**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, DC 20554**

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| In the Matter of | |
| Lifeline and Link Up Reform and Modernization; | WC Docket No. 11-42 |
| Federal-State Joint Board on Universal Service; | CC Docket No. 96-45 |
| Lifeline and Link Up | WC Docket No. 03-109 |

# COMMENTS OF NEXUS COMMUNICATIONS, INC.

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## SUMMARY

Nexus Communications, Inc. ("Nexus") has a strong incentive to eliminate waste, fraud, and abuse in the Low Income program because its business is focused on serving the Nation's low income population. Nexus has been serving low income consumers since 2006 and has committed itself to do so for the long-term. Its business strategy is therefore dependent on a viable and self-sustaining Low Income program. Nexus knows that waste, fraud, and abuse threaten the program and represent a direct and serious threat to Nexus' business.

That being said, Nexus also believes that the extent of waste, fraud, and abuse in the Low Income program is in fact unknown at this time. Many of the solutions such as limiting or effectively eliminating Link Up funding, capping the fund, requiring "foodstamp" letters in the interim period prior to establishing a database, and imposing a minimum monthly fee, may, in fact, be solutions in search of nonexistent problems.

The present discussion should not confuse actual waste with the legitimate reasons why the program is growing: (1) the unprecedented number of eligible Americans during the worst economic downturn since the Great Depression[1] and (2) the decreasing costs associated with providing wireless service. The stark facts belie unthinking, reactive skepticism to the recent growth in the Low Income program: ***one in eight Americans now receives food stamps,*** and the United States Department of Agriculture estimates that ***one in three eligible Americans are not***

[1] *See Three Top Economists Agree 2009 Worst Financial Crisis Since Great Depression; Risks Increase if Right Steps Are Not Taken* (February 29, 2009). Reuters. *available at* *http://www.reuters.com/article/2009/02/27/idUS193520+27-Feb-2009+BW20090227* retrieved 04-18-2011, from Business Wire News database; Report of Business Cycle Dating Committee, National Bureau of Economic Research (September 20, 2010). *available at* <http://www.nber.org/cycles/sept2010.html; *How the Great Recession Has Changed Life in America*, Pew Research Center (June 30, 2010) *available at* *http://pewsocialtrends.org/2010/06/30/how-the-great-recession-has-changed-life-in-america/* ("Of the 13 recessions that the American public has endured since the Great Depression of 1929-33, none has presented a more punishing combination of length, breadth and depth than this one.").

***receiving the benefits they are entitled to***.[2] In other words, widespread eligibility for the Low Income program is a certainty. What Americans need is a well-designed mechanism to root out actual waste, fraud, and abuse without undermining the mission of this program: to provide phone service to Americans most in need. A member of the Joint Board put the problem aptly in his statement accompanying the recommendation that prompted this proceeding:[3]

> [I]ncreased participation in Lifeline, whether through prepaid wireless programs, addition of income eligibility, or just more awareness, is not by itself evidence of fraud, waste, and abuse. Lifeline cannot properly be viewed as "right sized" today if only one third, at most, of the people who could benefit are participating. No record was made in this proceeding of any general problems with fraud, waste, and abuse in the Lifeline program. There was anecdotal evidence of concern presented of ineligible participants benefiting from newer prepaid wireless programs. There was also evidence that states are aware of and are addressing this issue. The record before us did not establish what portion of fund growth, if any, is due to fraud, waste, or abuse. The verification recommendations of this Recommended Decision are aimed in part at seeking additional ways to address and control problems in that area.

Interestingly, the only non-anecdotal evidence of waste, fraud, and abuse cited in the Notice of Proposed Rulemaking ("NPRM") was a USAC audit finding that some subscribers of a lone carrier, TracFone, also had service with another Eligible Telecommunications Carrier ("ETC").[4] This audit report has not been made public. Similarly, a state-level proceeding seeking to

[2] *See* Supplemental Nutrition Assistance Program, Data as of March 2011, United States Department of Agriculture (showing increase from 30 million to 45 million citizens, and from $3.6 to $5.7 billon monthly in food stamp program from October 2008 to January 2011), available at http://www.fns.usda.gov/pd/34SNAPmonthly.htm; *see also* Reaching Those in Need: State Supplemental Nutrition Assistance Program Participation Rates in 2008 -- Summary, United States Department of Agriculture, Office of Research and Analysis, December 2010, p. 1 ("Nationally, the SNAP participation rate among all eligible persons was 67 percent (Leftin, 2010) in fiscal year 2008"), available at http://www.fns.usda.gov/ora/menu/Published/snap/FILES/Participation/Reaching2008Summary.pdf.

[3] *In Re Federal-State Joint Board on Universal Service, Lifeline and Link Up*, CC Docket No. 96-45, WC Docket No. 03-109, Order, FCC 10J-3, 25 FCC Rcd 15598, Statement of Simon ffitch, Senior Assistant Attorney General, Washington State (rel. November 4, 2010) ("2010 Joint Board Referral Order").

[4] *In Re Lifeline and Link Up Reform and Modernization, Federal-State Joint Board on Universal Service, Lifeline and Link Up*, Notice of Proposed Rulemaking, FCC 11-32, 2011 FCC Lexis 987 at ¶ 48 (citing USAC Independent Auditor's Report, Audit No. LI2009BE006 (December 3, 2010) (TracFone Audit)).

confirm continued eligibility has kept key data confidential.[5] Nexus fully understands the sensitive nature of the underlying data. Nevertheless, the non-disclosure of the underlying data makes it difficult for the industry to assess the extent or causes of any waste, fraud, and abuse.

In addition, the daily economic challenges facing Low Income subscribers often make it difficult for them to respond promptly to efforts to verify their eligibility. The low response rates cited by some critics of the program is more likely due to the real difficulty of receiving and timely responding to correspondence and not a high level of ineligibility. The prevalence of these challenges is borne out by the statistics cited above.

