

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Federal State Joint Board on Universal Service

Lifeline and Link-up

CC Docket No. 96-45

WC Docket No. 03-109

**PETITION FOR RECONSIDERATION OF
THE WIRELINE COMPETITION BUREAU'S JANUARY 21, 2011
LETTER TO THE UNIVERSAL SERVICE ADMINISTRATIVE COMPANY**

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Date: February 22, 2011

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INTRODUCTION AND SUMMARY

Pursuant to Section 1.106 of the Commission's rules, CTIA – The Wireless Association®, United States Telecom Association, Independent Telephone and Telecommunications Alliance, National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, Rural Cellular Association, and Western Telecommunications Alliance (collectively “Petitioners”) respectfully petition the Commission to reconsider the decision set forth in a letter dated January 21, 2011, from the Chief of the Wireline Competition Bureau to the Chief Operating Officer of the Universal Service Administrative Company (“USAC”) (the “January 21 Letter”), in which the Wireline Competition Bureau issued directives to USAC and eligible telecommunications carriers (“ETCs”) regarding duplicate Lifeline claims. Each of Petitioners has members that are ETCs adversely affected by the January 21 Letter. Petitioners are concurrently filing a request for the Wireline Competition Bureau or the Commission to stay implementation by USAC of the January 21 Letter.

Petitioners all believe that it is important for the Commission to prevent waste, fraud and abuse in universal service. However, in doing so, the Commission must follow the requirements of the Administrative Procedure Act (“APA”) when affecting ETCs’ and low income consumers’ rights and responsibilities, in order to ensure that any new rules promulgated are fair and workable. The January 21 Letter, however, purported to promulgate new rules without notice and comment in violation of the APA, imposed new information collections without the approval of the Office of Management and Budget (“OMB”) in violation of the Paperwork Reduction Act, and failed to consider whether there were ways to reduce burdens on small entities in violation of the Regulatory Flexibility Act. Because the January 21 Letter purported to create new rules, it

also exceeded the authority of the Wireline Competition Bureau, which cannot initiate or complete a rulemaking. As such, the January 21 Letter's specific mandates on ETCs and low income consumers are unlawful and unenforceable.

Had the Commission sought public comment on these directives before they were imposed, it would have learned that they are incomplete, and that, even setting aside the substantial burden they impose on ETCs and low income consumers, if implemented, they would be ineffective at preventing the recurrence of duplicate Lifeline subscriptions. Because a low income consumer can initiate a new subscription with any Lifeline provider by executing the necessary self-certifications, duplicates will inevitably begin recurring as soon as they are eliminated. Such a tail-chasing exercise cannot pass the cost-benefit analysis contemplated by the President's recent Executive Order on "Improving Regulation and Regulatory Review," Exec. Ord. No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011), or by the Paperwork Reduction Act. The Commission or the Bureau should rescind the January 21 Letter, and, in the Notice of Proposed Rulemaking to be considered at the Commission's March 3, 2011, meeting, seek comment on an interim mechanism to address situations in which consumers receive Lifeline benefits from two or more ETCs.

FACTUAL BACKGROUND

On January 21, 2011, the Wireline Competition Bureau issued a letter providing guidance to USAC on how USAC should address situations in which "more than one eligible telecommunications carrier (ETC) seeks support from USAC for the same eligible consumer or household." *January 21 Letter* at 1. The Letter "direct[s] USAC to take specific steps to resolve duplicate claims for Lifeline support." *Id.* The January 21 Letter states that the Wireline Competition Bureau had sought comment on the issue in a Public Notice it had issued in

