

**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
)	

**WIRELESS ETC PETITIONERS' PETITION FOR RECONSIDERATION AND
CLARIFICATION**

John J. Heitmann
Joshua T. Guyan
KELLEY DRYE & WARREN LLP
3050 K Street NW
Suite 400
Washington, D.C. 20007
(202) 342-8400 (voice)
(202) 342-8451 (facsimile)
jheitmann@kelleydrye.com

*Counsel for i-wireless LLC, Telrite
Corporation, Assist Wireless, LLC, Total
Call Mobile, LLC, American Broadband and
Telecommunications Company, Telscape
Communications, Inc./Sage Telecom
Communications, LLC (d/b/a TruConnect)t
and Easy Telephone Services Company (dba
Easy Wireless)*

August 13, 2015

SUMMARY

The Wireless ETC Petitioners hereby petition for reconsideration and for clarification of one rule change in the Lifeline Second Report and Order¹ pursuant to Section 1.429 of the Commission's rules.² Specifically, the Wireless ETC Petitioners object to the method in which the Commission proposes to establish a uniform snapshot date for Lifeline reimbursements going forward because the revised rule as written would result in many situations where eligible telecommunications carriers (ETCs) provide Lifeline benefits to eligible low-income consumers without receiving reimbursement for such services.

The Wireless ETC Petitioners do not object to establishing a snapshot; however, the manner in which the order implements the snapshot would harm ETCs by forcing them to incur costs and provide service without reimbursement. The new rule takes a snapshot of an ETC's Lifeline subscribers as of the first of the month and provides reimbursements for the previous month's service based on the number of subscribers in the snapshot. To remedy the injustices described herein, the rule need only be modified to add to the snapshot count any subscribers de-enrolled in the previous month that received Lifeline service during that month.

Further, the Wireless ETC Petitioners seek clarification that the first month in which ETCs must use a snapshot is March 2016 and that the first payment that must be made pursuant to a first of the month snapshot is the March 2016 reimbursement for service provided in February 2016 (based on the March 1, 2016 snapshot).

¹ See *Lifeline and Link Up Reform and Modernization, et al.*, WC Docket 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 (rel. June 22, 2015) (Second Report and Order).

² See 47 C.F.R. § 1.429.

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³ The Wireless ETC Petitioners are i-wireless LLC, Telrite Corporation, Assist Wireless, LLC, Total Call Mobile, LLC, American Broadband and Telecommunications Company, Telscape Communications, Inc./Sage Telecom Communications, LLC (d/b/a TruConnect) and Easy Telephone Services Company (d/b/a Easy Wireless).

⁴ See *Lifeline and Link Up Reform and Modernization, et al.*, WC Docket 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 (rel. June 22, 2015) (Second Report and Order).

⁵ See 47 C.F.R. § 1.429.

The Wireless ETC Petitioners do not object to establishing a snapshot; however, the manner in which the order implements the snapshot would harm ETCs by forcing them to incur costs and provide service without reimbursement. The new rule takes a snapshot of an ETC's Lifeline subscribers as of the first of the month and provides reimbursements for the previous month's service based on the number of subscribers in the snapshot. To remedy the injustices described herein, the rule need only be modified to add to the snapshot count any subscribers de-enrolled in the previous month that received Lifeline service during that month. Further, the Wireless ETC Petitioners seek clarification regarding the month by which ETCs must transition to the uniform snapshot and when payments will be received.

I. Lifeline Providers Must Receive Reimbursements for Benefits Provided to Eligible Low-Income Consumers

In the Second Further Notice Proposed Rulemaking (Second FNPRM), the Commission seeks comment “on ways to increase competition and innovation in the Lifeline marketplace.”⁶ The Second FNPRM concludes, “we believe the best way to do this is to increase the number of service providers offering Lifeline services.”⁷ The Commission goes on to “seek comment on the best means to facilitate broader participation in the Lifeline program and encourage competition. . . .”⁸ This is a laudable goal, but unfortunately one which is undermined by a policy adopted in the same order that fails to reimburse Lifeline service providers for the discounted communications services provided to eligible low-income consumers in certain common instances.