Nexus supports the proposal to create a secure, national database of ETC low-income subscribers—administered by an impartial third party—to prevent customers from receiving duplicate Low Income services. Nexus also supports efforts to educate consumers regarding the legal requirements of the program, instituting a 60-day de-enrollment process for all ETCs and clarifying that ETCs should only claim partial support for partial months of service. However, many of the other changes proposed in the NPRM address problems whose causes have not been sufficiently identified. In addition, many of these changes are not founded on sound public policy. The proposed changes that would put an extreme compliance burden on ETCs and their low income customers are not justified by the record in this proceeding, and would have an anti-competitive effect on the market for low income services and would endanger the communications service of those who need it most.

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[5] *In re TracFone Wireless, Inc., Annual Verification of SafeLink Wireless Lifeline Subscribers, Massachusetts Dept. of Telecommunications and Cable*, Notice of Public Hearing, D.T.C. Docket 09-9 (Jan. 5, 2010) (recognizing TracFone's request for confidential treatment of data)

## I. THE EXTENT OF ANY WASTE, FRAUD, OR ABUSE IS CURRENTLY UNKNOWN AND SOME PROPOSED CHANGES ARE EXTREME

### A. The Low Income Program Has Grown Primarily Due to Increased Poverty and the Rise of Wireless Services

Historically, only about one-third of eligible participants received Low Income subsidies. This figure has recently increased slightly to 36%.[6] This low participation can be largely attributed to the lack of interest incumbent local exchange carriers ("ILECs") showed in offering technology or service offerings that were relevant to these customers. And until recently, universal service policy debates focused primarily on the High Cost program and contribution issues.

Then, around the middle of the last decade, the cost of providing wireless service finally dropped below the threshold that made serving low income customers a viable business model. The entrepreneurs who began focusing on the specific needs of low income Americans also offered innovative budget management tools, like prepaid payment plans, that allowed these new customers to keep the cost of wireless service within their means. These developments led to a rise in participation of around 6%, which is in line with the rising unemployment rate since the advent of wireless service offered through the Low Income program.[7]

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[6] *In the Matter of Lifeline and Link Up Reform and Modernization*, Notice of Proposed Rulemaking, WC Docket No. 11-42, FCC 11-32, Statement of Commissioner Michael J. Copps, (rel. March 4, 2011) ("The low-income programs have been historically underutilized and although there has been recent growth in the program, in 2009 only 36% of eligible consumers participated in Lifeline.") (hereinafter, "NPRM"). In 2009 during the height of the recession, only approximately 36% of eligible low-income households were receiving the benefit of subsidized lifeline communications services. *In the Matter of Lifeline and Link Up Reform and Modernization*, Notice of Proposed Rulemaking, WC Docket No. 11-42, FCC 11-32, Statement of Commissioner Michael J. Copps, (rel. March 4, 2011) ("The low-income programs have been historically underutilized and although there has been recent growth in the program, in 2009 only 36% of eligible consumers participated in Lifeline.") (hereinafter, "NPRM").

[7] *See* GALLUP FINDS U.S. UNEMPLOYMENT UP TO 10.0% IN MID-FEBRUARY, February 17, 2010, available at http://www.gallup.com/poll/146147/gallup-finds-unemployment-mid-february.aspx (visited April 13, 2010). The unemployment rate in 2006 was 4.6%. *Annual average unemployment rate, civilian labor force 16 years and over (percent)*, U.S. Bureau of Labor Statistics, available at http://www.bls.gov/cps/prev_yrs.htm visited April 21, 2010).

Nexus agrees with the Commission that this is the right time to make necessary reforms to the program. Universal service funds are limited, and the need is great. Nexus' business model, along with its ability to serve low income customers, is dependent on an efficient, well-run program. Nexus also believes that reforms must be based on a clear understanding of the actual causes of growth in the program where the real problems lie. Changes to the Low Income program should be designed to further the goals that Congress set out for the program: ensuring that all Americans have access to high-quality phone service that they need.

### B. The Commission Should Not Penalize Competitive Providers Who Choose to Focus on Providing Lifeline to Low Income Americans

Nexus, which has been in business as a facilities-based competitive carrier for nearly ten years, is an Eligible Telecommunications Carrier ("ETC") in 20 states, and provides services for which end users receive Low Income funding.[8] Nexus began providing its services over wireline technology, and has recently responded to strong customer demand by offering wireless technology as well. Nexus was one of the first telecommunications providers to recognize the Low Income market segment as a business opportunity rather than a regulatory burden. Its success in the market is based on its willingness to tailor its services to the specific needs of low income consumers, including the budget management tools and mobility that prepaid wireless services provide.

Wireless is no longer a luxury for financially challenged families—it is a necessity. Wireless is the only technology that provides them with the constant accessibility that they need for employment, health, family and safety. Indeed, wireless mobility is often more crucial to low income Americans than to those in higher income brackets. Low income Americans are mobile and transient, often balancing multiple jobs and moving frequently. Without a wireless phone

[8] Nexus uses the term "Low Income" to refer to the umbrella program under which Lifeline and Link Up support are provided to qualifying end users.

and accessible voicemail, low income job applicants are at a serious disadvantage in receiving messages from potential employers and arranging for interviews. Low income persons spend less time during the day at a fixed location, and even less time at a fixed location with a phone available for their use. The appeal of these services is borne out by the high subscriber rates of low income Americans: "nearly 40 percent of all adults living in poverty use only cellphones, compared with about 21 percent of adults with higher incomes."[9] Moreover, mobile wireless services are often a critical lifeline for homeless Americans, who depend on these services to stay in touch with their families, arrange appointments for medical care, and obtain other essential services.[10] The Low Income program, which was designed to help these Americans, must support the services they need if it is to remain relevant in the 21st Century.

