BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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

REPLY COMMENTS OF NEXUS COMMUNICATIONS, INC.

Danielle Frappier
Christopher Fedeli
Adam Shoemaker

Davis Wright Tremaine LLP
1919 Pennsylvania Ave. NW Suite 800
Washington, DC 20006
(202) 973-4200

Counsel to Nexus Communications, Inc.

May 10, 2011

TABLE OF CONTENTS

Page

SUMMARY ..... **i**

I. CONFUSION BETWEEN MARKETING FOCUS VS. COMMON CARRIER OFFERINGS SHOULD NOT RESULT IN UNNECESSARY RULE CHANGES ... **1**

A. Nexus Charges the Same Service Activation Fee to All Subscribers 2

B. Much of the Concern Over "Fabricated" Activation Charges is a Red Herring.. 5

C. Any Rule Changes Should Not Dictate Business Models or Marketing Strategies that Are Likely Inferior and Contrary to the Act and Commission Policy..... 8

II. THERE IS NO NEED FOR A DRASTIC INTERIM SOLUTION TO WHAT IS VERY LIKELY A LIMITED WASTE, FRAUD, OR ABUSE PROBLEM **10**

A. Low Income Ineligibility Issues are Likely Relatively Low, and Studies Demonstrate the Problem with Subscriber Self-Documentation Solutions..... 11

B. Household or Subscriber Duplication Issues are Also Probably Low 14

C. The Focus of the Commission, States, and Industry Should be on Quickly Establishing a National Database 15

III. THERE IS NO POLICY JUSTIFICATION FOR CAPPING THE LOW INCOME PROGRAM **18**

IV. CONCLUSION **21**

SUMMARY

Nexus Communications, Inc. ("Nexus") fully supports true reforms to make the Low Income program more efficient and that will eliminate any waste, fraud or abuse. There are multiple factors at play in the Commission's notice of proposed rulemaking ("NPRM"), however, that have led to proposals to reform "problems" which, as far as Nexus can tell, have never been properly measured or confirmed. The first and most significant factor is that, after years of chronic neglect by incumbent local exchange carriers ("ILECs"), qualifying consumers are finally being served by carriers such as Nexus, who concentrate their marketing efforts on the qualifying population. Lower costs of wireless service and the worst economic downturn since the Great Depression have led to an increase in carriers focused on this market segment. These carriers are providing high-quality, tailored service to low income customers, unlike the ILECs who never actively sought to serve this niche market. Carriers focused on the low income population have also taken advantaged of the rising popularity prepaid wireless services, which is not limited to the Low Income program, but is a growing trend among consumers industry-wide.[1]

Nevertheless, in certain political circles, the growth of prepaid in the Low Income program is being labeled "suspect" even thought it is the High Cost program that is by far the largest driver of growth behind the size of the fund and the contribution factor. This suspicion is due to unfamiliarity with prepaid markets, as well as the historic pressure to contain the size of the fund and the contribution factor. Yet the Commission has undertaken a piecemeal approach to universal service reform that fails to comprehensively review contributions together with

[1] *See, e.g.*, Prepaid is the New Wireless Battleground, Jenna Worthham, NEW YORK TIMES website at http://bits.blogs.nytimes.com/2010/04/22/prepaid-is-the-new-battleground-for-wireless-carriers/ (Apr. 22, 2010); The Prepaid Nation, Daniel Gross, NEWSWEEK (Oct. 16, 2010), available at http://www.newsweek.com/2010/10/16/third-world-financing-comes-to-the-u-s.html.

distributions. The Low Income program provides support directly to end users, unlike the High Cost fund, and that support is more transparent than any of the programs supported by the Universal Service Fund ("USF"). Reforming the High Cost program and USF contributions s, however, is fraught with political and technical difficulties. Even so, it is here that the Commission should focus the bulk of its reforms. It should not give in to pressure to also impose radical reductions on the low income Americans who depend on Lifeline and Link Up for their communications needs.

In short, the needs of the real constituents of the Low Income program—the poorest Americans—are at risk being ignored in the political wrangling over the fund. Nexus urges the Commission to resist the easy path of viewing growth in the prepaid industry simply as the latest "problem" in need of fixing. Low income Americans are turning to prepaid wireless because it best fits their communications needs, but getting those services could become very difficult if consumers are burdened with requests for more paperwork and lack adequate funding. This is particularly troublesome given that many of the proposals would favor large carriers such as the ILECs over small, efficient carriers focused on the needs of the target demographic.

Nexus is working, and will continue to work, with the Commission to root out waste, fraud and abuse from the program, but it urges the Commission to seek lasting and workable solutions that do not over burden America's poor or the entrepreneurs that serve them.

