

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

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| In the Matter of |) | |
| |) | |
| Lifeline and Link Up Reform and Modernization |) | WC Docket No. 11-42 |
| |) | |
| Lifeline and Link Up |) | WC Docket No. 03-109 |
| |) | |
| Federal-State Joint Board on Universal Service |) | CC Docket No. 96-45 |
| |) | |

**NATIONAL LIFELINE ASSOCIATION EMERGENCY PETITION FOR
DECLARATORY RULING REVOKING TEXAS' NATIONAL LIFELINE
ACCOUNTABILITY DATABASE OPT-OUT CERTIFICATION APPROVAL AND
OTHER RELIEF**

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SUMMARY

The National Lifeline Association (NaLA) urgently requests that the Federal Communications Commission (Commission or FCC) immediately revoke its approval of the National Lifeline Accountability Database (NLAD) “opt-out” certification of the Public Utility Commission of Texas (PUCT) and provide other necessary relief to restore Lifeline program integrity, the full ability of low-income Texans to connect to opportunity, healthcare, education, family, and community, and the viability of Texas eligible telecommunications carriers (ETCs) providing the vast majority of that service.

For years, the PUCT, through its Low-Income Discount Administrator (LIDA), has functionally failed to meet the commitments it made to the FCC in its NLAD Opt-Out Certification. The PUCT’s failure to provide an equivalent of the NLAD snapshot report (Snapshot Report) as well as its failures to provide identity or address verification functionality on par with the NLAD have produced dire consequences for the Lifeline-eligible population of Texas and the ETCs that provide the vast majority of Lifeline service to them. Combined with enforcement and audit actions taken by the Commission and the Universal Service Administrative Company (USAC) that rely on improper assumptions and assertions about the PUCT’s processes, the current situation has quickly escalated into a combustible turning point that threatens both Texas ETCs and the Lifeline-eligible low-income consumers who desperately need their assistance to stay connected during the COVID-19 public health crisis and the economic and unemployment disaster it spawned.

Most alarmingly, the PUCT’s failure to produce an equivalent of the NLAD Snapshot Report has not been recognized by the Commission or USAC. Instead, the Commission (and USAC at the agency’s direction) have misplaced reliance on the LIDA’s End-of-Month Discount

Report (EOM Report), treating it as though it is the equivalent of the NLAD Snapshot Report. But the LIDA EOM Report is not and cannot be the equivalent of the NLAD Snapshot Report because it does not include Lifeline subscribers deemed approved by the LIDA’s “real-time” or “near real-time” application programming interface review process after a variable mid-month cutoff date. The FCC’s misplaced reliance on the EOM Report already has resulted in a massive Notice of Apparent Liability (NAL) against an ETC for not treating the EOM Report as the equivalent of the NLAD Snapshot Report. At least one additional investigation centering on the same erroneous theory of liability is at the point where the FCC’s Enforcement Bureau is threatening an additional NAL. Moreover, USAC has issued notices to Texas ETCs at the direction of the Commission’s Wireline Competition Bureau alleging improper payments under the same erroneous theory of liability.

ETCs fearing punitive enforcement actions, crippling “restitution” payments, and the harms imposed by relentless audits, investigations, and a potential string of cookie-cutter NALs have under-claimed for Lifeline support by only filing based on the LIDA EOM Report. This government-induced improper underpayment scenario does tremendous harm to the Lifeline program, Texas ETCs, and the Lifeline-eligible Texans who, as a result of this regulatory morass, are now the costliest Lifeline subscribers to serve in the entire country. Thus, on behalf of Texas ETCs and others unwilling to continue to withstand the unjust and the catastrophic fallout from the PUCT’s failure to meet its NLAD opt-out commitments, NaLA respectfully and urgently requests the Commission expeditiously provide the following relief:

- (1) revoke approval of the PUCT’s NLAD Opt-Out Certification immediately;
- (2) terminate enforcement and audit activity based on the false conclusion that the LIDA EOM Report is the equivalent of the NLAD Snapshot Report; and
- (3) establish a process for ETCs to submit underpayment recovery claims based on the number of Texas Lifeline subscribers served as of the first day of the following month.

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DECLARATORY RULING REVOKING TEXAS’ NATIONAL LIFELINE
ACCOUNTABILITY DATABASE OPT-OUT CERTIFICATION APPROVAL AND
OTHER RELIEF**

The National Lifeline Association (NaLA)¹ hereby requests that the Federal Communications Commission (Commission or FCC) issue an emergency declaratory ruling revoking its approval of the National Lifeline Accountability Database (NLAD) “opt-out” certification of the Public Utility Commission of Texas (PUCT) (Opt-Out Certification) and provide other necessary relief to restore Lifeline program integrity, the viability of Texas eligible telecommunications carriers (ETCs), and the ability of low-income Texans to connect to opportunity, healthcare, education, family, and community.²

¹ NaLA is the only industry trade group specifically focused on the Lifeline segment of the communications marketplace and represents eligible telecommunications carriers serving low-income consumers. It supports eligible telecommunications carriers, distributors, Lifeline supporters and participants, and partners with regulators to improve the program through education, cooperation, and advocacy. *See* NaLA, “About NaLA,” <https://www.nalalifeline.org/home/about-us/>.

² *See* 47 C.F.R. § 1.2 (stating the Commission may “issue a declaratory ruling terminating a controversy or removing uncertainty”); *see also* 47 C.F.R. § 1.1 (stating the Commission may “hold such proceedings as it may deem necessary . . . in connection with the investigation of any matter which it has power to investigate under the law”).

I. TEXAS' FAILURE TO MEET ITS NLAD OPT-OUT COMMITMENTS HAS SPAWNED A STATE OF EMERGENCY REQUIRING URGENT RELIEF TO RESTORE THE INTEGRITY OF THE LIFELINE PROGRAM AND THE FULL ABILITY OF ELIGIBLE TEXANS TO PARTICIPATE IN IT

For years, the PUCT, through its Low-Income Discount Administrator (LIDA), has failed to meet the commitments it made to the Commission in its NLAD Opt-Out Certification.³ The PUCT's failure to provide an equivalent of the NLAD end-of-the month snapshot report (Snapshot Report) as well as its failures to provide identity or address verification functionality on par with the NLAD have produced dire consequences for the ETCs and Lifeline-eligible population of the nation's second most populous state. Combined with enforcement and audit actions taken by the Commission and the Universal Service Administrative Company (USAC) that rely on improper assumptions and assertions about the PUCT's processes, the current situation has quickly escalated into a combustible turning point that threatens both Texas ETCs and the Lifeline-eligible low-income consumers who desperately need their assistance to stay connected during the COVID-19 public health crisis and the economic and unemployment disaster it spawned.⁴

Most alarmingly, the PUCT's failure to produce an equivalent of the NLAD Snapshot Report has not been recognized by the Commission or USAC. Instead, the Commission (and USAC at the agency's direction) have misplaced reliance on the LIDA's End-of-Month Discount Report (EOM Report), treating it as though it is the equivalent of the NLAD Snapshot Report.

