

March 23, 2012

By U.S. Mail and email: Nicholas_A._Fraser@omb.eop.gov

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Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th St., NW
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Re: OMB Control Number: 3060-0819; WC Docket Nos. 12-23, 11-42, 03-109, CC
Docket No. 96-45

Dear Mr. Fraser:

General Communication Inc. (“GCI”) hereby comments on the emergency request submitted by the Federal Communications Commission (“FCC” or “Commission”) for Office of Management and Budget (“OMB”) approval, under the Paperwork Reduction Act (“PRA”), of the regulations pending under the above control number.

I. SUMMARY

A recent FCC order¹ enacts far-reaching changes to the low-income or “Lifeline” program rules of the Universal Service Fund (Low Income USF).² While the Low Income USF

¹ See *Lifeline and Link Up Reform and Modernization, Lifeline and Link Up, Federal-State Joint Board on Universal Service, Advancing Broadband Availability Through Digital Literacy Training, Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 11-42, WC Docket No. 03-109, CC Docket No. 96-45, WC Docket No. 12-23 (rel. Feb. 6, 2012) (“Lifeline Order”).

² See *Information Collection Being Submitted to the Office of Management and Budget (OMB) for Emergency Review and Approval*, Notice and Request for Comments, 77 Fed. Reg. 13,319-01 (Mar. 6, 2012) (“PRA Comment Request”).

program needed reform, the Commission has not justified the following three specific paperwork requirements, failing to balance the burdens imposed against the claimed incremental benefits:

- 1) Every 90 days, eligible telecommunications carriers (“ETCs”) must re-verify with subscribers who list temporary addresses on their Lifeline forms that the subscriber continues to rely on that address;
- 2) The ETCs receiving larger Lifeline reimbursements must commission biennial third party audits of their compliance with Lifeline regulations and must submit not only the final audit report, but also draft outside audit reports to both the FCC and to the nongovernmental Universal Service Administrative Company (“USAC”); and
- 3) ETCs must make lengthy disclosures in *all* marketing materials related to Lifeline-supported service, including in radio and television media and on outdoor billboards where such disclosures are impractical.

Because these new requirements violate the PRA³, OMB should disapprove them.

The first of these requirements, verifying every three months the addresses of all low-income consumers without permanent addresses, will require new tracking methods and intense outreach efforts that the Commission simply ignores, particularly when the host of other new requirements are designed to catch all but a few, exceptional cases of Lifeline ineligibility. The second, requiring that covered ETCs commission a biennial audit, is expensive overkill (and the requirement of a draft audit report as well as a final for the same time period is sheer waste). The third requires a one-size-fits all disclosure for all marketing, in effect prohibiting 30-second radio or television ads or billboards, in which the lengthy disclaimer would take up the majority

³ 44 U.S.C. § 3501 *et seq.*

of the allotted time or space. Moreover, this required disclaimer is superfluous, as it repeats disclosures already required elsewhere.

The Commission has not taken seriously the statutory obligation to minimize these burdens. As set forth more fully herein, these specific burdens are clearly contrary to the PRA and should be disapproved in the expedited emergency review requested by the Commission.⁴ The OMB should then undertake a more searching review of the entire set of Lifeline paperwork burdens during the subsequent regular review period so that it can identify and disapprove all of the information collections on which the Commission has failed to carry its burden under the PRA.

II. THE LIFELINE ORDER IMPOSES SUBSTANTIAL BURDENS WITH ESSENTIALLY NO EFFORT TO JUSTIFY THEIR NEED OR UTILITY PURSUANT TO THE PAPERWORK REDUCTION ACT.

