

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, DC 20554**

<b>In the Matter of</b>	)	
	)	<b>WC Docket No. 21-450</b>
<b>Affordable Connectivity Program</b>	)	
	)	

**Opening Comments of the National Consumer Law Center and  
the United Church of Christ Media Justice Ministry**

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## TABLE OF CONTENTS

SUMMARY .....	ii
I. Introduction.....	5
II. Participating Providers.....	8
A. Election Notice.....	8
B. Provider Withdrawal or Merger.....	11
C. Access to USAC Systems and Debarment.....	12
D. Alternative Verification .....	14
III. Household Eligibility .....	14
IV. Covered Services and Devices.....	21
V. Consumer Protections Provisions .....	24
A. Credit Check Prohibition .....	24
B. Non-payment.....	25
C. Complaint Process .....	27
D. Administrative Procedure Act.....	28
E. Consumer Protections. ....	29
VI. Promoting Awareness about and Participation in the Affordable Connectivity Program	32
VII. Data Reporting and Tracking of Available Funding.....	33
A. EBB Enrollments and Claims Tracker.....	33
B. Goals and Performance Measures.....	35
VIII. Transition from EBB to ACP.....	35
IX. Conclusion .....	37

## SUMMARY

Affordable access to broadband is more essential than it has ever been. Even as policymakers and the general public now recognize the importance of affordable access for all people in the U.S., the pandemic has moved vast numbers of essential services and civic institutions online. Low-income families will be relying on online access for these services and to find housing and food during this period of intense economic dislocation.

The Commission is in a good position to build on the successes and improvements it established in the Emergency Broadband Benefit (EBB) to begin the Affordable Connectivity Program (ACP) even with the compressed timeframe given to it by the legislative enactment date. The Commission should place the highest importance on ensuring that the Commission does not lose ground in moving to the new program. NCLC and UCC MJ support the proposal to use much the same approach and the same definitions and approach as were used Lifeline and EBB for the ACP because it builds in efficiencies from the established Lifeline and EBB programs.

Tremendous effort has been expended to move 8 million people into the EBB; the transition to the ACP should not leave families behind as the new program takes over. In that transition, the Commission should: 1) minimize bill shock; 2) minimize the number of households that drop off inadvertently; 3) minimize consumer confusion; 4) preserve the consumer's right to choose and strongly urge ACP subscribers to shop among products to obtain the best and most appropriate product for their needs; and 5) ensure all consumers receive information in a way that they can understand—in appropriate languages and with appropriate disability accommodations.

The transition to ACP should be seamless. Congress made it clear that EBB subscribers should be able to move without friction into ACP. While NCLC and UCC MJ believe that additional notifications we recommend the following policies and communications to EBB consumers moving to ACP:

- All EBB participants should receive clear and repeated notice that the program is transitioning, and they may opt out or choose an alternative provider at any time.
- Permit, in the first transition period, an opt-out transition if the consumer is on a product that will not incur any cost in the transition from a \$50 EBB benefit to a \$30 ACP benefit.
- If a provider can provide a different product for the consumer that will not result in a co-payment, the provider may notify the consumer and offer a consumer a choice of alternative arrangements via an opt-out system.
- If a provider's service offering after March 1, 2022 will require the household paying more than they paid before that date, the consumer must opt-in to continue service under those terms.
- Clarify for consumers that if they lose access to product because their provider cannot transition them, consumers do not need to reapply to demonstrate eligibility, they may easily continue by selecting a new provider.

At the same time that NCLC and UCC MJ believe that consumers should receive an additional opportunity to educate themselves and learn about alternate products and

opportunities. Therefore, any consumer who automatically transitioned to a new product via the opt-out mechanism in March should be given additional notices in August 2022 that they may choose alternate products and providers; that they benefit from consumer protection rules; and may file a complaint at the FCC if needed.

To aid consumers in shopping among services, the Commission should collect information that will enable them, and digital navigators assisting them, to make the best use of the “companies near me” tool. This means that basic information such as price and whether a product is wireless or wired should be electronically available by zipcode +4 to ensure the most precise searches.

The Commission should maximize its efforts to ensure consumers in the program receive key information. The Commission should develop a single set of standard disclosures and require those disclosures at every touch point during the ACP application and publicity process. The same information should be provided in marketing materials, when consumers subscribe to or renew a subscription, when notifications are sent regarding the end of EBB and initiation of ACP and at any other time providers, USAC or the FCC communicates with ACP enrollees or the general public. The FCC should also translate these standard disclosures in multiple languages.

The key information that all subscribers must receive are:

- ACP is a federal program offering discounts to private offerings.
- Contact information for the FCC, USAC, how to apply for the program.
- Consumers with problems can contact the FCC to file a complaint or obtain assistance.
- Consumers can obtain a wide variety of services from a wide variety of companies: they should shop around, compare products and select the best one for their needs. They can change their provider at any time. They can often get more information from local or national organizations.
- Information about consumer protections in the ACP.

The ACP consumer rights and responsibilities information should be prioritized for translation into multiple languages in time for distribution during the March 1, transition for currently enrolled EBB customers. These materials will also be critical for community-based organizations and non-profit entities doing ACP outreach into hard-to-reach communities.

NCLC and UCC MJ recommend that the goals for the ACP include: (1) ensuring the availability of broadband service for low-income consumers; (2) ensuring the affordability of broadband service for low-income consumers, and (3) ensuring ACP subscribers have continuous access to broadband service. Performance measures should include (1) continuous subscriber enrollment in broadband service (e.g., limiting the incidence of disconnections for non-payment), (2) robust ACP providers and services in the ACP program, and (3) robust participation in ACP in all regions of the country.

Once the initial communications materials are developed, NCLC and UCC MJ recommend that the Commission use its authorization to conduct focus groups to collect data and feedback on the usability of the written form, the online form and the online form as modified for a smart phone. The Commission should look for places where consumers are confused or stuck

and later test designs that help consumer fill out the forms more accurately and with more success. The Commission should revise, update and improve its communications by summer of 2022 based on its evaluation and feedback.

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**I. Introduction**

The National Consumer Law Center (NCLC) and the United Church of Christ Media Justice Ministry (UCC MJ) provide these Opening Comments to the Federal Communications Commission (Commission) in response to the Public Notice<sup>1</sup> seeking comments on Implementation of the Affordable Connectivity Program.<sup>2</sup>

NCLC<sup>3</sup> and UCC MJ<sup>4</sup> have long advocated on behalf of the most vulnerable people in the U.S. to ensure they receive appropriate and affordable access to communications services

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<sup>1</sup> Public Notice, Wireline Competition Bureau Seeks Comment on the Implementation of the Affordable Connectivity Program, DA 21-1453, Docket No. 21-450 (Rel. Nov. 18, 2021) (PN).

<sup>2</sup> Infrastructure Investment and Jobs Act, div. F, tit. V, sec. 60502 (2021).

<sup>3</sup> Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and communications and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people in the United States. NCLC's expertise includes policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services, and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitative practices, help financially stressed families build and retain wealth, and advance economic fairness. NCLC files these comments on behalf of its low-income clients.

<sup>4</sup> The United Church of Christ is a faith community rooted in justice that recognizes the unique power of the media to shape public understanding and thus society. For this reason, the United Church of Christ Media Justice Ministry (UCC MJ) works to create just and equitable media structures that give meaningful voice to diverse peoples, cultures and ideas.<sup>4</sup> Established in 1959, UCC MJ established the right of all citizens to participate at the Federal Communications Commission as part of its efforts to ensure a television broadcaster in Jackson, MS served its African-American viewers during the civil rights movement. The Cleveland-based United Church of Christ has thousands of local congregations across the United States; it was formed by

that will enable them to fully participate in society. The Affordable Connectivity Program was established by Congress to help households afford essential broadband service and enable families to access healthcare, education, work and access benefits such as housing and food. We strongly support the existing Lifeline program and the current Emergency Broadband Benefit (EBB) Program and believe the Affordable Connectivity Program will play a critical role in responding to the existing need for affordable broadband by using, but improving, the features of the existing Lifeline and EBB program.

The global pandemic has ushered in unprecedented reliance on broadband technologies to perform many of our society's most basic functions. Institutions like courts and health care moved online in record numbers. Many of these institutions will continue online because of its convenience, which means people without access to online services will fall even further behind. And economic dislocation caused by the pandemic and by the end of some of the pandemic's emergency measures will mean the vulnerable populations will be in need of the resources they can find on the internet more than ever.

The court system moved rapidly online, and that move had a severe impact on people without resources. For example, as Pew recently found, "Despite having almost no history of using virtual proceedings, beginning in March 2020, civil courts in every state and Washington, D.C., initiated online hearings at record rates."<sup>5</sup> The technology could have an equalizing impact, but it often did not. Pew concluded:

although technology holds promise to improve the legal system for people with disabilities and limited English proficiency, courts—like various other government services—have struggled to ensure that their technology is accessible to all users. Of nearly 10,000 state and local pandemic-related orders reviewed for this study, none specifically addressed technology accommodations for people with disabilities and limited English proficiency.<sup>6</sup>

Similarly, A new report from the U.S. Department of Health and Human Services (HHS) found that the share of Medicare visits conducted through telehealth in 2020 increased 63-fold,

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the 1957 union of the Congregational Christian Churches and the Evangelical and Reformed Church.

