

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

REQUEST FOR UNIVERSAL SERVICE)	WC Docket No. 05-337
FUND POLICY GUIDANCE REQUESTED)	WC Docket No. 06-122
BY THE UNIVERSAL SERVICE)	CC Docket No. 96-45
ADMINISTRATIVE COMPANY)	

COMMENTS OF THE
INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE

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SUMMARY

The Commission should clarify that 47 C.F.R. § 54.202(e) is to be given prospective effect only, and that carriers advertising Lifeline service can fulfill their obligations without specifying all aspects of supported local exchange service. The application of 47 C.F.R. § 54.202(e) to audit periods that occurred prior to the effective date of the rule violates fundamental principles of the Administrative Procedure Act, as well as elementary principles of fairness and reasonable expectation. Agency rules adopted through notice and rulemaking proceedings are accorded prospective application, and the Commission should accord no different treatment to 47 C.F.R. § 54.202(e).

The Commission should also clarify that carriers advertising the availability of Lifeline service are not required to list separately each specific supported service. The discrete elements of local exchange service are generally unknown and unfamiliar to consumers and a requirement to publish those aspects would conflict with the requirement to advertise Lifeline in a manner intended to reach those eligible for service.

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I. INTRODUCTION

The Independent Telephone & Telecommunications Alliance (ITTA) hereby submits comments in the above-captioned proceeding.¹ ITTA members are mid-size telephone carriers that provide a broad range of high-quality wireline and wireless voice, data, Internet, and video telecommunications services to 30 million customers in 44 states. ITTA has commented previously on the Universal Service Fund (USF) audits process,² and welcomes this opportunity to ensure that audits of USF beneficiaries are conducted pursuant to correct interpretations of applicable law.

¹ “Comment Sought on Request for Universal Service Fund Policy Guidance Requested by the Universal Service Fund Administrative Company,” Public Notice DA 09-2117, WC Docket Nos. 05-337, 06-122, CC Docket No. 96-45 (rel. Sep. 28, 2009) (Public Notice).

² See, *Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight: Reply Comments of the Independent Telephone & Telecommunications Alliance*, WC Docket No. 05-195 (Dec. 15, 2008); *Request for Review by AT&T Inc. of Decision of Universal Service Administrator: Comments of the Independent Telephone & Telecommunications Alliance*, CC Docket No. 96-45, WC Docket 05-337 (Aug. 20, 2009).

In the instant proceeding, the Commission seeks comment on several issues highlighted by the Universal Service Administrative Company (USAC) in separate letters to the Wireline Competition Bureau.³ ITTA comments on two of those issues, specifically, document retention requirements (August 19, 2009, letter, at 3) and advertising requirements for supported services (August 21, 2009, letter). In brief, ITTA submits that (a) application of document retention requirements that became effective in 2008 to audit periods prior to the effective date of those rules is impermissible, and (b) carriers advertising the availability of local telephone service for Lifeline subscribers fulfill applicable requirements without listing each component of the supported services.

II. DISCUSSION

A. **RETROACTIVE APPLICATION OF THE DOCUMENT RETENTION REQUIREMENTS IS IMPERMISSIBLE AND CONFLICTS WITH PUBLIC POLICY.**

USAC seeks Commission guidance on the application of currently effective document retention requirements to audit periods prior to the effective date of those regulations. As USAC explains,

The Commission established explicit High Cost Program document retention rules effective March 1, 2008 that require carriers retain for five years from receipt of funding all records necessary to demonstrate to auditors that support received was consistent with High Cost Program rules. When the Commission established this rule, it did not address what, if any remedial actions should be initiated against carriers that that did not maintain documentation for periods being audited prior to the establishment of the High Cost Program documentation rules.⁴

³ Letter from Richard A. Belden, USAC, to Julie Veach, Federal Communications Commission (Aug. 19, 2009) (August 19, 2009, letter), and letter from Richard A. Belden, USAC, to Julie Veach, Federal Communications Commission (Aug. 21, 2009) (August 21, 2009, letter).