As its name suggests, a core purpose of the PRA is to “minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government.”⁵ As applied here, the PRA covers “the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format,” affecting 10 or

⁴ GCI submits these comments on an expedited basis due to the Commission’s request for emergency PRA approval by March 30, 2012 – six days *before* the April 5, 2012, deadline identified in the Federal Register notice for comments from the public that will be burdened by the new regulations. *See* 77 Fed. Reg. 13319-01. We understand that the Commission may reconsider some of these issues, and that it may submit further justification for the burdens it imposes in these regulations. GCI may submit supplemental comments to the extent called for by subsequent Commission actions or arguments, and it may also simultaneously seek the Commission’s reconsideration of some or all of the specific issues raised here.

⁵ 44 U.S.C. § 3501(1).

more persons.⁶ Under the PRA, agencies must estimate the burden of proposed information collections, justify the need for the collection, and certify that the collection is necessary for the proper performance of agency functions,⁷ and the Director of OMB must then independently assess and determine “whether the collection of information by the agency is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility.”⁸ OMB’s regulations further explain that “[p]ractical utility means the actual, *not merely the theoretical or potential*, usefulness of information to or for an agency, taking into account...the agency’s ability to process the information it collects...in a useful and timely fashion.”⁹ In other words, an agency cannot impose paperwork burdens without demonstrating the real-world need for doing so.

The Commission’s Supporting Statement accompanying its request for expedited, emergency approval makes no such showing of practical utility. The Supporting Statement begins with the heading “Justification,”¹⁰ yet what follows is not a “justification” at all. The Statement merely recites the history of the low-income program and previous orders leading up to the current Lifeline Order and states that, in the Lifeline Order, the Commission takes

⁶ 44 U.S.C.A. § 3502(3)(A).

⁷ *See* 44 U.S.C. § 3506(c).

⁸ 44 U.S.C. § 3508. The PRA regulations further explain that the purpose of the Act is “to reduce, minimize and control burdens and maximize the practical utility and public benefit” of information collected by or for the Federal government. 5 C.F.R. § 1320.1. The President last year emphasized the importance of improving regulation and the regulatory review process. *See* Exec. Order No. 13,563, *Improving Regulation and Regulatory Review*, 76 Fed. Reg. 3821 (Jan. 18, 2011).

⁹ 5 C.F.R. § 1320.3(l) (emphasis added).

¹⁰ FCC Supporting Statement, OMB Control No. 3060-0819, at 1 (March 2012), *available at* http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201203-3060-002. (“Supporting Statement”).

“immediate actions necessary to address waste in the Universal Service Fund.”¹¹ Such a recitation is not a justification—nowhere does the Commission attempt to explain the “practical utility” of the each of the specific burdens imposed by the new Lifeline Order. As demonstrated below, the extra burdens at issue will produce little or no benefit, and there is no justification under the Act for adding these to the already extraordinary paperwork burden of the Lifeline program.

A. The Burdens at Issue Come on Top of Already Extreme Lifeline Paperwork Burdens Which the Commission Has Clearly Underestimated.

The unnecessary burdens at issue here will only add to the already complex and onerous Lifeline program, a burden that receives much less public-policy attention than other administrative issues with much smaller impacts. While the emergency-approval process the FCC has invoked here precludes a searching PRA analysis of its proposals, OMB should pause to consider the overall Lifeline paperwork context in evaluating the three specific issues highlighted here.

The agency itself estimates that its revised Lifeline regulations will burden Americans with *over 30 million hours per year* in paperwork.¹² In the supporting statement to its PRA submission to your office, the Commission also breaks down the elements of its estimate and quantifies their financial impact.¹³ The Commission’s own numbers (which, as explained below, clearly *underestimate* the burden) suggest that the regulations will impose a total cost of over

¹¹ *Id.*

¹² *See Information Collection Being Submitted to the Office of Management and Budget (OMB) for Emergency Review and Approval*, 77 Fed. Reg. 13319-01 (Mar. 6, 2012) (hereinafter PRA Comment Request).