I. CONFUSION BETWEEN MARKETING FOCUS VS. COMMON CARRIER OFFERINGS SHOULD NOT RESULT IN UNNECESSARY RULE CHANGES

There is nothing suspect regarding a carrier choosing to focus on providing service to low income Americans, a segment of society that has historically been disregarded by the large carriers. Unfortunately, there has been much confusion and disinformation over the distinction between the focused marketing strategies of some eligible telecommunications carriers ("ETCs"), on the one hand, and what constitutes their common carrier offerings on the other. For example, Nexus has standard common carrier offerings that are available to all consumers.[2] Consistent with its duties as an ETC, it provides discounts on those offerings for consumers who qualify for the federal Low Income program. Like other ETCs, Nexus has chosen to focus its marketing efforts on these qualifying consumers. Although Nexus does serve some consumers who do not qualify for the discounts and therefore, receive and pay for the standard offering without receiving Low Income discounts, the majority of its subscribers do qualify for the discounts. The fact that some ETCs such as Nexus have chosen to focus their marketing efforts on Low Income qualifying consumers does not render their common carrier offerings—whether contained in tariffs or otherwise—a nullity, nor should it raise concerns or otherwise suggest that funds are misused. There is nothing suspect about building a marketing strategy around the discounts and providing Lifeline service to low income Americans. In fact, one could argue that

[2] For example, Nexus' price lists typically provide that "[a] Service Activation Fee of $72.00 will be imposed by Nexus to activate a customer's service ***irrespective of product offering***." Nexus Communications, Inc. Statement of Terms and Conditions for the Furnishing of Wireless Service in the State of Georgia ("Georgia Price List") at 14, available at https://www.reachoutmobile.com/GA-Tariffs.pdf; Nexus Communications, Inc. Statement of Terms and Conditions for the Furnishing of Wireless Service in the State of New Jersey ("New Jersey Price List") at 18, available at https://www.reachoutmobile.com/NJStatementofTermsandConditions.pdf. The language in Nexus' West Virginia wireless price list has slightly different wording, but the effect is the same as in the Georgia and New Jersey lists. The West Virginia list states "[a] Service Activation Fee of $72.00 will be imposed by *REACHOUT WIRELESS*™ to activate a customer's service irrespective of product offering." West Virginia Informational Wireless Services Tariff of Nexus Communications, Inc. d/b/a TSI ("West Virginia Price List") at 42, available at https://www.reachoutmobile.com/WV%20REACHOUT%20%20Informational%20Wireless%20Services%20ONLINE%20Tariff%20_2_.pdf.

it results in a cleaner, more transparent way to serve low income subscribers. If the ETC were to refuse to provide service to other consumers pursuant to the undiscounted terms of its standard common carrier offerings, that would obviously be a violation of its duties as a common carrier. But that is a separate question and the Commission has ample statutory and regulatory authority to deal with such situations.

The danger in not properly distinguishing between an ETC's marketing focus and its duties as a common carrier is that the Commission's proposed rule changes would severely limit or even effectively ban legitimate business models that have served low income Americans more efficiently and more effectively than at any point since inception of the program. If the Commission gets this wrong, not only will existing Low Income service providers exit the market, it will provide a disincentive for additional service providers to enter the Low Income market. If that were to occur, the only providers left would be the large service providers. One needs to only look back at the last twenty some years of extremely low penetration rates to see what Lifeline would look like moving forward under the proposed rule changes. In fact, as will be discussed herein, the proposed changes to the Link Up rule are at best solutions in search of a problem.

A. Nexus Charges the Same Service Activation Fee to <u>All</u> Subscribers

Few would disagree that ETCs, as common carriers, should charge the same Service Activation Fee to all customers. The record in this proceeding is unclear as to the number of ETCs charging SAFs *only* on Low Income participants, an alleged practice that critics claim generates fraudulent Link Up support. Nexus, for its part, charges *the same* SAF to all of its subscribers, including its non-Low Income subscribers. The fact that the majority of its subscribers do qualify for discounts does not nullify Nexus' SAF. Moreover, Nexus has

subscribers that do, in fact, pay the full SAF because they do not qualify for any discounts. This is consistent with Nexus' standard common carrier offering. The Low Income discounts are deducted from that standard offering, consistent with the Commission's rules.

In certain states Nexus waives the balance of its SAF not covered by Link Up for its Low Income subscribers, which is a condition of its ETC designation in those states. Because Nexus focuses its *marketing* efforts on qualifying consumers, almost all consumers in those states receive the partial waivers. In other states, however, where Nexus has not agreed to waive the fee, Nexus collects fees from its subscribers for the balance of the SAFs after Link Up subsidies are applied, sometimes on a deferred schedule as is permitted under Commission rules.

Nexus' practices are hardly unusual and, in fact, were modeled after the same policies and procedures of AT&T and Verizon. Other carriers, such as AT&T, also waive the balance of their SAFs not covered by Link Up.[3] Yet AT&T supports a general prohibition on SAF waivers, *unless* the fees are being waived by order of a state PSC.[4] While Nexus agrees the Commission should not disturb the public policy decisions of state commissions *i.e.*, the more eligible consumers will take subsidized phone services if they don't have to pay out of their own pockets to get connected, Nexus submits that there is no reason to discourage carriers from providing on their own initiative partial waivers as an additional benefit to Low Income consumers. To implement a rule change that disallows carriers to voluntarily reduce the out of pocket expense to low income families would be contrary to the intent of the program.

Under AT&T's view, the proposed language of Rule 54.400(e) would only apply when an SAF is waived in exchange for "the purchase of additional products" and services, and so would not apply when carriers partially waive the fee pursuant to an order of a state

[3] Comments of AT&T at 29-30.
[4] *Id* at 29.

commission.[5] The economic result is the same, however, whether the ETC partially waives the fee pursuant to a state commission order, or whether it does so in order to provide additional benefits to the consumer by a waiver mechanism, discounts on additional minutes, etc. AT&T's argument is a distinction without an economic difference. Although Nexus agrees that ETCs that are required under the terms of their ETC designation to provide partial waivers are faced with an additional regulatory burden, the fact is that the economic result of state-endorsed or carrier provided waivers is the same. The economic effect for consumers is also the same: the poorest Americans are better able to obtain telecommunication services, which is the goal of the program. Not only should such policies not be banned, but in fact, the Commission should encourage service providers to reduce out of pocket expenses for Lifeline recipients.

