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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Total Call Mobile, Inc. Order Directing Temporary Hold of Payments	)))))))	WC Docket No. 11-42

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PETITION FOR RECONSIDERATION OF UNLAWFUL FUNDING HOLD

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Summary

The Wireline Competition Bureau ("Bureau") has issued an order ("Funding Hold Order") suspending 100% of Total Call Mobile, LLC's ("Total Call Mobile" or the "Company") Lifeline support payments for service provided in May 2016 and for future periods indefinitely. This order is a suspension of the Company in advance of procedural due process on the Commission's Notice of Apparent Liability ("NAL") issued on April 7, 2016. While the *Funding Hold Order* attempts to reach a result that the Commission has sought to achieve through various improper and unlawful means since at least October of 2015, the *Funding Hold Order* fares no better than those prior attempts and must be reversed in its entirety.

The *Funding Hold Order* directs the Universal Service Administrative Company ("USAC") to withhold 100% of Total Call Mobile's payments of Lifeline reimbursements indefinitely, "pending the Bureau's receipt and evaluation of TCM's final, complete response to the Bureau's letter of June 1, 2016."[1] The *Funding Hold Order* jeopardizes the Company's ability to continue to provide service to eligible subscribers and thereby threatens the essential communications services of [redacted] Lifeline subscribers. As discussed in more detail below, the *Funding Hold Order* is not justifiable. The Bureau lacks authority to "temporarily hold" payments without a reasoned factual basis that is backed by procedural due process. The purported temporary nature of the Bureau's action does not grant the Bureau special authority in this instance. Regardless of the terminology the Bureau used in the order, the *Funding Hold Order* is a suspension, pure and simple. Only Section 54.8 of the Commission's rules provides a process for taking that action, and the Bureau declined to follow that process.

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1 *See* Letter from Matthew S. DelNero, Chief, Wireline Competition Bureau, FCC, to Steven A. Augustino, Counsel, Total Call Mobile (June 1, 2016) ("June 1 Letter").

Moreover, the Bureau's purported reason for issuing a funding hold – the alleged failure of Total Call Mobile to respond fully to Bureau requests for information – is contrary to the evidence presented. Total Call Mobile has fully supported its funding requests and has complied with the Bureau's requests for detailed information from the Company. Total Call Mobile provided a full and complete response to the Commission's directive in paragraph 102 of the NAL and, in response to the Bureau's June 1 letter purportedly seeking more information to evaluate that response, Total Call Mobile produced responses and documents on June 13, 17, 22, 23 and 27 as well as additional responses and documents on July 6, 8 and 13, 2016 in response to a June 30 letter[2] requesting additional information. The Company's production included a list of every subscriber claimed for the past three months (provided in the initial response to the Bureau's letter) and eligibility documentation for every one of those subscribers (provided in more than 165,000 pages of documentation produced on the same day the *Funding Hold Order* was issued). Moreover, the Company has continued to produce materials to the Bureau since the *Funding Hold Order*.

Therefore, because the *Funding Hold Order*: (1) contains material errors and omissions; (2) involves erroneous findings as to important or material questions of fact; and (3) fails to take into account changed circumstances, Total Call Mobile respectfully requests that the Bureau reverse the *Funding Hold Order* in its entirety.

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2 *See* Letter from Matthew S. DelNero, Chief, Wireline Competition Bureau, FCC, to Steven A. Augustino, Counsel, Total Call Mobile (June 30, 2016) ("June 30 Letter").

TABLE OF CONTENTS

Page

STATEMENT OF FACTS **2**

I. THE NOTICE OF APPARENT LIABILITY **2**

II. THE COMMISSION'S IMPROPER ATTEMPTS TO WITHHOLD TOTAL CALL MOBILE'S FUNDING **3**

A. The Commission's First Attempt: October 2015 3

B. The Commission's Second Attempt: April 2016 4

C. The Commission's Third Attempt: The *Funding Hold Order* 5

ARGUMENT **10**

III. THE *FUNDING HOLD ORDER* CONTAINS MATERIAL ERRORS AND OMISSIONS **10**

A. The *Funding Hold Order* Contains a Material Error in That It Misapplies Section 54.8 of the Commission's Rules 10

B. The Funding Hold Order Contains a Material Error Because it Provides No Applicable Support for the Action Taken 12

C. The Bureau's Cited Legal Authority Fails to Provide the Commission Authority to Withhold Payments and Therefore Constitutes a Material Error 14