¹³ *See* Supporting Statement. While the Commission estimates a 30 million hour burden in the PRA Comment Request, it indicates in the Supporting Statement a lower but still staggering 22 million hours per year. *Id.*

\$550,000,000 per year in paperwork alone, a burden amounting to almost 25% of the total projected Lifeline budget for 2013.¹⁴

OMB maintains an inventory of currently approved information collections, showing the FCC responsible for imposing on the country a total OMB-approved paperwork burden estimated at over 57 million hours per year (the equivalent of the fulltime annual labor of 28,500 jobs at 2000 hours per year), at a total cost to the economy of over \$821 million.¹⁵ The FCC's own estimates thus put the regulatory burden of the Lifeline program alone at more than half the total paperwork hours that *all* current FCC regulation imposes on the country (30 million out of 57 million) – and at *two thirds* the total cost (\$550 million out of \$821 million). To put this extraordinary burden in context, the paperwork cost alone is nearly three times what the Government Accountability Office estimates would be saved by replacing dollar bills with coins¹⁶ – yet the administrative burden of Lifeline has received nowhere near as much scrutiny.

B. OMB Should Disapprove the Rule Requiring Verification of Temporary Addresses Every Three Months.

The Commission adopted a host of rules to ascertain whether a subscriber is complying with its newly articulated “one-per-household” requirement, one of which requires ETCs to re-verify a subscriber’s temporary address every 90 days. Others include: a requirement that the subscriber himself acknowledge, under penalty of perjury, that the subscriber must notify the ETC if he or she is receiving more than one Lifeline benefit or if another member of the

¹⁴ See Lifeline Order, ¶ 357 n. 961 (estimating the size of the Lifeline fund at \$2.2 billion in 2013).

¹⁵ See Office of Information and Regulatory Affairs (OIRA) Inventory of Currently Approved Information Collections (Federal Communications Commission), *available at* <http://www.reginfo.gov/public/do/PRAMain;jsessionid=DBF78FAAD3F559F7E696D96FC56376B5>.

¹⁶ U.S. Gov’t Accountability Office, GAO-11-281, Report to U.S. Congressional Requesters: U.S. Coins (March 2011).

subscriber's household is receiving a Lifeline benefit, and that he or she must provide any new address to the ETC within 30 days if he or she moves¹⁷; a requirement that the ETC collect the subscriber's date of birth and last four digits of his Social Security number, in addition to the name and physical address¹⁸; a requirement that all subscribers (whether or not with a temporary address) re-certify their eligibility every year¹⁹; and a requirement that ETCs submit subscribers' name, address, telephone number, date-of-birth and last four digits of the Social Security Number to a central Lifeline database.²⁰ On top of all of this, the Commission adopted a rule requiring ETCs requiring to "re-certify, every 90 days, the residential address of each of its subscribers who have provided a temporary address as part of the subscriber's initial certification or recertification of eligibility."²¹

The temporary address re-verification requirement appears to be targeted at an extremely narrow case of potential ineligibility. Temporary address re-verification is clearly not needed to determine whether an individual consumer may be receiving more than one Lifeline benefit from two separate addresses: that case will be detected much more reliably by comparing name, date of birth and last four digits of the Social Security number – information the FCC also requires ETCs to collect. Conducting a temporary address re-verification in this case adds no practical utility, as any consumer who lies about his date of birth and last four digits of the social security number will also lie about the whether the person was still at the same address.

¹⁷ See Lifeline Order, Appendix A, Rule 54.410(d)(3).

¹⁸ See *id.*, Appendix A, Rule 54.410(d)(2).

¹⁹ See *id.*, Appendix A, Rule 54.410(f)(1).

²⁰ See *id.*, Appendix A, Rule 54.404(b)(6).

²¹ *Id.*, Appendix A, Rule 54.410(g); see also *id.* ¶ 89.