Further, AT&T suggests the FCC modify its proposal to define "routine" SAF charges as those that are imposed "more than 50% of the time." AT&T offers no support as to why 50%—or any other percentage—would be the proper threshold. If an ETC had 25% of its subscriber base that did not qualify for Low Income and paid the full SAF, this would be insufficient under AT&T's proposal, yet there is no explanation as to why 50% or any other threshold is rational. This is an arbitrary threshold that serves no purpose other than to eliminate ETCs with a Low Income-specific marketing focus.[6] If AT&T's view were to succeed, only carriers like AT&T that have a large, wealthy subscriber base and for whom providing service to Low Income consumers is an afterthought would receive the subsidies. This was precisely the situation until recently, and helps explain the program's chronically low participation rate of *under a third of*

[5] *Id* at 30 ("…AT&T's ILECs 'routinely' impose line connection charges on new non-Lifeline customers and, in the situation described above, AT&T's ILECs are not waiving, reducing, or eliminating these charges for Lifeline customers due to the 'purchase of additional products, services, or minutes.' Instead, our ILECs are reducing their line connection charges in some states because of a regulatory compulsion to do so.").

qualified consumers.[7] The mere possibility of a repeat of such underperformance should in itself be sufficient reason to reject the proposed changes.

Further, although Nexus does have subscribers that do pay the full SAF, Nexus can imagine a scenario in which an ETC focusing its marketing efforts on Low Income consumers does not have any non-Low Income subscribers that requested service. If that ETC also happened to be operating in states in which its designation order requires it to waive the balance not covered by Link Up, that ETC would be caught in a "Catch 22" situation where suddenly, it does not qualify for Link Up. Traditional legal concepts of what constitutes a common carrier offering (and therefore, must be offered and provided to all consumers) are more than sufficient to guard against unfair discrimination against non-qualifying consumers. For example, if the ETC's tariff provides a standard SAF that applies to all consumers, and any Low Income discounts are only applied to consumers who qualify under the Commission's Low Income rules, this is sufficient absent some showing that the ETC refused to provide service under its standard tariff terms to a non-qualifying consumer. The Commission has ample statutory and regulatory authority to guard against such discriminatory practices should they arise. There is no need to impose an arbitrary and meaningless measure of when a charge becomes "real" based on the type of subscriber served.

B. Much of the Concern Over "Fabricated" Activation Charges is a Red Herring

Parties who support the Commission's proposal to limit Link Up funds for carriers that waive a portion of SAFs base this support on the premise that such a rule will eliminate fraud

[7] *See* USAC 2009 Lifeline Participation Rate Data, http://www.usac.org/li/about/participation-rate-information.aspx (last visited May 9, 2011).

and obvious abuse.[8] They do not argue that the Commission should impose a ban on waivers that are part of a legitimate business model or required by state commission, which are (in both cases) designed to enable more eligible subscribers to participate in the Low Income program. Nexus' waiver policy is based on achieving the goals of the program, and therefore it should not be subject to any restrictions. The Commission should recognize, as several state commissions have, that in many cases the waiver of customary charges for all low income subscribers can be a boon to the program and its eligible participants. If some ETCs are actually fabricating SAFs (*i.e.*, not charging them for non-qualifying subscribers or otherwise charging for costs not incurred), the Commission has existing procedures to deal with such situations.

Nexus suspects that the parties focusing on SAF waivers and discounts are, in fact, more concerned about competition and the overall size of the federal universal service fund, and their own bottom lines. By chipping away at the ability of ETCs who focus on the Low Income market to recover their costs, the critics will not succeed in dramatically reducing costs, but will significantly undermine the Low Income program, which is far from being the main driver behind the current size of the fund. Another motive is these parties' own financial gain. Simply put, eliminating the ability to access Link-Up will effectively destroy the ability of small ETCs to participate in the Low Income program. Once these competitive ETCs are eliminated, the only option left for low income individuals are the large service providers, whose financial goals are not aligned with the low income population For example, most low income subscribers do not have sufficient credit history to merit a contract for year-to-year terms. The large carriers would then charge these consumers inflated rates to compensate for the lack of positive credit history or refusing to provide service. It should be clear that the overwhelming motivation of some

[8] *See, e.g.*, Comments of AT&T at 29; Comments of Cricket Communications and Leap Wireless at 6; Comments of the Missouri PSC at 7; Comments of the Mississippi PSC at 4.

opponents of Link Up is not public policy concerns but instead is a thinly-veiled attempt at elimination of competitive choices to low income Americans.

Nexus incurs real and significant costs in service activation and Nexus' SAF is intended to recover these legitimately incurrent costs. Nexus provides services over its own facilities and incurs costs for connecting a line, phone, and number, etc. just as any carrier would. While some parties suggest that these costs are *de minimis*, ILECs routinely submit as part of cost studies around the country that their service ordering and provisioning activities generate real costs, even for large carriers with significant economies of scale and well-developed OSS. As a facilities-based carrier, Nexus incurs costs associated with service ordering and service provisioning activities such as: providing new subscribers a telephone number, configuring and activating the handset to properly communicate with its network, activating the account and otherwise provisioning subscribers' orders. These are all costs incurred by Nexus for activities that, for the most part, involve costly, labor intensive, manual intervention, as opposed to the "magical, no-cost, automated flipping of a switch," incorrectly suggested by some commenters.