⁶ Second FNPRM, ¶ 121.

⁷ *Id.*

⁸ *Id.*

A. New Rule Section 54.407 Would Result in ETCs Providing Unreimbursed Lifeline Services

Section 54.407 of the Commission’s rules currently follows the fundamental principle that the provision of Lifeline service and reimbursement go hand-in-hand – “Universal service support for providing Lifeline shall be provided directly to an eligible telecommunications carrier, based on the number of actual qualifying low-income consumers it serves.”⁹ Upon the effective date, the new Section 54.407 will state, “Universal service support for providing Lifeline shall be provided directly to an eligible telecommunications carrier, based on the number of actual qualifying low-income consumers it serves *directly as of the first day of the month.*”¹⁰ The Second Report and Order confirms that the snapshot date will be the first of the month and it will determine eligibility for reimbursement for the previous month. The Commission’s example is that, “on May 1, carriers would take a snapshot of the number of subscribers in their system on that day, which they would use on the FCC Form 497 for the April data month.”¹¹ The Wireless ETC Petitioners do not object to applying a uniform snapshot date. However, the new rule will result in several situations where ETCs will provide Lifeline service without receiving reimbursement for that service.

First, an ETC will not be reimbursed for the service provided to any subscriber that enrolls and de-enrolls in the same month. For example, a subscriber enrolls on August 2 and de-enrolls on August 30. The ETC will have provided service (e.g., 250 or, in some jurisdictions, more minutes) to the subscriber, which the subscriber can use in its entirety and,

⁹ 47 C.F.R. § 54.407(a).

¹⁰ Second Report and Order, Appendix B.

¹¹ *Id.*, note 478.

because the subscriber is no longer a subscriber on September 1, the ETC would not receive reimbursement for the service provided.¹²

Second, an ETC will not be reimbursed for the service provided to any subscriber that de-enrolls in any month after receiving Lifeline service but before the first of the following month. In these situations, the subscriber's last month of service would not be reimbursed. For example, a subscriber enrolls on August 2 and de-enrolls on November 30. The subscriber would receive four months of Lifeline service,¹³ but the ETC would receive only three reimbursements.¹⁴

Finally, and most egregiously, Lifeline providers would not be reimbursed for service in the month of December for all subscribers that fail to recertify their eligibility annually because USAC requires all such subscribers to be de-enrolled by December 31, rather than within five business days after December 31. Annual recertification is the largest single de-enrollment event in the Lifeline program. Annual recertification failure rates vary by carrier from 10 to 50 percent. The highest failure rates are generally attributable to those ETCs that use USAC to conduct recertification. ETCs are generally able to achieve substantially better results by conducting their own recertification processes. Under the new snapshot rule, ETCs would provide service to their customer base for the entire month of December and not be reimbursed

¹² The same would be true for a wireline service, especially if a customer de-enrolls at the end of their service period and before the first of the month.

¹³ If a wireless ETC makes minutes available on the same day of enrollment each month, this subscriber would receive minutes on August 2, September 2, October 2 and November 2. If the ETC makes minutes available based on the first of the month, the subscriber would receive minutes on August 2, September 1, October 1 and November 1.