Nor does temporary address re-verification have any significant practical utility for preventing subscribers from receiving more than one Lifeline benefit per household. The FCC defined a “household,” appropriately, as “any individual or group of individuals who are living together at the same address as one economic unit”, with an “economic unit” defined as “all adult individuals contributing to and sharing in the income and expenses of a household.”²² For temporary address re-verification to have practical utility, therefore, there would have to be a significant number of subscribers in temporary addresses who subsequently move permanently into an abode with another Lifeline subscriber and begin sharing not just expenses, but also income. As GCI argued in *ex parte* presentations prior to the adoption of the Lifeline Order, and which the Commission does not controvert in the Order, it is extremely unlikely that a Lifeline subscriber in a temporary address will merge households with the household of another Lifeline subscriber.²³ Simply moving one family into an apartment with another family does not suffice to merge households, unless the families not only share expenses, but also income. Many such multifamily arrangements are not single family households, including multigenerational living situations and unrelated adult roommates.²⁴ The Commission never even attempts to estimate the incremental benefit of the temporary address re-verification requirement, *i.e.*, the number of times in which a Lifeline subscriber will move and actually merge households with another Lifeline subscriber and not report the move to the ETC in a timely manner.

The Commission similarly neglects to address the need for a 90-day temporary address verification requirement in light of the fact that it has separately adopted a rule requiring ETCs to

²² Lifeline Order ¶ 37; Appendix A, § 54.400(h).

²³ See GCI Notice of *Ex Parte* Presentation at 1-2, WC Docket Nos. 11-42, 03-109 (filed Jan. 24, 2012).

²⁴ Lifeline Order ¶ 74 n. 195.

obtain the same information from every subscriber as part of the annual recertification process.²⁵

The Commission acknowledges that the 90-day requirement imposes a substantial burden (although, as explained below, it grossly miscalculates that burden). But it makes no effort to explain how the 90-day requirement achieves enough of an improvement over the annual process to justify the enormous additional burden it imposes. Considering that the Commission will already obtain the address verification it seeks via the annual process, its failure to justify the additional burden associated with receiving the same information every 90 days fails to satisfy the requirements of the PRA.²⁶

The Commission also seriously underestimates the burden on ETCs of recertifying subscribers with temporary addresses. First, the Commission's estimates are inconsistent. The Commission estimates that "fewer than 1 million subscribers will be subject to a change of address or a temporary living situation where their address needs to be re-certified every 90 days" and uses the figure of 1 million affected subscribers in its calculations.²⁷ Every one of the Commission's estimated 4 million certifications and recertifications per year (1 million subscribers x 4 quarterly certifications) must be reviewed by an ETC under new rules that OMB is being asked to approve on an emergency basis, yet the Commission inexplicably and inconsistently bases its calculations on the assumption that only 100 ETCs will need to recertify only 25 subscribers every 90 days. By the Commission's math, 4 million certifications and

²⁵ See Lifeline Order ¶ 115; see also *id.*, Appendix A, Rule 54.410(f)(2)(iii), (d)(2)(jj) (identifying the requirements of the annual re-certification process, including re-certification of residential address).

²⁶ Cf. 44 U.S.C. 3506(c)(3)(B) (regulations do not comply with the PRA if they are "unnecessarily duplicative of information otherwise reasonably accessible to the agency").

²⁷ Supporting Statement, ¶12.g.

recertifications would be submitted by subscribers²⁸ but only 10,000 (2500 per quarter x 4 quarters) would have to be reviewed by ETCs.²⁹

Using the Commission's base numbers of 1 million subscribers with temporary addresses, the burden on ETCs would have to be 1 million subscribers x 4 quarterly requests x .25 hours per request = 1 million hours, not the 2500 hours the Commission represents to OMB. This stands to reason under the Commission's assumption that it takes an ETC 15 minutes to review and process a certification or recertification form – the same amount of time it takes a subscriber to fill one out. So, the total amount of time subscribers spend on this paperwork should equal the total amount spent by ETCs. That brings the dollar burden up to \$40 million using the Commission's \$40 hourly rate for ETC personnel³⁰ (1 million hours x \$40 per hour).³¹

But the estimate is still not complete even when the Commission's math/logic error is corrected, because it omits the biggest burdens imposed by this regulation: determining what the Commission (or perhaps USAC) will consider to be a temporary address and addressing the customer confusion that surely will result in the absence of a clear, objective definition of the term "temporary address,"³² developing systems to track subscribers at such addresses,³³

²⁸ *See id.* (estimating time burden on subscribers as "1 million x .25 hours x 4 annual requests = 1 million hours").