⁴ August 19, 2009, letter, at 2.

Consequently, carriers are being cited for failure to comply with the document retention requirements of 47 C.F.R. 54.202(e), even where this rule was not in effect for the period being audited. As USAC describes, auditors have issued qualified opinions for audits periods during 2003 and 2005, placing at risk support received by carriers who allegedly did not comply with rules that were not yet in existence.⁵ This outcome not only defies reason and common sense, but also “familiar considerations of fair notice, reasonable reliance, [] settled expectations” and the law.⁶

In 2005, the Commission issued a Notice of Proposed Rulemaking (NPRM) seeking comment on, *inter alia*, document retention requirements for recipients of High Cost, Low Income, and Rural Health Care USF mechanisms.⁷ The Commission described the conclusions it had reached regarding document retention requirements for recipients in the Schools and Libraries Program, and sought comment on whether it

⁵ August 19, 2009, letter at 2, 3.

⁶ *See, Marie v. Securities and Exchange Commission*, 374 F.3d 1196, 1207 (D.C. Cir. 2004) (*Marie v. SEC*) (SEC disciplinary action against auditors for 1994 actions invalidated because standard imposed was not effective during period of auditors’ actions), quoting *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

⁷ *Comprehensive Review of Universal Service Fund Management, Administration, and Oversight* (WC Docket No. 05-195); *Federal-State Joint Board on Universal Service* (CC Docket No. 96-45); *Schools and Libraries Universal Service Support Mechanism* (CC Docket No. 02-6); *Rural Health Care Support Mechanism* (WC Docket No. 02-60); *Lifeline and Link-Up* (WC Docket No. 03-109); *Changes to the Board of Directors for the National Exchange Carrier Association, Inc.* (CC Docket No. 97-21); *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, FCC 05-124, at paras. 83-85 (2005) (NPRM).

should “adopt document retention rules for all of the USF mechanisms”⁸ In 2007, the Commission announced,

We will require recipients of universal service support for high cost providers to retain all records that they may require to demonstrate to auditors that the support they received was consistent with the Act and the Commission’s rules, assuming that the audits are conducted within five years of the disbursement of such support.⁹

The Commission’s language, “We *will* require”¹⁰ confirms the prospective nature of the Commission’s pronouncement, rather than any notion that such retention requirements would apply retroactively.

That intent, in fact, is wholly consistent with the Administrative Procedure Act (APA), pursuant to which the rulemaking proceeding of the Commission was undertaken, and pursuant to which its outcomes are bound. The D.C. Circuit explains that the APA “authorize[s] agencies to conduct formal rule making proceedings, in which all interested parties are notified, hearings conducted, and new rules adopted. Rules so adopted are prospective in application only.”¹¹ The D.C. Circuit reiterated this mandate more than a

⁸ NPRM at para. 84.

⁹ *Comprehensive Review of Universal Service Fund Management, Administration, and Oversight* (WC Docket No. 05-195); *Federal-State Joint Board on Universal Service* (CC Docket No. 96-45); *Schools and Libraries Universal Service Support Mechanism* (CC Docket No. 02-6); *Rural Health Care Support Mechanism* (WC Docket No. 02-60); *Lifeline and Link-Up* (WC Docket No. 03-109); *Changes to the Board of Directors for the National Exchange Carrier Association, Inc.* (CC Docket No. 97-21); *Report and Order*, FCC 07-150, at para. 24 (2007).

¹⁰ *Id.* (emphasis added).