¹⁴ The ETC would receive reimbursements based on the September 1, October 1 and November 1 snapshots, but not based on the December 1 snapshot for November service, even though a benefit was provided in November. Again, the same is true for a wireline service. In this case, the customer is used to paying the discounted amount for service. In the final unreimbursed month, the wireline carrier would have to attempt to get the customer to pay the full price for the service.

for between 10 and 50 percent of them. This issue can be resolved by modifying Section 54.407 of the rules as described herein.¹⁵

B. ETCs Incur Many Costs to Provide Service to Lifeline Customers Each Month

Lifeline service may be provided in many situations at no cost to low-income consumers, but the service is not without cost to ETCs. These costs include marketing and outreach, enrollment costs, interaction with the National Lifeline Accountability Database (NLAD), activation fees, daily line fees (per active line), the cost of minutes and the allocated costs of running a Lifeline business, including legal and regulatory costs and back office systems. In addition to those costs, ETCs incur many set costs to provide Lifeline service to eligible customers each month. For example, many state and local governments claim taxes and

¹⁵ The limited issue of annual recertification can also be addressed by interpreting the end-of-year deadline for recertification independently from the obligation to de-enroll within five business days, as they are in the rules. Section 54.410(f) of the Commission’s rules requires ETCs to annually recertify all subscribers, and if they are unable to do so, comply with the de-enrollment requirements of Section 54.405(e)(4). Section 54.405(e)(4) requires ETCs to de-enroll within five business days a Lifeline subscriber who does not respond to the carrier’s attempts to obtain recertification. *See* 47 C.F.R. § 54.405(e)(4). These processes should be interpreted to be separate and sequential. The obligation to annually recertify by the end of the year in Section 54.410(f) is first, and any subscriber that does not meet the end of year deadline should be subsequently de-enrolled within five business days pursuant to the de-enrollment process outlined in Section 54.405(e)(4). *See* 47 C.F.R. § 54.405(e)(4). The Commission should revise or clarify its interpretation of these rules as described in its October 2012 public notice regarding the annual recertification process. *See Wireline Competition Bureau Reminds Carriers That They Must Recertify Eligibility of All Lifeline Subscribers by December 31, 2012*, WC Docket Nos. 11-42, 03-109, 12-23 and CC Docket no. 96-45, Public Notice, DA 12-1626, 2-3 (2012) (“The recertification process is not considered ‘complete’ until the ETC has de-enrolled all subscribers that failed to respond to a re-certification request or are no longer eligible...In those states where state agencies perform re-certification, state agencies must provide sufficient notice to each ETC so that the ETC can initiate all de-enrollments by December 31, 2012 and can file its annual recertification report by January 31, 2013.”) Under our proposed revised Section 54.407(a) no ETC should seek a reimbursement for service to such a customer in January (that would be included on a February Form 497).

fees are owed based on service during the month rather than revenues. In Alabama, the 911 Board promulgated regulations stating that “[a] single monthly statewide 9-1-1 fee is to be imposed on each active voice communications service connection in Alabama that is technically capable of accessing a 9-1-1 system.”¹⁶ The fee is \$1.75 monthly.¹⁷ Though the new law is being challenged in court, Indiana imposes a similar 911 fee of \$1.00 per month for each communications service provided.¹⁸

Therefore, for a subscriber that enrolls on August 2 and de-enrolls on August 30, the ETC must incur the cost to acquire and enroll that customer, provide an allotment of no-cost minutes to the customer, and pay any applicable taxes and fees, but the ETC would receive no reimbursement from USAC. This outcome is patently unfair and would result in fewer Lifeline providers and less competition in the provision of Lifeline service, which is directly contrary to the Commission’s stated goals in the Lifeline Second FNPRM of increasing competition and improving Lifeline service offerings to low-income consumers. Further, requiring ETCs to provide service without reimbursement is arguably an impermissible “taking” pursuant to the Fifth Amendment of the U.S. Constitution.¹⁹

C. ETCs Do Not Have Control Over the Timing of Many De-Enrollments

In most cases ETCs do not have control over the timing of their de-enrollments to avoid providing unreimbursed services under the new rule. Other than annual recertification, most de-enrollments occur due to the Commission’s 60-day non-usage rule and carrier changes

¹⁶ Ala. Admin. Code r. 585-X-4.01(2).

¹⁷ See Alabama 9-1-1 Board Meeting, Minutes of April 23, 2014 (approving the \$1.75/month rate).

