Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Telecommunications Carriers Eligible to Receive Universal Service Support	)	WC Docket No. 09-197
Kajeet Inc.	)	
Petition for Streamlined Designation as a Lifeline Broadband Provider Eligible Telecommunications Carrier	)	

REQUEST OF THE PUBLIC UTILITY DIVISION OF THE OKLAHOMA CORPORATION COMMISSION TO HOLD IN ABEYANCE THE APPLICATION OF KAJEET INC. FOR FCC DESIGNATION AS A LIFELINE BROADBAND PROVIDER ELIGIBLE TELECOMMUNICATIONS CARRIER

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SUMMARY

The Public Utility Division of the Oklahoma Corporation Commission ("PUD") requests that the Federal Communications Commission ("FCC" or "Commission") hold in abeyance the processing of the application by Kajeet Inc. ("Kajeet") requesting designation as a Lifeline Broadband Provider ("LBP") eligible telecommunications carrier ("ETC"), pursuant to Section 214(e) of the Communications Act of 1934, as amended ("Act"), and Sections 54.201 and 54.202 of the FCC's rules.

Kajeet's request seeks an LBP ETC designation in Oklahoma, in addition to other jurisdictions. Kajeet does not currently hold ETC designation from the Oklahoma Corporation Commission ("OCC"). Kajeet also asserts that its application qualifies to be processed on a streamlined basis under 47 C.F.R. §54.202(d)(1) and should be granted within 60 days. Where ETC designations in Oklahoma have historically been granted by the OCC in accordance with Section 214(e)(2) of the Act, this application represents one of the first requests for an ETC designation from which the states are preempted from granting, leaving such designation the exclusive domain of the FCC.[1]

There are two significant unresolved questions raised by the preemption of the states' authority to designate LBP ETCs. One being whether or not the FCC has authority to preempt the states, and to issue its own designations. The United States Court of Appeals is currently

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[1] 47 C.F.R §54.201(j)

reviewing this important question.[2] The other significant unresolved question is what role, if any, state regulatory agencies, such as the PUD, will have in monitoring the activities of these federally designated LBP ETCs and enforcing the applicable state and federal Lifeline rules. This question, as well as several closely related issues, are currently before the FCC in the form of a Petition for Clarification filed by the Pennsylvania Public Utility Commission.[3]

PUD reviews and provides recommendations in response to requests for ETC designation filed with the OCC. Further, PUD, through its Consumer Services group, also engages in monitoring and enforcement activities to ensure ETCs adhere to state and federal rules and laws regarding the provision of Lifeline services in Oklahoma. As such, PUD is concerned about the potential negative impacts to the Lifeline market if the FCC grants ETC designation where statutory authority does not exist and the loss of what, to date, has been effective oversight by states, such as Oklahoma, of the ETCs participating in the Lifeline market. The state oversight includes the implementation and enforcement of protections to guard against waste, fraud and abuse in the Lifeline program.

Given that these important questions are pending before the FCC and the DC Circuit, which will provide necessary clarity to these concerns, PUD believes the best and most prudent course would be to hold the processing of this application in abeyance until these issues have been resolved. Of critical concern is that the streamlined process for designating LBP ETCs will, if followed, result in the *automatic* grant of the requested designation in 60 days, well before the benefit of the rulings of the FCC and DC Circuit can be known and acted upon. (emphasis added) Accordingly, PUD would further request that the FCC notify Kajeet that its

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[2] *See, National Association of Regulatory Utility Commissioners v. Federal Communications Commission and the United States of America* Case No. 16-1170 Petition for Review (filed June 3, 2016).

[3] *See, Petition for Clarification of the Pennsylvania Public Utility Commission*, WC Docket Nos. 11-42, 09-197, and 10-90, dated June 23, 2016.

application will not be deemed granted in 60 days, thereby stopping the "clock" and then hold the processing of the application in abeyance until such time as the critical issues of authority and enforcement can be resolved. Such a step by the FCC is clearly within its authority as the rule, at 47 C.F.R. §54.202(d)(1), specifically provides that the FCC can notify the common carrier that "the grant will not be automatically effective." Further, a decision to hold Kajeet's application in abeyance would be congruent with the FCC's request that the DC Circuit Court hold the consolidated cases, which include NARUC's Petition for Review, in abeyance pending action by the FCC on petitions for administrative reconsideration and clarification (this would include the Pennsylvania Public Utility Commission's Petition for Clarification) of the order under review.[4]

For these reasons, PUD respectfully requests that the FCC notify Kajeet that its application will not be granted automatically within 60 days and then hold the processing of the application in abeyance until the question of designating authority has been resolved and clarification has been provided as to the enforcement responsibilities and capabilities of state regulatory agencies with regard to the LBP ETCs.

