

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

In the Matter of)	
)	
Lifeline and Link Up Reform and Modernization)	WC Docket No. 11-42
)	
Telecommunications Carriers Eligible for Universal Service Support)	WC Docket No. 09-197
)	
Connect America Fund)	WC Docket No. 10-90
)	

**PETITION FOR WAIVER OF
USTELECOM, CTIA, AND ITTA**

USTelecom – the Broadband Association, CTIA, and ITTA - The Voice Of America’s Broadband Providers (the Petitioners) seek a one-time waiver of the rules of the Federal Communications Commission (Commission) regarding the requirements for completion of a biennial audit (Biennial Audit) as required by 47 C.F.R. § 54.420. Given the Commission’s commitment to Congress to carry out the unanticipated forensic audits (Forensic Audits), Petitioners maintain that such a waiver is appropriate and is in accordance with the public interest. Such waiver should apply only to eligible telecommunications carriers (ETCs) that have been selected for a Forensic Audit but also remain subject to the existing Biennial Audit requirement, and should extend for a period of two years following the completion of a Forensic Audit, consistent with the framework of biennial audits.¹

¹ To the extent that the Commission later adopts a risk-based audit program, the waiver period should be conformed to that approach. *See infra* Section II.A.

I. Introduction and Background

In 2017, United States Senators Claire McCaskill and Ron Johnson requested Forensic Audits of the top thirty ETCs in an effort to identify possible instances of waste, fraud, or abuse of taxpayer dollars.² In response to this request, Commission Chairman Ajit Pai announced that the agency's Office of Managing Director and Wireline Competition Bureau (Bureau) were working with the Universal Service Administrative Company (USAC) to develop a Forensic Audit plan consistent with that request. According to Chairman Pai's letter, Commission staff would oversee USAC's work on this initiative to ensure the Forensic Audits were conducted in a "cost-effective manner."³

Since then, Forensic Audits are well under way, with some ETCs reporting the receipt of audit announcements as early as September. In addition, USAC recently released its "High Cost and Low Income" briefing book that specifically addresses the timeline for Forensic Audits (*USAC Briefing Book*).⁴ The *USAC Briefing Book* reports that the first round of Forensic Audits will commence in October and November, 2018, with first round testing commencing in

² See, Letter from Senator Ron Johnson, Chairman, and Senator Clair McCaskill, Ranking Member, Committee on Homeland Security and Governmental Affairs, to Chairman Ajit Pai, Federal Communications Commission, and Vicki Robinson, Acting CEO, Universal Service Administrative Company (September 15, 2017).

³ Letter from Chairman Ajit V. Pai to Sen. Ron Johnson and Sen. Claire McCaskill (Nov. 21, 2017) (available at: <https://docs.fcc.gov/public/attachments/DOC-348164A1.pdf>) (visited December 5, 2018) (*Chairman Pai Letter*).

⁴ See, USAC Briefing Book, *High Cost and Low Income Briefing Book*, October 29, 2018 (available at: <https://www.usac.org/res/documents/about/pdf/bod/materials/2018/High-Cost-Low-Income-Briefing-Book-October.pdf>) (visited November 27, 2018).

November and December, 2018.⁵ The second round of testing will commence in January and February, 2019, with completion of all Forensic Audits by August or September, 2019.⁶

Under the Biennial Audit framework adopted in 2012 (*2012 Lifeline Order*),⁷ the Commission established a framework to “ensure there is a focused and effective system for identifying and deterring program abuse.”⁸ The Commission established its audit framework “to test the effectiveness of Lifeline ETCs’ internal controls and ensure that management is reporting accurately to USAC, the Commission, and state regulators, as appropriate.”⁹ ETCs subject to the Biennial Audit requirement must hire an independent audit firm to assess their overall compliance with the Lifeline program’s requirements.¹⁰

Subsequent to the release of the *2012 Lifeline Order*, the Bureau issued its Lifeline Biennial Audit plan (*2014 Audit Plan*). The *2014 Audit Plan* consisted of a detailed, uniform and robust framework to satisfy the Biennial Audit obligations adopted in the *2012 Lifeline Order*. The *2014 Audit Plan* focused on an ETC’s corporate-wide compliance rather than an ETC’s performance on a specific day in a particular study area.¹¹ In other words, the Biennial Audits focus on a company’s overall compliance with the Lifeline rules to assess whether the company has internal controls necessary to comply with the Commission’s Lifeline rules.

⁵ *Id.*, p. 35.

⁶ *Id.*

⁷ Lifeline and Link Up Reform and Modernization, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656, FCC 12-11 (Feb. 6, 2012) (*2012 Lifeline Order*).

⁸ *Id.*, ¶ 285.

⁹ *Id.*, ¶ 287.

¹⁰ *Id.*, ¶ 291.