Nexus recognized the needs of low income Americans early and has spent years designing and providing the competitive services that address the challenges facing its customers. When research showed that its customers wanted to "cut the cord" from restrictive fixed wireline services, Nexus rebuilt its services on a wireless platform. When its customers asked for mobile services free from up-front fees, prohibitive credit checks and long term contracts, Nexus created solutions tailored to their needs. Nexus submits these comments out of concern that many of the changes proposed in the NPRM would, rather than assist the efforts of Nexus and other competitive ETCs, modify the rules of the marketplace to benefit the large carriers who have traditionally ignored the needs of low income Americans, preferring their non-low income customers instead. The proposal to essentially limit service activation fee reimbursement to large ILECs would penalize Nexus and other ETCs focused on providing

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9 Sabrina Tavernise, *Youth, Mobility and Poverty Help Drive Cellphone-Only Status*, N.Y. Times, April 21, 2011. *available at http://www.nytimes.com/2011/04/21/us/21wireless.html?_r=1&src=recg* (visited April 21, 2011).

10 Kevin Graham, *Wireless a Lifeline for Homeless,* St. Petersburg Times, Apr. 9, 2007.

better and more efficient service specifically to low income customers.[11] Similarly, the proposal to automatically enroll qualifying customers into the Low Income program, while laudable in its goal of increasing participation, may be implemented in a way that designates ILECs as default carriers at the expense of smaller, low-income focused ETCs.[12] The Low Income program should be designed to offer a level-playing field on which ETCs can compete on innovation, qualify of service, and value, and not be hobbled by regulatory accidents of history, policy changes based on limited information, or other anticompetitive prejudices.

The NPRM's proposal to conduct full audits of ETCs whose customers do not respond to yearly surveys is similarly misguided.[13] This proposal assumes that failure to respond to a yearly eligibility survey should create a presumption of waste, fraud or abuse. Nexus suspects that waste, fraud, or abuse does not account for the vast majority of non-responses, certainly not on the part of ETCs. Low consumer response rates are more likely the result of low income customers' inability to receive the requests, given their frequent changes of address, and the difficulty they may have in retaining and producing the required paperwork. ETCs and the Low Income program's administrators should work with these customers to develop notification and response systems that work, such as text messages until the a national database and other more efficient verification systems have been established.

### C. The Commission Should Not Cap the Low Income Program

In light of the importance of the Low Income services Nexus and other ETCs provide, and the high number of eligible customers not yet receiving benefits, the Commission should not artificially restrict the benefits that the poorest Americans receive with a program cap. As the

[11] Nexus discusses this Link Up issue in more detail below at Section II(A).

[12] NPRM at ¶ 202

[13] NPRM at ¶ 185.

Commission points out, the Low Income program already has an inherent cap: namely, the total number of eligible low-income households.[14] Any other type of cap would be a misplaced band-aid that would likely be difficult to administer.

A cap on the Low Income program would be unlikely to solve the problems of the Universal Service Fund ("USF") because the Low Income program is not the major driver of the contribution factor. The size of the Low Income program is dwarfed by that of the High Cost fund, which soaked up 54% of federal USF 2010 disbursements. ***High Cost and E-rate together accounted for 83%*** of the fund, whereas Low Income only received 16% of disbursements.[15]

| Program | 2010 Disbursements | Percentage of Total |
|---|---:|---:|
| **High Cost** | $ 4,267,746,000 | **54%** |
| **Schools and Libraries ("E-rate")** | $ 2,282,499,000 | **29%** |
| Low Income | $ 1,315,734,000 | 16% |
| Rural Healthcare | $ 85,952,000 | 1% |
| *Total* | $7,951,931,000 | |

The High Cost program differs from Low Income not only in its size, but also in efficiency. Unlike in the Low Income program, High Cost funds are not distributed on a competitive or market-driven basis, and subsidies go to carriers, not directly to end users. Recognizing the flaws of that program, The National Broadband Plan devoted almost an entire chapter to High Cost support restructuring.[16] In particular, the Commission has recommended realigning the

[14] NPRM at ¶ 144 ("We note that fund growth is not necessarily indicative of waste, fraud, and abuse… We also note that the program has an ultimate cap in that only a defined population of eligible low income households may participate in the program, and support is limited to a maximum of $10 per month per household (other than on Tribal lands).").

[15] Universal Service Administrative Company 2010 Annual Report at p. 47,. *Available at* http://www.universalservice.org/about/governance/annual-reports/ (visited April 21, 2011).

[16] Federal Communications Commission, Omnibus Broadband Initiative, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (2010) ("National Broadband Plan") at Chapter 8, "Availability," *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf.

economic incentives for providing rural services, by implementing market-based mechanisms, like reverse auctions, that award funding in a cost-effective way.[17]

The Low Income program is not based on the same inefficient model, and already provides direct and explicit subsidies to end users in an efficient and economically rational way. Low Income funding goes directly to the most vulnerable Americans, providing precisely the type of transparent and predictable universal service funding foreseen by the Communications Act. Not coincidentally, only the programs that provide these types of direct subsidies—Low Income, E-rate and Rural Health Care—were strongly supported in the National Broadband Plan. Indeed, the Commission recommended the Low Income program be *expanded*, not cut.[18]

Not only is a Low Income cap unnecessary, it is not clear how such a cap could practically be implemented. For example, in the NPRM, the Commission asked "how could ETCs be notified when the cap had been reached?" When notified that a cap had been reached for the relevant period, would the ETC be required to continue to provide service and then de-enroll the consumer? Would the ETC or the consumer be responsible for the difference in cost between the Lifeline and non-Lifeline package? If it is the consumer's responsibility, and the cap were to be set, for example, on a monthly basis, would the consumer need to demonstrate eligibility after each de-enrollment due to the cap, which could potentially be each and every month? Even if the cap were administered on an annual basis, the ETC would presumably need to notify the consumer that regardless of his or her actual eligibility, that the benefits might stop

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[17] National Broadband Plan at Recommendation 8.2 ("*The FCC should identify ways to drive funding to efficient levels, including market-based mechanisms where appropriate, to determine the firms that will receive [Connect America Fund] support and the amount of support they will receive*. If enough carriers compete for support in a given area and the mechanism is properly designed, the market should help identify the provider that will serve the area at the lowest cost.") (emphasis in original).