IV. THE BUREAU'S DECISION INVOLVES NUMEROUS ERRONEOUS FINDINGS AS TO IMPORTANT OR MATERIAL QUESTIONS OF FACT **15**

V. THE BUREAU'S DECISION FAILS TO TAKE INTO ACCOUNT CHANGED CIRCUMSTANCES **18**

CONCLUSION **19**

REDACTED, FOR PUBLIC INSPECTION

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PETITION FOR RECONSIDERATION OF UNLAWFUL FUNDING HOLD

Total Call Mobile, LLC ("Total Call Mobile" or the "the Company"), by and through its attorneys, and pursuant to 47 C.F.R § 1.106 of the Federal Communications Commission's ("FCC" or "Commission") rules, hereby submits this Petition for Reconsideration of the June 22, 2016 order from the Chief of the Wireline Competition Bureau ("Bureau").[3] The Bureau's Order Directing Temporary Hold of Payments ("*Funding Hold Order*") withholds payments "effective beginning with TCM's [Total Call Mobile] request for reimbursement in all states filed for the data month of May 2016, and shall remain in effect pending the Bureau's receipt and evaluation of TCM's final, complete response to the Bureau's letter of June 1, 2016 and subject to the Bureau notifying USAC of any change to the terms of the temporary hold."[4] The *Funding Hold Order* must be reversed because it: (1) contains material errors and omissions; (2) involves erroneous findings as to important or material questions of fact; and (3) fails to take into account

3 *See In the Matter of Total Call Mobile, Inc.,* WC Docket No. 11-42, Order Directing Temporary Hold of Payments, DA 16-708 (rel. June 22, 2016) ("Funding Hold Order").

4 *See id.*

changed circumstances. Therefore, Total Call Mobile hereby seeks the Bureau's reconsideration of the *Funding Hold Order* and respectfully requests that the Bureau' reverse its decision.

STATEMENT OF FACTS

I. THE NOTICE OF APPARENT LIABILITY

On April 7, 2016, the Commission issued a Notice of Apparently Liability for Forfeiture and Order ("NAL") to Total Call Mobile for "receiv[ing] millions of dollars in improper reimbursements from the Universal Service Fund ("USF" or "Fund") for duplicate and ineligible consumers that were apparently enrolled in violation of the Commission's rules."[5]

As Chairman Wheeler has informed Congress in the past, an NAL is the Commission's charging document; it is "akin to a complaint in a civil action" and "is not a final decision" by the Commission.[6] The NAL makes broad allegations and claims that Total Call Mobile failed to follow the Lifeline rules, but the NAL is based on information from a short period of time in 2014 that is beyond the Commission's statute of limitations. Total Call Mobile responded to the NAL on July 5, 2016, at the time agreed-upon by the Commission.[7] The NAL does not accurately depict Total Call Mobile – not back in 2014, and certainly not now. The NAL remains pending at this time. The Commission is evaluating the response and has not issued any final orders in the proceeding.

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5 *See* In the Matter of Total Call Mobile, Inc., Notice of Apparent Liability for Forfeiture and Order, File No.: EB-IHD-14-00017650 at ¶ 1 (rel. Apr. 7, 2016) ("NAL").

6 *See* Letter from Tom Wheeler, Chairman, Federal Communications Commission, to Honorable Ron Johnson, US Senate (Dec. 18, 2015).

7 *See* Total Call Mobile, LLC Response to the Notice of Apparent Liability for Forfeiture and Order (July 5, 2016) ("NAL Response").

II. THE COMMISSION'S IMPROPER ATTEMPTS TO WITHHOLD TOTAL CALL MOBILE'S FUNDING

This Petition for Reconsideration does not challenge the NAL, as Total Call Mobile has already responded to the NAL on the merits. Rather, it is a challenge to the *Funding Hold Order*.

