

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

In the Matter of                    )  
  )  
Request for Review by            )        WC Docket No. 03-109  
AT&T Inc. of a Decision         )  
Of the Universal Service         )  
Administrative Company         )

**COMMENTS OF  
THE UNITED STATES TELECOM ASSOCIATION**

USTelecom<sup>1</sup> is pleased to submit the following comments in support of AT&T's Request for Review of several Universal Service Administrative Company (USAC) audit findings.<sup>2</sup> We submit that the following audit findings are not reasonable interpretations of the requirements of the Lifeline program and represent substantive changes from the FCC's settled interpretation of these issues.

First, the Commission should reject the finding of USAC's auditors that AT&T failed to comply with section 54.417(a) of the Commission's rules for its alleged failure to obtain customer certifications of eligibility prior to May 12, 2005, the date on which the rule became effective.<sup>3</sup> Attempting to enforce any regulation prior to the date that such regulation even takes effect is dubious as a legal proposition.

Second, we agree with AT&T that the failure of a non-ETC reseller to provide a compliance certification to a wholesale provider should not result in a finding of non-compliance

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<sup>1</sup> USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks.

<sup>2</sup> See Request for Review by AT&T, Inc. of the Decision of the Universal Service Administrator, WC Docket No. 03-109 (filed on August 18, 2008) ("AT&T Petition")

<sup>3</sup> AT&T Petition at 3-4.

with section 54.417(a) of the Commission's rules.<sup>4</sup> The FCC shouldn't enforce a carrier's failure to obtain documentation from a reseller, when the reseller is under no obligation to provide it.

Third, the FCC should reject the finding of USAC's auditor that AT&T was required to use Line 9 to report ETC gains or losses of Lifeline customers mid-month. USAC and its auditors were incorrect in concluding that AT&T was required to populate Line 9 of the FCC Form 497 with partial or pro-rata data attributable to Lifeline subscribers who initiated or dropped Lifeline service from AT&T during any given month.<sup>5</sup>

These issues are of concern to all USTelecom members regardless of company size, because USTelecom's members, from the largest to the smallest, participate in the Low Income Program as ETCs and are therefore required to abide by the same regulations that USAC is attempting to enforce on AT&T here. USTelecom has also filed comments with respect to other pending requests for review filed by Qwest and AT&T.<sup>6</sup>

**I. THE REQUIREMENT FOR SIGNED SELF-CERTIFICATIONS TO BE RETAINED FOR CUSTOMERS INITIATING LIFELINE SERVICE BEGAN ON MAY 12, 2005, NOT PRIOR TO THAT DATE**

As was previously noted by US Telecom, AT&T should not be penalized for failing to retain customer self-certifications prior to the time that there was an effective obligation to do so. AT&T should not be required to produce self-certifications for customers who had initiated Lifeline service before May 12, 2005.<sup>7</sup> The only way USAC's application of the rule can be interpreted as not improperly applying on a retroactive basis is if AT&T had been required to have all of its current Lifeline customers that had initiated Lifeline service prior to May 12, 2005,

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<sup>4</sup> AT&T Petition at 4-5.

<sup>5</sup> See AT&T Petition at 6-8.

<sup>6</sup> See USTelecom comments filed May 14, 2008, in response to the Request for Review by AT&T Inc. of the Decision of the Universal Service Administrator, WC Docket No. 03-109 (filed on Jan. 7, 2008); and US Telecom comments filed June 16, 2008, in response to the Request for Review by Qwest, Inc. of the Decision of the Universal Service Administrator, WC Docket No. 03-109 (filed on April 25, 2008) ("Qwest Petition").

<sup>7</sup> See AT&T Petition page 11

recertify their eligibility for Lifeline service. And, as Qwest correctly noted in a similar request for review, the Commission has never explicitly imposed such an obligation.<sup>8</sup> Therefore, the document retention requirements of Section 54.417(a) must be read to impose the obligation starting from the effective date of the rule. In the absence of an explicit recertification requirement, the Commission must find that AT&T is maintaining self-certifications of eligibility in compliance with the Commission's rules and reverse USAC's findings to the contrary.