²⁹ *Id.*

³⁰ The Commission values subscribers' time at only \$1 per hour.

³¹ Furthermore, the proportion of Alaskan subscribers with temporary addresses is likely to be much higher than the proportion in the rest of the country, because the Alaskan population is much more seasonally transient than the population in other states. Almost 20% of workers in Alaska in 2010 were nonresident. The Commission's burden analysis makes no effort to account for this unique Alaskan element. *See* State of Alaska, Alaska Dept. of Labor and Workforce Development, Nonresidents Working in AK (January 2012), available at <http://labor.alaska.gov/research/reshire/nonres.pdf>.

³² The Commission failed to define "temporary address" in the Lifeline Order or in the new regulations, leaving ETCs and subscribers to apply their own interpretation of the phrase. This omission will only add to the burden on ETCs, as they will have to expend more time and

reaching out to them to seek recertification, and following up when, as is often the case, the impoverished and marginalized population served by this program does not respond to initial queries.³⁴ The 15 minutes-per-subscriber that the Commission estimates as the ETCs' burden in reviewing certifications that are eventually received is a gross underestimate of the true costs.

The end result of all this effort? Every 90 days, the soldier, the student, the homeless person – any number of people in long-term yet impermanent living situations – must file an address certification that duplicates the one filed 90 days before, and ETCs must reach out to request the paperwork and attempt to track down others who, living at the margins of society, do not reliably respond.

The Commission's request for emergency approval of the quarterly verification requirement thus cannot pass PRA review, on an emergency or any other basis, because it simply ignores the largest aspects of the burden, plainly underestimates the burdens it does identify, and offers only negligible benefit for these large and underestimated costs.

resources trying to determine whether or not an address is temporary. For instance, a college student or soldier might not consider his or her current address to be a permanent address, but it would make no sense to verify such addresses every 90 days. Similarly, a long-term homeless person might spend years without a permanent address, yet nothing is gained by tracking him down and collecting a duplicative certification every 90 days.

³³ This is a new requirement, and carriers have no pre-existing regulatory or business reason to track customers in temporary living situations separately from those in permanent ones.

³⁴ The Commission fails to take into account the historically low response rates to recertification attempts. For instance, in GCI's last annual audit, only 32% of the sampled subscribers recertified their eligibility by the recertification date. Another 28.4% recertified only after their Lifeline service was suspended, and 6.7% recertified after their Lifeline service was disconnected. In total, only 67% of the sampled subscribers recertified. The marginalized populations living in temporary housing situations, such as in homeless shelters, are less likely to respond to attempts to verify an address. The temporary address rule will not only impose a much greater burden on carriers to serve as social-service caseworks for marginalized and difficult-to-serve, populations, it will effectively eliminate Lifeline service for those who most need it when they fail to respond.

C. OMB Should Reject the Emergency Request to Approve The Requirement for Biennial Outside Audits of Lifeline Compliance by All ETCs Receiving More Than \$5 Million in Lifeline Support, or At Least the Requirement to Submit Two Versions of the Audit Report.

The Commission adopted a rule requiring ETCs that receive \$5 million or more annually in the aggregate, on a holding company basis, in Lifeline reimbursements to commission a biennial third-party audit to “assess the ETC’s overall compliance with the program’s requirements.”³⁵ But obvious errors in the FCC’s Supporting Statement show a much greater burden than the Commission represents to OMB. As with the other burdens at issue here, this requirement is superfluous because there are already multiple reviewers of the “overall compliance” of such ETCs.