A. The Commission's First Attempt: October 2015

To fully put the *Funding Hold Order* in context, it is necessary to go back to October 30, 2015, when, without any notice to Total Call Mobile, the Commission simply withheld the entirely of the Company's Lifeline disbursements for September subscribers, which had been submitted on its Form 497 in October. This action was taken without any notice whatsoever: Total Call Mobile learned of an action only after the payment failed to appear and its counsel made informal inquiries to the Commission and USAC. The Commission and USAC did not offer any explanation for the action until ten days after it was implemented. In a letter from USAC, the administrator informed Total Call Mobile that the funding hold was implemented at the direction of the Commission, stating:

> [T]he FCC has directed USAC to initiate this suspension pending completion of a further investigation and possible other ameliorative measures to ensure that any USF support provided is used solely in a manner consistent with Commission rules and policies.[8]

Total Call Mobile promptly challenged the hold as improper procedurally and substantively. It filed an emergency motion with the Commission to remove the funding hold and threatened to go to court to obtain relief if the FCC did not act by a date certain. On the eve

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[8] Letter from USAC to Mr. Hideki Kato, President, Total Call Mobile, Inc. [sic] at 2 (Nov. 9, 2015) ("USAC November Letter").

of the Total Call Mobile's court filing, the Commission restored all of the Company's funding.[9] But that restoration was temporary.

B. The Commission's Second Attempt: April 2016

Paragraph 102 of the NAL issued on April 7, 2016 ordered Total Call Mobile "to submit a report and explain why the Commission should not (1) order USAC to suspend all Lifeline reimbursements to TCM; (2) revoke approval of TCM's ETC compliance plan; and (3) initiate proceedings against TCM to revoke its Commission authorizations." This report was to be submitted within thirty days.

Yet, despite requesting that Total Call Mobile explain why the Commission should not suspend its funding, the Commission did not wait for a response. Instead, on April 8, *one day after the NAL requested such a report from the Company,* Total Call Mobile received a letter from USAC stating that USAC intended to suspend Lifeline program support for Total Call Mobile beginning with the May 2016 disbursements.[10] The USAC letter stated that:

> For the reasons contained in the Total Call Mobile, Inc. Notice of Apparent Liability (FCC 16-44), released on April 7, 2016 and served on Total Call as ordered, the Commission has determined that in light of the evidence the Commission has reviewed, continued payments would likely not be consistent with the rules of the Lifeline Program. ***Accordingly, the FCC has directed USAC to initiate this suspension,*** and implement other ameliorative measures as necessary, designed to ensure that any USF support is used solely in a manner consistent with Commission rules and policies."[11]

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9 Even with the restoration of funding, the Commission never explained the basis for the funding hold, nor did it attempt to explain why it had withheld funding without any prior notice to the Company. Its reversal of the funding hold was communicated orally by Wireline Competition Bureau personnel.

10 *See* Letter from USAC to Mr. Hideki Kato, President, Total Call Mobile, Inc. (Apr. 8, 2016) ("USAC April Letter").

11 *See. id.*

TCM responded to the USAC letter on May 9, 2016,[12] explaining among other things, that the FCC's instruction conflicted with the NAL, which had directed a report from the Company regarding whether the FCC should initiate any separate action to suspend funding. Once again, the Commission backed down: Total Call Mobile received its May payment. But that, too, was temporary.

C. The Commission's Third Attempt: The *Funding Hold Order*

On May 9, 2016, as directed, Total Call Mobile submitted its response to Paragraph 102 of the NAL to the Commission, explaining why the Commission should not order USAC to suspend all Lifeline reimbursements to Total Call Mobile.[13] Total Call Mobile explained that there was no basis for a suspension of Total Call Mobile's Lifeline funding. Total Call Mobile described in detail its training and order review policies and procedures, submitting to the Bureau copies of its current manuals for sales agents and for its internal real-time review team. Moreover, the Company explained that the NAL relied on evidence concerning a brief time period in 2014 and that the Company had changed its practices and its focus since them. Among other things, the Company explained that it took several actions to revise its practices after the inquiries raised in late 2014, that it fired the sales agents implicated and that the Company shifted its sales focus from the states identified in the 2014 actions. The Company explained that today, the vast majority of its current subscriber base came from three states with strong eligibility verification tools. None of these three states were among the states with alleged duplicate subscribers on the USAC list produced back in October 2014. Almost a month later, on June 1, 2016, the Bureau came back to Total Call Mobile with a letter that requested

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12 *See* Total Call Mobile, LLC Response to USAC Letter (May 9, 2016).