[18] National Broadband Plan, Recommendation 9.1: "The Federal Communications Commission (FCC ) should expand Lifeline Assistance (Lifeline) and Link-Up America (Link-Up) to make broadband more affordable for low-income households,"

at any time, with very little notice. This would leave the consumer vulnerable because he or she would need to find an alternative service and handset quickly, it would also endanger the ETC's reputation by suggesting that the de-enrollment was due to the ETC's internal policy. It is also important to consider that ETCs concentrating on serving the Low Income population operate on very thin margins. Asking ETCs to absorb the costs associated with de-enrollment is simply not feasible for ETCs such as Nexus, and to the extent that the burden of administering the cap drives small ETCs out of the market, the policy would create an anti-competitive advantage for larger ILECs.

## II. PREVENTION MEASURES MUST NOT SWALLOW THE PROGRAM THEY ARE MEANT TO PROTECT

Nexus reiterates its strong support for reasonable, common-sense approaches that will significantly reduce the possibility of waste, fraud, or abuse in the Low Income program. In particular, Nexus supports sensible solutions to the problem of consumers receiving Lifeline service from multiple ETCs. To that end, Nexus is an active participant in the industry group that is working with the Commission to implement emergency measures that will resolve this issue. This group will also work with the Commission to assess the problem of more than one person per household receiving benefits and will seek solutions to this issue.[19]

Unfortunately, some of the proposals in the NPRM go beyond reasonable fraud-prevention measures and would have the effect of picking winners among ETCs offering services to low income Americans. In particular, the proposed change to service activation fee ("SAF") reimbursement through Link Up would exclude all but large carriers with higher-income customer bases from serving low income America. This does a disservice not only to the

[19] *See e.g.*, Ex Parte filing filed in WC Docket No. 03-109 on Apr. 15, 2011 by Nexus Communications, Inc., USTA, CTIA, AT&T, CenturyLink, Cox Communications, Inc., General Communication, Inc., Sprint Nextel Corp., Tracfone Wireless, Inc. and Verizon Communications, Inc ("Carriers' Ex Parte Filing").

program and its beneficiaries, but is inconsistent with the pro-competitive principles of the Communications Act. In addition, reduction of the Link Up subsidy to less than $30 and elimination of self-certification may force effective ETC competitors like Nexus from the market and would deprive thousands of low income families from the benefits of the program entirely.[20]

### A. The Proposed Link Up Changes Are Unnecessary

Despite the NPRM's positive proposals to increase Low Income efficiency, the proposed Link Up rule changes would have the pernicious effect of forcing participants out of the Low Income program during a time when they need it most. Nexus respectfully asks the Commission to take a very close look a these proposals in light of Nexus' comments and explanation below.

#### 1. Changes to the Link Up Rule Are Unnecessary, Unjustified, and Harmful to Consumers

Nexus' customer base is almost exclusively comprised of Low Income participants, although it does have a limited number of non-Low Income customers. Nexus, like every other carrier that charges a Service Activation Fee ("SAF"), utilizes Link Up funding to reduce (or in some states eliminate) the up-front out of pocket fee to its low income subscribers. In a few states, Nexus waives the balance of the SAF not covered by Link Up for its Low Income customers. This partial waiver was taken on as an additional benefit to low income consumers as part of Nexus' ETC designation process in those states. Although this policy was reached in negotiations with state commissions authorized to oversee ETC designation, USAC has interpreted the Commission's rules so that this kind of waiver disqualifies the customer from reimbursement of their SAF. A new interpretation of the Commission's rules is needed.

[20] Indeed, drastic reduction in Link Up funding for telephony services could send a negative message to entities that have expressed an interest in the participating in a Low Income broadband pilot program.

Unfortunately, the Commission has also proposed to define what qualifies as a supported "customary" SAF as being limited to SAFs that are "charged" to all customers within a state.[21] Recent interpretations by USAC suggest that any partial waiver provided to the customer will result in disqualification from Link Up support unless the customer's ETC also has non-Low Income customers that pay the full SAF (without Link Up or waiver) or has Low Income customers that receive no waivers of any part of the SAF. Such a policy is not legally supportable or sustainable because it unfairly discriminates against one class of carrier while giving preferential treatment to another.

The result is that ILECs, who have large customer bases and are not focused on the low income population, will get Link Up without issue, in all cases, without regard to their waiver policies. The wavier policy will only threaten smaller carriers like Nexus who concentrate on this market segment and whose customers will either be denied Link Up or be forced to "pay to play." Cash-strapped families will be forced to pay out-of-pocket in order to receive the subsidy, depending on the particular carrier involved. ILECs, such as AT&T, could continue to provide partial waivers without restriction to their Low Income customers simply because they serve other customers who can afford to pay the full SAF.[22] Nexus and other carries that focus on providing Lifeline and Link Up to low income subscribers who were ignored by larger carriers for years should not be penalized by an overly restrictive definition of customary charges.

Even if this policy were applied without regard to the ETC's customer base, the policy would still be flawed. A pay-to-play policy requiring low income consumers to pay significant amounts will only serve to discourage eligible consumers from participating in the program.

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[21] NPRM at ¶¶ 71 – 76; NPRM at ¶ 74 ("We also propose that Link Up rules make clear that activation charges that are waived, reduced, or eliminated when activation is accompanied by purchase of additional products, services, or minutes are not customary charges eligible for universal service support.")

[22] Comments of AT&T Inc. *In the Matter of TracFone Wireless, Inc. Petition for Declaratory Ruling*, WC Docket 09-197, CC Docket 96-45 (filed Dec. 23, 2010) at 3.

### 2. The Proposed Changes to the Link Up Rule Would Deny Legitimate Cost Recovery

Changes to the SAF rules are unnecessary, in addition to risking perverse effects on the market. No change to the Link Up rule is needed to ensure that the Link Up program work efficiently and effectively. Low Income funding – unlike High Cost subsidies collected by carriers – flows directly to the benefit of end users. It is Low Income consumers, the proper beneficiaries of the Low Income program, who benefit from efforts of carriers such as Nexus to waive the balance of SAF not covered by Link Up. Indeed, no party has alleged a specific wasteful, fraudulent, or abusive practice that this rule change would prevent. The proposal seems effective at only one thing—forcing efficient, Low Income-market focused service providers like Nexus out of business, and providing a disincentive for competitors seeking to enter the Low Income market.