<sup>5</sup> Erika Rickard & Qudsiya Naqui, "Pandemic Spurs Technology Revolution in State Civil Courts," (Dec. 1, 2021), <https://www.pewtrusts.org/en/research-and-analysis/reports/2021/12/how-courts-embraced-technology-met-the-pandemic-challenge-and-revolutionized-their-operations>

<sup>6</sup> Id.

from approximately 840,000 in 2019 to 52.7 million.<sup>7</sup> The DHS report found the overall use of telehealth was higher in urban areas than in rural areas, reversing previous trends. In addition, although DHS found strong participation by Asian and Hispanic beneficiaries and by low-income dual-enrollees in Medicare and Medicaid, Black beneficiaries did not move online at the same rate.<sup>8</sup> In education the country saw vast changes as well, but despite the herculean efforts to provide technology for all children in school, disparities in income remain. The National Center for Education Statistics reported that for families with incomes of \$25,000 annually, only 83 percent reported that computers were always or usually available for educational purposes, as compared with 98 percent for families with incomes of over \$150,000.<sup>9</sup>

Besides the move to online services across-the-board, economic dislocation for households transitioning after emergency pandemic protections are eliminated means online access is critical for the most vulnerable in our society. Analysis of recent Census Bureau Household Pulse Survey data indicate that 5.7 million renters with children are behind on their rent and that almost have report high risk of eviction.<sup>10</sup> This is consistent with analysis by the Federal Reserve Bank of Philadelphia that projects that by December 2021, 2 million renters will be behind on their rent due to job loss or involuntary part-time work due to the COVID-19 pandemic and that the average rental debt by December 2021 will be \$9,300.<sup>11</sup> Millions of families that are housing unstable will need affordable broadband to find stable housing, apply for assistance, perform or find work and whose children will need broadband for schoolwork. Some of these families may end up doubling up with family and some may spend time in shelters

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<sup>7</sup> New HHS Study Shows 63-Fold Increase in Medicare Telehealth Utilization During the Pandemic, (Dec. 3, 2021), <https://www.cms.gov/newsroom/press-releases/new-hhs-study-shows-63-fold-increase-medicare-telehealth-utilization-during-pandemic>

<sup>8</sup> Lok Wong Samson et al, ASPE Office of Health Policy, “Medicare Beneficiaries’ Use of Telehealth in 2020: Trends by Beneficiary Characteristics and Location” at 12-13, <https://aspe.hhs.gov/sites/default/files/documents/a1d5d810fe3433e18b192be42dbf2351/medicare-telehealth-report.pdf>

<sup>9</sup> Institute of Education Sciences, Report on the Condition of Education 2021, Chapter 2, Impact of the Coronavirus Pandemic on the Elementary and Secondary Education System, at 5, NCES 2021-144, [https://nces.ed.gov/programs/coe/pdf/2021/tcb\\_508c.pdf](https://nces.ed.gov/programs/coe/pdf/2021/tcb_508c.pdf) (May 2021).

<sup>10</sup> Erik Gartland, *Families with Children at Increased Risk of Eviction, With Renters of Color Facing Greatest Hardship*, Center on Budget and Policy Priorities (Nov. 2, 2021).

<sup>11</sup> Davin Reed and Eillen Divringi, *Household Rental Debt During COVID-19: Update for August 2021*, Federal Reserve Bank of Philadelphia (July 30, 2021), available at <https://www.philadelphiafed.org/community-development/housing-and-neighborhoods/household-rental-debt-during-covid-19-update-for-august-2021>.



and some may not have shelter for period of time. It is critical that these households learn about the ACP and are able to enroll and that these households have the broadband they need to help take care of the households needs.

These vulnerable households cannot afford internet access. According to the National Low Income Housing Coalition’s analysis, extremely low-income renters have little discretionary income left over after rent and no state has an adequate supply of affordable housing for low-income renters.<sup>12</sup> Even as broadband internet becomes more important, “27% of adults living in households earning less than \$30,000 a year are smartphone-only internet users” as of early 2021.<sup>13</sup> A new study conducted by John Horrigan for EveryoneOn demonstrated that among low-income households with incomes at \$50,000 or less, 40 percent say they cannot afford to pay anything for a home internet high-speed service subscription and 22% are comfortable paying only about \$25 per month.<sup>14</sup>

## **II. Participating Providers**

### **A. Election Notice**

Providers participating in the EBB Program are required to file an election notice with USAC that includes basic information about the nature of the services and states where the provider offers qualifying services. The Commission seeks comment on whether it should require all providers to submit a new election notice for the Affordable Connectivity Program (ACP); only require providers who have not certified any claims for the EBB Program to submit new election notices, or require existing EBB providers to update their notices.<sup>15</sup> NCLC and UCC MJ recommend that at a minimum, the EBB providers who plan to participate in ACP file updated election notices with USAC.

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<sup>12</sup> See Andrew Aurand, Ph.D., MSW *et al*, *Gap: A shortage of affordable homes* (March 2021), available at [https://reports.nlihc.org/sites/default/files/gap/Gap-Report\\_2021.pdf](https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2021.pdf).

<sup>13</sup> Emily A. Vogels, “Digital divide persists even as Americans with lower incomes make gains in tech adoption,” Pre Research (June 22, 2021), <https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/>.

<sup>14</sup> John Horrigan, “Affordability and the Digital Divide,” December 2021, <https://www.everyoneon.org/2021-national-study>.

<sup>15</sup> PN at ¶14.

The EBB election notice<sup>16</sup> includes basic service provider information and service offering details such as speed and data caps, the standard rate for this offering, including that it is a monthly recurring cost; equipment costs and jurisdiction where service is offered, as well as documented proof establishing this offering was available on December 1, 2020. The last item regarding whether the offering was available on December 1, 2020, does not apply to the ACP.

NCLC and UCC MJ appreciate the complexity and time involved in requiring the detailed reporting of all the services offered by a provider, given that the IJA requires that participating providers allow an eligible household to apply their ACP benefit to any internet service offering of the participating provider and at the same rates and terms available to non-eligible households.<sup>17</sup> If the Commission considers paring back the reporting requirement, NCLC and UCC recommend that the election notice contain a summary that includes details such as description of the types of service offerings, range of speeds, data caps, and equipment costs. The Commission should also require participating providers retain documentation of promotional offerings and contract rates and terms for audit and dispute resolution purposes.

We note that the EBB (and the IJA retains) the prohibition on providers from charging an early termination fee (ETF) if the household later terminates that contract.<sup>18</sup> Thus, even if the provider normally charges non-ACP eligible customers an early termination fee (ETF) for leaving a contract early, it is prohibited from charging an ACP customer that ETF. This is an important safeguard to protect low-income consumers against bill shock, and will also protect these consumers from promotional offers with ETFs.

NCLC and UCC MJ recommend that in order for the ACP consumer shopping tool, USAC's "Companies Near Me" search tool, to accurately inform about service options available at a consumer's home, participating providers must also include with their Election Notice or Election Notice update for the ACP, the following at the zip code, and ideally zip code plus four level, information about standard rate products (e.g., excludes promotions):

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<sup>16</sup> See [https://www.usac.org/wp-content/uploads/about/documents/ebb-program/Application\\_Docs/EBBP-Service-Provider-Election-Form-3\\_24.pdf](https://www.usac.org/wp-content/uploads/about/documents/ebb-program/Application_Docs/EBBP-Service-Provider-Election-Form-3_24.pdf).

<sup>17</sup> IJA, div F, tit. V, sec. 60502(a)(3)(B)(ii), §904(b)(7)(A)(i).

<sup>18</sup> §904(b)(6)(A)(i).

Boxes must be checked for all of a provider’s standard rate services that apply:

For each zip code (plus 4)			
<input type="checkbox"/>	Products < \$30/month	<input type="checkbox"/> Fixed	<input type="checkbox"/> Mobile
<input type="checkbox"/>	Products < \$75/month	<input type="checkbox"/> Fixed	<input type="checkbox"/> Mobile
<input type="checkbox"/>	Products above \$75/month	<input type="checkbox"/> Fixed	<input type="checkbox"/> Mobile

Providers should have a duty to keep this information up to date and be required to provide USAC timely changes to the availability of supported services. NCLC and UCC MJ also note that IIA Section 60504 requires the Commission to promulgate rules on Consumer Broadband Labels and we encourage the Commission to keep in mind whether any of that future Consumer Broadband Label information could be helpful with the Companies Near Me tool, or the development of other tools to help ACP consumers select a broadband product that best meets their needs.

As with the EBB Program, it makes sense for the Commission to accept election notices on a rolling basis throughout the Affordable Connectivity Program.

The Commission seeks comment on when and under what circumstances USAC should reject an election notice.<sup>19</sup> Enforcement actions, and fraud convictions, particularly those involving the Lifeline Program, the EBB or ACP should be grounds for rejection of an election notice. Enforcement actions and fraud convictions by state or local entities should also be grounds for rejection as well as substantial and substantiated complaints revealing an inability of the provider to provide their supported service per their marketed terms or substantial and substantiated complaints raising concerns about the company’s fitness to participate in the ACP where there is heightened risk to the safety, security and soundness of the ACP program and sensitive personal information of customers. If an applicant fails to provide a complete election notice, they should not be permitted to participate in the ACP until their application is completed and approved.