13 *See* Total Call Mobile, LLC Response to Paragraph 102 of the Notice of Apparent Liability for Forfeiture and Order (May 9, 2016) ("Paragraph 102 Response").

additional information, purportedly about Total Call Mobile's Paragraph 102 Response ("June 1 Letter").[14]

In the June 1 Letter, the Bureau directed Total Call Mobile to respond to nine additional questions seeking information about the Company's enrollment and eligibility policies and practices within twelve days, by June 13, 2016. The requests contained in the June 1 Letter were extensive, calling for current and historical information about the Company's policies, procedures, and subscribers, calling for information that had to be created specifically for the response, and seeking information maintained with the Company's vendor, [redacted] The June 1 Letter stated that "[t]he Commission will evaluate whether to direct a hold of future monthly payment requests in light of its review of the foregoing information. Any failure by Total Call Mobile to provide such information may also result in an immediate hold of all further Lifeline payments pending further investigation by the Commission."[15]

Despite the breadth and scope of the requests in the June 1 Letter, Total Call Mobile provided as much information as it could in its initial responses on June 13, 2016, providing responses to Requests 1, 2, 3, part of 4, and 7, while the Company endeavored to provide the remaining information as soon as possible. Total Call Mobile produced the most important piece of information in its initial June 13 production – the subscriber lists underlying the Company's three most recent 497 submissions—along with other information of questionable relevance to its entitlement to funding.

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14 *See* Letter from Matthew S. DelNero, Chief, Wireline Competition Bureau, FCC, to Steven A. Augustino, Counsel, Total Call Mobile (June 1, 2016) ("June 1 Letter").

15 *See id.* at 3.

Total Call Mobile submitted a supplemental response to the June 1 Letter on June 17, 2016, responding to Request 8 and noting that "Total Call Mobile is producing information on a rolling basis, with the expectation that it will complete production by June 27."[16]

Total Call Mobile was also upfront about the most burdensome of the requests – every eligibility document for all subscribers – which had to come from the Company's vendor. Total Call Mobile received that information– approximately 165,000 documents – and was in the process of producing it on June 22, 2016. The Company told the Commission staff in the morning on June 22 that a large production of eligibility documents was coming and the magnitude of the production. The *Funding Hold Order* was issued on June 22, 2016, several hours after Total Call Mobile informed the Bureau that it was finalizing a production of more than 165,000 documents to be delivered that day. Total Call Mobile's June 22, 2016 production provided responses to Requests 4, 5, 6, and 9.

The *Funding Hold Order* is premised on the Company's alleged "fail[ure] to assure [the Commission] that additional payments to the company would comply with our Lifeline rules and policies."[17] As part of those alleged failures, the *Funding Hold Order* faults Total Call Mobile for "its June 13 response, [where] TCM provided an incomplete or no response to five of the Bureau's nine questions."[18] The *Funding Hold Order* therefore directs "USAC to exercise its authority to suspend further payments to TCM."

The funding hold purportedly was temporary. In the order, the Bureau stated:

> We emphasize that this hold is temporary. If we determine after reviewing TCM's complete responses to our June 1 letter that

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16 *See* Second Supplemental Response from Steven A. Augustino, Counsel, Total Call Mobile, LLC, to Charles Taylor, Wireline Competition Bureau and Michelle Garber, Vice President, Lifeline Division, USAC at 2 (June 17, 2016) ("Second Response").

17 *Id.* at ¶ 8.

18 *See id.*

> TCM has implemented controls reasonably calculated to prevent improper payments, this temporary hold will be lifted as of the date those controls became effective.[19]

Further, the *Funding Hold Order* explained:

> [W]e are not disqualifying TCM from participation in the Lifeline program, either temporarily or permanently. Rather we are temporarily holding payments to TCM pending our evaluation of TCM's responses to the Bureau's June 1, 2016 letter. To the extent that the Commission receives adequate assurance that TCM's requested payments for future enrolments will not be improper, TCM will be entitled to past held payments, in accordance with past practice regarding TCM and other Lifeline participants.[20]

On June 23, 2016, Total Call Mobile submitted another supplemental response to the June 1 Letter, responding to Requests 4, 5, 6 and 9.[21] On June 27, 2016, Total Call Mobile completed its response, answering requests 1, 5, 6 and 7.