response to a Request for Review by Verizon/Alltel Management Trust of a USAC audit decision. *Id.* (citing *Comment Sought on Verizon/Alltel Management Trust Request for Review of a Decision of the Universal Service Administrative Company Against Alltel Corporation Concerning Audit Findings Relating to the Low-Income Program*, WC Docket No. 03-109, Public Notice, 24 FCC Rcd 14745 (Wireline Comp. Bur. 2009)) (“*Alltel Public Notice*”). The *Alltel Public Notice*, however, did not, as the Bureau claims, solicit comment on what steps USAC should take to resolve duplicate claims for Lifeline support, nor did it suggest or otherwise put interested parties on notice that the Commission (much less the Bureau) was considering adopting rules or procedures to resolve such claims. Rather, it simply sought comment on Verizon/Alltel Management Trust’s request for review of certain USAC audit findings regarding Alltel’s compliance with the existing requirements of the Low-Income Program— which included, but were not limited to, the issue of duplicate Lifeline subscriptions. *Id.*¹ The *Alltel Public Notice* proposed no solutions to the duplicate Lifeline enrollment problem—whether those adopted in the January 21 Letter or any other potential approach. Moreover, the *Alltel Public Notice* was issued by the Bureau, not the Commission, and was not published in the Federal Register.

Unlike the *Alltel Public Notice*, the January 21 Letter establishes and places new obligations and information collection requirements on all ETCs and Lifeline consumers. The Letter acknowledges, “Commission orders and rules do not provide ETCs and USAC with a process to follow when they learn that a customer has received duplicate Lifeline support.”

January 21 Letter at 2. Notably, nothing in the January 21 Letter suggests that ETCs were not

¹ Verizon Alltel Management Trust’s appeal, in turn, only asked the Commission to confirm that ETCs would not be denied support retroactively in these cases. Request for Review by the Verizon/Alltel Management Trust of Decision of the Universal Service Administrator at 25 (filed Oct. 5, 2009)

operating in compliance with the Commission’s existing requirements.² The Letter nonetheless proceeds to create such a process out of whole cloth. It “direct[s] USAC to notify the ETCs involved” in writing that a duplicate Lifeline claim has been discovered (apparently disclosing to both ETCs the fact that the customer has chosen another Lifeline provider and the identity of that other provider). *Id.* at 3. It then requires ETCs and their customers to do the following:

- ETCs must “stop including the duplicate subscribers among the subscribers claimed for Lifeline support on the form 497” even though the ETC has already provided (and continues to be obligated to provide) the customer with Lifeline benefits. *Id.*
- ETCs must “notify the customer by phone, and in writing where possible, that he or she has 30 days to select one Lifeline provider or face de-enrollment from the program.” *Id.*
- The customer must sign a new certification with the chosen provider. *Id.*
- The chosen ETC must notify USAC and the other ETC of the customer’s selection. *Id.* The letter also states that “USAC should direct ETCs to educate the subscribers on the Commission’s ‘one-per-household’ requirement.” *Id.*
- The non-chosen ETC must then “de-enroll the customer from its Lifeline service and may not seek reimbursement for that customer going forward.” *Id.*

The January 21 Letter does not reflect consideration of any problems with or alternatives to the new rules it purports to establish. For example, notwithstanding comments submitted in response to the *Alltel Public Notice* suggesting that USAC should address its inquiries to the

² The problem of duplicate Lifeline subscriptions for the same individual provided by multiple carriers is, in fact, a direct result of the Commission’s decision to permit consumers to self-certify Lifeline eligibility. *See Federal-State Joint Board on Universal Service, Report & Order*, 12 FCC Rcd 8776, 8975 ¶ 376 (1997) (“1997 Universal Service Order”).

subscriber, rather than the ETCs,³ the January 21 Letter established its ETC-centric process without any explanation as to why it was rejecting commenters' suggestions. Nor does the January 21 Letter address (among many other issues) what will occur if both ETCs obtain an authorization from the subscriber selecting them as the Lifeline provider, or if the subscriber responds to neither carrier's request for a new certification. These are issues that Petitioners and other interested parties would have been able to raise had the Commission sought public comment on the binding requirements contained in the January 21 Letter.⁴