The Commission seeks comment on what information should be collected from providers to ensure they are legitimate broadband providers committed to adhering to the ACP rules and

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<sup>19</sup> PN at ¶18.

are capable of providing broadband service to eligible households.<sup>20</sup> While we strongly support the ability of new entrants to ACP, we are concerned about companies that do not have the capacity to provide the robust broadband marketed to consumers and companies that are a high risk for fraud, waste and abuse. While additional certifications regarding prompt service delivery and consumer complaint resolution are good measures, it may not screen out the risk we highlight. The Commission should consider requiring the disclosure that none of the officers of the provider have had a fraud conviction and require providers to disclose all federal, state or local enforcement actions involving the company or any prior company of any of the officers. We also recommend that newer broadband providers without a track record of service receive early check-ins by the Commission or USAC to ensure that the provider understands the ACP programs rules and processes.

The proposal for each participating provider to file an election notice separately that includes the FRN, EIN, and DUNS for the entity receiving payment<sup>21</sup> is reasonable for ease in administration of the ACP.

#### **B. Provider Withdrawal or Merger**

The Commission asks how it should address provider withdrawal from ACP.<sup>22</sup> Because consumers will be harmfully impacted by a provider's withdrawal from the program, a standard basic mechanism should be in place to protect consumers. The Commission should require adequate consumer notice. The withdrawing provider must provide multiple notices to the ACP recipients. The first initial notice should be 60 days before withdrawal, another ACP customer notice should be provided at 30 days before withdrawal, and a final notice at 2 weeks before withdrawal. The notice should be clear and consistent with other consumer notice provisions adopted for ACP, such as the notification that must be offered when a customer subscribes or renews their service. The notice should inform consumers that the discount will no longer be accepted and that other companies do still participate in the program and provide instruction on how to transfer the ACP benefit to another provider. The Commission should require providers

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<sup>20</sup> PN at ¶18.

<sup>21</sup> PN at ¶19.

<sup>22</sup> PN at ¶13.

to obtain an affirmative opt-in for any customer that will see a bill increase for maintaining service with the company after it withdraws from ACP.

For providers that may acquire or spin-off companies participating in ACP, the Commission should apply existing review processes, but ensure that the transacting parties articulate how they will address existing ACP customers. The Commission should consider as part of a transaction, consistent with existing legal standards, whether the acquiring company will honor the prior company's commitments and whether it will continue to participate in the ACP. The election notice and zip code (plus 4) information must be filed in a timely manner. All of the disclosures and certifications for the acquired companies in the notice of election apply to officers of the spin off that will remain with the acquiring company.

### **C. Access to USAC Systems and Debarment**

The agents and other enrollment representatives of all participating providers are required to have their agents and other enrollment representatives registered with the Representative Accountability Database (RAD), as is currently required for Lifeline and EBB.<sup>23</sup> This is important to minimize fraud, waste and abuse. This requirement will protect the sensitive personal information of ACP, EBB and Lifeline consumers, and protect the USAC systems administering those programs.

NCLC and UCC MJ strongly support the proposal to prohibit participating ACP providers from offering or providing to their enrollment representatives or their direct supervisors any commission compensation that is based on the number of consumer who apply or are enrolled in the ACP with that provider.<sup>24</sup> We note the unscrupulous actions of providers and their sales agents to abuse the National Free and Reduced School Lunch Community Eligibility Provision to pump up their EBB sales volume.<sup>25</sup> Absent this protection, the risk increases that a provider will hire enrollment representatives that will use high pressure, unfair and deceptive tactics to enroll low-income ACP consumers in a particular provider's service. The incentive commissions system also increases the risk of slamming unsuspecting consumers from

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<sup>23</sup> PN at ¶20.

<sup>24</sup> *Id.*

<sup>25</sup> FCC Office of Inspector General, Memorandum, Advisory Regarding Fraudulent EBB Enrollments Based on USDA National School Lunch Program Community Eligibility Provision, Nov. 22, 2021.

one provider's service to a particular provider's service as that would also drive up the commissions. Depending on the structure of these incentives, they may increase the risk that consumers who desire to change providers will have a very difficult time extricating themselves from their current provider. Rogue supervisors and agents who use unfair, deceptive, fraudulent tactics to get consumers to subscribe to a particular provider's service should be banned from the RAD permanently.

NCLC and UCC MJ support the proposal to formalize a process for limiting provider access to USAC systems or removing providers from the ACP due to waste, fraud and abuse.<sup>26</sup> Consistent with that process, USAC should suspend providers if a troubling trend of complaints “suggest that the provider is not offering eligible households broadband service or connected devices, is failing to enroll subscribers pursuant to ACP rules, is not passing through the discount to subscribers, is providing devices that do not provide the connectivity that was promised or that consumers require, or is otherwise acting in a way that suggests failures to comply”<sup>27</sup> with ACP rules. Clear rules protect both customers and companies that operate in an ethical manner in compliance with the law. The Commission should finalize its new debarment rulemaking to ensure that the rules are clear and that all providers must comply with rules protecting the integrity and ACP.<sup>28</sup>

USAC should have the discretion to first freeze the provider's access to USAC systems while an investigation is underway. In such situations, similar to when a provider exits the program, the provider must give their customers notice of the situation and the ability to transfer to another provider's service. Except where fraud or extreme and egregious activities are at issue, the formalized process to limit access to USAC systems or remove providers from ACP should include the capability for providers to devise a rapid remediation plan that provides redress to consumers and the ACP and avoids these shortfalls in adhering to the program rules. Aggressive spot checks by USAC or the Commission to monitor provider compliance, particularly in the first year of ACP will help provide early information on program integrity and are a very reasonable measure.

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<sup>26</sup> PN at ¶22.

<sup>27</sup> *Id.*

<sup>28</sup> PN at ¶131.

The Commission should also supplement its document retention rules as appropriate to facilitate such monitoring. The Commission should provide for a mechanism to promptly delist or suspend providers or their agents where there is sufficient evidence that they have (1) submitted material, false information to USAC or the Commission, (2) failed to submit information required by the approval or election process, or (3) otherwise failed to comply with ACP rules.<sup>29</sup> The ACP is critical to helping bridge the persistent digital divide by addressing low-income household barriers to essential broadband service due to cost. Bad actors such as rogue agents and companies determined to abuse the program have no place in the ACP. The Commission's ACP program should set the tone with participating providers that there will be immediate and very serious consequences for activities that jeopardize the ACP.

Moreover, in cases where company fraud occurs, the Commission should take remedial steps which are directed toward companies, not steps that harm consumers. Adding additional compliance obligations on consumers when companies mislead consumers does not serve the goals of ACP.<sup>30</sup>

#### **D. Alternative Verification**

NCLC and UCC MJ support extending the Commission's proposal required alternative verification processes for the ACP to be at least as stringent as methods used by the National Verifier.<sup>31</sup> We further support limiting the use of alternative verification processes to providers that maintain an existing verification process used for its own low-income program or other purpose unrelated to the EBB Program, Affordable Connectivity Program, or similar federal assistance program.<sup>32</sup>

### **III. Household Eligibility**

*Applying the same definitions and approach as Lifeline and EBB.* NCLC and UCC MJ support the proposal to use the same definitions and approach as Lifeline and EBB for the ACP regarding household eligibility determinations because it builds in efficiencies from the

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<sup>29</sup> PN at ¶22.

<sup>30</sup> Wireline Competition Bureau Announces Additional Program Integrity Measures for Emergency Benefit Enrollments Based on the Community Eligibility Provision, DA 21-1464 (Nov. 22, 2021).

<sup>31</sup> PN at ¶24.

<sup>32</sup> PN at ¶27.

established Lifeline and EBB programs.<sup>33</sup> There are several connections between the Lifeline, EBB and ACP programs: (1) participation in Lifeline confers eligibility for the ACP<sup>34</sup>, (2) EBB participants before December 31, 2021 shall have an additional 60 days at the amount in effect before December 31, 2021,<sup>35</sup> and, except for those who qualified via demonstration of loss of income due to the COVID-19 pandemic or participation in the providers COVID-19 affordability program, after December 31, 2021, a household participating in EBB shall have continue to have access to an affordable service offering.<sup>36</sup> Adding process variations from Lifeline and EBB risks adding complexity to the administration of the ACP and confusing consumers. Streamlining processes that make it easy for the Lifeline and EBB participants to participate in ACP should be a Commission goal. Maximizing use of the EBB and Lifeline processes will also help make the messaging during the transition from EBB to ACP less confusing to consumers.

*Community Eligibility Provision.* NCLC and UCC MJ recommend that the CEP provision still apply with ACP. The Community Eligibility Provision (CEP) of the USDA's Free and Reduced School Lunch program applies when 40 percent or more of the students are certified as eligible for free school meals through data-matching showing the household receives Supplemental Nutrition Assistance Program (SNAP), Temporary Assistance for Needy Families (TANF), Food Distribution Program for Indian Reservations (FDPIR), and in some states Medicaid or the student is enrolled in Head Start, or in foster care, etc.<sup>37</sup> The CEP program identifies high-poverty schools for free lunch and breakfast for all students, reducing the barriers posed by reliance on parents and guardians filling out applications for the program. This eligibility provision should continue in the ACP.