## **II. THE FCC SHOULD NOT ENFORCE THE REQUIREMENT TO OBTAIN LIFELINE RESELLER CERTIFICATIONS**

As a matter of equity, USTelecom can think of at least three reasons why the FCC should not enforce the failure of any wholesale provider to acquire a certification from resellers that such resellers will comply with all state and federal rules governing the Lifeline program.<sup>9</sup> The FCC should take wholesale providers out of this compliance loop and enforce this Lifeline compliance certification requirement directly on non-ETC resellers.

First, as AT&T accurately notes, though the FCC's rules may evince such a requirement, there is no reciprocal obligation anywhere in the Commission's rules or orders that require a non-ETC reseller to provide such a certification. As such, even if an ETC exercises reasonable good-faith efforts to acquire such certifications, as AT&T appears to have done, resellers may simply fail to provide a certification. Whether this failure is borne of good-faith or bad-faith, a wholesale provider's ability to comply with this requirement is entirely within the control of another service provider who is a direct competitor in the marketplace.

Second, requiring a wholesale provider to acquire such a certification is an act of meaningless formalism. The mere act of seeking and acquiring such a certification doesn't

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<sup>8</sup> Qwest Petition page 12

<sup>9</sup> 47 C.F.R. §54.417(a)

authorize (and nor does it obligate) a wholesale provider to police a reseller's compliance with all state and federal rules. Since the rules do not even anticipate the possibility that a wholesale provider is entitled to refuse to accept a reseller certification (because the wholesale provider has reason to know that a reseller's certification of compliance is inaccurate or fraudulent), the wholesale provider's role in this process is simply to incur record retention costs and assume administrative compliance risks that are completely unrelated to the subject of the certification, with no additional substantive or procedural benefits. And finally, the act of executing this certification does not bind the reseller to comply with all applicable state and federal rules, it simply gives wholesale providers another opportunity for non-compliance. While it may be the case that wholesale providers may have an opportunity to police program compliance through their interconnection agreements, it is by no means clear that wholesale providers are authorized to do so.

Finally, rather than placing wholesale providers at risk for failing to acquire reseller documentation, the FCC should simply rely on its (and USAC's) authority to seek such documentation directly from the reseller. Section 54.417(b) of the Commission's rule authorizes the Commission and USAC to directly request such documentation, and non-ETC resellers are required to comply with such requests. As such, the FCC should use this authority to create a process whereby resellers are directly required to certify compliance with the Lifeline program to the FCC or USAC, even on an annual basis, should that prove useful for the FCC or USAC.

**III. THE FINDING THAT ETCs MUST REPORT PARTIAL MONTH SUBSCRIPTION VIA LINE 9 IS INVALID AND SHOULD BE REVERSED BY THE COMMISSION**

**A. THE PLAIN MEANING AND HISTORY OF THE FORM 497 DO NOT SUPPORT THE INTERPRETATION AND FINDING OF THE AUDITOR**

The auditor concluded that AT&T's practice of reporting all Lifeline subscriber counts was not correct and that AT&T should complete Line 9 to report Lifeline subscribers who began or ended service during any given month. As AT&T and Qwest each note in previous, respective Requests for Review, the instructions to the FCC Form 497 state: "If claiming partial or pro-rata dollars, check the box on line 9."<sup>10</sup> [emphasis added] Common sense dictates that if there is a box to be checked, checking the box is optional, otherwise there would be an explicit instruction to provide the information and there would be no need for a box to be checked. Moreover, this language modifies and controls the instruction to check the box. USAC's interpretation of the word "if" in the instruction makes the conditional clause meaningless. Instead, USAC interprets this sentence to refer to the possibility that a carrier might have a month in which it would have no Lifeline customers who either began or terminated Lifeline service mid-month.<sup>11</sup> This cuts against the plain meaning and conditional nature of the phrase "If" claiming partial or pro-rata dollars. If not claiming pro-rata dollars, there is no need to check the box. Moreover, while this scenario may be possible (though still highly unlikely) for the smallest ETCs, it cannot be the case for the vast majority of carriers providing Lifeline service, and would not seem to be a legitimate reason for adding a line to the FCC Form 497 when instead such carriers could just report no activity. Furthermore, to determine that there is no Lifeline activity during a month, even the smallest carriers would have to monitor their Lifeline churn on a daily basis since no change in total Lifeline subscribers from month to month

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<sup>10</sup>Qwest Petition at 4 and AT&T Petition at 15-18.