The January 21 Letter also purports to establish new rules to govern the situation in which "multiple customers in a single household are receiving support from two or more ETCs." *January 21 Letter* at 3. The January 21 Letter directs USAC to require ETCs "to educate the subscribers on the Commission's 'one-per-household' requirement and require the subscribers to make a single Lifeline provider selection for the household or they will be de-enrolled from the program." *Id.* In imposing these requirements on ETCs and low income consumers, the January 21 Letter ignored comments filed in response to the *Alltel Public Notice* arguing that the Commission has never, in fact, adopted a rule with respect to the post-1996 Telecommunications Act Lifeline program that prohibits multiple individuals in the same household from subscribing

³ See *Reply Comments of AT&T* at 4, WC Docket No. 03-109 (filed Feb. 23, 2010) ("AT&T Reply Comments"); *Comments of Verizon and Verizon Wireless* at 6, WC Docket No. 03-109 (filed Jan. 29, 2010) ("Verizon and Verizon Wireless Comments").

⁴ See, e.g., Letter of the United States Telecom Association, CTIA – The Wireless Association®, Independent Telephone and Telecommunications Alliance, National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, Rural Cellular Association, Western Telecommunications Alliance, AT&T, CenturyLink, Qwest, TracFone Wireless, Inc., Windstream Communications, Inc. and Verizon to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-109 (filed Feb. 15, 2011) ("USTA et al. February 15, 2011 Letter").

to Lifeline services.⁵ The January 21 Letter also nowhere discussed the entire record compiled in response to a Petition for Clarification submitted by TracFone with respect to the scope of the term “household,” if there is a limitation on Lifeline subscriptions within a “household.” See *Comment Sought on TracFone Request for Clarification of Universal Service Lifeline Program “One-Per-Household” Rule as Applied to Group Living Facilities*, Public Notice, 24 FCC Rcd 12788 (rel. Oct. 21, 2009) (“*TracFone Public Notice*”).⁶

The January 21 Letter has not been published in the *Federal Register*, nor was it issued as the result of any Notice of Proposed Rulemaking published in the *Federal Register*. The January 21 Letter has not been submitted to the Office of Management and Budget for approval of its mandatory collection of information from ETCs and Lifeline subscribers. Moreover, the Commission has not prepared either an initial or a final regulatory flexibility analysis with respect to the requirements set forth in the January 21 Letter, as required by the Regulatory Flexibility Act.

ARGUMENT

I. THE JANUARY 21 LETTER IS INVALID BECAUSE IT PURPORTS TO PROMULGATE A NEW LEGISLATIVE RULE THAT CAN ONLY BE ADOPTED BY THE COMMISSION PURSUANT TO THE ADMINISTRATIVE PROCEDURE ACT’S NOTICE AND COMMENT REQUIREMENTS.

It is beyond dispute that new legislative rules – rules that “create new law, rights, or duties,” *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991) – can only be

⁵ See *GCI Comments* at 2 (filed Feb. 16, 2010).

⁶ TracFone asked the Commission “to clarify that the Commission’s ruling that carriers can receive Lifeline support for a single telephone line in an eligible consumer’s principal residence is not intended to limit the availability of Lifeline-supported service to only one qualified low-income resident per homeless shelter, and to provide guidance on how eligible telecommunications carriers (ETCs) may enroll residents of shelters in their Lifeline programs without risking violation of the rule.” *Id.* Several comments were submitted, but the Commission has taken no further action on the *TracFone Public Notice*.

promulgated by the Commission after following the procedures set forth in Section 553 of the Administrative Procedure Act. *See* 5 U.S.C. § 553. No such process was followed here, and thus the January 21 Letter is invalid.