There is really only one complicating issue the Commission should address here: while it is unclear the extent to which resellers perform such functions, Nexus' understanding is that these resellers receive discounts from their underlying carrier and as a result, providing Link Up subsidies to these resellers would result in "double-dipping." The concern of AT&T and others about "fabricated" SAF charges would only seem to properly apply to these types of situations.[9] In no way do these concerns implicate carriers like Nexus with their own network facilities: there

[9] Comments of AT&T at 30 ("For example, the Commission requests comment on whether it should adopt a rule that 'prohibits resellers from imposing a connection charge on consumers when the underlying wholesale provider has not assessed a similar connection charge on the reseller.' In such a scenario, the reseller is clearly fabricating a charge in order to obtain Link-Up reimbursements because the reseller incurs no connection-related costs when its customer begins service.")

is no evidence that carriers like Nexus are "gaming" the system to recover "free money," as TracFone claims.[10]

Nexus imposes its standard SAF on all subscribers, and provides Low Income discounts to qualifying consumers as provided under the rules of the Commission and state public service commissions.[11] Nexus sometimes foregoes recovery of the balance not covered by Link Up, either under legal obligation or otherwise under a company discount. This practice should not be punished. The Commission should not enact any rule that fails to distinguish between this legitimate policy and the fraudulent and fabricated SAFs that may be claimed by pure resellers. Such a rule would undermine the goals of Link Up and would improperly mandate specific business practices between wholesalers and retailers.

C. Any Rule Changes Should Not Dictate Business Models or Marketing Strategies that Are Likely Inferior and Contrary to the Act and Commission Policy

As Nexus understands it, the point of the various Commission proposals to limit SAF waivers is to prevent fraud, not to dictate business models. The role of the Commission is not to pick market winners and losers or reward less-efficient competitors. The only thing a rule that prohibits legitimate practices like Nexus' will accomplish is to eliminate the ability of carriers to focus primarily on serving low income subscribers. Nexus is not aware of any record evidence that artificially structuring the market in such a way would accomplish any public policy purpose.

---

[10] *See* Comments of TracFone at 43 (suggesting that all ETCs that waive SAFs "'game' the system in order to receive 'free money'"). *Id.* at 31 ("Similarly, it appears that some carriers may impose higher service activation charges on Lifeline customers than on non-Lifeline customers, a practice that is designed to maximize the carrier's Link-Up reimbursements.")

[11] In its order designating Nexus as an ETC, the Mississippi PSC, among others, *required* Nexus to waive its customary SAF for low income customers. *See* Mississippi Nexus ETC Designation Order at ¶ 19 (October 5, 2010) ("Nexus will then provide qualified subscribers with an additional discount of $42.00 thereby reducing a qualified subscriber's service activation charge, after the application of the $30.00 Link-Up discount, to '0'.").

In fact, even a casual contemplation of the issue suggests that public policy may well be better served by entities, such as Nexus, that specialize in serving this target, low income population. There are many aspects of serving low income subscribers that are unique, and as past experience indicates, larger carriers, such as AT&T and Verizon, that can make more money from affluent subscribers, are not likely to develop the necessary expertise to successfully market to low income subscribers. By contrast, Nexus specifically reaches out to low income subscribers by means of promotional activities in low income neighborhoods, visiting low income neighborhoods, often with vans, and engaging the target population by providing information about low income subsidies and other aspects of its service. Clearly, if there is merit in having a Low Income program – and, policy makers have decided there is – then all indications are that the program is better served by companies such as Nexus than by larger companies to whom these subscribers are mostly an afterthought.

Moreover, there appears to be an unspoken but implied assumption that larger companies with a diverse subscriber base can spread the costs of serving low income, less profitable subscribers across the entire subscriber base, thus lowering the costs to the fund. There are at least two problems with this. First, there is no demonstration that AT&T and others would serve the volume of low income subscribers currently served by Nexus. Second, the notion that it would be appropriate – nay desirable, from a policy perspective – to blend low income subscribers with a larger affluent set of subscribers to defray the costs is patently illegal as a policy objective. Universal service funding is supposed to be sufficient and explicit.[12] In fact, Sec. 254(b)(5) of the Act has been interpreted by the Commission to explicitly prohibit any policies that seeks to effectuate universal service subsidy flows that are internal; as the Commission noted: "The Conference Committee also explained that these provisions require any

[12] Act of 1996, Sec. 254(b)(5).

such universal service support payment to be, to the extent possible, 'explicit, rather than implicit as many support mechanisms are today.'"[13] The proposed changes appear directly at odds with Congress' intent and the Commission's past stated universal service policies.

Finally, AT&T and other large carriers recover costs through long-term contracts with early termination fees, whereas Nexus provides a prepaid service that is better adapted to the budgeting needs of the target demographic. The mere fact that Nexus *doesn't market to high income subscribers* who are able to commit to a long term contract and risk high early termination fees should not be the basis for imposing discriminatory regulatory treatment on its business model.