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[4] *See,* Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C. *et al.,* Case Nos. 16-1170 and 16-1219, (2016 D.C. Cir.) Motion of the FCC to Hold Case in Abeyance and to Defer the Filing of the Record. (filed September 29, 2016)

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Kajeet Inc. ("Kajeet") has requested that the Federal Communications Commission ("FCC" or "Commission") grant it designation as an Eligible Telecommunications Carrier ("ETC") under the FCC's newly created Lifeline Broadband Provider ("LBP") classification, established by the Lifeline Modernization Order[5] and pursuant to "Section 214(e) of the Communications Act of 1934, as amended ('Act'), and Sections 54.201 and 54.202 of the rules of the Federal Communications Commission ('FCC' or 'Commission')" for the "purpose of receiving universal service Lifeline support for the provision

[5] *See In the Matter of Lifeline and Link Up Reform and Modernization; Telecommunications Carriers Eligible for Universal Service Support; Connect America Fund,* WC Docket Nos. 11-42, 09-197, 10-90, Third Report and Order, Further Report and Order , and Order on Reconsideration, FCC 16-38 (released April 27, 2016) ("Lifeline Modernization Order")

of broadband Internet access service ('BIAS')." Kajeet is requesting LBP ETC designation in all 50 states, including Oklahoma, the District of Columbia, Puerto Rico and the U.S. Virgin Islands. Kajeet further asserts that it qualifies for the streamlined designation process afforded LBP ETC applications under the Lifeline Modernization Order and 47 C.F.R. §54.202(d)(1).[6] It is the provision in the rules for an LBP ETC application to be "deemed granted within 60 days of the submission" that is of immediate concern to PUD.

Kajeet is not currently designated as a wireless ETC in Oklahoma for purposes of providing Lifeline services for reimbursement from the federal Universal Service Fund. Kajeet has not requested any such ETC designation from the Oklahoma Corporation Commission ("OCC").

Given that the FCC's authority to grant the relief requested by Kajeet is currently the subject of review by the United States Court of Appeals for the District of Columbia[7] and that the FCC has not acted on the very substantive Petition for Clarification of the Pennsylvania Public Utility Commission,[8] PUD would respectfully request that, consistent with 47 C.F.R. §54.202(d)(1), the FCC notify Kajeet that its application will not become effective automatically and then hold processing of this application in abeyance until such time as the Court resolves the questions around the FCC's authority to designate LBP ETCs and the FCC

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[6] If the petitioning common carrier has offered broadband Internet access service to the public for at least two years before the date of filing and serves at least 1,000 non-Lifeline customers with voice telephony and/or broadband Internet access service as of the date of the filing, the common carrier's petition for designation as an Lifeline Broadband Provider eligible telecommunications carrier shall be deemed granted within 60 days of the submission of a completed filing unless the Commission notifies the common carrier that the grant will not be automatically effective.

[7] *See,* Nat'l Ass'n of Regulatory Util. Comm'ers v. F.C.C., *et al.,* Case No. 16-1170 (2016 D.C. Cir.) Petition for Review (filed June 3, 2016).

[8] *See,* Petition for Clarification of the Pennsylvania Public Utility Commission, WC Docket No. 11-42, WC Docket No. 09-197, and WC Docket No. 10-90, dated June 23, 2016.

addresses the important points of clarification requested by the Pennsylvania Public Utility Commission.

I. Background

The OCC has taken an active and effective role in both designating ETCs for purposes of providing Lifeline services as well as enforcing state and federal rules applicable to the offering and provision of Lifeline services in Oklahoma. The OCC has designated twenty-six (26) wireless ETCs for participation in the federal universal service support program, including and/or limited to the Lifeline program, in accordance with 47 U.S.C. §214(e), 47 C.F.R. §54.101, 47 C.F.R. §54.201, 47 C.F.R. §54.202, and 47 C.F.R. §54.207.

Also, the OCC has been proactive in its enforcement of federal and state rules as well as in taking a pro-consumer stance. The OCC has put in place effective rules[9] that have established necessary and useful requirements for ETCs in Oklahoma. For example, the OCC established parameters around the mobile marketing activities in which most wireless ETCs engage in the provision of their Lifeline services.[10] The OCC implemented these rules to ensure that Lifeline consumers could seek and receive service in a safe and reliable manner that would enable them to understand who their provider would be, as well as to know how to go about resolving consumer issues.