³ See Amendment to the Petition to Opt-Out of the Nat'l Database Pursuant to C.F.R. 47 54.404(a) by the Pub. Util. Comm'n of Tex., 7-26 (Nov. 16, 2012) (Opt-Out Certification). Solix, Inc. serves as the PUCT's LIDA. *Id.* at 2.

⁴ See, e.g., *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, Order, DA 20-354, ¶ 2 (WCB 2020) (waiving Lifeline rules and ordering USAC to pause involuntary Lifeline de-enrollments as a result of the COVID-19 public health crisis to ensure eligible Lifeline subscribers retain access to service).

But as explained below, the LIDA EOM Report is not and cannot be the equivalent of the NLAD Snapshot Report because it does not include Lifeline subscribers deemed approved by the LIDA’s “real-time” or “near real-time” application programming interface (API) review process after a variable mid-month cutoff date when Texas ETCs submit subscriber information to the LIDA. The following table illustrates the differences between the inadequate LIDA EOM Report in Texas and the process in a state using the NLAD.

Table 1. How Exclusive Reliance on the LIDA EOM Report Shortchanges Texas Consumers and ETCs

| Scenario | Texas/LIDA Process Alleged in the TracFone NAL | Ohio/NLAD Process | Proper Texas/LIDA Process |
|--|--|--|--|
| Customer A | | | |
| API Query and Approval Date | January 10 th | January 10 th | January 10 th |
| Customer Appears on Report | January 31 st (EOM Report) | February 1 st (Snapshot Report) | January 31 st (EOM Report) |
| ETC/Customer Eligible for Lifeline Subsidy | February 1 st | February 1 st | February 1 st |
| Customer B | | | |
| API Query and Approval Date | January 20 th | January 20 th | January 20 th |
| Customer Appears on Report | February 28 th (EOM Report) | February 1 st (Snapshot Report) | February 28 th (EOM Report) |
| ETC/Customer Eligible for Lifeline Subsidy | <i>March 1st</i> | February 1 st | February 1 st |

Therefore, using the EOM Report exclusively and not including those subscribers approved by the API review process for purposes of Lifeline reimbursement claims would: (1) contravene the Commission’s snapshot rule, which stated during the applicable time period that “[u]niversal service support for providing Lifeline shall be provided directly to an [ETC] based on the number actual qualifying low-income customers it serves directly as of the first day of the

month;”⁵ and (2) require revocation of the Texas NLAD opt-out because, without counting the API review process, the Texas system would not be at least as robust as the NLAD because it would not have the capability to receive and process information provided by ETCs both in real-time and via periodic batches, and allow ETCs to submit queries regarding a Lifeline applicant’s eligibility for the program as required by its NLAD opt-out.⁶

To date, the FCC’s misplaced reliance on the EOM Report has resulted in a massive Notice of Apparent Liability (NAL) seeking more than \$5 million in civil penalties against an ETC for not treating the EOM Report as the equivalent of the Snapshot Report, for which it cannot possibly be a substitute.⁷ At least one additional investigation centering on the same erroneous theory of liability is at the point where the FCC’s Enforcement Bureau (EB) is threatening an additional NAL. Moreover, USAC has issued notices to Texas ETCs at the direction of the Commission’s Wireline Competition Bureau (WCB) alleging improper payments under the same erroneous theory of liability. These notices seek restitution of millions of dollars in support for discounted Lifeline service already provided to eligible subscribers in reliance on the LIDA’s API-based online eligibility determinations, as if that bell somehow could be un-rung.

ETCs fearing punitive enforcement actions, crippling restitution payments, and the harms imposed by relentless audits, investigations, and a potential string of cookie-cutter NALs not seen since the FCC’s 2013-14 misguided series of “IDV Duplicate NALs” (that saw over

⁵ 47 C.F.R. § 54.407(a) (2018).

⁶ The NLAD accepts real-time enrollments during the entire month and includes those subscribers in its NLAD Snapshot Report. Therefore, the LIDA must also have that capability to be at least as robust as the NLAD in order to maintain the PUCT’s opt-out of the NLAD.

⁷ See *TracFone Wireless, Inc.*, File No. EB-IHD-18-00027738, Notice of Apparent Liability for Forfeiture and Order, FCC 20-45 (2020) (TracFone NAL).

\$100,000,000 in fines proposed without a single dollar collected through forfeiture and barely more than \$2,000,000 collected through voluntary settlements with no admissions of liability),⁸ have under-claimed for Lifeline support by only filing for reimbursement based on the EOM Report. This government-induced improper underpayment scenario does tremendous harm to the Lifeline program, the ETCs who provide service in reliance on independent real-time eligibility determinations but then are unable to recover legally-mandated Lifeline discounts already provided, and the Lifeline-eligible Texans who, as a result of this regulatory morass, are now the costliest Lifeline subscribers to serve in the entire country.

This game of regulatory roulette whereby ETCs provide discounted Lifeline service as required and then are presented with the false choice of not getting reimbursed or facing massive audit and enforcement exposure must stop. If the PUCT has approved an applicant in real-time or near real-time as being eligible and the ETC provides Lifeline service to that person as of the first day of the following month, then the Commission's rules clearly establish that the ETC is entitled to reimbursement. Unless and until those rules change (again), neither the PUCT, nor the FCC, nor USAC is free to compel a different outcome. This petition is part of the effort to pause and reverse efforts to compel a different outcome. This petition seeks to thereby restore integrity to the Lifeline program in Texas with the simple goal of upholding the fair and

⁸ See *Bridging the Digital Divide for Low-Income Consumers, et al.*, WC Docket No. 17-287, *et al.*, Fifth Report and Order, Memorandum Opinion and Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 19-111, ¶ 16, n.50 (2019) (listing the IDV Duplicate NALs) (2019 Lifeline Fifth Report and Order); see also *Cintex Wireless, LLC*, File No. EB-IHD-13-00010671, Consent Decree, FCC 17-173 (2017) (settling NAL with no admission of liability); *Easy Tel. Servs. d/b/a Easy Wireless*, File No. EB-IHD-13-00010590, Consent Decree, FCC 17-174 (2017) (same); *Global Connection Inc. of Am. d/b/a Stand Up Wireless*, File No. EB-IHD-13-00010970, Consent Decree, FCC 17-175 (2017) (same); *i-wireless, LLC*, File No. EB-IHD-13-00010656, Consent Decree, FCC 17-176 (2017) (same); *Telrite Corp. d/b/a Life Wireless*, File No. EB-IHD-13-00010674, Consent Decree, FCC 17-177 (2017) (same).

reasonable inducement enshrined in the Commission’s rules: provide discounted service to those independently approved as being eligible for Lifeline support and the Commission will reimburse an ETC for providing that public service. Thus, on behalf of Texas ETCs and others unwilling to continue to withstand injustice and the catastrophic fallout which cascades from the PUCT’s failure to meet its NLAD opt-out commitments, NaLA respectfully and urgently requests the Commission expeditiously provide the following relief:

- (1) revoke approval of the PUCT’s NLAD Opt-Out Certification immediately;
- (2) terminate enforcement and audit activity based on the false conclusion that the LIDA EOM Report is the equivalent of the NLAD Snapshot Report; and
- (3) establish a process for ETCs to submit underpayment recovery claims based on the number of Texas Lifeline subscribers served as of the first day of the following month.