II. THERE IS NO NEED FOR A DRASTIC INTERIM SOLUTION TO WHAT IS VERY LIKELY A LIMITED WASTE, FRAUD, OR ABUSE PROBLEM

Nexus continues to urge the FCC not to adopt proposed Rule 54.410(b), which would require subscribers to provide documentation of their participation in qualifying social programs to participate in the Low Income program. Even as an interim measure, such a rule would have a harmful effect on the program. Although rates of true ineligibility are very likely quite low, and duplicate support is unlikely to be a very significant portion of the fund, the main issue is that neither the Commission nor the industry have properly measured the extent to which either problem actually exists. Furthermore, data from ineligibility studies suggests that any interim solution that seeks to rely on self-verification through documentation would risk excluding a large percentage of needy individuals who merely cannot make the time to respond or keep track of government-mandated requests for information. Finally, the need for carriers and states to

[13] *In Re Federal-State Joint Board on Universal Service,* Report and Order, 12 FCC Rcd 8776 at ¶ 9 (FCC rel. May 8, 1997).

process a new a paperwork verification requirement would merely divert energy from what all parties agree is the ultimate solution to the problem – the creation of a third party database.

A. Low Income Ineligibility Issues are Likely Relatively Low, and Studies Demonstrate the Problem with Subscriber Self-Documentation Solutions

Continuing to allow low income Americans to enroll for Lifeline by utilizing self-certification under penalty of perjury should be maintained. Imposing additional restrictions such as requiring "proof of poverty" such as copies of foodstamp letters will simply prevent many qualified low-income households from enrolling in Lifeline. Such documentation of program-based eligibility is not readily available to many low income households who may relocate often and don't have the luxury of organized retention of important papers and documents issued over time due to the transient nature of low income Americans. Even in those situations in which where documents are available, low income consumers lack access to fax machines, copiers, and scanners needed to transmit documentation to service providers seeking to enroll the subscriber.

That being said, neither USAC nor the Commission have properly scoped the extent to which truly ineligible consumers are participating in the program. The data that does exist, however, may indicate that the problem of true ineligibility is likely to be relatively low.

Nexus obtained USAC's summaries of its review of annual verification efforts in federal default states, which Nexus understands to be the most recent data available.[14] A review of USAC's summaries of these verifications indicates that the amount of actual ineligible subscribers receiving service is likely to be quite low. In each of its summaries from 2005 to

[14] Freedom of Information Act Request, Control No. 2009-560 (Dec. 7, 2009), attached to which were provided USAC Overview of Verification Process and Results (covering 2005) ("2005 USAC Overview"); USAC Overview of Verification and Certification Process and Results (covering 2006) ("2006 USAC Overview"); USAC Summary of 2007 Verification and Certification Process and Results ("2007 USAC Overview"); USAC Summary of 2008 Verification and Certification Process and Results ("2008 USAC Overview"); Summary of 2008 Lifeline Verification Process and Results for AT&T, Qwest, and Verizon ("2008 USAC Overview of AT&T, Qwest, and Verizon").

2007, USAC explicitly acknowledged that its ineligible subscriber figures may be high because a large number of ETCs may have mistakenly reported consumers as being ineligible when the real issue was that the consumer simply failed to respond to the ETC's mailing, phone call, or other effort to verify continued eligibility.[15] In fact, USAC's summaries reveal that it is not clear whether some carriers double counted such consumers in both the non-responsive and the ineligible categories.[16] In each year USAC acknowledged that carrier-reported numbers of "ineligible" subscribers (a weighted average of about 15% per year over the three years) were not verifiably accurate.[17] In 2008, in seeming recognition of the lack of uniform company reporting standards, USAC did away with reporting separate categories for ineligible subscribers and those failing to report, and instead reported both ineligible and non-responding subscribers in a single "ineligible" category.[18]

Furthermore, for 2005 to 2007 USAC acknowledged that anywhere between 17% and 30% of subscribers did not respond to their carrier's inquiry, and from 2005 to 2008 between 85% and 50% of all carriers made only a single attempt to contact a subscriber before providing their final data to USAC.[19] This further suggests that even the low ineligibility figures USAC

---

[15] USAC 2005 Overview of Verification Process and Results, p. 2 ("USAC believes this number [of ineligible customers] may be inflated because some companies may have included customers who were also listed as non-responders."); USAC 2006 Overview of Verification and Certification Process and Results, p. 2 ("This number [of ineligible customers] may be inflated because some companies may have included customers who were also listed as non-responders"); USAC 2007 Summary of Verification and Certification Process and Results, p. 3 ("This number [of ineligible customers] may be inflated because some companies may have included customers who were also listed as non-responders, thus double-counting some customers").

[16] *Id.*

[17] 2005 USAC Overview at p.2 ("USAC believes that this number may be inflated because some companies may have included customers who were also listed as non-responders."); 2006 USAC Overview at p.3 (same); 2007 USAC Overview at p.3 (same).

[18] See USAC Summary of 2008 Verification and Certification Processes and Results, p.3.

[19] USAC 2005 Overview of Verification Process and Results, p. 2 ("ETCs in federal default states reported that 21.1808 percent of Lifeline customers did not respond to the survey. Since only 14.4828 percent of ETCs in federal default states submitted follow-up results of the random sample of consumer eligibility, USAC cannot assess whether or not additional customers responded after carriers submitted their results."); USAC 2006 Overview of Verification and Certification Process and Results, p. 2 ("ETCs in federal default states reported that 30.05 percent of Lifeline customers did not respond to the survey, an increase of 8.87 percent over 2005. In addition, of those ETCs that indicated in their initial submission that some consumers did not respond to the survey, 132 ETCs did not

found are higher than actually present, since little follow-up effort was made to track down non-responding subscribers to determine whether they were in fact eligible or just could not get around to advising their Lifeline phone carrier of their income. Combined with USAC's admission that ineligible figures could skew high due to the fact that carriers were likely including non-responding subscribers as ineligible, this data should not be relied upon for a finding of whether fraud or waste due to ineligibility presents a significant problem.