¹¹ Public Notice, Wireline Competition Bureau Announces Release of Final Lifeline Biennial Audit Plan, DA 14-450, Attachment 3, ¶ 4 (April 2, 2014) (*2014 Audit Plan*).

The Forensic Audits are similar in all material respects. Their purpose is to assess overall compliance with the Lifeline program requirements and identify instances of waste, fraud and abuse. To date, the auditors have focused on program eligibility documentation, certification/recertification forms, pass-through documentation, usage documentation, one-per-household documentation, and recertification Form 555. In other words, the Forensic Audits examine the same compliance areas that are tested in the Biennial Audits. As such, they are duplicative of the Biennial Audits in all material respects, and the Bureau should therefore waive the Biennial Audit requirement for any ETC subject to a Forensic Audit.

II. Good Cause Exists to Grant the Requested Waiver.

The Commission may waive its rules for good cause shown.¹² The Commission may exercise its discretion to waive a rule when the particular facts make strict compliance inconsistent with the public interest.¹³ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁴ In short, a waiver is justified when special circumstances warrant a deviation from general rules and such deviation will serve the public interest. Moreover, Section 54.420(a)(2) of the Commission's rules expressly permits waiver of the requirement for a Biennial Audit.

¹² 47 C.F.R. § 1.3.

¹³ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

¹⁴ *WAIT Radio*, 418 F.2d at 1150; *Northeast Cellular*, 897 F.2d at 1166.

A. Waiver of the Biennial Audit Requirement is Justified Under Section 1.3 of the Commission's Rules.

Here, granting the requested waiver for Biennial Audits would serve the public interest by removing the unnecessary duplication of audits of Lifeline ETCs. Although Petitioners support the use of audits to address waste, fraud, and abuse in the Lifeline program, the execution of unscheduled Forensic Audits combined with the established schedule of Biennial Audits means that Lifeline ETCs will be subject to duplicative audits of their Lifeline programmatic procedures during overlapping periods. Grant of the waiver would remove the burdensome and duplicative audit requirements, while still ensuring that the Commission's overall policy of rooting out fraud, waste and abuse in the Lifeline program is not hindered. In other words, because ETCs will still be subject to a thorough Forensic Audit, the Commission and Congress will still be assured of Lifeline program integrity for each ETC subject to the Forensic Audit.

Without a limited waiver from the Biennial Audit obligations, substantial administrative burdens and costs will arise for the Commission, USAC, and Lifeline ETCs. Both Commission and USAC staff will be required to expend significant time and resources to carry out redundant audits that are focused on the identical goals of identifying instances of fraud, waste and abuse. Since a Forensic Audit will have already been conducted (or is scheduled to be conducted), the imposition of an unnecessary Biennial Audit will create additional – and wholly unnecessary – administrative burdens and costs for USAC and Commission staff.

Absent a waiver, USAC staff and Commission personnel will be forced to essentially repeat a near-identical process from one audit (*e.g.*, the Biennial Audit), followed by another (*e.g.*, the Forensic Audit). It makes little sense for the Commission to needlessly expend such resources given that a single audit will suffice for achieving this important policy goal.

Moreover, grant of the waiver for Biennial Audits would satisfy Chairman Pai’s stated goal of ensuring that Forensic Audits are conducted in a “cost-effective manner.”¹⁵ Grant of the waiver would ensure that the Commission could conduct the requested Forensic Audits in a fiscally prudent manner by avoiding the unnecessary costs associated with redundant Biennial Audits. These costs savings would be realized not only by ETCs, but also by the Commission and USAC.

Failure to grant a waiver will impose unnecessary burdens on Lifeline ETCs with no material benefit to the public interest. USTelecom has previously commented on the significant burdens associated with the various audit requirements that many ETCs encounter throughout any given year, along with the diminishing value of these audits. For example, in comments in response to the *2017 Lifeline Notice*,¹⁶ USTelecom discussed some of the administrative burdens and inefficiencies in the Lifeline Payment Quality Assurance (PQA) Program assessments on ETC affiliate carriers.¹⁷

USTelecom noted instances where assessments may amount to millions of dollars in support reviewed with inconsequential, if any, discrepancies. One USTelecom member had ETC affiliates that were subject to approximately 80 Lifeline PQAs in six years. For this member, from 2012 – 2017 approximately eight million dollars in Lifeline support was reviewed with a total recovery of less than two thousand dollars, resulting in a recovery rate of .02%.¹⁸

¹⁵ *Chairman Pai Letter*, p. 1.

¹⁶ *Bridging the Digital Divide for Low-Income Consumers*, Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, 32 FCC Rcd 10475, FCC 17-155 (Dec. 1, 2017) (*2017 Lifeline Notice*).

¹⁷ USTelecom Lifeline Comments, p. 5, WC Docket No. 17-287, WC Docket No. 11-42, WC Docket No. 09-197 (submitted February 21, 2018).