The Commission urges OMB’s emergency approval of this requirement on the representation that these audits will cost a national grand total of only \$13,602 per year, but it calculates this absurdly optimistic figure by assuming that each can be accomplished in 25 hours, by outside auditors who will charge \$40 per hour.³⁶ The FCC gives no basis for these numbers, but even a casual perusal of the 299-page order in which they appear suggests that they reflect no serious effort to come to grips with the complexity of the Lifeline program and the enormity of the task of assessing “overall compliance” with a program responsible for over half the annual paperwork burden imposed by the entirety of the FCC’s regulations.

To put these numbers in perspective, a survey last year by the Financial Executives Research Foundation found that, on average, financial audits of public companies required “12,540 hours in 2010, while private companies averaged about 3,394 hours.”³⁷ While an audit

³⁵ Lifeline Order, ¶ 291. *Id.*, Appendix A, Rule 54.420(a).

³⁶ See Supporting Statement, ¶12.k.

³⁷ See News Release, FEI Audit Fee Survey, June 9, 2011, available at <http://fei.mediaroom.com/index.php?s=43&item=255>.

of compliance with Lifeline regulations is not as comprehensive a task as an overall audit of a company's business, it is nevertheless an extremely serious, burdensome undertaking. It requires auditors to review, become familiar with, and test systems involving thousands of subscriber accounts and complicated administrative procedures for processing reimbursements and requests for reimbursements from USAC. It also requires auditors to assess ETCs' performance of tasks fundamentally alien to the private sector, such as evaluating beneficiaries' proof of participation in federal welfare programs, and to evaluate compliance not just with accounting standards but with a complex federal regulatory regime. Properly done, these tasks will take hundreds of hours of work – not 25.³⁸

And the assumed \$40 per hour rate for a competent outside auditor defies reality. In 2010, a reputable national survey found that 2009 hourly fees for outside auditors ranged from \$185 to \$218.³⁹

Assuming conservatively that the Commission's 25 hour estimate is off by a factor of 10 and using an hourly fee of \$200 on the assumption that audit fees have not materially increased since 2009, a more appropriate per-ETC estimate of the biennial audit requirement is 24 ETCs x 250 hours x \$200 = \$1,200,000, or nearly 100 times the FCC's estimate. And, the FCC's estimate contains no provision at all for legal fees, but the FCC's requirement to audit each

³⁸ The USF program is so complex, and evaluating compliance with its byzantine legal requirements so distinct from the normal work of auditors, that a USF-related audit can actually be *more* burdensome than a comprehensive financial audit. A financial audit has to assess compliance with generally accepted accounting practices (with which auditors are generally familiar), but not compliance with federal law. For instance, a USAC audit of another company's compliance with just one part of the USF program (revenue calculating and reporting on FCC Form 499) recently took 27 months to complete, requiring the input of 35 executives and subject matter experts and 3,000 man hours. See Letter from Stephen A. Augustino to Marlene H. Dortch, Attachment at 3 (Dec. 9, 2011).

³⁹ See <http://www.vrl-financial-news.com/accounting/intl-accounting-bulletin/issues/iab-2010/iab-470-471/us-audit-fees-stabilised-in-20.aspx> (reporting on annual FERF audit-fee survey).

ETCs' "overall compliance with the program's requirements" appears to call for a legal opinion, since the requirements are defined not by accounting principles but by hundreds of pages of Commission orders and federal regulations, and, notwithstanding, the rules often still are unclear.

