‘regulation[s] promulgated under subsection (c),’ the general rulemaking for section 904, which includes the consumer protection requirements.” *Id.* ¶ 91. The Commission characterized these as “apparently conflicting provisions.” While at this time we decline to characterize this language as conflicting, we suggest that the Commission can issue initial rules for the launch or transition period of the ACP even if it seeks further comment on these matters or if sets a later effective date of such initial rules in accordance with the APA.

<sup>41</sup> Infrastructure Act, sec. 60502(a)(3)(B)(ii), § 904(b)(11)(A)(v).

However, it is impossible for the Commission to anticipate all potential unjust or unreasonable practices; and some practices could arguably be justified in certain limited circumstances, but not in others.

Therefore we urge the Commission to adopt in its rules a general prohibition against unjust and unreasonable practices that undermine the purpose, intent, or integrity of the ACP, and use its authority to adjudicate any allegations of violations on a case-by-case basis. Indeed, this would extend the incremental approach seen in the implementation of the EBB program. If from this process the Commission discovers additional specific practices that should be prohibited by rule, it can adopt such rules. This is of course how the law currently works for telecommunications services, and thus the Commission has the necessary systems to address such matters *post hoc*.

**V. The Long Term Success of the ACP Requires Detailed Data Collection, Reporting and Opportunity for Public Input.**

The Commission has long recognized that the collection and dissemination of detailed, accurate and timely data is critical to its functioning, helping the agency “develop, evaluate, and revise” its policies, particularly in markets that are “rapidly changing.”<sup>42</sup> The Commission rightly understands that data collection and dissemination can provide “valuable benchmarks for Congress . . . other policy makers, and consumers.”<sup>43</sup> While the overall U.S. broadband market is reaching a mature level of widespread adoption, the creation and administration of a new low-income subsidy program is certainly a “rapidly changing” situation, one where faithful implementation of the law requires a deep and constantly-updated analysis of all available information.

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<sup>42</sup> See, e.g., *Local Competition and Broadband Reporting*, CC Docket No. 99-301, Report and Order, 15 FCC Rcd 7717, 7718, ¶ 1 (2000).

<sup>43</sup> *Id.*

In the *EBB Program Order*, the Commission concluded “that tracking and reporting on disbursement and program enrollment activity [would] be an essential tool for managing the EBB program.”<sup>44</sup> As the Commission states in the *Notice*, the primary purpose of the EBB data collection practice as-implemented was “to allow providers and the public to monitor the balance of the Emergency Broadband Connectivity Fund and prepare for the end of the program.”<sup>45</sup> Though the Commission did not affirmatively conclude in the *Notice* to conduct a similar data collection and dissemination practice, it did raise a number of questions that indicate it is considering continuing and possibly expanding this practice for the ACP.

Free Press applauds the Commission for its initial, and later expanded EBB data dissemination (“EBB data tracker”), and strongly urges the agency to expand the scope of data collected and released for the purposes of administering the ACP. The primary motivation for the EBB data tracker was to aid the Commission and public in “developing an informed forecast of the end of the program.”<sup>46</sup> Though the ACP’s appropriation at 4-times that of the EBB (with a 40 percent lower baseline per-household benefit) means it will likely spend down less quickly than

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<sup>44</sup> *EBB Program Order* ¶ 112.

<sup>45</sup> *Notice* ¶ 117.

<sup>46</sup> *EBB Program Order* ¶ 112.

the EBB would have, it nonetheless will see funds depleted, perhaps as soon as 2024.<sup>47</sup> This means that the Commission’s prior rationale for creating the EBB data tracker remains for the ACP.

However, tracking fund exhaustion is but one reason for data collection and dissemination. The collection and dissemination of detailed data on the ACP is also necessary to minimize any program waste, detect the need for the Commission to initiate additional consumer protection rulemakings, and detect early signs of abuse or fraud. Furthermore, though the ACP was created with a one-time appropriation, it is certainly possible that Congress may determine at a future date to continue the program with additional appropriations. Thus the collection and dissemination of detailed data is essential for policy makers and the public to analyze and evaluate the ACP, in order to learn any valuable lessons about program design that could prove indispensable as the program disburses its initial appropriation.

We propose that the Commission continue to collect and disseminate geographically-detailed enrollment data. However, though the current ZIP-code level basis has shown to be useful for tracking general EBB enrollment patterns, we believe more detailed information could unlock substantial policy insights, in particular a very sophisticated

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<sup>47</sup> See, e.g., “Congressional Budget Office Cost Estimate, for Senate Amendment 2137 to H.R. 3684, the Infrastructure Investment and Jobs Act, as Proposed on August 1, 2021,” Congressional Budget Office, at 14 (Aug 9, 2021). The CBO score estimates that the ACP would expend \$5.68 billion in fiscal year 2022, \$7.1 billion in fiscal year 2023, and the remaining \$1.42 billion in fiscal year 2024. CBO estimates are far from transparent, so we cannot offer any substantive response to this projection, except to note that the 2023 expenditure equates to 19.7 million households supported at an average of \$30 per month. As of November 1, 2021, there were approximately 7.1 million EBB-enrolled households. There were 5.8 million Lifeline-enrolled households as of September 30, 2021. CBO’s projections seem to indicate its belief that the ACP will see far higher participation above EBB’s current level, doubling over the next 12 months. This is a reasonable assumption based on the ACP’s expanded income-eligibility criteria as compared to the EBB. However, such uncertainty and the impact of take rate on all of these projections is precisely why the Commission should, at a minimum, transition the EBB data tracker into a similar ACP data tracker.