As PUD previously indicated in its filed comments,[11] rules were implemented in response to real problems that were being observed. This included "such things as consumers being unable to identify exactly who their Lifeline service provider actually was, let alone how to reach

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[9] OAC 165:55-23-1, *et al*

[10] OAC 165:55-23-16 Limitations on Marketing of Supported Services by ETCs ("Mobile Marketing Rules")

[11] *See, Reply Comments of the Public Utility Division of the Oklahoma Corporation Commission* WC Docket No. 11-42, WC Docket No. 09-197, and WC Docket No. 10-90 (filed August 31, 2015)

that carrier or how to have a problem resolved; Lifeline wireless handsets showing up at crime scenes and drug busts; Lifeline services being marketed and sold out of car trunks at the side of the road and consumers easily acquiring multiple wireless handsets activated for Lifeline service and then selling those handsets to anyone willing and able to come up with the requisite amount of cash."[12]

As a result of PUD's rules and enforcement efforts, ICON Telecom, Inc. relinquished its ETC designation in Oklahoma. [13] This is particularly illustrative as ICON Telecom, Inc. and its owner, Wesley Chew, were ultimately charged and plead guilty to money laundering and making false statements in conjunction with the fraudulent activities ICON Telecom, Inc. engaged in with the federal Lifeline program.[14] Further, at the height of the presence of waste, fraud and abuse in the Lifeline program, Lifeline providers in Oklahoma in 2012 received over $246 million of federal Lifeline support.[15] That federal support was reduced by over 56% to $108 million in 2015.[16] There is no doubt that this reduction was connected to the considerable efforts of the OCC and PUD to bring ETCs in Oklahoma into compliance with federal and state Lifeline rules.

PUD believes that any grant of an application for an LBP ETC designation, in advance of the Court ruling on the FCC's legal authority to do so and prior to the FCC's response to the Pennsylvania Public Utility Commission's Petition for Clarification, could permanently undo the

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12 *Id, at page 3*

13 *See, Cause No. PUD 201300018, Application of Brandy L. Wreath, Director of the Public Utility Division, of the Oklahoma Corporation Commission for a Show Cause Hearing Against ICON Telecom, Inc.* filed February 14, 2013. *See also, Cause No. EN 201300076, Complaint, Information, Summons, and Notice of Citation for Contempt,* filed August 13, 2013. *See also, Cause No. PUD 201300167, In the Matter of the Notification of ICON Telecom, Inc. of Voluntary Relinquishment of ETC Designations,* filed September 17, 2013.

14 *See, U.S. v. Chew, No. CR-14-170-D (W.D. OK, 2014 WL 8108217)*

15 USAC LI05 Annual Low Income Support Amounts by State and Company – January 2012 through December 2014 (http://www.usac.org/about/tools/fcc/filings/2015/q2.aspx)

16 USAC LI05 Annual Low Income Support Amounts by State and Company – January 2013 through December 2015.xls (http://www.usac.org/about/tools/fcc/filings/2015/q2.aspx)

significant benefits associated with the undertaking by states, such as Oklahoma, to administer and enforce the state and federal ETC and Lifeline rules.

The Pennsylvania Public Utility Commission clearly points out the unacceptable tension between the Lifeline Modernization Order's preemption of the states' ability to designate LBP ETCs[17] and the failure to specifically and clearly address what role and authority state commissions will have with regard to enforcement, consumer protection and general oversight of the LBP ETCs designated by the FCC. Without such clarification from the FCC, it can be anticipated that any carrier with an LBP ETC designation for Oklahoma will not be building state requirements, such as Oklahoma's Mobile Marketing Rules, into its processes and procedures. Moving forward with LBP ETC designations without clarification will effectively eviscerate all of the pro-consumer and anti-waste, fraud and abuse programs and efforts implemented and administered by Oklahoma and other states. Additionally, to the extent the Lifeline market in Oklahoma is served by two different types of ETCs (i.e., state designation vs. federal designation) with different obligations, problems such as consumer confusion, delays in complaint resolution, and some ETCs being disadvantaged in the marketplace as compared to others, will negatively impact the entire market. Further, without adequate clarification, such problems begin upon the effective date of an FCC designation of an LBP ETC.