A. The January 21 Letter Constitutes a Legislative Rule under the Administrative Procedure Act.

The new requirements imposed by the January 21 Letter are in effect legislative rules to which Section 553's notice and comment requirements apply. "Legislative' rules that impose new duties upon the regulated party have the force and effect of law and must be promulgated in accordance with the proper procedures under the Administrative Procedures [sic] Act (APA)." *Chao v. Rothermel*, 327 F.3d 223, 227 (3d Cir. 2003). Although the Commission can issue interpretive rules without notice and comment, "new rules that work substantive changes in prior regulations are subject to the APA's procedures." *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003). Rules are "legislative" and not merely "interpretative" when they "create new law, rights, or duties." *Fertilizer Institute*, 935 F.2d at 1307-08. "If a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect, the agency may not rely upon the statutory exemption for policy statements, but must observe the APA's legislative rulemaking procedures." *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382-83 (D.C. Cir. 2002) (quoting Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like-Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1355 (1992)). An agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding, or is applied by the agency in a way that indicates that it is binding. *Id.* at 383.

There is little doubt that the January 21 Letter purports to create binding new duties for USAC, ETCs, and low income consumers. It specifically requires ETCs to "stop including the

duplicate subscribers among the subscribers claimed for Lifeline support”; to notify customers “by phone, and in writing where possible” that they have 30 days to select one Lifeline provider “or face de-enrollment from the program”; to collect information from customers, such as the customer’s choice of provider; to require customers to sign a new certification; and to notify USAC and the ETC who had previously served the customer of the customer’s selection.

January 21 Letter at 3. Because it is written as a directive, the letter appears on its face to be binding: “it commands, it requires, it orders, it dictates.” *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000). To paraphrase the D.C. Circuit, through the letter, the Commission (or at least the Wireline Competition Bureau) has given ETCs their “marching orders.” *See id.* As such, the January 21 Letter constitutes a legislative rule under the APA that the Commission could only properly issue pursuant to the APA’s notice and comment procedures.

B. The Wireline Competition Bureau Does Not Have Authority to Issue a Legislative Rule.

The Wireline Competition Bureau’s delegated authority does not extend to initiating or completing a rulemaking. *See* 47 C.F.R. § 0.291(e) (“The Chief, Wireline Competition Bureau, shall not have authority to issue notices of proposed rulemaking, notices of inquiry, or reports or orders arising from either of the foregoing”). Thus, the Bureau could not properly issue new rules via the January 21 Letter.

C. The Commission Did Not Use Notice and Comment Rulemaking as Required by the APA.

The Bureau issued the “guidance” in the January 21 Letter in response to requests from USAC and the comments the Bureau received regarding the *Alltel Low-Income Audit Appeal*. *January 21 Letter* at 1. The Commission did not issue a notice or provide an opportunity for

public comment on any of the directives included in the letter. The Public Notice seeking comment on the *Alltel Low-Income Audit Appeal* was not issued by the Commission and was not published in the Federal Register and thus cannot be the basis for a rulemaking. Moreover, the *Alltel Public Notice* did not actually seek comment on what steps USAC should take to resolve duplicate claims for Lifeline support. Rather, it simply noted (in summary fashion) the USAC audit findings on which Verizon/Alltel Management Trust sought review and stated that interested parties could “file comments.” Thus, apart from the procedural defects, the notice did not reasonably apprise interested parties that the Commission might adopt new rules or procedures that USAC would be required to apply to resolve duplicate claims for Lifeline Support. *See Sprint Corp. v. FCC*, 315 F.3d 369, 376 (D.C. Cir. 2003) (finding that Sprint was “not on notice that the Commission was proposing to ‘revise’ its initial rule” because the Commission did not publish a notice in the Federal Register, and the Commission purported to act through the Common Carrier Bureau, which lacks authority to issue notices of proposed rulemaking).

The January 21 Letter failed to comply with Section 553’s directive that “General notice of proposed rule making shall be published in the Federal Register,” nor did the Commission publish the January 21 Letter in the Federal Register as a final rule. Moreover, the *Alltel Public Notice* did not propose *any* solution to the duplicate Lifeline subscription problem—modeled after the January 21 Letter or any other potential approach. Accordingly, the January 21 Letter is invalid and cannot be enforced.