¹⁸ *Id.*

Importantly, relieving ETCs of the Biennial Audit requirement would not undercut the Commission’s policy goals, since the Forensic Audits for the relevant ETCs would still take place. Grant of the waiver would simply introduce greater administrative efficiencies into the Commission’s broader Lifeline integrity program. To the extent that an ETC is able to demonstrate program compliance through the Forensic Audit, it would similarly be able to demonstrate compliance via the Biennial Audit. Relief from the duplicative audit requirement will free Lifeline ETCs’ resources to provide more and better services to low-income customers.

In addition, the Commission is currently considering whether the current audit framework – based exclusively on the \$5 million threshold – is the appropriate guidepost for identifying instances of waste, fraud and abuse. Specifically, in the *2017 Lifeline Notice*, the Commission has proposed transitioning the independent audit requirements required by section 54.420 of the Commission’s rules towards “identifying companies to be audited based on established risk factors and taking into consideration the potential amount of harm to” the Universal Service Fund.¹⁹

The Commission maintained that such an approach would allow for “adaptable, independent audits that respond to risk factors that change over time,” and would “better target waste, fraud, and abuse in the program and also utilize administrative resources more efficiently and effectively than in prior years.”²⁰ Grant of the requested waiver would further the goal in the *2017 Lifeline Notice* of ensuring greater administrative efficiencies in its Lifeline audit program by avoiding unnecessary Biennial Audits whose efficacy the Commission has already called into question.

¹⁹ *2017 Lifeline Notice*, 32 FCC Rcd at 10505 ¶ 84.

²⁰ *Id.*

For all of these reasons, the Commission should waive the Biennial Audit requirement for any Lifeline ETC subject to a Forensic Audit. This waiver should extend for a period of two years following the completion of the Forensic Audit.²¹ This will maintain the minimum frequency of audits established in the Biennial Audit requirement while eliminating redundant audits.

B. Waiver of the Biennial Audit Requirement is Justified Under Section 54.420(a)(2) of the Commission’s Rules.

The Bureau may also waive the requirements for its Biennial Audits under section 54.420(a)(2) of the Commission’s rules. Under that section, Biennial Audits are required, “unless directed otherwise by the Commission.”²² In its *2012 Lifeline Order*, the Commission directed that the Bureau may, in its discretion, relieve an ETC of its obligation to perform a Biennial Audit. Good cause exists for the Bureau to exercise its authority under the Commission’s rules.

When the Commission adopted its *2012 Lifeline Order*, it stipulated that if there are no material findings in a carrier’s first independent audit report, the Bureau may “relieve the carrier of its obligation to perform an independent audit in the next biennial audit cycle.”²³ Such an approach is logical, since it ensures that administrative burdens and costs are avoided in instances where it is unlikely that instances of fraud, waste or abuse will be identified in subsequent audits.

²¹ To the extent that the Commission later adopts a more targeted, risk-based audit program to replace the Biennial Audit requirement, the waiver period should be tailored to conform to that approach. *See generally id.* at 10505-06 ¶¶ 84-89. In no event should the waiver period be less than one year from the completion of the Forensic Audit.

²² 47 C.F.R. § 54.420(a)(2).

²³ *2012 Lifeline Order*, ¶ 295.

Petitioners maintain that the reasoned principle established in the *2012 Lifeline Order* is even more relevant in an instance where an ETC is subject to a Forensic Audit. In establishing the ability of the Bureau to waive the Biennial Audit for an ETC, the Commission was focused on achieving administrative efficiencies by ensuring that ETCs are not subjected to unnecessary and burdensome audit procedures. The framework established in the *2012 Lifeline Order*, which applies in instances where there were “no material findings” in an ETC’s audit report, is equally applicable where a Forensic Audit has been scheduled to occur.

Indeed, in the current scenario where some ETCs will face both a Biennial Audit and Forensic Audit during a single year, the need for a waiver is more acute. The *2012 Lifeline Order* envisioned a waiver of a subsequent Biennial Audit requirement, meaning that an ETC could be relieved of its Biennial Audit two years from its initial result of no material findings. In the current scenario, however, some ETCs will be facing burdensome audits (*i.e.*, the Biennial Audit and a Forensic Audit) during a *single* year timeframe. The Bureau should therefore exercise the discretion it is afforded under section 54.420(a)(2) to waive the Biennial Audits for ETCs subject to the Forensic Audits. Such a waiver is warranted given the circumstances and is consistent with the policy goals of the rule. As discussed above, this waiver should extend for a period of two years following the completion of the Forensic Audit.²⁴

²⁴ See *supra* Section II.A. At minimum, the waiver should extend for at least one year from the completion of the Forensic Audit. *Id.*

III. CONCLUSION

For the foregoing reasons, the Bureau should grant the instant Waiver Petition.

Respectfully submitted,

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