<sup>11</sup> See USAC Management Response to AT&T (dated June 28, 2007) at 2.

could reflect two possibilities – offsetting gains and losses of Lifeline customers or no activity, but the carrier would have no indication as to which. So there would be no point for such carriers not to check the box since they would have the exact same burdens as if they had checked the box.

USAC’s interpretation is not supported by the history of partial month Lifeline reporting which was cited by AT&T in a previous, similar Petition for Review.<sup>12</sup> In 2004, the Commission announced that it intended to amend FCC Form 497 to require ETCs to report the number of Lifeline subscribers receiving federal support for part of the month and the number of days those subscribers received support. The Commission felt an amendment was necessary to make partial month reporting mandatory. In response to ETC concerns about the revision, the Commission delayed and later suspended indefinitely adoption of the new form. The fact that the Commission felt that it needed to announce that it contemplated a change to the form makes clear that any change was a substantive revision of the content required on the form. The fact that, in response to comment, no change was made confirms that the reporting was and remained optional. This FCC decision should have closed the door on USAC’s consideration of this issue.<sup>13</sup>

Since the Commission acted on this issue in 2004, USAC has no authority to contradict the Commission and establish a new rule. *See* 47 C.F.R. §54.702 (describing USAC’s functions and responsibilities, which do not include modifying Commission decisions.)

**B. CARRIERS HAVE NO INCENTIVE TO CHOOSE NOT TO REPORT INSTANCES OF SUBSCRIBERS OBTAINING PARTIAL MONTH SUPPORT**

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<sup>12</sup> Request for Review by AT&T Inc. of the Decision of the Universal Service Administrator, WC Docket No. 03-109 (filed on Jan. 7, 2008) at 3.

<sup>13</sup> See *Wireline Competition Bureau Announces Effective Date of Revised Form 497 Used to File Low Income Universal Service Support*, WC Docket No. 03-109, Public Notice, DA 04-3188 (rel. Oct. 4, 2004); *Wireline Competition Bureau Announces Delayed Effective Date for Revised Form 497 Used for Low-Income Universal Service Support Until Further Notice*, WC Docket No. 03-109, Public Notice, DA 05-604 (rel. March 4, 2005)

Carriers generally have no control over when and how many subscribers sign up for the Lifeline program. There are three possibilities regarding the number of customers signing up for Lifeline support in a given month; (1) the days subscribed to by new applicants could outweigh the days foregone by those dropping out of the program. In this instance the carrier would lose money by not reporting on a partial month basis. (2) the number of days subscribed to by new applicants could be equal to those dropping out of the program. This would be a wash to the carrier; or (3) there are more days foregone by those dropping out of the program than days added by new applicants in which case there could theoretically be a “profit” for a Lifeline provider. But because each month is variable, to gain net revenue the carrier in this last circumstance would have to check the partial-month box in months when it could “profit” and not check the box in a month when it absorbed the net Lifeline discount. But, as exemplified by AT&T in the instant case and as demonstrated by Qwest and AT&T in similar requests for review, carriers consistently do not check the box because it is so burdensome to determine the number of subscribers on a daily basis that they are willing to tolerate the variability of Lifeline support and absorb a reimbursement from the program that may not be fully compensatory. Actual data cited by Qwest in support of its request for review demonstrates that the amount of reimbursements that it has received from USAC are less than the federal Lifeline support Qwest has actually provided to its Lifeline customers.<sup>14</sup>

Any suggestion that carriers have an incentive to discourage Lifeline subscription and therefore profit from mid-month changes is ridiculous. There is no reason for a carrier to discourage people from subscribing to Lifeline service since the carrier is fully reimbursed for the discounted rate. Furthermore, if the customer’s choice is between Lifeline service and no

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<sup>14</sup> See Qwest Petition page 4

service, it is to the advantage of the carrier to have the customer take Lifeline service because in many instances Lifeline customers also purchase other services from their Lifeline providers.