Nexus' SAFs are designed to cover real and significant costs. These costs are no longer linked—for Nexus or any other carrier—to *physical* installation except in rare circumstances, but the costs are nevertheless real and significant.[23] Both wireless and wireline carriers connect residential customers to their networks by having customer service representatives gather the necessary subscriber and service package information, setting up a billing account and activating, in the carrier's operational support systems, a new account in order to permit the customer's telephone equipment to communicate with the network. The process of ensuring that the customer's equipment properly communicates and interacts with the network is even more involved and therefore, costly, with a wireless network.

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[23] Even landline local exchange carriers typically maintain a soft dial tone at premises with no active customers, meaning that there is no need to physically connect facilities when a new customer requests a service. It is the rare residential customer that does not already have all the necessary physical wire connections in place. In other words, for the vast majority of service "connections," there is no physical work done to connect the customer's NID to the network—there is no "truck roll."

Nexus' customary charge for service activation is listed in its informational tariffs and price lists, and is a binding common carrier offering. As a common carrier, Nexus is required to serve all potential users indifferently, and the prices, terms, and conditions in its tariffs must be offered to all its customers.[24] A typical Nexus tariff states that "[a] Service Activation Fee ['SAF'] . . . is required to activate a customer's service irrespective of product offering."[25] This language constitutes Nexus' legally-binding common carrier offering to all customers in that state. Any partial waivers applicable to Low Income customers are set out in a separate, distinct section that governs the customer's receipt of Low Income funding along with related terms and conditions. The fact that Nexus has specific and separate provisions that apply to prospective Low Income customers does not convert its offering to other potential customers into a nullity. The standard language applying the SAF to all customers should be more than sufficient to qualify this charge as "customary" for purposes of the Link Up rule.[26] Nexus and similar carriers have designed their waiver policies either at the request of state commissions or in furtherance of their overall goal of increasing the ability of low income customers to participate in the Low Income program, even if they cannot afford tariffed activation charges. The Commission should not punish these ETCs for this policy, nor should it require ETCs to present a burdensome justification for every waiver.

Nexus' SAF is not unusual. In fact, charging an SAF is a wireless industry standard, rather than an exception. For example, each of the top five wireless providers in the nation charge SAF—AT&T, Verizon (including the formerly Alltel operations, which continues to have

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[24] *Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921, 929 (D.C. Cir. 1999); *Nat'l Assoc. of Regulatory Utility Commissioners v. FCC*, 553 F.2d 601, 608 (D.C. Cir. 1976); *In Re Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 785 (FCC rel. May 8, 1997) ("1997 Universal Service Order").

[25] *See e.g.*, Nexus Communications, Inc. Statement of Terms and Conditions for the Furnishing of Wireless Service in the State of Georgia at 14; West Virginia Informational Wireless Services Tariff of Nexus Communications, Inc. d/b/a TSI at 42.

[26] 47 C.F.R. § 54.411(a).

separate pricing), Sprint-Nextel, T-Mobile and US Cellular. Similarly, a Nexus survey identified over 40 other wireless carriers that charge SAFs, including seventeen carriers that charge an SAF on prepaid plans.[27] In the wireline industry, SAFs (non-recurring service connection fees) appear to be nearly universal. Specifically, in a Commission survey, residential connection charges were present in each of the 95 sampled cities (cities that represent 45 states and eight largest ILECs, including AT&T, Verizon and Qwest).[28] A review of specific ILEC tariffs shows that the ILEC SAFs are sometimes composed of several fees, such as "service ordering" (including "service establishment" and "records only"), "central office connection" and "premises work" fees.[29] The fact that ILECs may charge a service order (or even a "records only") non-recurring charge that is separate from physical wiring charges is another indication that SAFs are legitimate even if no physical wiring takes place.

### 3. The Proposed Change to Link Up Is Anti-Competitive

Finally, the proposed change to the Link Up rule is anti-competitive. It would accomplish little more than effect a redistribution of funds from competitive market-focused carriers like Nexus to larger nationwide carriers, penalizing carriers who concentrate exclusively on – and therefore most effectively serve – the low income population. In practice, the proposed

[27] In addition to Nexus, seventeen other carriers charge SAFs on prepaid wireless plans: Alaska Wireless Communications LLC; Cellular South; Chariton Valley Communications; Corr Wireless; DPI Teleconnect, L.L.C.; Illinois Valley Cellular - IV Cellular; I-Q Telecom, Inc.; Lucky Wireless; Mobi PCS (Coral Wireless); Pine Tree Cellular (Maine); Smith Bagley - Cellular One; STi Prepaid, LLC; Telrite - Life Wireless; Terracom Wireless; True Wireless, LLC; West Central Wireless (Right Wireless); and YourTel America, Inc. Other wireless carriers that charge SAF include the following: Airlink Mobile; Arctic Slope Wireless; Caprock Cellular; CellularOne of East Texas; CloseCall America, Inc.; Cordova Wireless Communications Inc; Cross Mobile - Mobilz; E.N.M.R. Telephone Cooperative - Plateau Wireless; FTC Communications, Inc.; Immix - Keystone Wireless; Greatcall, Inc., d/b/a Jitterbug Wireless; Lamar County Cellular; Long Lines Metro; North East Colorado Cellular - Viaero Wireless; nTelos; OTZ Telecommunications Inc. - OTZ Cellular; SouthernLINC; and Union Wireless - Union Telephone Company.

[28] *See* FCC 2008 Reference Book of Rates, Price Indices, and Household Expenditures for Telephone Service, Table 1.3, available at http://www.fcc.gov/wcb/iatd/lec.html.