Unfortunately, unscrupulous EBB providers and their sales agents abused the EBB CEP provision designed to help streamline the enrollment process for households with students in a school or school district participating in CEP. The Commission immediately modified the CEP eligibility determination to require households to identify the school name and provide official

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<sup>33</sup> PN at ¶29.

<sup>34</sup> Consolidated Appropriations Act, div. N, tit. IX, § 904(a)(6)(A) and IIJA, div F, tit. V, sec. 60502(b)(1)(A) (the IIJA left that eligibility criteria and expands the income eligibility criteria from Lifeline 135% of FPL to 200% FPL).

<sup>35</sup> IIJA, div F, tit. V, sec. 60502(b)(2).

<sup>36</sup> IIJA, div F, tit. V, sec. 60502(b)(1)(A).

<sup>37</sup> See e.g., Food Research and Action Center's webpage on Community Eligibility Provision, available at <https://frac.org/community-eligibility>.



school documentation demonstrating that the household has a child or dependent enrolled at the CEP school.<sup>38</sup> We note that we predict the new process may have the effect of increased failure rate for those who choose to prove eligibility due to participation in the free and reduced school lunch program CEP eligibility criteria because ACP applicants are unlikely to have immediately on hand documentation demonstrating their child is a student at a CEP school. Low-income households have limited ability to take time off from work to apply for assistance programs, much less make multiple trips to apply for assistance. Analysis of National Eligibility Verifier determinations shows the dramatic drop-off in successful eligibility determination due to insufficient or failure to submit documentation. Whereas in Q3 2020, where 66 percent of households were approved automatically through computer matching with qualifying programs, where households applied through an eligibility criteria and process requiring the provision of documentation, only 6% were approved and 28% were not approved due to failure to provide documentation or the provision of insufficient documentation.<sup>39</sup> Requiring the provision of documentation for the CEP will likely render the CEP criteria more difficult for households to use successfully. Permitting families to use report cards is the least problematic way to verify attendance in a school, because report cards are more readily available and issued to most students.

NCLC and UCC MJ support allowing households to qualify based on documentation from the current school year or the school year immediately preceding their ACP application submission to accommodate school closures or school participation in non-annual eligibility determination processes (e.g., schools certify eligibility for USDA's free and reduced school meals for a 2-year period).

NCLC and UCC MJ also support guarding against duplicative support by requiring all providers to track enrollments of eligible households in the ACP in the NLAD, including households whose eligibility is verified through a permitted alternative verification process or

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<sup>38</sup> Wireline Competition Bureau Announces Additional Program Integrity Measures for Emergency Benefit Enrollments Based on the Community Eligibility Provision, DA 21-1464 (Nov. 22, 2021).

<sup>39</sup> USAC HCLI Briefing Book (Jan 25, 2021) at 67 of 69, available at <https://www.usac.org/wp-content/uploads/about/documents/leadership/materials/hcli/2021/2021-01-HCLI-Briefing-Book.pdf>.

school-based verification, and to update subscriber information in the NLAD within 10 business days of receiving the changed information.

*Enrollment.* NCLC and UCC MJ support the program-wide use of NLAD as a tool for enrollment, reimbursement calculations and duplicate checks and that providers submit to NLAD information about the subscriber, service, connected device, reliance on an approved verification process or school eligibility determination to verify subscriber eligibility, whether subscriber lives on Tribal lands or high cost areas eligible for the up to \$75 per month for ACP-supported service.<sup>40</sup> Lifeline households should not be required to submit new applications or new eligibility documentation for the ACP, provided the household opts-in or affirmatively requests enrollment in the ACP and is already enrolled in NLAD.<sup>41</sup>

NCLC and UCC MJ strongly support the continuation of the identity authentication options permitted with the EBB. Households can either provide the last four digits of their social security number and potentially receive faster eligibility determinations or households can provide other approved identity documentation.<sup>42</sup> NCLC and UCC MJ recommend that the Commission use its authorization to conduct focus groups<sup>43</sup> to collect data and feedback on the usability of the written form, the online form and the online form as modified for a smart phone. The Commission should look for places where consumers are confused or stuck and later test designs that help consumer fill out the forms more accurately and with more success.

NCLC and UCC MJ strongly support the use of automated database connections wherever possible to verify household eligibility for the Affordable Connectivity Program. As noted earlier, when households are asked to provide supporting documentation, there is a high failure rate due to failure to return forms or insufficient documentation. This could be a function of limited time to focus on completing an application, lack of the digital literacy skills required to upload forms, inability to find the appropriate documentation as the paperwork could be lost or recycled, particularly for populations with unstable housing. This is not unique to the FCC's

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<sup>40</sup> PN at ¶39.

<sup>41</sup> PN at ¶40.

<sup>42</sup> PN at ¶41.

<sup>43</sup> IJA div. F, tit. V, sec. 60502(a)(3)(B), § 904(b)(10)(C)(ii) (2021).

broadband assistance program; other low-income assistance programs experience the similar barriers.<sup>44</sup>

NCLC and UCC MJ appreciate the Commission’s request for comments on ways to expedite the development and testing and readying the relevant systems to accept enrollments in the ACP starting on December 31, 2021.<sup>45</sup> Although only modest changes are likely to be practicable before December 31, 2021, we recommend that soon after the transition from the EBB to ACP is over, the Commission turn to organizing focus groups to discuss the usability of the paper, online and smartphone application designs as well as quality translations of the application and instructions. The FCC could be a leader in identifying and addressing barriers to participation for low-income people in federal benefits programs. Particularly given the broad funding available through other legislative efforts, such as the Digital Equity Act, this kind of knowledge and responsiveness could be useful across the broadband ecosystem.

*De-enrollments.* NCLC and UCC MJ support the different avenues for ACP consumers to stop ACP service, either through notifying the provider who must then transmit the de-enrollment to NLAD within one business day, allowing the consumer to go through USAC directly to stop ACP service and where technically feasible, to have self-service options to terminate ACP.

NCLC and UCC MJ and civil rights organizations have filed previously in the Lifeline dockets in strong opposition to requiring consumers to install an “app” on their devices to

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<sup>44</sup> *APPRISE Incorporated, LIHEAP Research Experiences of Selected Federal Social Welfare Programs and State LIHEAP Programs in Targeting Vulnerable Elderly and Young Child Households* (Dec. 1, 2008) (research into federal programs targeting low-income vulnerable populations discusses the low participation rates in these programs and barriers to participation), available at <https://www.acf.hhs.gov/ocs/report/liheap-research-experiences-selected-federal-social-welfare-programs-and-state-liheap>; see also Annie Lowry, *The Time Tax: Why is so much American bureaucracy left to average citizens?* *The Atlantic* (July 27, 2021), available at <https://www.theatlantic.com/politics/archive/2021/07/how-government-learned-waste-your-time-tax/619568/>; and Sean Coffey *New Report: More than half of California Households Leaving CalFresh Program Are Still Eligible* (Jan. 29, 2021) (A new study in California found that families are six times more likely to drop out of SNAP the month they have to reconfirm their eligibility), available at <https://www.capolicylab.org/news/new-report-more-than-half-of-california-households-leaving-calfresh-program-are-still-eligible/>.

<sup>45</sup> PN at ¶43.

monitor usage to ensure that the broadband is being used.<sup>46</sup> The organizations explained the proposal was “paternalistic and invasive of privacy” which “disregard[s] the dignity of struggling, low-income individuals and runs the risk of deterring participation in Lifeline by the very consumers who need broadband connectivity to access the economic promise of the information age.”<sup>47</sup> Similarly, the questions about obtaining data on broadband usage of ACP recipients<sup>48</sup> is invasive and does not respect the ACP participants or their broader communities. We strongly urge the Commission to repudiate any proposals to invade the privacy of low-income households by monitoring the broadband usage of ACP participants. The Commission must abandon any suggestion that these proposals are appropriate now or in the future.

*Recertification.* NCLC and UCC MJ agree that annual recertification is reasonable for the ACP. We also support the existing Lifeline processes for recertification. USAC uses the automated databases in the National Verifier for recertification and where it cannot find households through the database connections it provides a paper recertification form, and online and IVR recertification options. For EBB enrolled subscribers that transition to the ACP, their anniversary date should be tied back to when they enrolled in EBB.

Research is showing the inadvertent, and sometimes intentional, impacts of increasing administrative burdens leading to loss of eligible households’ benefits.<sup>49</sup> We strongly

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<sup>46</sup> Opening Comments of NCLC, et al., Bridging the Digital Divide for Low-Income Consumers, WC Docket 17-287 (filed Jan. 27, 2019).

<sup>47</sup> *Id.* at 12.

<sup>48</sup> PN at ¶¶45-48.