Notably, even after Total Call Mobile completed all of the Bureau's assigned tasks, the Bureau did not come forward with any substantive evidence that might support even a partial funding hold. Despite having complete subscriber lists since June 13 and despite having eligibility documents since June 22, no improper subscribers have been identified. Instead, the Bureau responded by seeking yet more information from the Company.

On June 30, 2016, the Bureau sent a follow up letter ("June 30 Letter") requesting additional information from the Company under the guise of seeking complete responses from the Company.[22] However, many of the requests in the June 30 Letter seek new information that

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19 *See id.* at ¶ 20.

20 *See id.* at ¶ 12.

21 Total Call Mobile also complied with the Commission's request for signed declarations responding to the June 1 Letter.

22 *See* Letter from Matthew S. DelNero, Chief, Wireline Competition Bureau, FCC, to Steven A. Augustino, Counsel, Total Call Mobile (June 30, 2016) ("June 30 Letter").

was not previously requested, and appear designed to force Total Call Mobile to jump through additional hoops, thereby extending the funding hold.

For example, in Supplemental Request 3, the Bureau requests thirteen additional fields for the 497 subscriber spreadsheets the Company previously provided on June 13, 2016. The original request sought "full and complete subscriber lists and spreadsheets supporting TCM's claims for reimbursements from the Universal Service Fund." Total Call Mobile provided the actual spreadsheets that underlie its 497 submissions and all of the fields used for those purposes on June 13, 2016. However, the Bureau's follow up request asks for additional information stored across databases and in various locations for thirteen additional fields. The Bureau has not identified how this information will assist in its review, but merely requested the fields because they had been contained in other types of spreadsheets Total Call Mobile had produced in other investigations.[23] Total Call Mobile responded to the June 30 Letter on July 6, 8, 13, and 22, 2016.

Total Call Mobile has cooperated fully with the Bureau's June 1 and June 30 Letters. Despite these substantial responses, and the substantial amount of time that the Bureau has had to review information to date, the Bureau has not identified a single subscriber that it finds suspect or a single substantive reason that would support withholding of a payment to Total Call Mobile.

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23 The June 30 letter requested fields like "CGM_insert_date" and "IEH." When Total Call Mobile requested explanation of certain fields, the Bureau could only point Total Call Mobile to two spreadsheets that previously contained these fields. It did not offer any explanation of what information it sought or how those fields related to the validity of Total Call Mobile's funding requests.

ARGUMENT

III. THE *FUNDING HOLD ORDER* CONTAINS MATERIAL ERRORS AND OMISSIONS

A. The *Funding Hold Order* Contains a Material Error in That It Misapplies Section 54.8 of the Commission's Rules

The *Funding Hold Order* was issued without the necessary due process protections required by the Commission's rules. The Bureau incorrectly asserts that it need not comply with Section 54.8 of its rules while temporarily withholding Total Call Mobile's funding. In support of its position, the Bureau asserts, that "[t]he procedures set forth in Section 54.8 of our rules apply to suspensions and debarments of people and companies from participation in programs funded by the Universal Service Fund, and do not apply to the *temporary hold of payments* to program participants during investigations."[24] The Bureau concludes that because "we are not disqualifying TCM from participation in the Lifeline program, either temporarily or permanently" but rather "are temporarily holding payments to TCM pending our evaluation of TCM's responses to the Bureau's June 1, 2016 letter," the procedures set forth in Section 54.8 do not apply.[25] This is a material error which requires reconsideration.

The Bureau's attempt to distinguish between suspension and a temporary hold is a distinction without a difference. Contrary to the Bureau's position, it was required to follow the procedures set forth in Section 54.8 prior to issuing the *Funding Hold Order*. The *Funding Hold Order* jeopardizes the Company's ability to continue to provide service to eligible subscribers and thereby threatens the essential communications services of [redacted]

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24 *See* Funding Hold Order, ¶ 12-13.

25 *Id.*, ¶ 12. Notably, USAC, in its November 2015 and April 2016 letters, twice referred to the Commission's action as a "suspension," stating that the Commission had ordered USAC to suspend funding to the Company. *See* USAC November Letter and USAC April Letter.

[redacted] Lifeline subscribers. By its actions, the Bureau threatens Total Call Mobile's ability to serve these existing low-income subscribers.