The Commission’s goal to “Keep Americans Connected” requires bold action and, because the PUCT has not met its NLAD opt-out commitments, the Commission must not hesitate to act to avert and amend the harms caused to Texas ETCs and the low-income Texans they serve.⁹

Decisive action is required now to restore Lifeline program integrity, ETC viability in Texas, and the full ability of Lifeline-eligible low-income Texans to connect to opportunity, healthcare, education, family, and community.

II. TEXAS’ NLAD OPT-OUT CERTIFICATION APPROVAL MUST BE REVOKED IMMEDIATELY

The Commission must revoke its approval of the PUCT’s NLAD Opt-Out Certification immediately because the LIDA does not provide a comprehensive system for the verification and

⁹ See *Chairman Pai Launches the Keep Americans Connected Pledge*, FCC Press Release (Mar. 13, 2020), <https://docs.fcc.gov/public/attachments/DOC-363033A1.pdf> (asking voice and broadband providers to take action to prevent consumers from losing service during the COVID-19 public health crisis). NaLA and many of its members individually have committed to the Chairman’s “Keep Americans Connected” Pledge.

enrollment of Lifeline subscribers in Texas that is “at least as robust as” the processes adopted by the Commission for the NLAD.

A. Background

The Commission established the NLAD in the 2012 Lifeline Reform Order to help determine Lifeline applicant eligibility by preventing duplicate subscriber enrollments.¹⁰ The Commission required the NLAD to perform certain “core functions,” including the ability to receive and process subscriber information from ETCs in real-time and allow ETCs to query the database to determine a Lifeline applicant’s eligibility for the program.¹¹ The Commission also required the NLAD to provide processes for verifying a Lifeline applicant’s identity and address information provided at enrollment.¹²

Recognizing that certain states already had deployed their own Lifeline systems, the Commission permitted states to opt-out of the NLAD under limited circumstances.¹³ Specifically, the Commission allowed states to opt-out if they certified that they implemented a comprehensive system that is “at least as robust as the processes adopted by the Commission” for the NLAD.¹⁴ The Commission required states seeking to opt-out to describe how their systems provide “each functionality” of the NLAD in accordance with the rules governing the

¹⁰ *Lifeline and Link Up Reform and Modernization, et al.*, WC Docket No. 11-42, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11, ¶ 179 (2012) (2012 Lifeline Reform Order).

¹¹ *Id.* The NLAD’s eligibility screens are generally designed to prevent duplicative support and disbursements. The National Verifier screens program and income eligibility.

¹² *Id.* at ¶¶ 193, 201.

¹³ *Id.* at ¶ 221. *See* 47 C.F.R. § 54.404(a) (authorizing states to opt-out of the NLAD).

¹⁴ 2012 Lifeline Reform Order at ¶ 221. *See* 47 C.F.R. § 54.404(a) (requiring the state system to be “at least as robust as the system adopted by the Commission”).

database.¹⁵ As mandated by the 2012 Lifeline Reform Order, the WCB issued a Public Notice setting out the requirements for a state to demonstrate that it implemented a comprehensive system “at least as robust” as the NLAD processes.¹⁶ The NLAD Opt-Out Public Notice included specific process requirements for real-time ETC subscriber updates and queries as well as subscriber identity and address verifications.¹⁷

The PUCT subsequently filed an Opt-Out Certification that its LIDA purportedly provides a comprehensive system that is at least as robust as the NLAD processes.¹⁸ The PUCT Opt-Out Certification was granted automatically after 90 days.¹⁹ However, as demonstrated below, the LIDA fails to provide many NLAD “core functions,” including those related to real-time subscriber updates used to create a snapshot report for ETCs to use when claiming Lifeline reimbursement as well as subscriber identity and address verifications. Consequently, the LIDA fails to provide a comprehensive system that is “at least as robust as” the NLAD processes and the Commission must revoke the PUCT’s NLAD Opt-Out Certification approval immediately.

B. Texas’ NLAD Opt-Out Certification Approval Must Be Revoked Because the LIDA Fails to Provide an Equivalent of the Snapshot Report

The Commission must revoke its approval of the PUCT’s NLAD Opt-Out Certification because the LIDA EOM Report does not and cannot serve as a substitute for the NLAD Snapshot

¹⁵ 2012 Lifeline Reform Order at ¶ 221. *See* 47 C.F.R. § 54.404(a) (stating the opt-out certification must detail how the state system performs the “equivalent functions” of the NLAD).

¹⁶ 2012 Lifeline Reform Order at ¶ 221, n. 582. *Wireline Competition Bureau Clarifies Minimum Requirements for States Seeking to Opt Out of Nat’l Lifeline Accountability Database*, WC Docket No. 11-42, *et al.*, Public Notice, DA 12-1624 (WCB 2012) (NLAD Opt-Out Public Notice).

¹⁷ NLAD Opt-Out Public Notice at 2-3.

¹⁸ Opt-Out Certification at 2.

¹⁹ *See* 2012 Lifeline Reform Order at ¶ 221 (describing automatic opt-out certification approval process); 47 C.F.R. § 54.404(a) (same).

Report. Moreover, the LIDA EOM Report does not represent the exclusive mechanism through which Texas ETCs can determine Lifeline applicant eligibility. The LIDA also provides real-time and near real-time Lifeline applicant eligibility determinations through the API review process, and ETCs must provide Lifeline service to subscribers after receipt of an API approval. Thus, the LIDA's failure to produce an NLAD Snapshot Report equivalent that includes API-determined eligible subscribers harms ETCs as well as Lifeline-eligible Texans and results in improper underpayments. Therefore, the Commission must revoke its approval of the PUCT's NLAD Opt-Out Certification.

1. The LIDA EOM Report Does Not and Cannot Serve as a Substitute for the NLAD Snapshot Report

The LIDA EOM Report is not a substitute for the NLAD Snapshot Report. In the 2012 Lifeline Reform Order, the Commission determined that the NLAD (and therefore any state opt-out system) must have the capability to receive and process information provided by ETCs both in real-time and via periodic batches, and allow ETCs to submit queries regarding a Lifeline applicant's eligibility for the program.²⁰ The NLAD Opt-Out Public Notice reiterated that state systems must be capable of "real-time" updates and facilitate ETC queries "prior to enrolling" new subscribers.²¹

²⁰ 2012 Lifeline Reform Order at ¶¶ 198-99 ("We...require that the database must be capable of receiving and processing data provided by ETCs both in real-time and via periodic batches" and "[o]nce the database receives the necessary information from ETCs, it is equally important that ETCs and other authorized parties be able to query the database to determine if prospective subscribers are already receiving support from another ETC").