<sup>49</sup> See e.g., Pamela Herd and Donald Moynihan (professors at Georgetown University’s McCourt School of Public Policy), Health Affairs Health Policy Brief, *How Administrative Burdens Can Harm Health: Health-promoting social welfare programs, such as unemployment insurance, food stamps, and Medicaid, are critical in a major recession. However, administrative burdens that block access to these benefits and create stress may undermine health* (Oct. 2020)

(administrative burdens include learning costs, compliance costs and psychological costs to the applicants and the burdens become magnified during economic downturns), available at <https://www.healthaffairs.org/doi/10.1377/hpb20200904.405159/full/>. See also, Emily Badger and Margot Sanger-Katz, *Take the Quiz: Could You Manage as a Poor American? See whether you make the kinds of mistakes that can cost poor families food or health insurance*, New York Times (Jan.28, 2020), available at

<https://www.nytimes.com/interactive/2020/01/28/upshot/administrative-burden-quiz.html> (challenges the economic assumption that the more people need a benefit they will put more effort into getting it by noting the real-life impact on stressed low-income households, “These burdens . . . may instead be tripping up the worst off: hourly workers who can’t shuffle their

recommend the Commission factor in the possibility that eligible households do not receive ACP due barriers posed by enrollment and recertification program design, rather than because they are not eligible. The FCC can maximize eligible participation by maximizing its reliance on automated processes and simple, error-proof forms (e.g., by prefilling out forms with known information, and truly limiting the request for documentation to those instances absolutely necessary for program integrity). While other analysis shows that federal program participation rates range from 50 to 70 percent for entitlement programs like SNAP and Medicaid, federal non-entitlement programs like the Low Income Home Energy Assistance Program (LIHEAP) have lower participation rates ranging from 10 - 50% of the eligible population.<sup>50</sup> The National Eligibility Verifier is a standout design in program delivery that can be further enhanced through more computer matching agreements with programs that confer ACP eligibility. Program administrative burdens on the applicants can suppress the participation rate, but the Commission can become a leader in reaching low-income households by improving the forms' design and application processes by using focus groups and by regularly soliciting feedback from frontline organizations that help consumers navigate the enrollment process. NCLC and UCC MJ recommend the FCC and USAC create office hours for community-based ACP navigator organizations so they can quickly ask questions, offer feedback and resolve problems through an efficient, easy-to-use process.

*Multi-family dwellings.* NCLC and UCC MJ support Stewards of Affordable Housing for the Future's (SAHF's) proposal to broaden the publically assisted housing eligibility criteria beyond just public housing to also include project-based assistance (e.g., Section 8). In the comment cycle to establish the EBB, SAHF recommended that the Commission work with HUD to identify all assisted multifamily properties where substantially all units are receiving HUD project-based assistance. SAHF also recommended that the residents living in this housing be

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schedules for a meeting; parents dealing with domestic violence, disabilities or low literacy; families without bank accounts to automate monthly payments; households already facing unpaid bills and late notices when another urgent letter arrives in the mail.”)

<sup>50</sup> *APPRISE Incorporated, LIHEAP Research Experiences of Selected Federal Social Welfare Programs and State LIHEAP Programs in Targeting Vulnerable Elderly and Young Child Households* (Dec. 1, 2008) (research into federal programs targeting low-income vulnerable populations discusses the low participation rates in these programs and barriers to participation), available at <https://www.acf.hhs.gov/ocs/report/liheap-research-experiences-selected-federal-social-welfare-programs-and-state-liheap>.

presumed eligible based on the eligibility requirements for the HUD assisted housing program.<sup>51</sup> We note that the Department of Energy’s Weatherization program (which also has an income eligibility criteria of 200% of FPL<sup>52</sup>) allows federal weatherization of HUD assisted properties, both housing owned and operated by public housing authorities and privately-owned multifamily buildings receiving project-based assistance where at least 66% of the residents in each building (or at least 50% for units for 2- and 4-unit buildings) have certified incomes at or below 200% of FPL.<sup>53</sup> Similar to the CEP provision, this subsidized housing serves low-income families.

#### **IV. Covered Services and Devices**

The Commission should interpret the Infrastructure Act’s requirement that a participating provider “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 households that are not eligible households”<sup>54</sup> to mean that a participant in ACP should be treated like any other customer: just because a customer is relying on the ACP discount does not mean they should be limited in their choices of products. Therefore, the Commission should interpret “any internet offering” to mean any product a consumer could otherwise obtain. Thus, if a consumer is using a grandfathered plan, the consumer should be able to apply their ACP discount to the grandfathered plan.<sup>55</sup> If a consumer is a senior citizen, lives in a market where a particular discount be being offered or is otherwise eligible for a discount or able to purchase a product, the consumer should be able to apply ACP to that product.

The Commission is wise to monitor whether products offered under ACP fall outside of the scope and intent of the ACP. On the one hand, because the December 1, 2020 reference date is no longer applicable in the new program many more products will be eligible, at the same time, products already offered to the general public will likely be subject to regular competitive

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<sup>51</sup> SAHF Comments on the EBB, WC Docket No. 20-445 (filed Jan. 25, 2021).

<sup>52</sup> 42 USC §6862(7) (DOE’s low-income weatherization authorizing statute definition of “low-income” is 200% FPL).

<sup>53</sup> See Department of Energy’s Weatherization Program Notice 17-4: Multifamily Housing – Procedure for Certifying Income-Eligible HUD Assisted Buildings (June 6, 2017), available at <https://www.energy.gov/eere/wap/articles/weatherization-program-notice-17-4-multifamily-housing-procedure-certifying>.

<sup>54</sup> Infrastructure Act, div. F, tit. V, sec. 60502(a)(3)(B)(ii), § 904(b)(7) (2021).

<sup>55</sup> PN at ¶53.

market forces. Given the many elements of the new program, the new consumer protection rules and our recommendation and that providers submit information about the availability of their products offered for a retail price of \$75 or lower on a zip code level basis, we do not believe that minimum service standards should be adopted at this time, particularly due to a concern that it will hamper the expedited rollout timeline of the ACP. Nonetheless, the Commission should monitor products closely and should take action to adopt minimum standards if needed.

The Commission should pay particular attention to products that are at or below \$30 and for consumers who may have the lowest digital literacy or least understanding that they may shop around for the product that best meets their needs. Products that are exclusively or heavily marketed only to consumers who are eligible for ACP discounts might be worthy of careful analysis in comparison with products offered to consumers more generally so that products geared for low-income consumers do not fall behind other products in the marketplace in terms of quality. It is certainly relevant to consider the various kinds of technology, such as mobile or wireless products,

The Commission has authority to adopt minimum service standards. The Infrastructure Act provides that the Commission shall establish consumer protection rules, including the authority to adopt rules that impose “restrictions that amount to unjust and unreasonable acts or practices that undermine the purpose, intent, or integrity of the Affordable Connectivity Program.”<sup>56</sup> The Infrastructure act also authorizes a consumer complaint process which includes complaints regarding the quality of service received under the program.<sup>57</sup> Violation of the ACP and EBB provisions shall be treated as a violation of the Communications Act and the Commission is authorized to use 47 U.S.C. §503 to enforce the section and impose forfeiture penalties.<sup>58</sup> Moreover, the Commission adopted minimum service standards in the Lifeline program and we note that the EBB provisions of the Consolidated Appropriations Act, 2021 explicitly authorize the Commission to use rules applicable to Lifeline in administering the new programs.<sup>59</sup>

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<sup>56</sup> IJA, div. F, tit. V, sec. 60502(a)(3)(B), §904 (b)(11)(A)(v).

<sup>57</sup> IJA, div. F, tit. V, sec. 60502(a)(3)(B), §904 (b)(9)(A).

<sup>58</sup> IJA, div. F, tit. V, sec. 60502(a)(3)(b), §904(b)(9)(C)(ii) (2020); Consolidated Appropriations Act, 2021, H.R. 133, div. N, tit. IX, §904(g).

<sup>59</sup> Consolidated Appropriations Act, 2021, div. N, tit. IX, §904(f).

The Commission should permit bulk billing in ACP in the same way that it permitted that billing in EBB.<sup>60</sup> The Commission proposes that, as in the EBB Program, voice, data, and text bundled services should be eligible for ACP support, while broadband-video bundled services should not.

The Commission asks about the significance of the Commission removing the term “associated equipment” from the ACP as compared with the EBB. It is important to note that the term “associated equipment” was deleted as a result of Congress eliminating the requirement that products must be offered as of December 1 in order to be eligible for the federal discount, the words associated equipment was included within the phrase “internet service offering and associated equipment” as it related to the standard rate set by the rate for products being offered as of December 1, 2020.<sup>61</sup> It is not clear from this language whether Congress intended to prohibit reimbursement of associated equipment or whether the equipment could be considered part of the standard internet service offering. In the case of ambiguous statutory provisions, the Commission has the authority to interpret the provisions.<sup>62</sup> Sound policy reasons support inclusion of equipment necessary to receive a broadband service. If low-income households cannot afford the equipment, such as including modems, routers, and hotspot devices and antennas, obtaining internet service without the means to use it would be meaningless.<sup>63</sup> It would not seem to be supportive of Congress’ goal. NCLC and UCC MJ agree that providers may not manipulate their prices in order to avail themselves higher reimbursement rates.<sup>64</sup>

The Commission should maintain its EBB guidance with regard to the devices eligible for a connected device benefit. Nevertheless, the Commission should require a connected device to be able to connect to all Wi-Fi devices, and not just certain hotspots.<sup>65</sup> Consumers should not be given devices that otherwise limit their ability to use any technology available to them, or to manage the data included in their plans in the same way any other consumer may do.