These statements make clear that the *Funding Hold Order* is a suspension (albeit purportedly temporary) and are further evidence that the procedures set forth in Section 54.8 should have been used in this instance. If the Commission wants to suspend a company, it must do so via the procedures set forth in Section 54.8. If the Commission believes that the predicate actions in 54.8 are too narrow, it must revise the rule to specify other circumstances that justify suspensions, but until it has done so, it cannot simply exempt itself from its own rule by claiming it is "temporarily holding" money.

There is no question that the procedural requirements of Section 54.8 have not been met here. Section 54.8 allows the Commission to "suspend and debar" a person who is convicted or found civilly liable of fraud, embezzlement and other fraud or criminal offenses associated with the low-income support program,[26] following specific rules it established for the suspension or debarment of an entity from the Universal Service programs.[27] Total Call Mobile has not been convicted or found civilly liable for fraud, embezzlement, or other fraud or criminal offenses associated with Lifeline. Indeed, the NAL is a civil forfeiture proceeding, which itself is not even final at this stage. Therefore, the Commission may not initiate suspension procedures under Section 54.8.[28]

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26 *See id.* § 54.8(b)-(c).

27 *See In the Matter of Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202, ¶¶ 64-77 (rel. Apr. 30, 2003); *see also In the Matter of Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*, WC Docket No. 05-195 et al., Report and Order, 22 FCC Rcd 16372, Appendix C (rel. Aug. 29, 2007).

28 Nor would a Forfeiture Order be sufficient to invoke suspension under the rules.

Further, for the Commission to apply the procedures under Section 54.8 to execute a suspension, the Commission must first issue a notice of suspension to Total Call Mobile. The notice shall "give the reasons for the proposed debarment in terms sufficient to put a person on notice of the conduct or transaction(s) upon which it is based and the cause relied upon."[29] Then, Total Call Mobile would have the opportunity to respond to the proposed suspension by filing arguments and any relevant documentation with the Commission.[30] Before the Commission can impose a suspension, the Commission must follow these procedures set forth in Section 54.8. While the Commission has now entered into its third attempt at suspending Total Call Mobile's funding, it still has not done so with a proper procedural or substantive basis. Because the Commission has not taken those steps necessary to ensure due process before issuing the *Funding Hold Order*, the *Funding Hold Order* contains material errors and must be reversed.

B. The Funding Hold Order Contains a Material Error Because it Provides No Applicable Support for the Action Taken

The Bureau also incorrectly relies on several other authorities for its action. It asserts that the *Funding Hold Order* is proper because Section 254 of the Communications Act provides the Commission with broad discretion in discharging its universal service mandate and imposing cost controls to avoid excessive expenditures that will detract from universal service.[31] The Commission also states that section 54.707 of its rules authorizes USAC to "suspend or delay" support amounts if the carrier fails to provide adequate verification.[32] Neither of these provisions support the action taken here.

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29 47 C.F.R § 54.8(e)(2)(i).

30 *Id.* § 54.8(e)(4).

31 *See Funding Hold Order,* ¶ 13.

32 *See id.*

Section 254 is not implicated here, as it only grants rulemaking authority to establish the program; it does not grant enforcement authority. Moreover, Section 54.707 does not support the action taken here, and this regulation was never even cited by the Bureau in its June 1 or June 30 letters that requested information. Section 54.707 relates to "Audit controls" and provides that:

> [T]he Administrator shall have authority to audit contributors and carriers reporting data to the administrator. The Administrator shall establish procedures to verify discounts, offsets, and support amounts provided by the universal service support programs, and may suspend or delay discounts, offsets, and support amounts provided to a carrier if the carrier fails to provide adequate verification of discounts, offsets, or support amounts provided upon reasonable request, or if directed by the Commission to do so.[33]

Under section 54.707, the relevant question is whether Total Call Mobile has provided adequate information for the Administrator to verify the support amounts claimed. Specifically, the provision authorizes USAC (not the Bureau) to seek verification of "discounts, offsets, or support amounts." The provision does not relate to the question of whether adequate controls exist. Whether Total Call Mobile has implemented policies and procedures to ensure compliance with Lifeline rules and regulations is a separate question. Under 54.707, Total Call Mobile may have to prove that it served the subscribers, that the subscribers received the discount, and presumably, that they are eligible. The Bureau has all of the information necessary to conduct this analysis and to confirm this. The most critical piece of evidence for an analysis of the support amount, Total Call Mobile's subscriber lists setting forth the subscribers underlying Total Call Mobile's most recent Form 497 submissions, were produced on June 13, 2016, as requested. Total Call Mobile also produced the program eligibility documents, including applications, proof of identification, and proof of eligibility for its recent subscribers on the very

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33 47 CFR § 54.707

day the *Funding Hold Order* was issued. With this information, the Commission can validate for itself the support amount claimed and confirm compliance with Section 54.407.[34] Notably, to date, the Bureau still has failed to identify even a single subscriber that may not have received a discount or that may not be eligible.