²¹ NLAD Opt-Out Public Notice at 2-3 ("[T]he state must demonstrate that the system on which it bases the opt-out request...has the capability of receiving updates from ETCs both in real-time and in periodic batches" and "includes a means for ETCs...to query the system prior to enrolling the subscriber to determine if the subscriber or anyone in the subscriber's household is already receiving duplicative support.").

The NLAD is updated with new subscriber enrollments in real-time, which enables ETCs to provide Lifeline service immediately after an API-based eligibility approval and allows USAC to produce the Snapshot Report.²² The Snapshot Report is taken on the first of the month and shows an ETC's NLAD subscriber count for the prior month.²³ Critically, the Snapshot Report includes all subscribers enrolled with the ETC in the NLAD in the prior month and served as of the first of the following month.²⁴ ETCs use the Snapshot Report in non-opt-out states to determine their Lifeline reimbursement claims in accordance with the Commission rule dictating that Lifeline support “shall be provided directly to an eligible telecommunications carrier based on the number of actual qualifying low-income customers listed in the National Lifeline Accountability Database that the eligible telecommunications carrier serves directly as of the first of the month.”²⁵

²² *Wireline Competition Bureau Provides Guidance on the Lifeline Reimbursement Payment Process Based on NLAD Data*, WC Docket No. 11-42, Public Notice, DA 18-30, 1 (WCB 2018) (WCB NLAD Guidance) (stating that the Snapshot Report “show[s] the ETC’s subscriber count for the prior month,” which is “based on data received either from the state or directly from the ETC”); *see also* USAC, “National Lifeline Accountability Database (NLAD),” <https://www.usac.org/lifeline/enrollment/national-lifeline-accountability-database-nlad/> (“The National Lifeline Accountability Database (NLAD) allows service providers to check on a real-time, nationwide basis whether a consumer is already receiving a Lifeline Program-supported service”); USAC, NLAD User Guide for Release 4.1.0, 83-86 (July 19, 2018) (describing how ETCs access and use the Snapshot Report).

²³ WCB NLAD Guidance at 1. *See Lifeline and Link Up Reform and Modernization, et al.*, WC Docket No. 11-42, *et al.*, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, FCC 15-71, ¶¶ 241-42 (2015) (establishing the current subscriber snapshot process).

²⁴ The Snapshot Report is the part of NLAD’s duplicate screening functionality that prevents more than one ETC from claiming reimbursement for a Lifeline subscriber in any given month (*i.e.*, it is an NLAD process for barring duplicate claims).

²⁵ 47 C.F.R. § 54.407(a). *See TracFone NAL* at ¶ 9 (“To promote efficiency and ease of administration of the Lifeline eligibility rules, support payments are based on the number of actual qualifying low-income customers being served by an ETC on the ‘snapshot date’ for that month, which is taken on the first of the month and shows the ETC’s subscriber count for the prior month.”).

By contrast, the LIDA EOM Report is not based on real-time subscriber data because it does not include real-time subscriber updates from ETCs for the entire month. Instead, the EOM Report only includes the subscribers enrolled by a variable mid-month cutoff date when ETCs submit subscriber information to the LIDA.²⁶ Under this process, an eligible Texas Lifeline subscriber enrolled at the beginning of a month should appear on the ETC's next EOM Report. However, an eligible Texas Lifeline subscriber enrolled between the mid-month cutoff and the end of a month would not appear on the ETC's next EOM Report (or sometimes even on the following EOM Report). In other words, the EOM Report contains an unacceptable "data lag" that results in the omission of LIDA-approved eligible Texas Lifeline subscribers that are receiving Lifeline-supported discounted service from the list.²⁷ Accordingly, the EOM Report does not provide for real-time subscriber updates and does not include all of the eligible Lifeline subscribers served by a Texas ETC for the prior month as determined on the first of the following month.²⁸ The LIDA EOM Report therefore cannot be considered or used as a

²⁶ See LIDA, "LITE-UP Texas TSP Requirements," 2, 5-14 (Oct. 6, 2015) (describing LIDA processes for producing EOM Report) (Texas TSP Instructions to ETCs); LIDA, "LITE-UP Texas TSP Requirements – Pre-Paid Lifeline Supplement," 2, 5-8 (Feb. 17, 2016) (same); see also PUCT, Prepaid Schedule: 2019-2020, https://www.puc.texas.gov/industry/communications/forms/Lifeline/TSP_FY_20_Prepaid.pdf (listing the mid-month ETC subscriber data submission cutoff dates).

²⁷ Although this is the most obvious problem, this may not be the only data lag or problem with the EOM Report failing to include all LIDA-approved eligible Lifeline subscribers. Carriers have reported other problems, as well.

²⁸ The fact that the EOM Report does not come out on the first of the month, and purports to make no statement whatsoever as to which of the subscribers previously approved by LIDA as being eligible retain "eligible" status as of the first day of the following month, is the least of this report's fatal flaws. The fact that it by design excludes any subscribers enrolled and served based on a LIDA eligibility approval obtained after the mid-month submission of ETC data renders irrational any reliance placed on the EOM Report as the "determinative" piece of PUCT-provided information that can be used to establish the first-of-the-month snapshot for Texas. At present, the most rational way to use PUCT-provided information to arrive at a first-of-the-

substitute for the NLAD Snapshot Report. As a result, based solely on its EOM Report, the LIDA fails to provide a comprehensive system that is “at least as robust as” the NLAD processes. Thus, if the PUCT were to claim that the LIDA EOM Report is the equivalent of the NLAD Snapshot Report for the purpose of determining ETC Lifeline reimbursement, then the Commission must revoke its approval of the PUCT’s NLAD Opt-Out Certification.

2. The LIDA Provides Real-Time and Near Real-Time Lifeline Subscriber Eligibility Determinations, as Required By the PUCT’s NLAD Opt-Out Certification

The LIDA EOM Report does not represent the only mechanism through which Texas ETCs can determine Lifeline subscriber eligibility. As noted in the PUCT’s Opt-Out Certification, “ETCs are also able to access the LIDA system to conduct real-time verifications of Lifeline customer eligibility.”²⁹ According to the PUCT, this process allows ETCs “to query the LIDA database *to identify eligible customers,*” with “the LIDA system generat[ing] a real-time response detailing whether the identified customer *is eligible for Lifeline.*”³⁰

The LIDA currently facilitates real-time and near real-time Lifeline applicant eligibility queries and determinations through its online API review process.³¹ The LIDA API review process “was designed to allow carriers [to] submit an applicant for a Real-Time or Near-Real-

month snapshot is to review the LIDA’s post mid-month API approvals and the month-end “de-enroll report” along with the EOM Report.

²⁹ Opt-Out Certification at 7. *See id.* at 24 (“ETCs have the ability to conduct real-time transactions, including to verify customer Lifeline eligibility.”)

³⁰ *Id.* at 12 (emphasis added).