**C. TO CREATE AN OBLIGATION TO REPORT PARTIAL-MONTH SUBSCRIPTION DATA WOULD BE EXTRAORDINARILY BURDENSOME FOR CARRIERS**

Many carriers such as AT&T use their billing systems to obtain the number of subscribers receiving the Lifeline discount at the end of each month.<sup>15</sup> To separately track Lifeline subscribers beginning and ending service during a month would require extracting this information from a carrier's billing system on a daily basis – or even more frequently. This is extremely burdensome and unnecessary. The majority of USTelecom's member companies would have much the same burdens as described by AT&T.

AT&T's description of the burdens involved makes clear that mid-month Lifeline reporting would require extraordinary efforts. As noted earlier, in order to properly use the FCC Form 497 as interpreted by USAC and its auditors, ETCs must track the number of customers that begin and end Lifeline subscription on a daily basis. This level of tracking will involve a significant amount of administrative costs for all ETCs, costs that are not justified by an equivalent benefit. As such, this "requirement" is tantamount to regulation for the sake of regulation. Moreover, as noted by Sprint, the FCC and USAC do not require ETCs to provide partial-month line count data for purposes of high-cost funding, despite the fact that the support associated with the various high-cost funds combined is about 5 times larger than the amount of support associated with the Lifeline program.<sup>16</sup>

It is notable to point out that the FCC has adopted various other rules and guidelines that are designed to minimize administrative burdens of its regulatees. For example, the FCC has

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<sup>15</sup> See AT&T Petition at 16-18

<sup>16</sup> Sprint comments filed May 14, 2008, in response to the Request for Review by AT&T Inc. of the Decision of the Universal Service Administrator, WC Docket No. 03-109 (filed on Jan. 7, 2008) at 2.

adopted and maintained universal service contribution "safe harbors" for CMRS, interconnected VoIP, and paging service providers, rather than imposing the obligation on such service providers to track the jurisdictional nature of each call. Additionally, in exercising its permissive authority to exempt providers who would not contribute more than \$10,000 in any given year, the FCC has established that the burdens associated with contributing (and attempting to collect such contributions from end users) does not outweigh the benefits of the ability of the Fund to assess such contributions to *de minimis* contributors. By choosing to adopt and maintain these administrative exceptions, the FCC is essentially saying that the value in reducing administrative burdens outweighs the value of the benefits of increased precision in reporting, even though these actions inevitably result in some (very minor) distortion of the telecommunications marketplace.

Such an analysis weighs even more heavily in opposition to imposing these burdens in the FCC Form 497 context. First, there's no disputing that partial-month reporting is extremely burdensome and the case has yet to be made that there are significant (if any) benefits to be derived from imposing these burdens. There is little or no economic incentive (and thus little or no distortive effects) for carriers to arbitrage the FCC Form 497 process since, as noted above, a carrier would have to track and analyze subscription information in order to report partial month subscription information when it stood to benefit, and withhold partial month subscription information when it did not. (USTelecom has previously suggested that USAC should file data into the record of this proceeding as to whether this kind of selective reporting is taking place, and USTelecom again speculates that it does not occur.) Finally, even if there were carriers that used the FCC Form 497 in this fashion, the economic value gained by these few carriers could

not possibly outweigh the burdens associated with imposing this degree of additional regulatory oversight over all ETCs.

**VII. CONCLUSION**

The Commission should find that USAC erred when it concluded that (1) AT&T did not properly comply with the record retention requirements for its failure to collect documentation prior to the effective date of the rule, (2) AT&T should be held liable for failing to acquire reseller compliance certifications, since no good-faith effort on the part of a wholesale carrier can compel a reseller to provide one, and (3) AT&T was required to populate Line 9 of the FCC Form 497 with partial or pro-rata data. These requirements should not be applied to AT&T or to any other ETC participating in the Low Income program.

Respectfully submitted,

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