The regulations cited by the Commission in paragraph 13 of the *Funding Hold Order* do not support the actions taken here, and the *Funding Hold Order* should be reversed.

C. The Bureau's Cited Legal Authority Fails to Provide the Commission Authority to Withhold Payments and Therefore Constitutes a Material Error

In defending the *Funding Hold Order*, the Bureau cites a number of cases that refer specifically to withholding Medicaid funds.[35] The important distinction in these cases as compared to the facts of Total Call Mobile's case is that in the Medicaid cases, the government had specific authority, either through state or federal statute, to withhold the funds.[36] Here, the Bureau has no statutory authority by which it can withhold funds from a Lifeline service provider, and the only potential authority in the rules (Section 54.8) is claimed not to apply. Instead, it extrapolates authority from cases that are not pertinent to this issue.

The Bureau also cites to the Improper Payments Elimination and Recovery Act ("IPERA") which requires agencies to provide information about its record of improper

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34 47 C.FR § 54.407

35 *See Funding Hold Order*, ¶ 14.

36 *See Pers. Care Prods. v. Hawkins*, 635 F.3d 155, 159 (5th Cir. 2011) (stating that Texas state law allows for withholding reimbursements and federal law does not prohibit the holds); *see also Clarinda Home Health v. Shalala*, 100 F.3d 526, 528 (8th Cir. 1996) (explaining that question of withholding funds in this case is specifically about a regulation allowing for a suspension of payments); *see also Yorktown Medical Library, Inc. v. Perales*, 948 F.2d 84, 89 (2d Cir. 1991) (explaining that the New York State Department of Social Services promulgated the applicable regulations to allow for the withholding of Medicaid funds); *see also Peterson v. Weinberger*, 508 F.2d 45, 49–50 (5th Cir. 1975) (explaining that the withholding of funds from the plaintiff was appropriate based on the instructions provided by the Medicare Act).

payments for each fiscal year and allows them to *recover*, not withhold, overpayments.[37] It refers specifically to an improper payment as "any payment that should not have been made or that was made in an incorrect amount" or "any payment to an ineligible recipient," not payments that have yet to be made.[38] Therefore, IPERA also does not support the *Funding Hold Order.* Moreover, even if IPERA were to apply, the Bureau has the subscriber lists and eligibility documents for prior payments and has not demonstrated that there is anything improper with those pieces of information.

IV. THE BUREAU'S DECISION INVOLVES NUMEROUS ERRONEOUS FINDINGS AS TO IMPORTANT OR MATERIAL QUESTIONS OF FACT

The Bureau premises its action on Total Call Mobile's alleged failure to respond to Bureau inquiries, asserting that it has provided Total Call Mobile "more than one opportunity to demonstrate that future payments to Total Call Mobile will comply with the Commission's Lifeline rules and policies."[39] Specifically, the Bureau states that the Company has "still not explained or documented its current compliance program."[40] This is not the case, and the erroneous findings of fact necessitate a reversal of the *Funding Hold Order*.

At the outset, Total Call Mobile notes that it provided a detailed explanation of its current compliance program in the May 9, 2016 response to Paragraph 102 of the NAL. This Response described the practices in place and attached the current manuals used for agent training and for real-time review procedures. Instead of evaluating those documents for compliance with the Commission's rules, the Bureau attempted to explore a different subject: how Total Call Mobile's procedures evolved since late 2014. The Bureau's June 1 and June 30 letters go far

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37 Improper Payments Elimination and Recovery Act of 2010, Pub. L. No. 111-204, § 2, 124 Stat. 2229 (2010).

38 *Id.*

39 *See Funding Hold Order,* ¶ 8.

40 *See Funding Hold Order,* ¶ 10.

beyond Total Call Mobile's current procedures, and ask questions that have little or no discernable relationship to the validity of Total Call Mobile's current funding requests.