[29] *See* for example, AT&T Tariff Illinois Bell Telephone Company, I.C.C. No. 19, Part 3, Sec. 1 p. 1 available at http://cpr.bellsouth.com//pdf/ic/0003-0001.pdf.

rule would mean that unless a carrier has a substantial number of non-Low Income customers, or requires its Low Income customers to pay an out-of-pocket fee, the SAF does not qualify as a customary charge. This would turn the pro-consumer efforts of Nexus and several state public utility commissions to assist low income Americans into a "Catch 22" situation for successful competitors.[30]

In short, any mandatory SAF billing policy is simply incompatible with the Commission's competition policy and the basis for the 1996 Telecommunications Act. There is no need to police product offerings in competitive markets, because an end user chooses providers and product offerings that deliver most value from a particular end-user's standpoint. An ETC that offers an inferior value will lose customers to competitors. The fact that wireless ETCs focusing on the Low Income segment are gaining customers is an indication that a growing number of Low Income customers are finding wireless Low Income product offerings more "valuable" that the ILEC Low Income product offerings.

Nexus believes that there can be no question as to the value of the competitive services it brings to the market. The numbers leave no doubt that wireless services, and particularly prepaid services, are giving Low Income Americans the kind of telephone service that they need. Studies show that when Low Income families choose their phone service, they generally choose wireless.[31] Wireless services provide critical benefits for Low Income Americans that improve their security, mobility, and economic welfare in ways that are particularly important given the

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[30] Nexus has consistently demonstrated that it cares about eliminating waste, fraud and abuse from the Low Income program by developing on its own accord an internal best practices policy whereby Lifeline subscribers who do not use their handset for sixty days are de-enrolled. Additionally, Nexus has engaged in extensive outreach efforts, including deploying mobile information centers directly to economically disadvantaged neighborhoods, which was recently recognized by the Federal-State Joint Board on Universal Service. *In Re Federal-State Joint Board on Universal Service; Lifeline and Link Up*, Recommended Decision, 2010 FCC LEXIS 6557, at ¶ 64 (Jt. Bd. rel. Nov. 4, 2010).

[31] Janice A. Hauge, et al., *Whose call is it? Targeting universal service programs to low-income households' telecommunications preferences,* 33 Telecomm. Pol'y 129, 136 (2009), *available at* http://warrington.ufl.edu/purc/purcdocs/papers/0805_Hauge_Whose_Call_is.pdf.

economic and social challenges they face. Numerous studies have demonstrated that wireless phones help low income Americans in profound ways, and that they recognize it. Low Income Americans also recognize the benefits of prepaying for wireless services. In the last few years, the increase in prepaid subscribership has been particularly high in low income households, which makes sense, as prepayment allows these families to effectively manage their costs and avoid unexpected fees. Studies have shown that low income customers choose prepaid in higher numbers than any other group.[32]

Given these strong and undeniable industry and marketplace trends, Nexus questions why any rule that would make prepaid wireless *less available* to consumers is being called for. The partial waiver of prepaid wireless SAFs makes telephone services more affordable for low income Americans, furthering the policy goal of the Low Income program, which is to help ensure that "[q]uality services [will] be available at just, reasonable, and affordable rates" for *all* citizens.[33] Yet from the inception of the program until very recently, fewer than a third of eligible subscribers were being served by the program.[34] The Commission, therefore, should encourage efforts of ETCs such as Nexus to expand their services and pro-consumer pricing policies like partial waivers.[35] It should not impose a restrictive interpretation of "customary charge" that would unfairly advantage incumbent providers and hurt consumers who benefit from the competitive offerings of ETCs like Nexus that focus on serving their needs. A minimum

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[32] *Id.* at 138.

[33] 47 U.S.C. § 254(b).

[34] 2009 Universal Service Monitoring Report at tbl. 2.1.

[35] ETCs that waive the balance of a Lifeline subscriber's SAF not covered by Link Up is good public policy, and encouraging ETCs to continue engaging in the practice is in the public interest. The remaining balance of the SAF is like a "co-pay" for medical treatment. When Nexus (or any other ETC) waives remaining balance of the SAF it is analogous to doctors waiving or reducing their fee. If doctors were penalized for engaging in the practice of waiving or reducing fees, the obvious result would be a strong disincentive for health care professionals to engage in this admirable practice. The same goes for ETCs who provide Lifeline and Link Up services to income-challenged Americans.

monthly charge would be discriminatory and would hurt the very people the Low Income program is designed to help.

### 4. Reducing Link Up Reimbursement Lower than $30 Will Distort the Market

Nexus also urges the Commission to reject the proposal to reduce Link Up reimbursements below the current $30.[36] Carriers like Nexus are not inflating service activation fees, as explained above in Section II(A)(2). To the contrary, any distortions of the market are likely due to practices of large wireless carriers who may use artificially low service activation fees as a "loss leader" with low profit margins. These carriers can instead recover their costs of signing up new customers through lengthy multi-year agreements and early termination penalties.

That kind of business model is not possible for carriers that focus exclusively on the low income market. The NPRM appropriately asks about costs associated with activating a phone line and establishing a billing relationship,[37] and Nexus reiterates that these costs are real and universal throughout the wireless and wireline industries. In designing the Link Up program, the Commission was aware of this reality. The intention of the Link Up program is to make obtaining telephone service affordable so as to achieve near 100% penetration among eligible recipients. If the program is redesigned so that only large carriers with national services can participate, fewer low income individuals will be served. The proposal to reduce Link Up reimbursements to less than $30 will lead to this undesirable result.

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[36] NPRM at ¶¶ 77 – 79.

[37] NPRM at ¶ 79.

### B. Eliminating Self-Certification Prior to the Establishment of a Database is Too Burdensome For Low Income Individuals

The current regulatory regime permits customers to self-certify, in most states, that they qualify for the Low Income funding based on their qualification for other social programs, such as food stamps. While there is also the option to qualify consumers based on income levels, the overwhelming majority of consumers rely on their eligibility for a relevant social program in order to receive Low Income benefits. The Commission has proposed to eliminate the self-certification mechanism because it is concerned that it does not provide adequate assurances that the consumer qualifies.[38]

Nexus reiterates that not only does the Commission lack sufficient data regarding the extent of waste, fraud and abuse, but macro economic indicators very strongly suggest that ineligibility is unlikely to be the case for most consumers. As discussed above, one in eight Americans receives food stamps, which equates to approximately 38.5 million people.[39] At typically monthly funding rates of $10 in Low Income disbursements, this means that the overall disbursement level of the program should be approximately $4.6 billion (*i.e.*, 38.5 million people x $10 x 12 months). Yet the disbursements in 2010 were only 28% of this figure.[40]

Nexus is not suggesting that self-certifications are an appropriate long-term solution. But eliminating self-certification for a relatively short interim period while the country is in the midst of a severe recession would only serve to punish consumers and is unwarranted based on the lack of evidence in the record of widespread ineligibility or fraud. Eliminating self-certifications will stall new consumer enrollment because most low income individuals do not have easy access to

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[38] NPRM at ¶ 170.