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<sup>60</sup> PN at ¶57.

<sup>61</sup> IJJA, div. F, tit. V, sec. 60502(b)(1)(A)(i), §904 (b)(1)(A)(ii) (“by striking “which shall be no more than the standard rate for an internet service offering and associated equipment...”)

<sup>62</sup> *Chevron USA, Inc. v. NRDC*, 467 US 837 (1984).

<sup>63</sup> EBB Order at ¶78.

<sup>64</sup> *Id.*

<sup>65</sup> PN at ¶67.



The Commission should encourage providers to obtain bulk purchases in order to offer devices, particularly laptop computers, in conjunction with their internet offerings. Like modems and routers, an internet service is meaningless without a device to use it.<sup>66</sup> The Commission should require providers, at a minimum, to maintain records regarding connected devices in the event that a question should arise about whether a device was provided, or the quality or functionality of a device, such as in the dispute resolution process employed in EBB and proposed for ACP.<sup>67</sup> The Commission should authorize USAC to spot-check documentation regarding devices, but at this time requiring submission of documentation in advance seems unnecessary given the relatively low participation rate in the program.

The Commission questions whether providers may profit off providing devices.<sup>68</sup> All providers offering products which participate in the ACP will presumably be earning a profit—it is unlikely that market prices are set at rates which preclude a profit. In fact, a major disappointment of the EBB program was the low level of device offerings. Therefore, it is not clear that merely offering a profit or obtaining a bulk discount should disqualify device reimbursement. On the other hand, if the costs and reimbursement rates were egregiously out of range, or the quality of products far below the rate reimbursed, the Commission ought to take action and provide additional guidance as to the proper use of ACP funds. For example, if the Commission were concerned about particular classes of devices, perhaps those devices could be subject to more rigorous documentation.

## **V. Consumer Protections Provisions**

### **A. Credit Check Prohibition**

NCLC and UCC MJ support the requirement that providers self-certify under penalty of perjury that the households they are claiming were not subject to credit checks as a condition of enrolling with the provider for the ACP with each reimbursement filing. We support the prohibition of providers inquiring, requesting or otherwise causing a consumer to submit to a credit check, or from accessing a consumer's credit information, before enrolling a consumer in

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<sup>66</sup> PN at ¶61.

<sup>67</sup> PN at ¶66.

<sup>68</sup> PN at ¶64.

the ACP.<sup>69</sup> The ACP benefit ensures a regular monthly benefit of up to \$30 per month (and up to \$75 per month for consumers in Tribal lands or in the new ACP high cost areas), this provides assurance of a steady payment stream from the ACP customer each month which is not the case with non-ACP participants. The Commission should also ensure that use of a credit check to limit ACP consumer access to service is explicitly listed in the ACP consumer complaints section as one of the areas of ACP complaints. NCLC and UCC MJ note that denial of internet service based on a credit check is likely fall under the Fair Credit Reporting Act and providers would then be required by the FCRA to provide an adverse action notice.<sup>70</sup> Furthermore, the Commission might be able to verify, and consumers might be able to detect a violation, if a credit bureau lists the “inquiry” from the company on a consumer credit report.

The ACP is explicit that a participating provider:

“(i) 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 households that are not eligible households; and”<sup>71</sup>

This raises the concern that ACP households may subscribe to a service that becomes unaffordable due to outside circumstances affecting the household’s monthly budget (e.g., loss of wages or sudden medical expenses). The ACP household will bear the risk of the credit and collections implications should they fall behind on their broadband service bills. NCLC and UCC MJ are concerned that deposits may be requested of ACP households as a condition of service and that could pose a barrier to cash-strapped households. As noted above, the ACP guarantees a steady monthly payment to the provider of up to \$30 per month (and up to \$75 per month re the Tribal lands and high cost provision). Deposits should not be required of ACP consumers as a condition of service.

## **B. Non-payment**

The ACP also explicitly prohibits disconnection for non-payment for 90 days.<sup>72</sup> NCLC and UCC MJ recommend that providers be required to provide notice and outreach to customers

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<sup>69</sup> PN at ¶81.

<sup>70</sup> 15 U.S.C. § 1681m(a) (Users of consumer reports that take an adverse action against consumers must provide notice of that adverse action).

<sup>71</sup> IIA, div. F, tit. V, sec. 60502(a)(3)(B)(i), § 904(b)(7)(A)(i)(2021).

immediately following the first month customers miss a full payment to explain that if the household is having trouble making payments for its current product, other lower-cost offerings including services would be fully covered by the ACP may or do exist. The notices should provide simple instructions for consumers to switch to the lower cost services. The notice and outreach should also make clear that subscribers can also switch providers because another provider may offer a lower-cost service that meets the ACP household's needs. Hopefully, with the provider's help, a majority of consumers who fall behind will be able to avoid negative credit consequences and disconnection and preserve connection to affordable broadband. NCLC and UCC MJ prefer this approach to allowing the provider to degrade a customer's service quality.<sup>73</sup> That option would require outreach as well to the consumer to notify them of the reason for the degradation in the service quality and it is more punitive than the approach NCLC and UCC MJ propose. Our recommendation puts the provider in a helpful role, one where the customer contact is solution-oriented and compassionate. Allowing providers to degrade service quality as a response to arrearages is punitive and more likely to aggravate and upset the consumer first before potentially moving towards a more solution-oriented approach of looking for more affordable options such as switching to a more affordable service.

Providers in the ACP should be required to pass through the ACP benefit to the household before claiming reimbursement.<sup>74</sup> In the EBB, consumers complained when they experienced service interruptions or were reported to collections due to the delay in the provider applying the ACP benefit to the customer account.<sup>75</sup> That is contrary to the intent of the federal low-income broadband affordability program. The risks of a provider's failure to timely apply the ACP benefit to a household's bill consistent with ACP rules should not be borne by the ACP customers, who would then be put in a situation of paying the full amount of internet service. NCLC and UCC MJ also support affirmatively requiring providers to immediately apply the discount to a household's broadband bill or account upon enrollment in the ACP, particularly if the ACP benefit can avoid a disconnection for non-payment.

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<sup>72</sup> IJJA, div. F, tit. V, sec. 60502(a)(3)(B)(ii), § 904(b)(7)(B) (2021).

<sup>73</sup> PN at ¶83.

<sup>74</sup> PN at ¶84.

<sup>75</sup> *Id.*

NCLC and UCC MJ strongly support requiring participating providers to provide timely notice to subscribers of their delinquent status before terminating for non-payment and to use that opportunity to educate consumers about the ability to switch to a more affordable service or to switch to another provider's service if that is more affordable.<sup>76</sup> We have proposed a tone and approach that is solution-oriented. An overarching goal of the ACP is to ensure low-income households remain connected to affordable broadband service. In addition, the dedicated ACP complaint process should include a dispute process for the provider's claim of non-payment and while consumers have an active dispute pending before the Commission, there should be no further credit and collections activity on the customer's account, pending resolution.<sup>77</sup>

### **C. Complaint Process**

The Commission is correct that the current informal complaint process can offer a useful tool to resolve many issues. Nevertheless, little public information exists to monitor the success of the informal complaint process. NCLC and UCC MJ request that the Commission issue regular reports with respect to complaints received in the ACP aggregated into various relevant categories—for example, slamming complaints, quality of service complaints, price complaints, bill shock, etc. The Commission should also issue public reports on the number of resolutions, the number of consumers and companies satisfied with the outcome of the complaint process, and any emerging issues coming that are turning up via the complaint process. If the Commission issues regular data monthly, it will be easier for the FCC and the public to monitor the complaint process to identify upcoming problems and concerns. Similarly, the Commission should explore a Better Business Bureau type publication where consumers could learn if particular providers are the target of multiple complaints. If we can publicly identify friction points, the Commission can better resolve concerns and improve program design. In addition, if additional needs arise from this complaint process, the Commission should consider utilizing a complaint system similar to the process used by people with disabilities in 47 CFR §§ 14.32, 14.34. This complaint process is accessible to ordinary consumers who might be dissatisfied with the informal complaint process but is not so complex as to be unrealistic for an ordinary person without legal representation. Any alternative to the formal complaint process should not include filing fees which will pose a barrier to low-income consumers.

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<sup>76</sup> PN at ¶85.

<sup>77</sup> PN at ¶85.

#### **D. Administrative Procedure Act**

The FCC should utilize the good cause exceptions to the Administrative Procedure Act to ensure that any consumer protections adopted will be applicable immediately when ACP begins. Specifically, as noted by the Commission, the APA explicitly provides for lesser time between publication and effective date of Commission rules and also deviation from the Federal Register publication requirement.<sup>78</sup> The APA requires the agency's good cause finding to be published with the rule, thereby subjecting that finding to the APA's review provisions. If an agency makes a good cause finding under those provisions, the agency is in compliance with the APA, it is merely availing itself of the good cause provisions of the APA. Moreover, courts reviewing procedural infirmities under the APA typically apply a "harmless error" rule, which evaluates whether the procedural infirmities led to a material or substantive difference in outcome.<sup>79</sup> Tight statutory deadlines for rulemaking is often invoked for good cause exceptions to the APA's procedural requirements.<sup>80</sup> In this case, most commenters have had access to the statutory language for several months, the agency has published a detailed public notice, one can expect that many interested commenters are aware of the notice and will actively participate. The Commission is explicitly considering the appropriate timing of implementing these rules. Moreover, a number of the consumer protections stem from the statute itself—arguably they are already in effect.