³¹ Solix, Inc., “Near-Real-Time Web Service API User Guide” (Nov. 29, 2017) (LIDA API User Guide). *See* The Pub. Util. Comm’n of Tex. Comments in Response to the Fed. Commc’ns Comm’n Second Further Notice of Proposed Rulemaking, WC Docket No. 11-42, *et al.*, 6 (Aug. 31, 2015) (stating the LIDA system provides API access to Texas ETCs).

Time review” by the LIDA.³² Upon receiving a Lifeline applicant’s information, the LIDA API review process either “[r]enders a decision immediately (Real-Time review)” or “[q]ueues the application for a review by a Solix reviewer (Near-Real-Time review).”³³ The LIDA API review process also will “return a pre-approval response when an application review results in approval but the phone number was not present in the initial submission.”³⁴ The LIDA API review process checks the Lifeline applicant’s information based on a number of factors, including whether the applicant is a duplicate of an existing subscriber, before issuing an eligibility determination.³⁵ Critically, the LIDA states that “[t]he goal [of the API review process] is to provide the customer with a decision within 10 minutes of complete data submission” and ETCs “have the opportunity to submit customer supporting documentation and expect a decision response within the 10-minute target guideline.”³⁶

The characteristics of the LIDA API review process clearly show that it is a separate mechanism for Texas ETCs to determine a Lifeline applicant’s eligibility apart from the EOM Report. Indeed, the LIDA’s PUCT contract requires it to allow ETCs to “verify a potential customer’s eligibility outside of the monthly process” by using the API “to obtain the eligibility status of a Customer in real time.”³⁷ Moreover, NaLA members have observed that API-

³² LIDA API User Guide at 6.

³³ *Id.*

³⁴ *Id.* (for carriers that prefer not to assign a phone number until after the applicant is pre-approved). These pre-approvals are valid for a period of time, after which they expire and the application process must be started over. *Id.*

³⁵ *Id.* at 26, 41-42 (listing “duplicate customer found” as a potential error code and “[Near Real-Time] Duplicate” as a reason for Lifeline application denial in the LIDA API review process).

³⁶ *Id.* at 13.

³⁷ Contract No. 473-15-00330 Between the Pub. Util. Comm’n of Tex. And Solix, Inc., 18 (Aug. 31, 2015). *See* Contract No. 473-19-00005 Between the Pub. Util. Comm’n of Tex. And Solix,

determined eligible Lifeline subscribers have appeared on the LIDA’s monthly subscriber de-enrollment report, indicating that these subscribers were enrolled in Lifeline and received Lifeline service from an ETC (and therefore must be de-enrolled), even when they never appeared on an EOM Report. Importantly, unlike the EOM Report, the LIDA API review and eligibility determination process complies with the requirements of the 2012 Lifeline Reform Order and NLAD Opt-Out Public Notice by having the capability to receive and process ETC subscriber updates and respond to ETC eligibility queries in real-time.³⁸ Consequently, the LIDA API-based eligibility determinations are sufficient to support a Texas ETC’s Lifeline reimbursement claims, barring inclusion of a LIDA API-approved subscriber on the LIDA’s end-of-month de-enroll report.

3. ETCs Must Provide Discounted Lifeline Service to Subscribers After Receipt of a LIDA API Approval and Therefore Must Receive Reimbursement for Providing Such Service

Texas ETCs must be able to rely on LIDA API-based eligibility determinations because they must provide Lifeline service to subscribers after receipt of an API approval. Commission rules require ETCs to make Lifeline service available “to qualifying low-income consumers.”³⁹ As demonstrated above, an ETC can submit a Lifeline applicant’s information to the LIDA API review process and receive an approval in real-time (or near real-time) that the applicant is a qualifying low-income consumer, triggering the ETC’s Lifeline service obligation. Further, ETCs must receive reimbursement for providing such Lifeline service under federal law and the Commission’s rules. Section 214 of the Communications Act requires ETCs to offer Lifeline

Inc., 23-24 (Dec. 27, 2019) (stating that the LIDA “must provide an online system for a Prepaid TSP to verify a potential customer’s availability on demand”).

³⁸ See 2012 Lifeline Reform Order at ¶¶ 198-99; NLAD Opt-Out Public Notice at 2-3.

³⁹ 47 C.F.R. § 54.405(a).

services “that are supported by Federal universal service support mechanisms.”⁴⁰ Under FCC rules, the supported service is the discounted voice/broadband service – *i.e.*, service for which the discount is applied for the subscriber and the Lifeline support amount is provided to the ETC.⁴¹ Simply put, ETCs cannot offer “supported” Lifeline service to eligible subscribers under federal law if they do not receive reimbursement through the Lifeline program because unreimbursed service is, by definition, not Lifeline service.

In addition, Texas regulations state that an ETC “shall only provide Lifeline Service to all eligible customers identified by LIDA” through certain procedures.⁴² Under one such procedure, an ETC identifies on the LIDA’s “initial database” those customers to whom it is providing service and must “begin reduced billing for those qualifying low-income consumers.”⁴³ As explained above, an ETC can query the LIDA database in real-time (or near real-time) through the API review process to identify to LIDA those customers to whom it is providing service that qualify for Lifeline, and would be required to provide discounted Lifeline service to such qualifying customers under Texas rules.⁴⁴

The Texas regulations also state that an ETC must provide discounted Lifeline service to qualifying low-income consumers listed on the LIDA EOM Report within 30 days.⁴⁵ But

⁴⁰ 47 U.S.C. § 214(e).

⁴¹ See 47 C.F.R. §§ 54.401(a) (defining Lifeline service as a “retail service offering provided directly to qualifying low-income consumers . . . [f]or which qualifying low-income consumers pay reduced charges *as a result of application of the Lifeline support amount*”) (emphasis added), 54.403(b) (requiring ETCs to apply the Lifeline support amount “to reduce the cost” of the supported service).

⁴² 16 Tex. Admin. Code § 26.412(g)(2)(A).

⁴³ 16 Tex. Admin. Code § 26.412(g)(2)(A)(i).

⁴⁴ *Id.*

⁴⁵ 16 Tex. Admin. Code § 26.412(g)(2)(A)(iv).

nothing in the state regulations requires or even suggests that the EOM Report is the sole avenue for Texas ETCs to identify Lifeline-eligible subscribers. The LIDA API review process provides a real-time (or near real-time) process for determining Lifeline applicant eligibility and identifying Lifeline subscribers served to LIDA that can be used by Texas ETCs to support their Lifeline reimbursement claims. This must be the case. Otherwise, the Texas rules would not permit real-time ETC subscriber updates and queries, as required by the 2012 Lifeline Reform Order, NLAD Opt-Out Public Notice, and PUCT Opt-Out Certification.⁴⁶ If a Texas ETC cannot use the LIDA API-based eligibility determination process to confirm a subscriber's eligibility, provide Lifeline-discounted service, and seek Lifeline support reimbursements for such service, then the LIDA API process serves no purpose.