These figures shed another light on the problem of any proposed interim solution that requires Low Income subscribers to provide evidentiary support of their status. USAC's statistics for 2005 to 2008 suggest that an average of approximately 20% of subscribers each year failed to respond to surveys *in any way*. In other words, 1 out of 5 low income subscribers failed to respond to a survey requiring simple affirmation they were still eligible to receive benefits. The proposed interim rules (prior to the establishment of a database) threaten to cut off not only subscribers who fail to respond, but those who provide insufficient evidentiary responses in the form food stamp or TANF documents, that number could jump from 1 in 5 to a much higher figure.

A point made in Nexus' initial comments bears repeating: one in eight Americans currently receives food stamps, which equates to approximately 38.5 million people.[20] At typical

---

submit a follow up to revise their initial submissions."); USAC 2007 Summary of Verification and Certification Process and Results, p. 3 ("ETCs in federal default states reported that 17.31 percent of Lifeline customers did not respond to the survey, a decrease of 12.74 percent over 2006. In addition, of those ETCs that indicated in their initial submission that some consumers did not respond to the survey, 107 ETCs did not submit a follow up to revise their initial submissions."); USAC Summary of 2008 Verification and Certification Processes and Results, p.3. ("In addition, of those ETCs that indicated in their initial submission that some consumers did not respond to the survey, 148 ETCs did not submit a follow up to revise their initial submissions.").

[20] *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

monthly funding rates of $10 in federal 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.[21]

In other words, actual widespread ineligibility for the Low Income program is highly unlikely and USAC's own data lack precision and otherwise indicate a low likelihood of ineligible consumers participating in the Low Income program.

Yet to cure a short term problem (which is likely very small) the proposed rule changes would deny communications subsidies to a large number of current recipients in a program where only an estimated 1 in 3 eligible citizens are receiving the service in the first place. The interim rules could have this effect at a particularly inopportune time, in the middle of an economic downturn when 45 million Americans are receiving food stamps and a higher number are likely eligible.[22] Making phone subsidies more difficult to receive at this time is not sound public policy.

B. Household or Subscriber Duplication Issues are Also Probably Low

Although no one knows for certain the prevalence of duplicates in the Low Income program, anecdotal estimates put that figure in the 10% range or about 400,000. Of course, these subscribers would be entitled to one—but not two—subsidy streams meaning that half of the Lifeline funding provided to these subscribers was improper. ***If these estimates are accurate, the amount of improper Lifeline funding is approximately 2% of the Low Income program*** (*i.e.*, (400,000 people x $10 x 12 months)/2 = $24 million, which constitutes 2% of the $1.3

2008"), available at
http://www.fns.usda.gov/ora/menu/Published/snap/FILES/Participation/Reaching2008Summary.pdf.

[21] 2010 Low Income disbursements were $1,315,734,000. *See* supra note 15.

[22] *See* Nexus Initial Comments at pp. 3-4, 6, and fns. 1-3, 6-7.

billion Low Income fund). This is less than 0.3% of the overall federal Universal Service Fund ($24 million compared to the total disbursements of $7,951,931,000 in 2010).[23]

Nexus emphasizes that any improper amount of Low Income funds spent should be targeted for elimination, and it has been an active participant in an industry working group to quickly eliminate as many duplicates as possible.[24] In fact, this industry-led process will hopefully provide the Commission, USAC and industry with non-anecdotal evidence of the prevalence of duplicates to better inform this process. But Nexus believes it is hardly a case of the sky falling when than 0.3% of the total Universal Service Fund is at issue, and that the very real potential for harm to consumers posed by the proposed rule changes is not justified when the Commission lacks even basic data regarding the actual scope of the problem. This is particularly true when everyone agrees that the real solution to eliminating duplication and income ineligibility is a national subscriber database, which should be undertaken as quickly as possible (as explained more fully in Section II.C. immediately below). For all these reasons, proposed Rule 54.410(a) requiring subscriber documentation should be rejected.

C. The Focus of the Commission, States, and Industry Should be on Quickly Establishing a National Database

Almost all parties who submitted comments in this proceeding NPRM are in favor of a national certification and verification database administered by a third party.[25] Nexus has consistently and vigorously supported a database solution. Nexus is part of ad hoc industry-FCC

---

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

[24] *See e.g.*, Ex Parte filing in WC Dockets 11-42 and CC Dockets 96-45 (Apr. 15, 2011) (describing the collaboration of the industry working group, which includes Nexus, with the Commission on implementing an interim process to remove duplicate support).

[25] *See, e.g.*, Comments of AT&T at 11; Comments of Cox Communications at 3; Comments of Cricket Communications and Leap Wireless at 7; Comments of CTIA at 4; Comments of Michigan PSC at 9; Comments of Mississippi PSC at 18; Comments of NASUCA at 25; Comments of NCTA at 2; Comments of Nebraska PSC at 5; Comments of New York PSC at 11; Comments of Sprint Nextel at 3; Comments of TracFone Wireless at 16; Comments of Verizon and Verizon Wireless at 9.

group which developed an interim plan to identify duplicate Lifeline subscribers and a real-world solution to de-enroll Lifeline subscribers receiving redundant Lifeline benefits from multiple ETCs. The ad hoc industry-FCC group submitted the interim plan to FCC on April 15, 2011. Given the overwhelming support for this proposal, the willingness of ETCs and state commissions to work together to develop a database and the fact that only a database can definitively resolve questions of eligibility, the Commission should proceed expeditiously to the set up this system. It should not waste time developing and imposing draconian and likely ineffective stop-gap measures.