¹⁸ Indiana Code 36-8-16.6.

¹⁹ See U.S. Const. amend. V (“nor shall private property be taken for public use, without just compensation.”)

(benefit porting). De-enrollment for non-usage is based on a set timeline that is triggered by the customer's failure to use the service.²⁰ ETCs cannot control when customers stop using their wireless services. Therefore, ETCs have no control over when customers must be de-enrolled and whether the ETC will provide Lifeline service without being reimbursed for that month.

Lifeline providers also do not control the timing of de-enrollments due to a change in Lifeline service provider. Lifeline customers are generally free to switch Lifeline service providers whenever they choose.²¹ Therefore, again ETCs have no control over when customers must be de-enrolled and whether the ETC will provide Lifeline service without being reimbursed for that month.

D. The Commission Can Remedy This Injustice With a Minor Rule Modification

The Wireless ETC Petitioners recognize the apparent simplicity and programmatic consistency of the snapshot rule. However, the injustices described herein would stifle the Commission's goal of increasing the number of Lifeline service providers. Fortunately, the rule does not need to be discarded entirely to remedy the provision of uncompensated services. The rule can be fairly easily modified to avoid requiring ETCs to provide uncompensated Lifeline service. In order to reimburse Lifeline providers for discounted services provided to eligible low-income consumers, Section 54.407(a) should be modified to include all subscribers as of the first of the month and any subscribers de-enrolled in the previous month

²⁰ Prior to de-enrollment for non-usage, ETCs must provide 30 days' notice for the customer to use the service. *See* 47 C.F.R. §54.405(e)(3). If the subscriber does not use the service in those 30 days, the ETC must de-enroll the subscriber.

²¹ Although the NLAD does not allow an automatic benefit port within 60 days of enrollment or the last benefit port, customers can always de-enroll with their current Lifeline provider and enroll with another.

that received service from the ETC. Therefore, the Commission should reconsider and revise Section 54.407(a) of the rules to read as follows:

Universal service support for providing Lifeline shall be provided to an eligible telecommunications carrier, based on the number of actual qualifying low-income consumers it serves directly as of the first day of the month plus any qualifying consumers de-enrolled in the previous month that received Lifeline service in the prior month.

This minor rule modification would retain the simplicity of a snapshot with the minor addition of subscribers de-enrolled in the previous month that received Lifeline service to ensure that ETCs are reimbursed for the Lifeline services provided.²² That is a basic essential for the Lifeline program to attract service providers and increase competition in order to improve services and service offerings for low-income consumers.

II. Lifeline Provider Responses to the Current Snapshot Rule Could Diminish Benefits to Low-Income Consumers

While Lifeline service providers compete with each other and try to provide the most benefits possible to low-income consumers, many ETCs will not be able to simply provide services at no cost to the consumer without receiving the Lifeline reimbursements owed. In that case, there is a distinct possibility that some ETCs will attempt to match up the provision of service with the reimbursement in ways that may be necessary, but will not benefit low-income consumers.

For example, some ETCs may provide minutes at enrollment, but then begin providing additional minutes only when they know the services will be reimbursed by USAC. An ETC may provide 250 minutes to a consumer that enrolls on August 2 (which will be reimbursed based on a September 1 snapshot) and then provide the second allocation of minutes

²² ETCs should not be permitted to include de-enrolled customers that simply had minutes that carried over from a previous month.

on October 1 when the ETC knows it will be eligible for a second reimbursement. This would result in a low-income customer receiving 250 minutes of use to stretch over nearly two months. In the Second FNPRM, the Commission is looking for ways to increase service offerings, not stretch them thinner.