Moreover, if, as the Commission claims in the TracFone NAL, the EOM Report serves as a complete and exclusive snapshot of valid, eligible Lifeline recipients notwithstanding its exclusion of subscribers that were determined to be eligible for Lifeline service pursuant to the API-approval process after the mid-month cutoff date, the LIDA system necessarily violates the Commission's snapshot rule, which permits ETCs to claim support for the "actual" number of qualifying subscribers served by the ETCs as of the first of the following month.⁴⁷ While the

⁴⁶ See 2012 Lifeline Reform Order at ¶¶ 198-99; NLAD Opt-Out Public Notice at 2-3; Opt-Out Certification at 7.

⁴⁷ 47 C.F.R. § 54.407(a). It also results in an unconstitutional regulatory taking. See U.S. Const. Amend. V (providing that private property may not be taken for public use without just compensation). Regulatory taking claims are examined under a three-factor test. *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Forcing Texas ETCs to provide unreimbursed Lifeline service to API-approved subscribers enrolled after the mid-month cutoff date satisfies each factor. First, the economic impact of forcing Texas ETCs to provide unreimbursed Lifeline service is significant, as it effectively negates the economic value of the Lifeline voice/data usage allotments and other services provided to eligible subscribers. *Id.* Most Lifeline service is provided free of charge to the subscriber, such that receiving Lifeline reimbursement is the only economic return anticipated by ETCs for providing Lifeline service to eligible subscribers. Thus, forcing Texas ETCs to provide unreimbursed Lifeline service often

Commission’s recently-revised version of the rule provides that ETCs in an opt-out state “must comply with [the] state administrator’s process for determining the number of subscribers to be claimed for each month,” nothing in the Texas rules or LIDA processes mandates that the EOM Report serve as the exclusive list of Lifeline subscribers eligible for support.⁴⁸ The Commission made clear when adopting this requirement that “ETCs may also base claims for reimbursement on *any reports or information* the state administrator provides to the ETC concerning which

prevents them from receiving *any* economic return – let alone a reasonable one – for providing Lifeline service to eligible API-approved subscribers. *See id.* at 136. Second, forcing Texas ETCs to provide unreimbursed Lifeline service significantly interferes with their reasonable investment-backed expectations. *Id.* at 124. Texas ETCs make significant investments to provide service to Lifeline-eligible subscribers, including API-approved subscribers enrolled after the mid-month cutoff date, such as voice/data usage allotments, subscriber outreach efforts, and customer care and account maintenance assistance. Texas ETCs make such investments with the “primary expectation” that they will receive reimbursement for providing Lifeline service to eligible subscribers, and forcing them to provide such service without reimbursement upsets this reasonable investment-backed expectation. *See id.* at 136. Third, the “character” of forcing Texas ETCs to provide unreimbursed Lifeline service favors finding an unconstitutional regulatory taking. *Id.* at 124. The Commission fails to explain how forcing Texas ETCs to provide unreimbursed Lifeline service furthers any legitimate public purpose. *See Full Value Advisors, LLC v. SEC*, 633 F.3d 1101, 1109-10 (D.C. Cir. 2011). In fact, the situation only results in reduced resources for Texas ETCs to provide and improve their Lifeline service offerings, to the detriment of Lifeline-eligible Texans.

⁴⁸ 47 C.F.R. § 54.407(a). NaLA also notes that this requirement became effective on January 27, 2020, and did not apply during nearly the entire period covered by the current improper payment investigations and audits against Texas ETCs. *See* 84 Fed. Reg. 71308, 71328 (Dec. 27, 2019). Even if the PUCT did officially and explicitly state that the EOM Report shall serve as the exclusive list of Lifeline subscribers eligible for support, the rule’s snapshot requirement (that the ETC receives support for the qualifying subscribers that it actually serves as of the snapshot) still applies. In the 2019 Lifeline Fifth Report and Order modifying Section 54.407(a), the Commission directed USAC “to continue to base its Lifeline claims and reimbursement process on the number of qualifying subscribers the ETC serves on the snapshot date.” 2019 Lifeline Fifth Report and Order at ¶ 94. Even the TracFone NAL refers to the ETC’s ability to make claims for the actual qualifying low-income customers that the ETC serves directly as of the first day of the month. *See* TracFone NAL at ¶ 13. Thus, even under the revised version of the snapshot rule, the PUCT is not free to force ETCs to rely exclusively on a report that fails to include all eligible subscribers enrolled and served as of a monthly snapshot date.

subscribers can be claimed.”⁴⁹ The eligibility determinations provided by the LIDA API review process certainly constitute “information the state administrator provides” concerning the eligibility of Lifeline subscribers that “can be claimed” by Texas ETCs.⁵⁰ In fact, it is unclear what purpose the LIDA API preview process actually would serve if the eligibility determinations it generates cannot be used by Texas ETCs to begin providing Lifeline-discounted service and support their corresponding Lifeline reimbursement claims. As noted above, the NLAD provides a process for ETCs to submit Lifeline applicant information and receive real-time eligibility determinations that can be used to support their reimbursement claims. Thus, if the LIDA API review process could not be used for a similar purpose, the LIDA would fail to provide a system that is “at least as robust as” the NLAD processes and the Commission would be required to revoke its approval of the PUCT’s NLAD Opt-Out Certification.

4. The LIDA’s Failure to Produce an NLAD Snapshot Report Equivalent Harms ETCs as Well as Lifeline-Eligible Texans and Results in Improper Underpayments

The under-inclusiveness of the LIDA EOM Report – combined with the prohibition on relying on LIDA’s API eligibility determinations claimed by the Commission and implied by

⁴⁹ 2019 Lifeline Fifth Report and Order at ¶ 94 (emphasis added).

⁵⁰ In the TracFone NAL, the Commission claims that the “near real time” eligibility checks are “informational in nature and do not authorize the ETC to make any claims.” TracFone NAL at n. 44. The Commission cites to nothing to support this irrational proposition. The Commission goes on to state that the end-of-month list is determinative and supersedes the API checks. *See id.* To support that proposition, the Commission cites only to a statement in the Texas TSP Instructions to ETCs stating “[t]he LIDA will notify the Telephone Company when the list of customers eligible for the discount is available.” *Id.* (citing Texas TSP Instructions to ETCs at 1). The fact that the LIDA will notify ETCs when the EOM Report is available merely addresses the availability of the EOM Report, which is based on the input file submitted mid-month by the ETCs, and says nothing about the additional subscribers that were enrolled using the LIDA API process after the mid-month input file was submitted.

USAC (but not stated in any official PUCT document) – harms Texas ETCs and the low-income consumers they serve. Specifically, as interpreted by the Commission in the TracFone NAL and in USAC’s related recovery letters, the LIDA system forces Texas ETCs to either (1) forgo reimbursement for API-determined eligible Lifeline subscribers enrolled in the second half of a month until the following month (or beyond) or (2) face massive potential FCC enforcement penalties and/or USAC audit claw-backs for properly claiming reimbursement for such subscribers served as of the first of the following month.

