

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

In the Matter of)
)
Request for Review by Qwest) WC Docket No. 03-109
Communications International, Inc. of)
Decision of Universal Service Administrator)

REPLY COMMENTS OF SMITH BAGLEY, INC.

Smith Bagley, Inc. (“SBI”), by counsel and pursuant to 47 C.F.R. § 1.415(c), hereby provides these reply comments regarding the request for review (“Request”) by Qwest Communications International, Inc. (“Qwest”) of a decision by the Universal Service Administrative Company (“USAC”) concerning audit findings relating to the Lifeline and Link-Up programs.¹ As explained further below, SBI agrees that the audit findings were erroneous and requests that the Commission reject USAC’s conclusions.

I. DISCUSSION

A. The Reporting of Pro-Rated or Partial Lifeline Credit Amounts on Line 9 of FCC Form 497 Is Optional, Not Mandatory.

Qwest correctly argues that eligible telecommunications carriers (“ETCs”) are not required to report pro-rated or partial Lifeline credit amounts on line 9 of the Lifeline reporting form. The instructions for Line 9 state, in pertinent part:

If claiming partial or pro-rata dollars, check the box on line 9. Enter the dollar amount (if applicable) for all partial or pro-rated subscribers. Amounts should be reported in whole dollars, and may be either positive or negative, depending on whether there are more new subscribers being added part way through a month or more subscribers disconnecting during the reported month.

¹ See Public Notice, Comment Sought on Qwest Review for Review of a Decision of the Universal Service Administrative Company Concerning Audit Findings Relating to the Low-Income Program, DA 08-1144 (rel. May 15, 2008).

The operative word of the Line 9 instructions is the first word—“If”—because it indicates that while carriers may claim pro-rated amounts, they are not required to do so. SBI therefore agrees with AT&T’s assertion that USAC’s audit finding regarding Line 9 is “at clear odds with the plain language of the form and instructions.”² This argument is bolstered by Qwest’s observation that the FCC proposed, but never adopted, a requirement that carriers report the number of Lifeline customers receiving service for a portion of a month.³

Apart from the plain language and the lack of legal authority to require pro-rated or partial amounts, such a requirement would be unduly burdensome.⁴ Many billing systems lack the capability to handle the pro-rating of Lifeline amounts for customers who initiated or terminated service during a month. Also, SBI agrees with the observation by Qwest and supporting commenters that a carrier’s inability to report pro-rated amounts produces harmless results.⁵ Verizon correctly notes that, “[u]sing this methodology, some partial month customers are included in the count while other partial month customers are excluded.”⁶ Because the effect of not reporting pro-rated amounts is innocuous, a requirement to report on that basis would be unduly burdensome without any corresponding benefit to Lifeline subscribers or to the Fund.

B. Self-Certification is Sufficient to Satisfy an ETC’s Obligation to Determine that a Customer Lives on a Reservation.

It is both reasonable and permissible under the Commission’s rules for an ETC to rely on customer self-certifications in determining whether that customer resides on tribal lands for purposes of qualifying for Tier 4 Lifeline and Link-Up discounts. As USTA correctly observes,

² AT&T Comments at p. 2. *See also* USTA Comments at p. 3 (“USAC’s interpretation of the word ‘if’ in the instruction makes the conditional clause meaningless.”)

³ *See* Request at p. 5

⁴ *See* AT&T Comments at p. 2; Sprint Comments at pp. 1-2; Verizon Comments at p. 3; USTA Comments at pp. 5-6.

⁵ *See* Sprint Comments at p. 2 (“There is nothing to suggest that any ETC would earn a windfall by using end-of-period Lifeline subscriber counts for USF reporting purposes, or that the overall impact of this approach would have a material impact on Lifeline fund size.”); Verizon Comments at pp. 3-4.

⁶ Verizon Comments at p. 3.

under the Commission's Lifeline rules, "it's not clear that ETCs have the ability to withhold tribal support to end-users when presented with a facially-valid self-certification that is executed under penalty of perjury."⁷ Moreover, it is unclear what additional means USAC intended ETCs to use in determining whether a customer resides on tribal lands, and there appears to be no official or generally accepted source for making such a determination. As AT&T notes, without official federal or state guidance on whether a particular residence is located on tribal lands, it is unclear whether an ETC could make such a determination "even if it were to do a truck roll to the location."⁸

The FCC's rules and orders do not specify what a carrier must do to determine whether a customer's address is on tribal lands. SBI agrees with USTA and Qwest that by imposing a requirement that is not found in the Commission's rules, USAC is both impermissibly making its own interpretation of the Commission's rules and engaging in *ultra vires* retroactive rulemaking.⁹

C. Carriers' Recordkeeping Obligations Cannot Be Applied to Records Received Prior to the Effective Date of Such Requirements.

SBI agrees that the audit finding was erroneous to the extent it found Qwest's failure to retain customer verifications received prior to the effective date of the requirement in Section 54.415(a) that carriers keep copies of such verifications. Without restating Qwest's legal arguments, SBI notes that carriers cannot be required to adhere to record-retention obligations retroactively. Carriers cannot recreate thousands of customer records for time periods prior to the adoption of record-retention rules.

⁷ USTA Comments at p. 8.

⁸ AT&T Comments at p. 4 n.13.

⁹ See Request at p. 9; USTA Comments at p. 9.

II. CONCLUSION

For the reasons set forth above, SBI agrees with Qwest and the commenters supporting its Request, and requests that the Commission reject USAC's conclusions.

Respectfully submitted,

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