[39] *Supra* note 2. Moreover, one-third of eligible Americans do not receive food stamps. The 2010 census estimated the U.S. population to be 308.7 million. *Population Distribution and Change: 2000 to 2010*. United States Census Bureau. *available at http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf* (visited April 21, 2011).

[40] 2010 Low Income disbursements were $1,315,734,000. *See* supra note 15.

scanners, photocopiers, etc. to provide the necessary paperwork, live in transient housing, will not go through the trouble of producing documentation, etc. as is being considered. Moreover, it would likely lead to confusion in the industry. ETCs would need to scramble to establish new business processes to collect and verify qualification paperwork, not to mention determine each state's legal requirements regarding document retention periods. It will take a significant amount of time for industry to adjust its processes, likely until the establishment of a database. In short, the costs to consumers and industry of a complete shift in the certification process for an interim period is unjustified.

### C. A PIN Database Should be Established with State-Maintained Data and a Neutral Third Party Administrator

The only effective solution to the issue of eligibility (initial and continued) and duplicate support is a national database populated with state-provided data.[41] Nexus supports the proposal, first stated by AT&T, to provide each consumer with a unique identifier (a "PIN") to avoid confusion due to nicknames, misspellings, etc. Eligibility data must be provided directly by the relevant state agencies.[42] Given that states administer the qualifying programs (TANF, food stamps, etc.), states are uniquely positioned to confirm the eligible status of consumers for those programs, as well as handle consumers' sensitive personal data. The provision of this data by states would eliminate any opportunity for fraud and remove a key barrier to consumers accessing these needed services. Nexus supports this common sense approach.

As the Commission explained,[43] a PIN database would quickly answer two questions for ETCs: (1) is the subscriber eligible and (2) is the subscriber already receiving Low Income

[41] NPRM at ¶ 208.

[42] NPRM at ¶ 209.

[43] NPRM at ¶ 209.

service? Moreover, it would improve Low Income program in several respects. First, a centralized database on which consumers, ETCs USAC and the Commission could rely would increase efficiency and would reduce waste, fraud, and abuse by eliminating duplicate claims and lowering the administrative burdens associated with the current paper-based system. The current Low Income system is a patchwork of federal and state eligibility requirements, verification methods, and incentives programs that rely primarily on consumers to self-certify or furnish paperwork demonstrating qualification, along with a handful of state-level databases that vary in terms of efficiency and structure. This system would be vastly improved by a centralized repository of eligibility information that draws eligibility information directly from the qualifying state agencies.

It is crucial that the states, not ETCs, take responsibility for determining whether a customer is eligible to participate in the Low Income program. States are much better equipped to confirm whether a particular consumer is receiving benefits from any particular program, and has much more timely and accurate information with respect to when those benefits cease. ETCs have no legal way to check directly with the relevant agency, and are therefore dependent on consumers to keep their information current.

Another critical part of the database will be its ability to allow ETCs to compete fairly for eligible customers. This should include a simple and seamless process for submitting consumer letters of authorization ("LOA") for carrier changes as well as an easy process for consumers to update their address information or otherwise correct erroneous information. Initial registration and the ability to update subscriber information must be straightforward for all low income consumers irrespective of their relative level of technical sophistication. Potential Low Income subscribers who may not have access to the Internet should be allowed to work with third parties such as case workers, outreach volunteers, or with the Commission or USAC in order to obtain the PIN. The database must also separately show eligibility for Link Up as well as Lifeline, in order to ensure that a new carrier can be confident when receiving Link Up funds that they have been properly authorized.

Finally, the database administrator must be a neutral third party with no ownership or financial affiliation with any ETC. For example, an entity called Emerios has expressed interest in administering the database. Nexus' understanding is that Emerios is a subsidiary VMBC and that VMBC operates the subscriber database for TracFone, an ETC that serves a large portion of the Low Income market. The conflict of interest that such an administrator would have in running a national database that governs the customers of all ETCs is readily apparent. Any vendor that has provided subscriber database or other substantial services relating to an ETC's Low Income operations such as telemarketing, should be disqualified from this role. Industry and consumers must be confident that the database is administered without favor to any particular ETC.

### D. Duplicate Elimination Procedures Should Be Fair and Verifiable

Any database should permit ETCs to contact the customers directly once notified of duplicate support. As AT&T previously noted, there have already been instances in which USAC asked carriers to resolve "double-dipping" by "work[ing] together to determine which company should properly claim the Low Income subscribers identified by the auditors as receiving support from both companies"[44] This is an inappropriate role for carriers. Nexus notes that industry efforts to create, in cooperation with the Commission, an interim duplicate elimination process have generated a more appropriate solution: USAC randomly assigns a

[44] AT&T Comments in CC Docket No. 96-45 at 13 (filed Oct. 6, 2009) (citing Request for Review by the Verizon Alltel Management Trust of Decision of the Universal Service Administrator).

default carrier to each consumer, and USAC and a third party handle interactions with the consumer should he or she wish to override this default.[45] Nexus supports adoption of this solution to remove duplicate support to the same person ("Track 1"), as well as further assess how to best address duplicate support to the same household ("Track 2"), until a database can be established.