understanding of program participation rates.<sup>48</sup> First, as the Commission's move from releasing data on a 3-digit to a 5-digit ZIP code basis clearly demonstrates, more granular geographic information leads to a more accurate understanding of program participation trends. Second, while ZIP code-level data is useful for demographic analysis, it is inferior to Census-based geographies, particularly block-level data.<sup>49</sup> The Commission should enable interested parties to offer the highest-possible level of insight into the administration of the ACP by releasing enrollment data at the block-level. This data should not simply be ACP subscriber counts, but also include provider and service type (*e.g.*, fiber-to-the-home, cable modem, fixed wireless, mobile wireless, etc.).<sup>50</sup> Third, the Commission should ensure that geographically-detailed enrollment data is available periodically, and not just as a snapshot, to enable trend analysis.

If, as we expect, carriers object to the public release of their granular subscriber counts,<sup>51</sup> then the Commission could address these concerns by releasing this information to third-party

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<sup>48</sup> See Notice ¶ 119.

<sup>49</sup> On August 12, 2021, the Census Bureau released block-level population and basic demographic data from the 2020 decennial Census.

<sup>50</sup> See Notice ¶ 120. Because as the Commission notes, the ACP is a longer-term program (one that Congress explicitly created in the aftermath of an economic crisis that made clear the utility nature of broadband telecommunications services), it should require the most-detailed level of reporting on the nature of the services that participants select with their ACP benefit. As to the question of the frequency of such reporting by carriers, one-time at enrollment with a particular provider, or at the time the user changes their plan with that provider, would suffice.

<sup>51</sup> The release of aggregated basic ACP subscriber counts at the block-level would not raise any legitimate confidentiality or competitive sensitivity concerns.

researchers under a protective order.<sup>52</sup> This level of information is critical not only to a deep understanding of the ACP program operation, it is necessary for early detection of program waste, fraud and abuse. While certainly the Commission and USAC are equipped to detect such program waste, fraud and abuse, there are multiple examples of third parties using publicly available data to identify issues with FCC subsidy programs before the agency does.<sup>53</sup>

The Commission also inquired if it “should seek to understand whether the Affordable Connectivity Program is expanding the market for broadband by enrolling subscribers with no existing broadband service as opposed to those who apply the subsidy to an existing plan.”<sup>54</sup> We agree that collecting data to answer this and related questions is important for the agency’s overall policy making purposes, but the Commission must understand that the ACP is a subsidy program available to low-income households regardless of whether or not they currently subscribe to some form of internet access service.<sup>55</sup> While the Commission should have an overall policy goal of ensuring everyone has access to affordable high-quality internet access

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<sup>52</sup> The Commission routinely releases much more potentially competitively sensitive information to interested third parties under protective order. Furthermore, the Commission has a pending recommendation for the Wireline Competition Bureau to implement a key recommendation of the National Broadband Plan by developing a system so that outside researchers can access disaggregated Form 477 subscribership data, which is similar in form (though not in breadth) to ACP subscriber data. *See Modernizing the FCC Form 477 Data Program*, WC Docket No. 11-10, Report and Order, 28 FCC Rcd 9887, \_\_\_ ¶ 80 (2013).

<sup>53</sup> For example, Free Press was the first to identify rampant examples of RDOF waste, with funds going to subsidize broadband in urban areas without any serviceable locations, as well as already well-served residential and business districts. *See, e.g.*, S. Derek Turner, “Fiber to the Clubhouse: Pai Subsidizes Broadband for the Rich,” Free Press, Insight & Opinion, (Dec. 9, 2020).

<sup>54</sup> *Notice* ¶ 119.

<sup>55</sup> *See* Comments of Free Press, WC Docket No. 11-42, at 32-39 (filed Aug. 31, 2015).

service, and the ACP is a tool to help reach that goal, the measure of the program's success cannot be based solely on whether or not the program is primarily reaching new users.

## **VI. Conclusion**

Congress' establishment of the Affordable Connectivity Program is a historic, long-overdue commitment to supporting equitable access to broadband telecommunications services. The establishment of this program shows that Congress understands that high-quality, affordable broadband internet access services are essential for each individual's participation in modern society and the economy, and that maximizing this participation is critical to our collective well-being. However, Congress did not simply write a blank check to ISPs who elect to take part and take these federal support payments. It imposed a myriad of strong consumer protections and obligations on participating carriers, precisely because such protections are needed in this essential utility service marketplace, and because carriers have incentives to take advantage of their customers and undermine the goals of the ACP. Congress' message is clear and it is incumbent upon the Commission to operationalize it in the ACP rules: the ACP is a voluntary program designed to make essential broadband service more affordable for low-income families. Any ISP that would seek to undermine the program should stay away, and be prepared to accept severe consequences if they dare to abuse the public's trust in any manner.

Respectfully Submitted,

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