¹¹ *Retail, Wholesale and Department Store Union, AFL-CIO v. National Labor Relations Board*, 466 F.2d 380, at 388, *citing* 5 U.S.C. § 551(4) (D.C. Cir. 1972) (internal citations omitted) (company’s failure to reinstate striking workers was not an unfair practice where company relied upon then-existing regulatory standards, rather than subsequently-promulgated guidelines).

decade later, stating “the Administrative Procedure Act generally contemplates that when an agency . . . employs rulemaking procedures, its orders ordinarily are to have only prospective effect.”¹² The Supreme Court has confirmed this approach, stating, “the APA requires that legislative rules (i.e., rules adopted pursuant to notice and comment procedures of the APA, 5 USC 553) be given future effect only.”¹³ Therefore, attempts to foist the outcomes of the document retention rulemaking upon carrier actions that occurred prior to the effective date of the rules violate both the letter and the spirit of the APA, and accordingly must be rejected. The Supreme Court has stated clearly that statutory grant of legislative rulemaking authority does not include the power to promulgate retroactively-effective regulations absent express Congressional authority: “Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”¹⁴

¹² *Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission, et al.*, 826 F.2d 1074, at 1082, *cert. denied* 485 U.S. 913 (1988), *citing* 5 U.S.C. § 551(4)-(7), 553, 554 (D.C. Cir. 1987) (*Clark-Cowlitz*) (in a relicensing proceeding, the Federal Energy Regulatory Commission (FERC) overruled prior internal conclusions regarding municipal preferences; FERC’s prior interpretation of the issue, a sole pronouncement during a half-century, was found to not be a reliable prior agency practice).

¹³ *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 216 (1988) (*Bowen*) (retroactive application of Medicaid cost limitation regulations ruled invalid). *See, also, Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235 (D.C. Cir. 1997) (elimination of extended implementation period for specialized mobile service (SMR) license was not retroactive rulemaking because it did not increase a party’s liability for past conduct or impose new duties for completed transactions).

¹⁴ *Bowen*, 488 U.S. at 208 (internal citations omitted).

The *sine qua non* of impermissible retroactive applicability is “whether the new provision attaches new legal consequences to events completed before its enactment.”¹⁵ The application of 47 C.F.R. § 54.202(e) to audit periods that occurred prior to promulgation of the rule unreasonably transforms lawful activity into actionable deficiency. It is precisely the type of retroactive rule forbidden by the APA because it “alter[s] the past legal consequences of past actions.”¹⁶ In the instant matter, prior to promulgation of the 47 C.F.R. § 54.202(e), there was no stated requirement for carriers to retain documents for five years. The NPRM was clear that no defined standard existed, asking, “whether we *should* adopt document retention rules”¹⁷ and evincing that theretofore no defined requirements existed.¹⁸ Carriers should not be penalized for adhering to then-satisfactory modes of conduct: “Fair notice of the standards against which one is to be judged is a fundamental norm of administrative law.”¹⁹ It is fundamentally unfair to change the legal landscape by holding carriers accountable to new standards that did not exist at the time the action occurred. Doing so rips reason from rulemaking and should be rejected summarily by the Commission.

There are instances in which an agency may effect retroactive application, but the instant matter is not one of them. For example, in adjudicatory proceedings, an agency

¹⁵ *Marie v. SEC*, 374 F.3d at 1207, quoting *Landgraf*, 511 U.S. at 269, 270.

¹⁶ *See, Bowen*, 488 US at 219.

¹⁷ NPRM at para. 84 (emphasis added).

¹⁸ *See, also*, “FCC Needs to Improve Performance Management and Strengthen Oversight of the High-Cost Program,” Government Accountability Office, GAO-08-633, at 35 (Jun. 2008) (“ . . . the high-cost program had no requirement that carriers retain documents . . . participants are now required to maintain records . . .for 5 years . . .”).