As another example, some ETCs may still provide 250 minutes over the course of the month, but attempt to break up the availability of minutes to hedge the possibility of service going unreimbursed. Consider the example of a subscriber that enrolls on August 2 and de-enrolls on September 10. The ETC would likely provide the entire 250 minutes at enrollment due to competitive pressures, but may decide to provide the next group of minutes in two parts. The ETC might provide half of the monthly minutes on September 2 (125 minutes) due to the possibility that September service will go unreimbursed. If the subscriber de-enrolls on September 10 before receiving the second allotment of 125 minutes (perhaps scheduled to be provided on September 15), the ETC would not be reimbursed because the subscriber was not active as of October 1, but the ETC would have only provided 125 minutes rather than 250.

These potential outcomes may not occur due to competitive pressures, but the Commission should understand that many ETCs will have to consider these and other creative solutions if their provision of Lifeline services to eligible low-income consumers are not reimbursed by the Lifeline program. These solutions do not best serve consumers. Rather, consumers will receive the most robust service if ETCs are confident that the services provided will be fully reimbursed as they should be.

III. While the Snapshot Rule and Potential Future Use of the NLAD for Reimbursements May Simplify the Processes, the Commission Must Address Several Complications

The Wireless ETC Petitioners understand that one benefit of the snapshot is a move to simplicity and that the Commission's ultimate goal appears to be to transition to using each ETCs' subscriber base in the NLAD,²³ but the Commission should understand that it will have to contend with several complications in such a transition. This does not mean that a change or transition should not occur. It simply means that the Commission should consult with the industry in advance, recognize complications before they arise and address each one accordingly. Here, the Commission can take advantage of the simplicity of the snapshot while addressing the complications under the new snapshot rule where Lifeline services would be provided without reimbursement by modifying Section 54.407(a) to reimburse ETCs based on a first of the month snapshot plus any subscribers that were de-enrolled in the previous month and received Lifeline service. The following are a few of the likely complications that would arise if the Commission decides to use the NLAD for reimbursement. Each one would have to be addressed.

First, several states and territories have opted out of the NLAD as the Commission recognizes.²⁴ The NLAD cannot be used for reimbursement in those states and territories. Therefore, USAC will likely have to maintain some Form 497 submission infrastructure and procedures.

²³ See Second FNPRM, ¶ 179.

²⁴ The Second FNPRM states, "Texas, Oregon, California, Vermont, and the territory of Puerto Rico have each received approval from the Commission to opt out of the NLAD." Second FNPRM, note 340. The Second FNPRM asks, "would Lifeline providers operating in states that opted out of the NLAD be required to continue to file FCC Form 497s for those states?" Second FNPRM, ¶ 179.

Second, some Lifeline subscribers remain enrolled in the NLAD after the time for which service to them can be reimbursed. For those ETCs subject to the Commission’s 60-day non-usage rule that use a 90-day process, subscribers remain actively enrolled during the 30-day “cure” period, but that period is not reimbursable if the subscriber does not ultimately use the service. For example, assume a subscriber stops using the service for 60 days and the ETC sends the 30-day notice telling the subscriber that he or she has to use the service or be de-enrolled, but the subscriber does not use the service or respond within the 30 days. Today, the ETC would not include the subscriber on a 497 Form for service from Day 60 to Day 90, but if a snapshot were taken during that time period, the subscriber would show as active and have service reimbursed.

Third, ETCs file upward and downward revisions to their Forms 497 regularly. In some instances there are data entry errors or post-enrollment corporate auditing that result in increases or decreases to the number of reimbursable subscribers. The Commission’s rules permit such revisions indefinitely for downward revisions and for up to one year for upward revisions.²⁵ The Commission would need to continue to account for such revisions even if it moves to a policy of taking a snapshot using the NLAD for reimbursement.