II. THE JANUARY 21 LETTER IS UNENFORCEABLE BECAUSE IT DOES NOT COMPLY WITH THE PAPERWORK REDUCTION ACT.

The January 21 Letter does not comply with the Paperwork Reduction Act (“PRA”) and is therefore unenforceable. The PRA prohibits any agency, including the Commission, from

“conduct[ing] or sponsor[ing] the collection of information” without the prior approval of the Office of Management and Budget. 44 U.S.C. § 3507(a)(2). The PRA also specifically requires agencies to conduct a review of the proposed collection of information, solicit and evaluate comments regarding the collection, submit a certification to OMB, and publish a notice in the Federal Register. 44 U.S.C. § 3507(a)(1).

The January 21 Letter clearly requires a “collection of information.” A “collection of information” is defined in relevant part as “the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for ... answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States.” 44 U.S.C. § 3502(3)(a)(i). The January 21 Letter, *inter alia*, requires ETCs to educate customers receiving Lifeline service from more than one provider regarding the “one-per-household” requirement and notify them that they have 30 days to select one Lifeline provider, and to notify USAC and the other ETC(s) of the customer’s selection of Lifeline provider, as well as to collect new customer certifications from any subscriber identified by USAC. The January 21 Letter imposes the same reporting and recordkeeping requirements on all ETCs.

Inasmuch as the Commission failed to seek prior approval from OMB of these collections of information, and failed to comply with the other requirements of the PRA, the Commission cannot lawfully enforce the January 21 Letter’s information collection requirements against ETCs or Lifeline subscribers.

Beyond the procedural infirmities of the January 21 Letter, the proposed information collection will be burdensome and would not achieve the Commission’s goals because, *inter*

alia, there is no way to prevent a subscriber from subsequently self-certifying eligibility and again obtaining multiple Lifeline services from multiple providers. Before the Commission seeks approval for the information collections in the January 21 Letter, it must evaluate the burdens it is imposing as well as the futility of the collection it would mandate.

III. THE JANUARY 21 LETTER DOES NOT COMPLY WITH THE REGULATORY FLEXIBILITY ACT.

Under the Regulatory Flexibility Act, “[w]hen an agency is required ... to publish general notice of proposed rulemaking for any proposed rule ... the agency shall prepare and make available for public comment an initial regulatory flexibility analysis,” which describes the impact of the proposed regulation on small entities. 5 U.S.C. § 603(a). In addition, “[w]hen an agency promulgates a final rule ..., after being required by that section or any other law to publish a general notice of proposed rulemaking, ... the agency shall prepare a final regulatory flexibility analysis.” 5 U.S.C. § 604(a). As the President recently emphasized, “Adherence to these requirements is designed to ensure that regulatory actions do not place unjustified economic burdens on small business owners and other small entities.” Memorandum for the Heads of Executive Departments and Agencies, “Regulatory Flexibility, Small Business and Job Creation,” 76 Fed. Reg. 3827, 3828 (Jan. 18, 2011).

As discussed above, *see supra* at 6-8, the January 21 Letter establishes a legislative rule. The APA required the Commission to publish a general notice of proposed rulemaking. As such, the Commission should have conducted and published an initial regulatory flexibility analysis, simultaneously with a notice of proposed rulemaking. The Commission failed to follow either procedure; therefore, the January 21 Letter is unenforceable as to small entities covered by the Regulatory Flexibility Act.

IV. THE COMMISSION HAS NEVER ISSUED A POST-1996 ACT RULE THAT LIMITS LIFELINE SUPPORT TO ONLY ONE INDIVIDUAL IN A “HOUSEHOLD” IF OTHERS ARE INDEPENDENTLY QUALIFIED.