The interim proposals suggested by the Commission will be needlessly harsh in their insistence that consumers provide specific, paper-based documentation of their eligibility in order to receive the benefits entitled to them by law. As survey response rates demonstrate, many participants in the Low Income program lead lives that are so hectic, transient, and financially strapped that they are not able to timely and fully respond to traditional inquiries or maintain well-organized repositories of personal information. It is simply not realistic to expect that the entire subscriber base of any carrier, let alone low income Americans, can produce official documentation in the park, grocery store, or mall kiosk where they may first encounter the outreach activities of a Lifeline ETC, let alone repeat the process for periodic verifications. A policy that requires this will exclude a large number of eligible participants, and would undermine the goals of the Low Income program.

To be successful, both carriers and states need to participate in the database program. Carrier participation is essential to provide ETCs with a means of eliminating duplicates without running afoul of the Commission's subscriber proprietary network information rules. State participation in the database is required in order to provide a definitive eligibility determination,

an idea echoed by several other commenters.[26] If, as some critics suggest, some subscribers receive service through fraudulent documentation, it will be very difficult to eliminate this problem without state assistance to verify active participants in social services. Surely consumers intent on committing fraud will find ways to circumvent a system based on paper as the Commission has proposed. Without state assistance in verifying who is receiving qualifying program assistance—programs that are administered at the state level (TANF, food stamps, etc)—the database will be much less successful and is unlikely to truly eliminate any actual fraud.

The Commission should work quickly to establish the national database, a proposal that has had the consensus support of state commissions, ETCs, and the joint board since last year.[27] In general, and particularly here, the Commission should design its reforms to make it easier for the eligible subscribers to participate in the Low Income program, while establishing more secure procedures to prevent waste, fraud and abuse. The national database will accomplish both goals, and the interim proposal will accomplish neither. Therefore, the Commission should immediately set in motion the plans necessary to create a national database. Right now, the most important actions are to select a vendor and adopt reasonable rules for the database. There is no need to adopt drastic and costly interim measures for what is likely a very limited amount of waste, fraud, and abuse.

[26] Comments of AT&T at 12; Comments of Michigan PSC at 9; Comments of Nebraska PSC at 4.
[27] *In Re Federal-State Joint Board on Universal Service; Lifeline and Link Up*, Recommended Decision, 51 CR 1037 (rel. November 4, 2010) at ¶37.

III. THERE IS NO POLICY JUSTIFICATION FOR CAPPING THE LOW INCOME PROGRAM

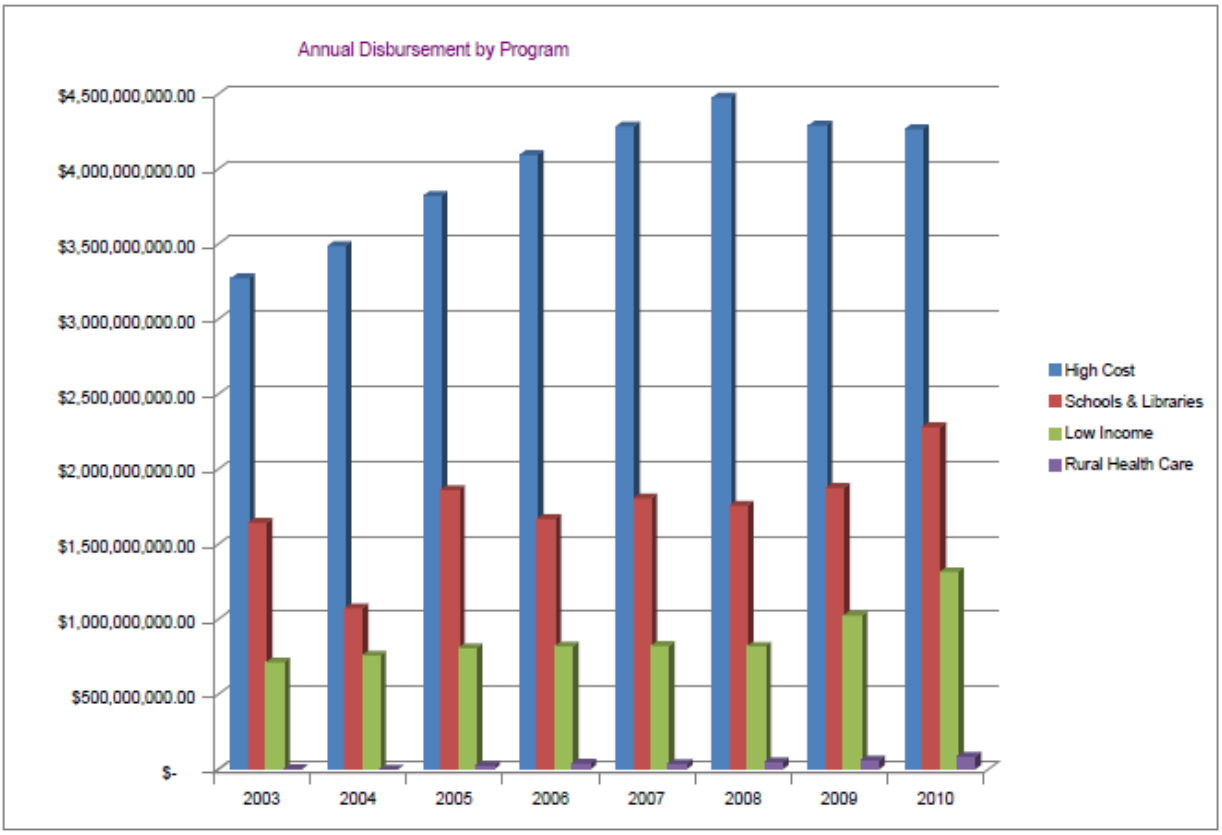
Almost all commenters agree that the Low Income program should not be subject to a second cap above and beyond the existing internal cap based on consumer eligibility.[28] There are a multitude of reasons for opposing the Commission's proposal, none more compelling than the sobering low participation rate among eligible Americans. First, the Commission has offered no proposal about how to limit the size of the fund without denying service to the roughly seventy percent of eligible Americans who are not yet subscribers. Refusing to allow them to participate in universal service in this way would violate the stated goals of Congress and, given the necessity of communications service in our interconnected world, would make a mockery of the nation's commitment to its citizens in need.