¹⁹ *See, Marie v. SEC*, 374 F.3d at 1206.

may apply a new interpretation of relevant law to the matter.²⁰ The Commission encountered this aspect of regulatory action when it ruled that certain calling cards were telecommunications services, and ordered a carrier to pay \$160 million in accumulated charges.²¹ In that instance, although the question presented by a supposed novel technology was new, the applicable regulations were extant and the matter before the Commission was only the applicability of existing regulations to a new product. In upholding the Commission's decision, the D.C. Circuit found that while it was "difficult to discern any clear policy" from prior Commission decisions, the subject decision was nevertheless a reasonable interpretation of the Commission's rules.²² By contrast, the document retention NPRM and Order were not intended to "fill in the interstices" of an ambiguous or unclear statute;²³ rather, the Commission's adoption of a five-year document retention regime introduced a wholly new requirement. Any attempt to apply the results of that rulemaking to periods prior to the rule's implementation is the improper imposition of a new liability upon old and lawful actions. Carriers must not be held

²⁰ See, *Clark-Cowlitz*, 826 F.2d at 1081 ("[W]hen as an incident of its adjudicatory function an agency interprets a statute, it may apply that new interpretation in the proceeding before it.") (internal citations omitted).

²¹ *American Telephone & Telegraph Company v. Federal Communications Commission*, 454 F.3d 329 (D.C. Cir. 2006) (*AT&T v. FCC*) (retroactive applicability of determination that prepaid calling card service was subject to intrastate access fees upheld as normal adjudicative function in which agency conducted fact-specific investigation to determine applicability of existing law to new service)..

²² *AT&T v. FCC*, 454 F.3d at 333.

²³ See, *SEC v. Cherney*, 332 U.S. 194, at 202-203 (1947) (where initial remand of agency decision was based on agency's failure to provide sustainable basis for its action, agency was not precluded from reaching same result, albeit on different basis; case-by-case evolution of statutory standards permitted as part of general administrative process).

accountable for not complying with rules that did not exist. This sort of result up-ends reasoned rulemaking and marginalizes any notions of regulatory certainty. A party's liability for past conduct ought not increase upon the enactment of new regulations not in place at the time of the action. Accordingly, the Commission should clarify that application of 47 C.F.R. § 52.202(e) is prospective only, and should vacate any audit findings that implicate carrier liability based on inappropriate application of that section.

In addition to being contrary to settled law, retroactive application of the document retention rules would be an anathema to good public policy. Such action would supplant reasonable reliance with perpetual uncertainty. The Supreme Court describes the reluctance to embrace retroactive applicability:

[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.²⁴

The fabrication of liability for past actions that were lawful at the time they were undertaken undermines confidence in the audits as rationally conducted reviews and does nothing to enhance prospective adherence to the rules. The audits are relegated to become arbitrary tools of entrapment to penalize carriers for adhering to practices that were acceptable during the period of the audited action. The result subjects prior-distributed support to a perpetual risk of recovery; the untenable uncertainty can cripple investor confidence in USF recipients' abilities to meet obligations. In sum, the potential effects emanating from inappropriate and unlawful retroactive applicability smacks squarely against sound public policy.

²⁴ *Landgraf*, 511 U.S. at 265 (internal citations omitted).

The underlying premise of an audit is the determination of an entity's compliance with then-applicable standards and regulations. Imposing liability upon carriers for not complying with rules that were not in existence defies even the basest levels of reason. Moreover, such audits cannot measure compliance because the measure of compliance is never defined at the time the audited action occurs. The application of 47 C.F.R. § 54.202(e) to periods prior to promulgation would produce the Orwellian result of holding carriers accountable for not complying with unknown standards.²⁵

The outcome for affected ITTA members has to date been confounding. ITTA members held subject to auditors' improper, if not illegal, interpretation of the Commission's rules have expended significant time and effort recreating information that the Commission did not require carries to retain. Pressed by auditors whose potential findings threaten severe adverse impact, carriers have taken the cautionary road to comply with auditors' requests in the absence of Commission clarification of relevant requirements. And, yet, despite these efforts to satisfy auditors' requests, carriers are subject to deficiency findings when the documents improperly requested cannot be provided.