The first scenario results in an underpayment of Lifeline reimbursements that qualifies as an “improper payment” under federal law. In particular, the Payment Integrity Information Act of 2019 (PIIA) and its predecessors define an improper payment made by a federal agency as “any payment that should not have been made or that was made in an incorrect amount, including an overpayment *or underpayment*, under a statutory, contractual, administrative, or other legally applicable requirement.”⁵¹ The PIIA requires federal agencies like the Commission to take certain actions to identify risk factors and reduce improper payments in Lifeline and other funding programs.⁵² Accordingly, requiring Texas ETCs to provide unreimbursed Lifeline service to API-determined eligible subscribers enrolled later in a month until the following month (or beyond) is contrary to federal law and results in reduced resources for Texas ETCs to provide and improve their Lifeline service offerings.

⁵¹ 31 U.S.C. § 3351(4) (emphasis added). *See* Improper Payments Information Act of 2002, Pub. L. 107-300, 116 Stat. 2350, § 2(d)(2) (2002) (defining improper payment as “any payment that should not have been made or that was made in an incorrect amount (including overpayments *and underpayments*) under statutory, contractual, administrative, or other legally applicable requirements”) (emphasis added).

⁵² 31 U.S.C. §§ 3352, 3357.

The second scenario fares no better. As shown in the TracFone NAL, claiming support for LIDA API-determined eligible Lifeline subscribers, although proper, can result in millions of dollars in proposed civil penalties under the FCC’s flawed theory of liability.⁵³ Application of the Commission’s base forfeiture of \$1,000 to \$5,000 per allegedly ineligible subscriber ensures that proposed civil penalties against ETCs for purported Lifeline violations will be massive even for a single month of claims.⁵⁴ Moreover, the Commission often upwardly adjusts proposed civil penalties based on a number of amorphous factors subject to the agency’s interpretation.⁵⁵ These upward adjustments often can exceed 100 percent of the applicable base forfeiture and result in astronomical proposed civil penalties that bear little relation to the actual harm caused to the Lifeline program.⁵⁶ The proposed civil penalties remain separate and in addition to any USAC audit claw-backs of allegedly improper Lifeline support disbursements, which the ETCs already used to provide Lifeline service and cannot recoup from subscribers.⁵⁷ Even if an ETC successfully challenges an FCC enforcement action or USAC claw-back audit, it still must allocate time and money to preparing information request responses, retaining legal counsel, and often engaging in litigation. This inexorably results in reduced resources for Texas ETCs to provide and improve their Lifeline service offerings, and engage in outreach to additional eligible low-income Texans.

⁵³ TracFone NAL at ¶ 33.

⁵⁴ *See id.* at ¶¶ 32-33 (proposing \$5,469,000 in civil penalties for a single month of Lifeline reimbursement claims).

⁵⁵ *See* 47 C.F.R. § 1.80, Section II (listing the upward forfeiture adjustment factors).

⁵⁶ *See* TracFone NAL at ¶ 34 (proposing an over 100 percent upward forfeiture adjustment for certain alleged violations).

⁵⁷ *See id.* at ¶ 35 (“[T]he penalties that result from this NAL are separate from any amounts that an ETC may be required to refund to USAC in order to make the Fund whole.”).

Either scenario above places ETCs in an untenable position and will result in the further decline in active Lifeline participation by Texas ETCs and fewer options for low-income Texans to receive Lifeline service. NaLA members already have observed declining Texas Lifeline enrollments in recent months and the LIDA's continued failure to produce an NLAD Snapshot Report equivalent will only accelerate this process.⁵⁸

C. Texas' NLAD Opt-Out Approval Should Be Revoked Because the LIDA Fails to Provide Adequate Subscriber Identity and Address Verification

The Commission must revoke its approval of the PUCT's NLAD Opt-Out Certification because the LIDA system fails to provide adequate subscriber identity and address verification functionality. In the 2012 Lifeline Reform Order, the Commission required the NLAD to be capable of verifying a Lifeline applicant's identity information.⁵⁹ The Commission also required the NLAD to provide a process for verifying Lifeline applicant address information.⁶⁰ The NLAD Opt-Out Public Notice similarly required that state systems provide a "means of verifying a subscriber's identity at the time a system inquiry is made" as well as a "means of . . . verifying addresses submitted to the system."⁶¹ The NLAD Opt-Out Public Notice further required that state systems be capable of accommodating non-traditional addresses and other exceptions in Lifeline applicant data.⁶² The NLAD currently verifies a Lifeline applicant's identity information using a number of sources, including LexisNexis.⁶³ If an applicant's identity cannot

⁵⁸ From July 2019 to March 2020, the number of Lifeline subscribers in Texas declined by nearly 11 percent, from 411,415 to 367,299.

⁵⁹ 2012 Lifeline Reform Order at ¶ 201.

⁶⁰ *Id.* at ¶¶ 193, 201.

⁶¹ NLAD Opt-Out Public Notice at 3.

⁶² *Id.*

⁶³ See USAC, "Third Party Identity Verification (TPIV) Failure Resolution," [usac.org/lifeline/enrollment/dispute-resolution/third-party-identity-verification-tpiv-failure-](https://www.usac.org/lifeline/enrollment/dispute-resolution/third-party-identity-verification-tpiv-failure-)

be verified, the NLAD will reject the enrollment and provide error codes to the ETC.⁶⁴ The NLAD verifies a Lifeline applicant's address information through the USPS Address Matching Service.⁶⁵ If an applicant's address cannot be verified, the NLAD will reject the enrollment and provide an error code to the ETC.⁶⁶

In NaLA members' experience, the LIDA system rejects prospective Lifeline subscriber enrollments for alleged identity and address verification failures at a significantly higher rate than for enrollments attempted through the NLAD. For example, one NaLA member calculated that the LIDA system rejects enrollments based on identity and address verification failures at nearly *19 times* the rate found in a non-opt-out state with a similar volume of enrollments. The following table shows the disparity in identity and address verification failures identified by the NaLA member between the LIDA in Texas and in a state using the NLAD.

resolution/ (describing the NLAD identity verification process, including checks regarding a Lifeline applicant's social security number and date of birth as well as whether an applicant is deceased).

⁶⁴ *Id.*

⁶⁵ USAC, "Address Resolution," <https://www.usac.org/lifeline/enrollment/dispute-resolution/address-resolution/> (describing the NLAD address verification process).