If the violation of universal service principles is an insufficient reason to decline capping the program, commenters have also raised a number of practical reasons why such a cap would be a particularly bad idea. First, as Cox, NASUCA, and the Benton Foundation, among others, suggest, the reform of the High Cost program should be the primary focus of cost-cutting.[29] The High Cost program, unlike Lifeline and Link Up, subsidizes the ETCs themselves, not subscribers, and has been the source of much of the fraud, waste, and abuse plaguing the USF. The Commission should recover funding from the High Cost program before undermining universal service by capping the Low Income program. In fact, as several commenters suggest, the cost savings from High Cost reform might be used to support more services and subscribers

[28] *See, e.g.*, Comments of AT&T at 32; Comments of Budget PrePay, Greatcall, and PR Wireless at 3; Comments of Cricket Communications and Leap Wireless at 13; Comments of Nebraska PSC at 9.

[29] Comments of Cox Communications at 9; Comments of NASUCA at 19; Comments of the Benton Foundation, Center for Rural Strategies, Public Knowledge, and United Church of Christ at 3.

in Low Income, a program that is an increasing success.[30] A look at the annual disbursements to the four programs supported by the Universal Service Fund quickly confirms that High Cost is by far the single largest driver behind the growth of the fund and that Low Income has actually experienced very modest growth and still remains the second to last program in terms of disbursements.



Second, a declining contribution base has compounded the Commission's already difficult challenges in taking on a comprehensive universal service reform agenda.[31] While Nexus recognizes that such reforms are complex and politically challenging, America's poor

[30] *See, e.g.*, Comments of Cox Communications at 9; Comments of the Benton Foundation, Center for Rural Strategies, Public Knowledge, and United Church of Christ at 3.

[31] *See* 2010 USAC Annual Report; 2009 USAC Annual Report; 2008 USAC Annual Report; 2007 USAC Annual Report; 2006 USAC Annual Report; 2005 USAC Annual Report; 2004 USAC Annual Report; 2003 USAC Annual Report.

should not take the fall so that large corporations can continue to collect subsidies for their networks to serve consumers without regard to those consumers' financial means.

Third, as AT&T, the Nebraska PSC, the New York PSC, and others point out, it would be premature to impose a cap on the Low Income program before the Commission has a chance to analyze the success of its reforms.[32] Given the extremely high number of eligible low income participants who are not yet being served by the Low Income program, the Commission should be careful to exhaust all other remedies for cost savings and increased efficiency before imposing an arbitrary cap on these programs. Specifically, the Commission should not seriously consider capping the program until after it has established a national database and has had time to analyze the data generated by the certification and verification tools it will provide. If, as Nexus believes, fraud, waste, and abuse actually amount to a relatively small problem, the database will allow the Commission to recognize this and implement targeted reforms to eliminate the problem.

The Commission has not described how a cap would be implemented, perhaps because no matter how a cap is designed, it will necessarily harm some particular group of Americans eligible for support under the law and thereby violate the tenets of universal service. Are new subscribers really less deserving of universal service support than established participants, as the Michigan PSC suggests?[33] Are families of four less important than families of eight? Is there any criterion by which the Commission can fairly cut off support for communications services for those who need it most? Instead of starting down this treacherous road, the Commission should make appropriate reforms to the High Cost program to ease the USF cost burden and

[32] *See* Comments of AT&T at 32; Comments of Nebraska PSC at 10; Comments of New York PSC at 3.
[33] Comments of Michigan PSC at 6.

should implement a national database to increase the efficiency of the vital Low Income program.

IV. CONCLUSION

For the foregoing reasons, Nexus respectfully requests that the Commission establish a national eligibility database as quickly as possible and continue to permit self-certifications during a short interim period until that process is finalized, and decline to cap the Low Income program.

Respectfully submitted,

_____

Danielle Frappier
Chris Fedeli
Adam Shoemaker

Davis Wright Tremaine LLP
1919 Pennsylvania Ave. NW Suite 800
Washington, DC 20006
(202) 973-4200

Counsel to Nexus Communications, Inc.