During the interim process, Nexus strongly believes that ETCs should be involved in the process of determining the methodology for assigning consumers a default carrier because Nexus anticipates a relatively low response rate from consumers due to the same "paperwork" difficulties discussed above in connection with the initial eligibility and verification processes. The default assignments, therefore, will take on heightened importance, and it will be important for ETCs to have adequate and concrete assurances that the assignments are done in an equitable and verifiable manner. ETCs must be provided sufficient data to determine that they were assigned roughly half of the duplicate consumers and if not, be able to link the number of assignments to a higher-than-anticipated response rate. For example, providing each ETC the total number of duplicates, triplicates, etc. that it shares with another ETC prior to USAC sending the notice to consumers, then providing as well as approximate response rates and updated numbers for the duplicates, triplicates, etc. after the close of the 30-day period during which consumers may choose the ETC by calling the toll-free number. This will permit ETCs to conduct high level checks on USAC's process, which could, depending on consumer response rates and the level of duplicate support, result in significant shifting of carrier-customer relationships and ETC support.

Nexus also supports efforts to educate subscribers about the requirements of the law. Some duplicate support is likely due to subscribers not being aware that they are only permitted

[45] Carriers' Ex Parte Filing, Proposed Interim Lifeline Duplicate Resolution Process at p.2.

to have one Lifeline and one Link Up account per address, or possibly, unawareness regarding the one account per person rule. While advertising services as Lifeline and Link Up will raise awareness of the program names, it may not, by itself, provide a full warning to customers of the one-account per household restriction. The Commission and state authorities, therefore, should work with ETCs to develop an education program explicitly targeted at raising awareness on this key point.

**E. De-Enrollment Procedures Should Not Unduly Burden ETC Customers**

Nexus recommends that the Commission adopt liberal notification procedures and timelines for customer de-enrollment for the poorest and least sophisticated consumers.[46] Any new verification policies, should take into account the specific needs of the targeted customers and the challenges in serving them. More often than not, customers participating in the Low Income program may find that wireless services best fit their needs or, in fact, are their only suitable option, and any de-enrollment process should incorporate text messages as a valid means of communicating and providing notice to consumers.

In the interim period before a PIN-based system can be implemented, improved annual verification methods could be explored. For example, Florida currently requires wireless ETCs to make contact by text message with their Low Income customers every 60 days. Nexus voluntarily implemented just such a policy for all its subscribers in all states in which it operates. Nexus de-enrolls from the Low Income program any customer who has not used his or her phone in 60 days and has not responded to Nexus' repeated attempts to verify the customer's continued use of the service. If it appears that a prepaid Low Income customer's account has not been used for 60 days, Nexus notifies the customer immediately that the customer is no longer eligible for Nexus

[46] NPRM at ¶¶ 93 – 94.

Low Income service unless the customer takes steps to re-enroll within a 30-day grace period. The customer's account will remain active during the grace period, and Nexus tries to determine whether the customer intends to continue using Nexus' Low Income service. If Nexus' attempts are unsuccessful, and if there is no evidence that the customer has used the service (such as to make or receive a call), Nexus deactivates services for that customer after the 30-day grace period has ended. Nexus does not seek any Low Income funding for service provided to the customer during the grace period and does not claim funding for that customer on its FCC Form 497 filed with USAC unless the customer reactivates its account during that time.

If the Commission adopts a 60-day de-enrollment policy, it should only require de-enrollment after a carrier has been able to verify inactivity for 60 days and it should also provide a grace period of 30 days during which the customer may re-enroll without needing re-certification.[47] This time is necessary due to the documented lack of responsiveness with the target demographic. Following those 90 days, if the customer does not respond, carriers should then follow the standard notice period prior to de-enrollment.[48] During this time, prepaid carriers should refrain from loading any minutes on the customer's phone unless the customer pays for a non-Lifeline package or demonstrates eligibility for a Lifeline package.

Finally, Nexus asks the Commission to preempt any state requirements that would conflict with the above proposed de-enrollment and disconnection proposal. For example, it must preempt any state or local statutes, regulations or any state-approved tariff requirements that would conflict with de-enrollment from both federal and state programs, as well as termination of service if the customer is unwilling to pay for a non-Lifeline service package.

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[47] NPRM at ¶¶ 82, 93.

[48] NPRM at ¶ 94.

## III. COMPLIANCE WITH NEW ELIGIBILITY RULES SHOULD CONSTITUTE SAFE HARBOR GOING FORWARD WITHOUT RETROACTIVE RECOVERY

Under current Commission and state rules, it is impossible for ETCs to definitively determine whether a consumer is simultaneously receiving Lifeline service from another ETC without violating the Commission's customer proprietary network information ("CPNI") rules and state-level privacy rules. Even once the database is established, the ETCs will have no independent means of verifying the accuracy of the database, again due to privacy law restrictions. The Commission has proposed a mechanism for seeking reimbursement for duplicative funding.[49] In the interim period prior to the establishment of a database, Nexus fully supports the industry proposal to deny funding only beginning with date of de-enrollment for carriers that otherwise complied with the interim process.[50]

Once the database is established, the Commission should adopt a rule that if the ETC properly and timely consults the database, that the ETC will receive "safe harbor" treatment, meaning that the ETC will not be subject to enforcement action, audits or action to retroactively recover funding disbursed prior to the date of de-enrollment, either from the Commission, USAC or a state public utility commission or other state agency.

## IV. CONCLUSION

Nexus respectfully requests that the Commission incorporate Nexus' suggestions into the upcoming reforms to the Low Income Programs. Nexus is deeply concerned that many of the proposed "solutions" such as limiting or eliminating Link Up funding, capping the fund, requiring "foodstamp" letters for the interim period prior to the establishment of a database, and imposing a minimum monthly fee, may in fact set back the gains made in the Low Income

[49] NPRM at ¶ 62.

[50] Carriers' Ex Parte Filing at p.2.

program over the last few years. The imposition of these proposed rule changes will also not produce the elusive monetary "savings" that the proponents of the rule changes have stated will fund the deployment of broadband. In particular, the proposed changes to the Link Up rule should not be adopted, as they will serve to eliminate low income market participants and deny services to eligible consumers. On the other hand, implementation of a national PIN database administered by a neutral third party consistent with Nexus' comments should be implemented as quickly as possible.

Respectfully submitted,

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