⁶⁶ *Id.*

Table 2. Disparity in Identity and Address Verification Failures Between LIDA and NLAD

| System Verification | Texas/LIDA | Ohio/NLAD |
|--|-------------------|------------------|
| Identity/Address Failures During February 2020 | 1,330 | 71 |
| Total Subscribers Successfully Enrolled During February 2020 | 2,851 | 2,460 |

This indicates that the LIDA system identity and address verification processes are not operating correctly and/or failing to accommodate non-traditional addresses and other data exceptions. As a result, otherwise-eligible Texans face a stiff, LIDA-created barrier to program participation not faced by eligible Lifeline applicants in states that participate in the NLAD. The LIDA system therefore is not as comprehensive as the NLAD for identity and address verifications for subscriber enrollments and fails to provide a system that is “at least as robust as” the NLAD processes.⁶⁷

III. THE FCC SHOULD TERMINATE ENFORCEMENT AND AUDIT ACTIVITY BASED ON THE ERRONEOUS CONCLUSION THAT THE LIDA EOM REPORT IS THE EQUIVALENT OF THE NLAD SNAPSHOT REPORT

The Commission should take action now to protect Texas ETCs and guard against the waste that results from unwarranted enforcement and audit activity stemming from the PUCT’s failure to live up to its NLAD opt-out commitments. The TracFone NAL is premised on the erroneous conclusion that the LIDA EOM Report can serve as an NLAD Snapshot Report equivalent. Specifically, the Commission found that TracFone apparently violated its rules by

⁶⁷ The NLAD serves to guard against waste in the Lifeline program by guarding against duplicative benefits, but it is also supposed to function efficiently to ensure that eligible subscribers are able to enroll. For example, the 2012 Lifeline Reform Order states that “[t]o ensure that subscribers are not mistakenly denied benefits,” the NLAD must establish a process “so that those consumers who failed the identification verification are able to either provide additional information to verify their identity, or correct errors in the information utilized to validate the subscriber identification.” 2012 Lifeline Reform Order at ¶ 201.

not treating the EOM Report as the “determinative” list of eligible Lifeline subscribers that could be claimed for reimbursement, as is the case with the Snapshot Report.⁶⁸ As explained above, however, the LIDA EOM Report does not and cannot serve as the equivalent of the NLAD Snapshot Report because it does not include all of the Lifeline subscribers served by an ETC in a month as determined on the first of the following month.

The Commission recognized in the TracFone NAL that the LIDA provides “near real-time” verifications of Lifeline subscriber eligibility through the API review process.⁶⁹ But the Commission baselessly asserted that these eligibility determinations “are informational in nature and do not authorize the ETC to make any claims.”⁷⁰ This is incorrect. The LIDA API review process provides a real-time (or near real-time) mechanism for Texas ETCs to submit Lifeline applicant queries and receive eligibility determinations, as required by the Texas NLAD opt-out. Nothing in the FCC or Texas regulations – or the PUCT Opt-Out Certification – states that ETCs cannot use these eligibility determinations to support their Lifeline reimbursement claims. The Commission’s theory of liability in the TracFone NAL therefore is unsupported by both the facts and the law.

The Commission’s erroneous theory of liability is not confined to the TracFone NAL. NaLA members are aware of at least one other EB investigation involving a Texas ETC centering on the same erroneous theory of liability. This investigation has reached the point where the EB is threatening to move forward on another unsupported NAL proposing massive civil penalties. In addition, USAC has issued notices to Texas ETCs at WCB’s direction alleging

⁶⁸ TracFone NAL at ¶¶ 27-29.

⁶⁹ *Id.* at ¶ 15, n. 44.

⁷⁰ *Id.*

improper payments under the same erroneous theory of liability, which demand restitution of millions of dollars in support already provided to eligible Lifeline subscribers. These enforcement and audit actions threaten the future viability of ETCs and already have resulted in the reallocation of ETC resources better spent on providing and improving Lifeline service offerings outside of Texas.

Enforcement and audit actions based on erroneous legal and factual conclusions waste scarce Commission resources and abuse the dwindling group of companies still actively conducting outreach including retail or in-person distribution of Lifeline services in Texas. Falsely accusing Texas ETCs of wrongdoing imposes undue harms on these service providers and damages the Lifeline program by unjustly raising program integrity concerns. It also harms Lifeline-eligible low-income Texans, who are less likely to be served by the declining number of ETCs willing and able to actively fund outreach including retail or in-person distribution of Lifeline service in the state. Reliance on PUCT-established processes for the independent determination of Lifeline subscriber eligibility, including the API review and approval process, should provide ETCs with a safe harbor against subsequent enforcement and audit activity. The Commission therefore should terminate all enforcement and audit activity based on the erroneous conclusion that the LIDA EOM Report can serve as an equivalent to the NLAD Snapshot Report.

IV. THE COMMISSION SHOULD ESTABLISH A PROCESS FOR ETCs TO SUBMIT UNDERPAYMENT RECOVERY CLAIMS BASED ON THE NUMBER OF TEXAS LIFELINE SUBSCRIBERS SERVED AS OF THE FIRST DAY OF THE FOLLOWING MONTH

To avoid further harm to Texas ETCs and the low-income consumers they serve, the Commission should take action now to allow Texas ETCs to receive Lifeline reimbursement for all eligible subscribers they served during a month as determined on the first of the following

month.⁷¹ As demonstrated above, the claimed prohibition on relying on LIDA's API review and approval process for Lifeline reimbursement claims by the FCC and USAC has resulted in some Texas ETCs forgoing reimbursement for eligible Lifeline subscribers enrolled later in a month until the following month (or beyond). These ETCs file Lifeline reimbursement claims based solely on the subscribers listed on the EOM Report, even though they provided Lifeline service to other, LIDA API-determined eligible subscribers during the prior month and continue to provide that service as of the first day of the following month.⁷²

The loss of reimbursement for providing Lifeline service to otherwise-eligible subscribers results in a substantial underpayment to Texas ETCs each month. Such underpayment significantly impacts the ability of Texas ETCs to provide and improve their Lifeline service offerings, both now and in the future. As explained above, such underpayment also represents an improper payment by the Commission under the PIIA.⁷³ The PIIA requires the Commission to take certain actions to identify risk factors and reduce improper payments in Lifeline and other funding programs.⁷⁴ The Commission therefore should establish a true-up process whereby ETCs would submit upward revisions to their Lifeline reimbursement claims to capture LIDA API-determined eligible subscribers left off the LIDA EOM Report that the ETCs served in the prior month. This process would help ameliorate the harms caused by the LIDA's continued failure to produce an NLAD Snapshot Report equivalent and reimburse Texas ETCs for all of the eligible Lifeline subscribers they served as of the snapshot date. The NLAD offers a real-time

⁷¹ See 47 C.F.R. § 54.407(a).

⁷² The fact that some Texas ETCs take a more conservative approach regarding their Lifeline reimbursement claims does not mean that this approach is required or should not be corrected because those ETCs have been improperly underpaid.

⁷³ 31 U.S.C. § 3351(4).

⁷⁴ 31 U.S.C. §§ 3352, 3357.

Lifeline reimbursement claims process through the Snapshot Report. The LIDA must do the same or else the Commission's approval of the PUCT's NLAD Opt-Out Certification must be revoked.

V. CONCLUSION

For the foregoing reasons, NaLA respectfully requests that the Commission expeditiously issue an emergency declaratory ruling revoking its approval of the PUCT's NLAD Opt-Out Certification and provide other relief described herein which is necessary to restore Lifeline program integrity, Texas ETC viability, and the full ability of low-income Texans to connect to opportunity, healthcare, education, family, and community.

Respectfully submitted,



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