The outside-audit requirement is not only much, much more expensive and burdensome than the Commission asserts, it is also pure administrative overkill. The ETCs at issue are generally corporations, which presumably face audits by their own outside auditors, which will include Lifeline revenues whenever material. They also face periodic audits by outside auditors hired by USAC and the possibility of investigations by the FCC's own Office of Inspector General and Enforcement Bureau. The threat of enforcement actions by an FCC that has signaled an increasing interest in using such actions to decrease Lifeline outlays and increase revenues by itself provides ample incentive to comply with the law in this highly regulated industry. The ETCs' own personnel, outside auditors hired by USAC, and FCC enforcement officials thus already enforce "overall compliance with the program's requirements." Under these circumstances, the added requirement that ETCs commission and undergo a special Lifeline audit so that a *fourth* party may also review compliance, then prepare and submit to the government a report on that compliance, is not "necessary for the proper performance of the functions of the agency" and hence cannot be approved consistent with the PRA.

As if the third-party audit requirement were not enough, the Commission even seeks OMB approval of its requirement that the third party auditor, within 60 days after completion of the audit work, but prior to the finalization of the report, also submit a *draft* of that report to the Commission and the Administrator.⁴⁰ The Commission offers no justification for the draft audit report rule in the Lifeline Order or in the Supporting Statement submitted to OMB.

⁴⁰ Lifeline Order, Appendix A, Rule 54.420(a)(4).

The Commission does not explain how the draft audit reports will be used, but in any event, draft audit reports would be of little utility to the Commission and USAC. A draft is by definition tentative, incomplete, subject to further review, not held out to invite reliance, and superseded by the final report. Draft audit reports would therefore be “unnecessarily duplicative of information otherwise reasonably accessible to the agency.”⁴¹ Moreover, draft audit reports can be misleading, because they may reflect tentative views based on an incomplete or incorrect understanding of the fact, processes, or the law. Requiring submission of draft audit reports is also likely to lack practical utility because it will mean, for all intents and purposes, that auditors only prepare “drafts” when they are near “final.” For these reasons, and entirely separate from the reasons for disapproving the third-party Lifeline audit requirement in whole, the Office should disapprove the rule requiring submissions of draft audits.

D. OMB Should Disapprove the Requirement to Add Lengthy Disclosures to All Marketing Materials, Rather than Appropriately Tailoring the Disclosure.⁴²

The Commission has ordered ETCs to “make specific disclosures in *all* marketing materials related to the supported service.”⁴³ In particular, they must “explain in clear, easily understood language” that “the offering is a Lifeline-supported service; that only eligible consumers may enroll in the program; what documentation is necessary for enrollment; and that the program is limited to one benefit per household, consisting of either wireline or wireless

⁴¹ See 44 U.S.C. § 3506(c)(3)(B).

⁴² The Supporting Statement submitted by the Commission to OMB does not address the new marketing rules. However, the PRA applies to the new rules because the term “collection of information” includes “any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information.” 5 C.F.R. § 1320.3(c). In addition, “a ‘collection of information’ may be in any form or format, including ...posting, notification, labeling, or similar disclosure requirements....” 5 C.F.R. § 1320.3(c)(1).

⁴³ Lifeline Order, ¶ 275 (emphasis added).

service.”⁴⁴ These disclosures must also warn that “Lifeline is a government benefit program, and consumers who willfully make false statements in order to obtain the benefit can be punished by fine or imprisonment or can be barred from the program.”⁴⁵ The Lifeline Order requires that these disclosures appear in *all* “marketing materials,” which includes “materials in *all* media, including but not limited to print, audio, video, Internet (including email, web, and social networking media), and outdoor signage, that describe the Lifeline-supported service offering, including application and certification forms.”⁴⁶