Nor has the matter been limited only to documents under the purview of Section 52.202(e). Fundamental questions regarding proper interpretation of Part 32 have arisen. By way of example, in one instance, an ITTA member provided auditors with a comprehensive explanation detailing why the auditors' presumptive interpretation of the

²⁵ In fact, the D.C. Circuit has described the concept of "unknowable law" as "literally Orwellian," citing "Squealer's *ex post* efforts to repaint the Seven Commandments to the pigs' whisky-bibbing benefit." *NetworkIP, LLC and Network Enhanced Telecom, LLP, v. Federal Communications Commission*, 558 F.3d 116, at fn. 5 (D.C. Cir. 2008), citing George Orwell, "Animal House."

requirements was incorrect. Rather than responding to the carrier in a substantive manner, the auditor repeated its blanket assertion that the carrier was not in compliance, without addressing any of the specific points raised by the carrier.²⁶ This sort of conclusory approach begs for Commission clarification as has been requested by USAC.

Clarification of the 47 C.F.R. § 52.202(e) requirement is a fundamental aspect of ensuring that audits are conducted fairly, rationally, and lawfully. Therefore, ITTA urges the Commission to confirm that 47 C.F.R. § 52.202(e) shall be applied only prospectively from its date of effectiveness.

B. THE OBLIGATION TO ADVERTISE LIFELINE SHOULD NOT REQUIRE THE SPECIFIC PUBLICATION OF EACH SUPPORTED SERVICE.

USAC seeks guidance on whether the obligation to advertise availability of supported services requires carriers to list each service, specifically, the availability of:

Voice grade access to the PSTN;
 Local usage;
 Dual-tone multi-frequency signaling or its functional equivalent;
 Single-party service or its functional equivalent;
 Access to emergency services;
 Access to operator services;
 Access to IXC services;
 Access to directory assistance; and,
 Toll limitation.

47 C.F.R. 54.405(b), requires carriers to advertise Lifeline services “in a manner designed to reach those likely to qualify for the service.” USAC notes that most carriers advertise “local telephone service.” This approach is consistent with the rule, since it describes plainly and succinctly the offering Lifeline subscribers may obtain.

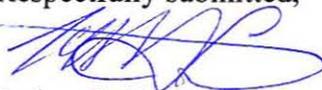
²⁶ The auditors’ response read: “Without adequate documentation supporting all items on the CPRs, we were unable to complete our examination and determine if the Beneficiary complied, in all material respects, with rules and related orders governing Universal Service Support for the HCP. As stated above, 47 C.F.R. § 32.12 requires ILECs to maintain documentation in a manner readily accessible to FCC representatives.”

Advertising the list of specific services, by contrast, is not only not necessary but also conflicts with the intent of 47 C.F.R. § 54.405(b), which requires carriers to advertise Lifeline services “in a manner designed to reach those likely to qualify for the service.” It is not likely that advertising that which may be referred to as the separate components of local telephone service would service the Commission’s goal of ensuring that eligible consumers are informed of Lifeline availability. Even a cursory review of general telephone advertising reveals that carriers describe their offerings using terms such as “local” or “long distance” service; one would likely be hard-pressed to uncover a telephone company advertisement for “dual-tone multi-frequency signaling or its functional equivalent.” Advertising reflects a provider’s expert interpretation of consumers’ understanding. Accordingly, carriers advertising “local telephone service” within the scope of Lifeline advertising are adhering to the requirement to publicize those services “in a manner designed to reach those likely to qualify for the service.” The Commission should clarify that carriers advertising the availability of “local telephone service” are in compliance with the applicable regulation.

III. CONCLUSION

For the reasons stated above, ITTA urges the Commission to clarify that 47 C.F.R. § 54.202(e) is to be given prospective effect only, and that carriers advertising Lifeline service fulfill their obligations without specifying all aspects of supported local exchange service.

Respectfully submitted,



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