The January 21 Letter erroneously states that the Commission has adopted a rule limiting Lifeline support to only one, potentially among multiple, independently qualified individuals in a household. *See January 21 Letter* at 1. In fact, no such rule has ever been adopted with respect to the post-1996 Act low income support program.⁷

Neither 47 C.F.R. § 54.409 (consumer qualification for Lifeline) nor any other section of 47 C.F.R. Subpart E limits Lifeline to one individual in a household. Furthermore, the Commission has never adopted a generally applicable one-individual-in-a-household limitation for Lifeline in any portion of an FCC order discussing decisions actually being made by the Commission in that order.

The January 21 Letter cites a background discussion in *Lifeline and Link-Up*, WC Docket No. 03-109, Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 1918, ¶¶ 3-4 (rel. Apr. 29, 2004) (“*2004 Lifeline Order*”) for the proposition that there is a “one-per-household” rule, but that Order did not actually adopt such a requirement in any decisional discussion. In that Order, the Commission cited to Paragraph 341 of the 1997 *Universal Service Order* in which the Commission stated with respect to the pre-1996 Act Lifeline program that “qualifying subscribers may receive [Lifeline] assistance for a single telephone line in their principal residence.” *1997 Universal Service Order*, 12 FCC Rcd at 8957 ¶ 341. First, the plain language of Paragraph 341’s statement that a qualifying subscriber can receive assistance for a single telephone in their principal residence does not exclude the possibility that a residence can contain more than one qualifying subscriber, and thus its language does not preclude multiple

⁷ The undersigned express no view as to whether there should be such a rule, but simply note that there is no such rule at this time.

qualifying subscribers from receiving Lifeline support even if they live at the same address. Moreover, Paragraph 341 itself is only a background section of the Order, and is not a section that adopts requirements for the Commission's new post-1996 Act Lifeline program. Further proving that there is no "one-per-household" rule for the post-1996 Act Lifeline program, the rule cited in that background discussion in the *1997 Universal Service Order* as establishing the limitation to a single telephone line in the subscriber's principal residence was specifically sunset by that Order when the new post-1996 Act Lifeline program took effect. *Id.* at I-45 (amending 47 C.F.R. § 69.104(k) to cease to be effective as of December 31, 1997).

The Commission cannot create rules by repeatedly stating them in background discussions, particularly when it has sunset the only affirmative statement in any actual rule. In order for there to be an effective rule, the Commission must have adopted the rule in an actual decisional statement. Otherwise, parties would never know when they have the right to petition for review of the creation of the rule.

V. THE JANUARY 21 LETTER IS ARBITRARY AND CAPRICIOUS BECAUSE IT FAILS TO CONSIDER ALTERNATIVES OR CONSIDER IMPORTANT ASPECTS OF THE PROBLEM.

The January 21 Letter is arbitrary and capricious because the Commission (and the Bureau) failed to offer a reasonable justification for its conclusions; to consider alternatives to the directives it issued; to weigh the costs and benefits of the directives; and to take into account important aspects of the problem of duplicate Lifeline claims, which were raised by the comments the Bureau received in response to the *Alltel Public Notice* and the *TracFone Public Notice*. Had the Commission followed the proper procedures for notice and comment rulemaking, it would have had the benefit of comments from those affected by the new

requirements, which likely would have pointed out the flaws in those requirements and potential alternatives.⁸

A court reviewing an agency decision will “hold unlawful and set aside agency actions, findings, and conclusions” that it finds to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706. A rule will be deemed arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Illinois Pub. Telecomm. Ass’n v. FCC*, 117 F.3d 555, 566 (D.C. Cir. 1997) (finding that the Commission’s failure to explain its decision not to provide interim compensation for certain carriers as required by statute, and its failure to cite a reasonable justification for the interim rate it chose, was arbitrary and capricious).