The Commission’s new marketing rule is simply unworkable for certain types of marketing material, such as newspaper, radio and television advertisements, and outdoor signage. It takes over 30 seconds to read out loud a statement of these required disclosures – thereby precluding marketing via standard 30-second radio or television advertisements. The space taken up by the required text would also make outdoor signage effectively unreadable. For some marketing materials, and, most importantly, for application and certification forms, it will be possible for ETCs to include the full text of the required disclosures. But the burden applies indiscriminately to all marketing, including newspaper, radio and television advertisements, and outdoor signage.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* (emphasis added). OMB may note that the Lifeline Order goes farther than the text the Commission would codify by regulation. Compare Lifeline Order, ¶ 275 (specifying marketing disclosure requirements) with *id.*, Appendix A, Rule 54.405(c) (codification). The Office should have no doubt, however, that the Commission takes the position that it will enforce statements it publishes in its Orders as rules of general applicability notwithstanding the failure to codify them as regulations. See Lifeline Order, ¶76 (asserting that Commission had enacted an enforceable “rule” limiting Lifeline support to one account per household despite never codifying any such rule in the Code of Federal Regulations).

Moreover, the requirement is again duplicative. The Commission already requires carriers to make the same disclosures to all Lifeline applicants in the required initial-eligibility paperwork.⁴⁷ Thus, even without this new proposed requirement, no one can actually apply for Lifeline benefits without being confronted with the same warnings.

To the extent there is any value at all in providing subscribers with these warnings twice, or in providing them to non-subscribing members of the general public,⁴⁸ the Commission could revise the marketing rule to allow ETCs to include a link to a website that contains the required disclosures. This is the approach the Commission has taken with respect to disclosure requirements in its Open Internet rules, which were subject to extensive comment and OMB review.⁴⁹ There is nothing in the Lifeline Order or in the Supporting Statement explaining why this far less burdensome alternative would not provide the same benefit without generating the same needless cost. Indeed, such a revision would make the rule more practical and would still accomplish the Commission's goal of ensuring that "only eligible consumers enroll in the program and that those consumers are fully informed of the limitations of the program, so as to prevent duplicative or otherwise ineligible service as well as other forms of waste, fraud, and abuse."⁵⁰

⁴⁷ Lifeline Order, ¶ 275.

⁴⁸ While all who might apply for Lifeline will see the required warnings in their application paperwork, also requiring them in advertising would obviously extend the warning to people who do *not* apply, but the FCC does not contend that there is any utility in this addition.

⁴⁹ In the recently issued Advisory Guidance for Compliance with Open Internet Transparency Rule, the Office of General Counsel and the Enforcement Bureau clarified that "[b]roadband providers can comply with the point-of-sale requirement by, for instance, directing prospective customers at the point of sale . . . to a web address at which the required disclosures are clearly posted and appropriately updated." *FCC Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule*, Public Notice, GN Docket No. 09-191, WC Docket No. 07-52 (rel. June 30, 2011).

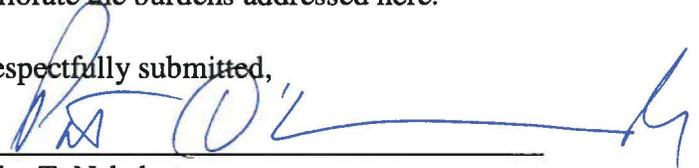
⁵⁰ Lifeline Order, Appendix A, §54.410(b),(c) and (d).

There is no emergency justification for this regulation, and OMB should disapprove it as currently proposed, without prejudice to the Commission's ability to reconsider and propose a narrower, less burdensome alternative.

III. CONCLUSION

The Lifeline Order imposes extraordinary information collection burdens on carriers and subscribers alike, but the Commission has failed to accurately quantify or meaningfully justify them. In particular, OMB should reject the specific burdens highlighted here in its expedited review of the Commission's emergency request for approval because they are so clearly unnecessary and because declining to approve them would not delay implementation of any core component of the new regulations. The Commission can remedy some of these by minor amendments to its regulations, but allowing them to go into effect now, in their present form, will impose compliance costs on ETCs that cannot be fully recouped if the Commission does later reconsider and amend its regulations to ameliorate the burdens addressed here.

Respectfully submitted,



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