In its recent Public Notice (DA 16-1118, released September 30, 2016) there seems to be an attempt to provide guidance to the states as to their role in regulating LBP ETCs designated by the FCC. The statement at ¶19 is "Indeed, the *Lifeline Modernization Order* preserved the 'roles that states have traditionally played in Lifeline' and recognized the states' ability to regulate ETCs subject to the states jurisdiction and applicable state laws." However, the footnote to this statement references ¶¶ 288-289 of the *Lifeline Modernization Order.* At ¶288 is the

[17] *Lifeline Modernization Order* at ¶*232*

statement "To the extent a provider only seeks the federal LBP, however, providers are not required to seek approval or designation from the states." While PUD would fully anticipate that an ETC seeking designation for purposes of participating in the Oklahoma Lifeline Fund would be subject to the laws and rules of Oklahoma, the fundamental question is what authority a state has to regulate LBP ETCs designated by the FCC for purposes of only receiving federal support for Lifeline service. PUD is concerned that, given the lack of clarity, an LBP ETC would take the position that they are not required to comply with any state regulation of its operation as an LBP ETC, thereby leaving states with the burden to resolve this question.

An even more fundamental problem with the FCC processing the application of Kajeet for designation as an LBP ETC, is that there is an open question as to whether or not the FCC actually has the authority to make such a designation. While the FCC provides its rational as to why states are preempted from designating LBP ETCs, NARUC's Petition for Review[18] points out that the FCC's action is inconsistent with the statutory language at 47 U.S.C. §214(e)(2) which provides states with the authority to designate ETCs, thereby raising a legitimate concern and question. PUD believes that this is a question for the courts and the Court's ruling on this important question is critical in order to correctly implement the process for the newly created LBP ETC designation. The concern today is that to grant Kajeet's application on a streamlined basis with an automatic "deemed granted" result in sixty (60) days will, given that exceptionally short timeline, inappropriately circumvent the Court's review of this important question and potentially disrupt the Lifeline market, causing consumer confusion as well as unnecessary expense and effort by both state regulators and ETCs themselves in the event the court determines that the FCC does not have the authority it will exercise in granting Kajeet's application (whether on a streamlined basis or not).

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[18] *Supra* n.7.

The likelihood that the 60 day clock will run prior to the Court's completion of its review of this question is a certainty. The Motion of the FCC to Hold Case in Abeyance and to Defer the Filing of the Record filed with the Court suggests that allowing the FCC to resolve the administrative reconsideration and clarification petitions "may simplify judicial review by resolving issues that the Court would otherwise need to address, or by clarifying or providing additional analysis of issues that remain in dispute."[19] The filing further indicates that, if the Court decides to hold the cases in abeyance, the FCC is proposing to advise the Court and the parties at 90-day intervals of the status of the agency's proceedings. Given this, it is clear that, unless the FCC takes steps to avoid the streamlined "automatic" 60 day approval process, Kajeet will have its LBP ETC designation and operations underway for a considerable amount of time before all of these important questions are resolved thereby creating a situation that could, at best, create significant impairment to consumers and require considerable effort by and resources from all parties to "undo" the approval and associated operations or, at worst, create a situation that cannot be corrected at all.

II. Relief Requested

For the reasons stated above, PUD respectfully requests that the FCC notify Kajeet that its LBP ETC application will not be granted on a streamlined basis and then hold the processing of the application in abeyance pending further action by the Court and the FCC.

The FCC's rules at 47 C.F.R. §54.202(d)(1) already provide the FCC with the ability to notify Kajeet that grant of their application "will not be automatically effective." This ability and authority exists even if the FCC's review confirms that Kajeet meets the qualifications for the streamlined processing of its LBP ETC application. Once the 60 day "clock" has been

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[19] Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C., *et al.*, Nos. 16-1170 and 16-1219 (2016 D.C. Cir.) Motion of the FCC to Hold Case in Abeyance and to Defer the Filing of the Record at p.6 (filed September 29, 2016)

stopped, the FCC should hold the processing of this application in abeyance pending 1) the DC Circuit Court's ruling on NARUC's Petition for Review; and 2) the FCC's response to the Pennsylvania Public Utility Commission's Petition for Clarification.

The FCC, in taking the requested action, will be able to process Kajeet's application with a full understanding of its authority to grant the relief requested by Kajeet and can take the time to consider Oklahoma's and other states' accomplishments in assisting Lifeline consumers and curtailing waste, fraud and abuse. Thus, the FCC can make a fully informed determination as to whether or not such positive efforts will continue under this newly formed LBP ETC designation process or if the state assisted avoidance of waste, fraud and abuse is going to be abandoned for an, as yet to be defined, alternative structure of regulatory oversight for such carriers.

Respectfully submitted,

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