Finally, even though the FCC may find an exception to the procedural requirements, the FCC's rules are still subject to the APA's arbitrary and capricious standard for judicial review. So even if the agency adopts its rules with fewer procedural protections, parties may still avail itself of the full range of judicial remedies if they were necessary.

There is good cause to depart from the APA requirements because otherwise the effective date of these important consumer protection rules may extend two months after the December

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<sup>78</sup> 5 U.S.C. §553(b)(3)(B), (d)(3).

<sup>79</sup> *See, e.g.,* *Shinseki v. Sanders*, 556 U.S. 396, 129 S.Ct. 1696, 1706, 173 L.Ed.2d 532 (2009) (“[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination.”); *Air Can. v. Dep't of Transp.*, 148 F.3d 1142, 1156 (D.C.Cir.1998); *City of Arlington v. Federal Communications Commission*, 668 F.3d 229, 244 (5th Cir. 2012) *aff'd* on other grounds 569 U.S. 290 (2013).

<sup>80</sup> *E.g.,* *Petry v. Block*, 737 F.2d 1193, 1200-01 (D.C. Cir. 1984).

31, 2021 effective date of new ACP.<sup>81</sup> These additional consumer protections are will protect consumers from some very expensive and harmful practices that erode the benefit of the ACP by roping consumers into expensive packages they cannot afford and by making it very difficult for ACP consumers to shop with their feet to select more appropriate and affordable service for the ACP household. Avoiding exposing consumers to these harmful business practices provides good cause to depart from the APA. These are some of the most egregious unfair and deceptive practices that trap consumers in poor service and deny households of the full benefit and freedom to choose an appropriate service that is intended by the ACP. We encourage the Commission to avoid exposure to unscrupulous practices in this case by accepting the comments on the protections provided in this expedited comment and reply cycle in lieu of a slightly longer comment cycle per the APA.

**E. Consumer Protections.**

The Commission must promulgate ACP rules to protect ACP consumers from:

- (i) inappropriate upselling or downselling by a participating provider;
- (ii) inappropriate requirements that a consumer opt in to an extended service contract as a condition of participating in the Affordable Connectivity Program;
- (iii) inappropriate restrictions on the ability of a consumer to switch internet service offerings or otherwise apply support from the Affordable Connectivity Program to a different internet service offering with a participating provider;
- (iv) inappropriate restrictions on the ability of a consumer to switch participating providers, other than a requirement that the customer return any customer premises equipment provided by a participating provider; and
- (v) similar restrictions that amount to unjust and unreasonable acts or practices that undermine the purpose, intent, or integrity of the Affordable Connectivity Program.<sup>82</sup>

The Commission seeks comment on the practices that would constitute inappropriate upselling and downselling. Merriam-Webster provides two definition of “upsell”:

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<sup>81</sup> PN at ¶92.

<sup>82</sup> IJA, div. F, tit. V, sec. 60502(a)(3)(B), § 904(b)(11)(A) (2021).

transitive verb: to try to convince (a customer) to purchase something additional or at a higher cost

*With a strong correlation between the amount of video consumed and the Internet speed that consumers think they need, providers could possibly upsell customers on costlier broadband packages. — Makeda Easter*

*They start upselling you before you book your vacation by offering upgrades to a higher-class cabin ...— Christopher Elliott*

noun (plural upsells): an attempt to convince a customer to purchase something additional or more costly : the act or an instance of upselling

*We passed on the products they had used during the massage, which were for sale. Almost every activity, it would turn out, ended with a gentle upsell. — Dan Saltzstein*

*I tend to avoid server upsells because I usually suspect they're trying to push a high margin or past-its-prime menu item. — Michael Nagrant <sup>83</sup>*

The FTC’s Telemarketing Sales Rule defines upselling:

(hh) *Upselling* means soliciting the purchase of goods or services following an initial transaction during a single telephone call. The upsell is a separate telemarketing transaction, not a continuation of the initial transaction. An “external upsell” is a solicitation made by or on behalf of a seller different from the seller in the initial transaction, regardless of whether the initial transaction and the subsequent solicitation are made by the same telemarketer. An “internal upsell” is a solicitation made by or on behalf of the same seller as in the initial transaction, regardless of whether the initial transaction and subsequent solicitation are made by the same telemarketer.<sup>84</sup>

Both definitions of upselling focus on a business practice to pressure or trick consumers into purchasing something that is additional to, or more expensive than, what the consumer initially sought. The ACP exists to help low-income consumers afford essential broadband service. Low-income households are already struggling to afford basic necessities during this COVID-19 pandemic.<sup>85</sup> The economic harms from these inappropriate practices must be avoided through strong rule and robust monitoring and enforcement.

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<sup>83</sup> See Merriam-Webster’s online definition of “upselling” available at <https://www.merriam-webster.com/dictionary/upsell> (accessed Dec. 7, 2021).

<sup>84</sup> 16 C.F.R. § 310.2 Definitions.

<sup>85</sup> See e.g., Center on Budget and Policy Priorities, *Tracking the COVID-19 Economy’s Effects on Food, Housing, and Employment Hardships* (Nov. 10, 2021)(analysis of Census Bureau’s

It was difficult to find reputable definitions of “downselling,” but in the context of ACP, inappropriate downselling would consist of a sales agent pushing ACP consumers to lower quality broadband service to further the business interests of the provider rather than the best interests of the consumer. We note lower cost products may be more affordable for the household, but if the service is lower quality it may not meet the needs of the consumer or his/her household. Thus, downselling can harm ACP consumers.

One measure to mitigate the ability of providers to inappropriately upsell or downsell is to require that providers inform consumers of all services that are \$30 per month or less (or in the case of Tribal and High Cost, \$75 or less) when an ACP consumer is interested in signing up for service or changing service. The consumers should also be told that they receive protections under the ACP and the process for filing complaints. This information should be included in all marketing materials and FAQs.

Practices that trap ACP consumers, impose additional costs (like conditioning ACP service on opting into an extended service contract<sup>86</sup>) and impose barriers to choosing another service or provider<sup>87</sup> are inappropriate and unfair. The FTC has released a recent enforcement policy statement regarding illegal practices to trick or trap consumers into subscriptions that can help to inform what constitutes inappropriate practices for ACP providers.<sup>88</sup> The FTC’s enforcement policy emphasizes clear and conspicuous disclosures of all material terms, obtaining the consumers express informed consent before charging for a product or services and provide easy and simple cancellation to the consumer.

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Household Pulse Survey and other sources), available at <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-economys-effects-on-food-housing-and>; Melissa Jenco, American Academy of Pediatrics (AAP) News, *Study: COVID-19 pandemic exacerbated hardships for low-income, minority families* (June 3, 2020), available at <https://publications.aap.org/aapnews/news/13838>.

<sup>86</sup> PN at ¶94.

<sup>87</sup> PN at ¶95.

<sup>88</sup> See FTC press release, *FTC to Ramp up Enforcement against Illegal Dark Patterns that Trick or Trap Consumers into Subscriptions: Agency policy statement puts companies on notice that sign-ups must be clear, consensual, and easy to cancel* (Oct. 28, 2021), available at <https://www.ftc.gov/news-events/press-releases/2021/10/ftc-ramp-enforcement-against-illegal-dark-patterns-trick-or-trap>. See also, *FTC Enforcement Policy Statement Regarding Negative Option Marketing* ( link is provided in the Oct. 28, 2021 press release), available at [https://www.ftc.gov/system/files/documents/public\\_statements/1598063/negative\\_option\\_policy\\_statement-10-22-2021-tobureau.pdf](https://www.ftc.gov/system/files/documents/public_statements/1598063/negative_option_policy_statement-10-22-2021-tobureau.pdf).



NCLC and UCC MJ support the proposals to require providers enroll eligible households or transfer their benefit within a prescribed time after the subscriber provides affirmative consent to enroll or informs provider of a desire to transfer their benefit. Failure to do so, particularly the failure to timely transfer the consumer's benefit to another service or provider, should constitute an unjust and unreasonable practice.<sup>89</sup> NCLC and UCC MJ support the proposal to prohibit providers from unreasonably delaying the application of the ACP on subscriber's bills.<sup>90</sup> Failure to provide the service that is advertised and promoted constitutes a violation of the ACP rules.<sup>91</sup> The Commission should impose requirements regarding how the ACP is advertised and promoted, with remedies for violations.<sup>92</sup>

## **VI. Promoting Awareness about and Participation in the Affordable Connectivity Program**

Public information during the transition and throughout the ACP will be one of the most critical elements of its success, or lack thereof. Consumers require information that can be understood at all literacy levels and by people who speak any number of language and require assistance because of disabilities or other needs. The Commission has a great opportunity to develop initial disclosure and messaging now and then evaluate it using the authority Congress gave it<sup>93</sup>; adopting new and improved outreach and standardized language within six months of the programs start.