Although agencies are entitled to deference, “they may not retroactively change the rules at will. Indeed, that ‘[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly’ has been well-established for ‘centuries.’” *NetworkIP v. FCC*, 548 F.3d 116, 122 (D.C. Cir. 2008) (quoting *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244, 265 (1994)). The arbitrary and capricious standard “is narrow and a court is not to substitute its judgment for that of the agency,” but the agency nevertheless “must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor*

⁸ *See e.g.* USTA et al. February 15, 2011 Letter.

Vehicle Mfrs., 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962)).

Here, the Bureau cites no reasonable explanation or justification for its directives. Indeed, rather than “articulat[ing] a satisfactory explanation for its action including ‘a rational connection between the facts found and the choice made,’” *id.*, the Bureau offers no explanation or justification for the mandates contained in the January 21 Letter, other than an identification of the problem of duplicate Lifeline claims and the general statement that the Letter was intended to “respond[] to informal guidance USAC has sought on how to resolve” such claims. *January 21 Letter* at 1. As established above, *see supra* at 12-13, the Commission never adopted a “one-per-household” rule with respect to the post-1996 Act low income support program. A rule that has never been promulgated cannot justify or explain the Commission’s directives.

It also appears that the Bureau did not consider alternatives to the mandates it set out in the January 21 Letter. *See* Exec. Ord. No. 12866, 58 Fed. Reg. 51,735 §1(b)(3) (Sept. 30, 1993) (asking each agency to “identify and assess available alternatives to direct regulation, including providing ... information upon which choices can be made by the public”). Although the Bureau received comments in response to the *Alltel Public Notice* and the *TracFone Public Notice*, the January 21 Letter fails to mention of the substance of those comments, or whether or how the comments affected the procedures the Bureau ultimately adopted. For example, AT&T suggested that USAC address its inquiries regarding duplicate Lifeline claims to the subscriber, rather than the ETCs.⁹ The January 21 Letter does not mention this suggestion, let alone demonstrate that the Bureau considered it, or explain why the Bureau apparently rejected it.

⁹ *See AT&T Reply Comments* at 4; *Verizon and Verizon Wireless Comments* at 6.

Similarly, with respect to the January 21 Letter's new requirements to govern the situation in which "multiple customers in a single household are receiving support from two or more ETCs," the January 21 Letter wholly ignored comments filed in response to the *Alltel Public Notice* arguing that the Commission has never, in fact, adopted a rule with respect to the post-1996 Telecommunications Act Lifeline program that prohibits multiple individuals in the same household from subscribing to Lifeline services,¹⁰ as well as the entire record compiled in response to *TracFone Public Notice* with respect to the scope of the term "household," if there is a limitation on Lifeline subscriptions within a "household." The Commission cannot, consistent with the arbitrary and capricious standard, ignore these comments, all of which were filed in WC Docket No. 03-109 and thus were properly before the Bureau when it issued the January 21 Letter.

Furthermore, notwithstanding the President's recent re-emphasis of the importance of agency "consideration of benefits, costs, and burdens," Memorandum for the Heads of Executive Departments and Agencies, "Regulatory Flexibility, Small Business and Job Creation," 76 Fed. Reg. 3827, 3828 (Jan. 18, 2011), the Bureau apparently failed to weigh the costs, benefits, and burdens of the requirements set forth in the January 21 Letter. Contacting each subscriber who might be receiving Lifeline support from more than one carrier will be time-consuming and costly for ETCs. The benefits of such an effort will be minimal and short-lived, because there is no effective way for ETCs to verify whether a customer has more than one Lifeline account. A customer found to have more than one Lifeline account could simply disconnect one account, sign a new self-certification with the chosen ETC, and then later sign up for a new Lifeline account with a different ETC. The January 21 Letter offers no solution to this problem; indeed,

¹⁰ See *Comments of General Communication, Inc.* at 2, WC Docket No. 03-109 (filed Feb. 16, 2010).

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Date: February 22, 2011