Finally, some Lifeline ETCs do not provide handsets to customers at enrollment in some circumstances (e.g., phone enrollments), but rather ship the phones to the customer address provided. In those instances, the subscriber will be enrolled in NLAD a few days before they receive the phone and activate their Lifeline service. If the customer does not activate their

²⁵ See *Lifeline and Link Up Reform and Modernization, Lifeline and Link Up, Federal-State Joint Board on Universal Service, Advancing Broadband Availability Through Digital Literacy Training*, WC Docket No. 11-42, WC Docket No. 03-109, CC Docket No. 96-45, WC Docket No. 12-23, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11, ¶305 (2012) (Lifeline Reform Order); “FCC Form 497 FAQs: General Questions,” USAC, available at <http://www.usac.org/li/about/getting-started/faq-online-497-general.aspx> (Response to Q7: “Carriers can revise any form that was submitted offline as long as it falls within the current administrative window.”).

service, they should not receive a reimbursement, but if they are enrolled in NLAD as of a snapshot date, the reimbursement would be triggered.

These are all complications that must be addressed by the Commission and USAC if they are to transition to using NLAD enrollments for reimbursements. The complications can be addressed, but the Commission should recognize that they cannot be ignored in the search for simplicity.

Similarly, the Commission must address the complications described herein under the new snapshot rule where Lifeline services would be provided without reimbursement. Therefore, the Commission should reconsider and modify Section 54.407(a) to reimburse ETCs based on a first of the month snapshot plus any subscribers that were de-enrolled in the previous month and received Lifeline service. Reimbursing ETCs for the Lifeline services provided to eligible consumers is a fundamental principle of the Lifeline program and is a basic requirement to encourage additional Lifeline providers and increased competition to the program.

IV. The Commission Should Clarify the Transition Month to the New Snapshot

ETCs are given a transition period to implement the new snapshot rule, but the transition requires clarification to ensure ETC compliance. The Second Report and Order states that, “within 180 days of the effective date of this Second Report and Order, ETCs should transition to using the first day for the month as the snapshot date.”²⁶ The Second Report and Order is effective August 13, 2015, so ETCs must transition to the snapshot by February 9, 2016. In order to comply, must ETCs use a February 1, 2016 snapshot for January service or begin with a March 1, 2016 snapshot for February service? The best reading of the order is one that allows for the full 180-day transition period provided and requires ETCs to move to use of the

²⁶ Second FNPRM, ¶ 243.

first-of-the-month snapshot date no later than March 1, 2016 for the February 2016 service month (allowing ETCs to use their current reimbursement methods prior to that date). The Wireless ETC Petitioners seek clarification of the Second Report and Order snapshot requirement consistent with this understanding.

In addition, the Wireless ETC Petitioners seek clarification regarding the timing of reimbursement payments related to the transition to the uniform snapshot date. The Commission should clarify and confirm that the first payment that must be made pursuant to a first of the month snapshot is the March 2016 reimbursement for service provided in February 2016 (based on the March 1, 2016 snapshot).

V. Conclusion

The Wireless ETC Petitioners petition for reconsideration of the method in which the Commission proposes to establish a uniform snapshot date for Lifeline reimbursements going forward because the revised rule as written would result in many situations where ETCs provide Lifeline benefits to eligible low-income consumers without receiving reimbursement for such services. The Wireless ETC Petitioners do not object to establishing a snapshot; however, the manner in which the order implements the snapshot would harm ETCs by forcing them to incur costs and provide service without reimbursement. To remedy the injustices described herein, the rule need only be modified to add to the snapshot count any subscribers de-enrolled in the previous month that received Lifeline service during that month.

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By:



John J. Heitmann
Joshua T. Gyan
KELLEY DRYE & WARREN LLP
3050 K Street NW
Suite 400
Washington, D.C. 20007
(202) 342-8400 (voice)
(202) 342-8451 (facsimile)
jheitmann@kelleydrye.com

Counsel for
i-wireless LLC
Telrite Corporation
Assist Wireless, LLC
Total Call Mobile, LLC
American Broadband and Telecommunications
Company
Telscape Communications, Inc./Sage Telecom
Communications, LLC (d/b/a TruConnect)
Easy Telephone Services Company (dba Easy
Wireless)

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