NCLC and UCC MJ propose that the Commission develop a single set of standard disclosures and require those disclosures at every touch point during the ACP application and publicity process. The same information should be provided in marketing materials, when consumers subscribe to or renew a subscription, when notifications are sent regarding the end of EBB and initiation of ACP and at any other time providers, USAC or the FCC communicates with ACP enrollees or the general public. The FCC should also translate these standard disclosures in multiple languages.<sup>94</sup>

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<sup>89</sup> PN at ¶97.

<sup>90</sup> PN at ¶97.

<sup>91</sup> PN at ¶98.

<sup>92</sup> PN at ¶98.

<sup>93</sup> IJA, div. F, tit. V, sec. 60502(a)(3)(B), § 904(b)(10)(C) (2021).

<sup>94</sup> See, e.g., COVID-19 Language Access Act, H.R. 1009, Sec. 2(b).

The key points that all subscribers must receive are:

- ACP is a federal program offering discounts to private offerings.
- Contact information for the FCC, USAC, how to apply for the program.
- Consumers with problems can contact the FCC to file a complaint or obtain assistance.
- Consumers can obtain a wide variety of services from a wide variety of companies: they should shop around, compare products and select the best one for their needs. They can change their provider at any time. They can often get more information from local or national organizations.
- Information about consumer protections and rights in the ACP. This ACP consumer rights and responsibilities document should be prioritized for translation into multiple languages in time for distribution during the March 1, transition for currently enrolled EBB customers. These materials will also be critical for community-based organizations and non-profit entities doing ACP outreach into hard to reach communities.

Once the FCC adopts initial standardized language—which must be used by providers—in a few months the FCC should utilize program evaluation tools, focus groups and other resources to evaluate the success of the disclosures and determine whether most consumers are receiving the information they need.

We strongly support the Commission conducting additional outreach with and alongside community partners. This outreach could occur via the FCC’s grant program, by hiring trusted vendors capable of culturally competent communications or by purchasing media buys targeted to vulnerable communities in media outlets that are owned and run by people of color, women and others who are well-positioned to communicate with potential ACP subscribers.

## **VII. Data Reporting and Tracking of Available Funding**

### **A. EBB Enrollments and Claims Tracker**

The EBB Enrollments and Claims tracker is a best practice example of transparency for a federal assistance program, particularly amongst the COVID-19 appropriated programs. The tracker includes data on EBB program enrollment nationwide, by state and by three-digit ZIP

code areas that is updated weekly and the total claims made by providers each month. The EBB tracker data helps stakeholders track the spend-out rate of the EBB funds and that allows any member of the public to analyze the performance of the program at different points in time.<sup>95</sup> Data analysis of the rich EBB data has led to more complex analysis of where households are enrolling in EBB.<sup>96</sup> This helps to inform policy decisions related to the closing of the digital divide. The more granular enrollment data that include demographic information, such as age breakdown, eligibility category, type of broadband service, and enrollment numbers by five-digit zip code areas, which are uploaded monthly are extremely helpful in informing how outreach efforts are succeeding and where more targeted outreach is needed. This program data also informs future community-based organizations about the most popular ways consumers are demonstrating eligibility for EBB. This information will be even more useful with the ACP and the funding for outreach and focus groups. Racial and ethnic demographic information (voluntarily provided by applicants) would be useful as well as data on the different language applications (and we urge the Commission to translate the ACP application into other languages). Since the ACP allows consumers to choose any of the participating provider's services it will be important for future policy and programs to know what services low-income households are choosing. For example, what percentage of ACP participants have chosen products above \$30 per month (or \$75 per month for Tribal and high cost areas). Are there particular product choices where consumers have been disconnected for non-payment? It is important to know how many households have been disconnected for non-payment, as that may signal a need to revisit the consumer protection and notice rules.

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<sup>95</sup> See e.g., Linda Hardesty, Emergency Broadband Benefit still has \$2.7B out of \$3.2B available, Fierce Telecom (Sep 15, 2021), available at <https://www.fiercetelecom.com/regulatory/emergency-broadband-benefit-still-has-2-7b-out-3-2b-available>.

<sup>96</sup> See e.g., John Horrigan, *The Emergency Broadband Benefit has thus far enrolled just 1 in 12 eligible households, but places with low broadband adoption rates show better results*, The Benton Institute for Broadband and Society (July 15, 2021), available at <https://www.benton.org/blog/emergency-broadband-benefit-has-thus-far-enrolled-just-1-12-eligible-households-places-low>; William Rinehart, *A progress report on the Emergency Broadband Benefit program*, Utah State University, Center for Growth and Opportunity (Oct. 27, 2021), available at <https://www.thecgo.org/benchmark/a-progress-report-on-the-emergency-broadband-benefit-program/>.

## **B. Goals and Performance Measures**

The Commission seeks comments on goals for the ACP.<sup>97</sup> NCLC and UCC MJ recommend that the goals for the ACP include: (1) ensuring the availability of broadband service for low-income consumers; (2) ensuring the affordability of broadband service for low-income consumers, and (3) ensuring ACP subscribers have continuous access to broadband service.

The Commission seeks comments on the performance measures for the ACP.<sup>98</sup> NCLC and UCC MJ recommend that ACP performance measures include (1) continuous subscriber enrollment in broadband service (e.g., limiting the incidence of disconnections for non-payment), (2) robust ACP providers and services in the ACP program, and (3) robust participation in ACP in all regions of the country.

## **VIII. Transition from EBB to ACP**

NCLC and UCC MJ strongly support a seamless transition for EBB participants who are eligible for ACP. The ACP legislation indicates Congress intended for a smooth transition, in particular providing for continued up to \$50 in monthly support for non-tribal participants for two additional months after EBB ends.<sup>99</sup> We support a decision to transition all EBB consumers to ACP on December 31, 2021 and then to focus on educating former EBB participants as the 60-day transition period occurs on March 1, 2022.

NCLC and UCC MJ have five core goals for the EBB to ACP transition: 1) minimize bill shock; 2) minimize the number of households that drop off inadvertently; 3) minimize consumer confusion; 4) preserves the consumer's right to choose; 5) ensure all consumers receive information in a way that they can understand—in appropriate languages and with appropriate disability accommodations.

Because of these goals, we believe that the Commission should reconsider its proposal to require all EBB participants to affirmatively opt-in to ACP. It is very difficult for low-income households to move through processes to apply for and select a broadband product.<sup>100</sup> Many of

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<sup>97</sup> PN at ¶118.

<sup>98</sup> PN at ¶118.

<sup>99</sup> IJJA, div. F, tit. V, § 60502(b)(2), (3).

<sup>100</sup> The challenge of overly complex bureaucratic requirements is being more widely understood and addressed. Annie Lowery, “The Time Tax,” *The Atlantic* (July 27, 2021),

the current EBB participants moved through a relatively complex process and it would not be sound to require them to opt-in because, in all likelihood, most of these vulnerable consumers will not respond to requests to opt-in and therefore will lose connectivity.

In addition to the information we outlined above in the promoting awareness disclosures—including, most important, information about consumer protection provisions and opportunities to select an alternate product or alternate provider—we recommend the following policies and communications to EBB consumers moving to ACP:

- All EBB participants should receive clear and repeated notice that the program is transitioning and they may opt out or choose an alternative provider at any time.
- Permit, in the first transition period, an opt-out transition if the consumer is on a product that will not incur any cost in the transition from a \$50 EBB benefit to a \$30 ACP benefit.
- If a provider can provide a different product for the consumer that will not result in a co-payment, the provider may notify the consumer and offer a consumer a choice of alternative arrangements via an opt-out system.
- If a provider’s post March 1, 2022 service will require the household paying more than they paid pre March 1, 2022, the consumer must opt-in to continuing service under those terms.
- Clarify for consumers that if they lose access to product because their provider cannot transition them to a product that will not result in a co-pay, these consumers do not need to reapply to the ACP to demonstrate their eligibility, they may easily continue with the ACP program by selecting a new provider.

At the same time that NCLC and UCC MJ believe that consumers should receive an additional opportunity to educate themselves and learn about alternate products and opportunities. Therefore, any consumer who automatically transitioned to a new product via the opt-out mechanism in March should be given additional notices in August 2022 that they may

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<https://www.theatlantic.com/politics/archive/2021/07/how-government-learned-waste-your-time-tax/619568/>; Civilla and Michigan Department of Health and Human Services, “Project Re:New Designing simple and intuitive renewals for Michigan’s largest assistance programs” (2019) <https://static1.squarespace.com/static/5d05998888b6c9000122325d/t/5de978d72fe4683bc4aaee60/1575581928117/Civilla+Project+ReNew+Report.pdf>.

choose alternate products and providers; that they benefit from consumer protection rules; and may file a complaint at the FCC if needed.

## **IX. Conclusion**

The Commission should adopt the recommendation herein in order to create the best program for low-income consumers to receive the Congressionally-created broadband service discounts.

Respectfully submitted,

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