Nevertheless, as described above, Total Call Mobile responded to those requests, too. Total Call Mobile provided four responses, dated June 13, 17, 22, and 27, 2016 to the June 1 Letter as well as additional responses, dated July 6, 8,13, and 22, 2016 to the June 30 Letter. Total Call Mobile also had several discussions with Bureau staff informing them of its progress in responding to these requests.

The Bureau found that Total Call Mobile failed to provide documentation that the Company's agents and employees receive training to prevent enrollment of duplicate and ineligible consumers and how the training has changed since the timeframe highlighted in the NAL. This is not correct. In its June 13 response, Total Call Mobile provided, in response to Request 1, a list of its current field agents and signed training acknowledgment forms for each.[41] These documents were labeled FCC-NAL-0000001 – FCC-NAL-00000163. Total Call Mobile's response to Request 1 was completed on June 13, 2016. In its June 22 response, Total Call Mobile provided, in response to Request 6, eight historic versions of the agent training manual produced as Exhibit A in its Paragraph 102 Response. These documents were labeled FCC-NAL-00168016 – FCC-NAL-00168022, making the response to Request 6 substantially complete before the order was issued.[42]

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41 In one instance, Total Call Mobile submitted evidence that the field agent attended training in lieu of the signed acknowledgement.

42 Moreover, how the training changed in the past is of questionable relevance to Total Call Mobile's eligibility for funding. The Bureau has Total Call Mobile's current procedures that it may evaluate for sufficiency under the rules.

The *Funding Hold Order* also incorrectly faults Total Call Mobile for its June 17 Response, claiming that the Company provided a short "supplemental response" concerning one of the questions in the Bureau June 1 Letter.[43] The *Funding Hold Order* omits the fact that with each response, Total Call Mobile made it clear it was unable to provide all requested information within the allotted time and would respond on a rolling basis, completing production by June 27. As promised, Total Call Mobile made four submissions, each with a production of documents, completing its response on June 27.

Next, the Bureau finds that Total Call Mobile, in its June 13 response, provided "an incomplete or no response to five of the Bureau's questions." As noted above, Total Call Mobile provide responses to Requests 1, 2, 3, part of 4 and 7 in its June 13 Response and noted where it would not be possible to produce the requested information due to circumstances outside its control and where it would need to provide the information on a rolling basis.[44]

Given the course of conduct by the Commission since October 2015, the Bureau's continued questioning appears to be a pretext for holding Total Call Mobile's funding. Having failed twice, the Bureau is now attempting to base the suspension of Total Call Mobile's participation in the Lifeline program on an alleged failure of the Company to respond to a series of manufactured requests for information. Total Call Mobile provided the information necessary to show it is entitled to continued payments, and any finding to the contrary is merely an excuse to punish the Company without the procedural due process to which it is entitled. This is the third time the agency has attempted to reach this result despite lacking substantive and procedural grounds to do so, and the third time that its attempt falls short.

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43 *See* Funding Hold Order, ¶ 8.

44 The Funding Hold Order also finds that the responses provided by Total Call Mobile were signed by outside counsel. To remedy this, Total Call Mobile immediately procured signed declaration from its President, Hideki Kato, and submitted it on June 24.

V. THE BUREAU'S DECISION FAILS TO TAKE INTO ACCOUNT CHANGED CIRCUMSTANCES

Reconsideration is also proper because since June 22, 2016, Total Call Mobile has continued to make productions to the Bureau and, with a submission that is being made today to the Bureau, considers its responses to the June 1 and June 30 Letters complete. While the Funding Hold Order is improper and should be reversed for the reasons stated above, it should also be reversed on the additional ground that the Company has made supplemental productions on June 22, 2016, the very day the *Funding Hold Order* was issued, as well as on June 23 and 27, 2016 and July 6, 8, 13 and 22, 2016. In light of the additional information the Company has provided to the Bureau, the stated reason the Bureau provided for withholding Total Call Mobile's funding can no longer be justified and *Funding Hold Order* should be reversed.

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CONCLUSION

For the reasons stated above, the Bureau's decision contains material errors and omissions, fails to take into account changed circumstances, and threatens the Lifeline services of [redacted] Lifeline subscribers. Therefore, the *Funding Hold Order* must be reversed.

Respectfully submitted,

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