

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Lifeline and Link Up Reform and Modernization)	WC Docket No. 11-42
)	
Lifeline and Link Up)	WC Docket No. 03-109
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Advancing Broadband Availability Through Digital Literacy Training)	WC Docket No. 12-23
)	

**THE UNITED STATES TELECOM ASSOCIATION'S
PETITION FOR WAIVER**

I. INTRODUCTION

Eligible Telecommunications Carriers (“ETCs”) are working diligently to implement the Commission’s comprehensive reforms to the Universal Service Fund’s Lifeline program.¹ However, ETCs have no control over when states with responsibility for making initial Lifeline eligibility determinations or states with automatic or coordinated Lifeline enrollment programs will meet their obligation to provide to the serving ETC notice of a subscriber’s eligibility and a copy of the subscriber’s certification form required by Commission rule 54.410. Having this notice and certification form is a prerequisite to an ETC’s ability to enroll new customers in the Lifeline program in compliance with section 54.407(d) and sections 54.410(b)(2) and (c)(2) of the Commission’s rules.

¹ See *Lifeline and Link Up Reform and Modernization, Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 11-42, FCC 12-11 (rel. Feb. 6, 2012) (“*Order*”).

States that are involved in Lifeline eligibility determinations face understandable challenges in revising their rules and processes within the timetables needed to avoid this problem. But, under the circumstances, the United States Telecom Association (“USTelecom”) respectfully requests that the Commission grant a limited waiver of rules 54.407(d) and 54.410(b)(2) and (c)(2). Specifically, the waiver would apply: (1) in a state where responsibility for making initial Lifeline eligibility determinations currently rests with a state Lifeline administrator or other state agency, or where subscribers are enrolled in the Lifeline program on an automatic or coordinated basis; and (2) the state is unable to modify its Lifeline enrollment procedures to meet the June 1, 2012 deadline. The requested waiver would apply only in each affected state and only until that state has met the notice and certification form requirements in rule 54.410.

The affected states in question include those that enroll subscribers in the Lifeline program or determine Lifeline eligibility for all or some subscribers in their respective jurisdictions.² Not all ETCs providing service in these states are affected equally. In several states, some ETCs are required to make all Lifeline eligibility determinations themselves while state agencies or administrators perform some or all of this function for other ETCs.³ In such states, the requested waiver would apply only where ETCs do not currently perform all of the Lifeline eligibility determinations themselves. States with coordinated or assisted enrollment programs have agencies or organizations provide some ETCs with periodic lists of subscribers

² A list of affected states is attached as Appendix 1. Other states are excluded from the scope of the Petition at this time, but Lifeline administration processes in additional states continue to be reviewed by USTelecom and member companies. Some of these states do, for example, have a role in reviewing applications/certifications collected by ETCs, but it is not clear at this time that these states will be required to make changes to their front-end procedures.

³ For example, in Arizona, Kansas, and New Jersey, the state manages eligibility for some ETCs but not others.

that the agencies have determined should be included in the Lifeline program, in addition to Lifeline customers who applied directly through the ETC.⁴ Where these states continue these measures, this waiver would extend only to any customers included on such lists provided to ETCs by such state authorities or organizations.

Absent such a waiver, ETCs in the affected states will likely have no choice but to decline to enroll new subscribers in the Lifeline program. If an ETC were to do otherwise and seek Lifeline reimbursement before a state has provided to the ETC the requisite certification form from the Lifeline subscriber and the requisite notice that the subscriber meets the eligibility requirements, an ETC would risk violating the Commission's rules. The denial, or at minimum delay, of Lifeline benefits to low-income subscribers is hardly a desirable outcome, but it could be the result for many Lifeline-eligible customers unless the Commission grants the requested waiver.⁵

⁴ For example, twice a year, Nevada's Health and Human Services Department sends ETCs a consolidated file of eligible households, which ETCs are to review to ensure their eligible customers are duly receiving the Lifeline discount. Florida's Department of Children and Family Services provides periodic lists of households that they have determined are Lifeline-eligible. The Public Utilities Commission of Ohio directs ETCs to accept automatic enrollment from state agencies that administer federal or state low-income assistance programs.

⁵ The industry previously expressed concern about the Commission's timeframes for implementing the reforms to the Lifeline program. See Petition for Waiver and Clarification of the United States Telecom Association, the Independent Telephone and Telecommunications Alliance, the National Telecommunications Cooperative Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies, the Western Telecommunications Alliance, and the Eastern Rural Telecom Association, WC Docket No. 11-42, at n.17 (filed March 9, 2012) ("Industry Lifeline Waiver Petition"). However, ETCs generally appear on track to meet the Commission's June 1, 2012 deadline in those states where they are responsible for satisfying the Commission's Lifeline subscriber eligibility determination and certification requirements. Thus, the scope of the requested waiver is limited only to those states where this responsibility rests in whole or in part with a state agency.

II. GOOD CAUSE EXISTS TO GRANT THE REQUESTED WAIVER.

The Commission may waive its rules for good cause shown. 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule when the particular facts make strict compliance inconsistent with the public interest.⁶ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.⁷ In short, a waiver is justified when special circumstances warrant a deviation from general rules and such deviation will serve the public interest.⁸

Here, granting the requested waiver would serve the public interest. Without a limited waiver from rules 54.407(d) and 54.410(b)(2) and (c)(2) in states with initial Lifeline eligibility responsibility or with automatic or coordinated Lifeline enrollment programs, some or all new low-income consumers will not receive Lifeline benefits to which they otherwise are entitled unless and until such states are able to satisfy their notice and certification form obligations under rule 54.410.

⁶ The Commission has considerable discretion as to whether to waive its rules. *See Office of Communication of United Church of Christ v. FCC*, 911 F.2d 803, 812 (D.C. Cir. 1990) (upholding the Commission's grant of a waiver "[g]iven the deference due the agency in matters of this sort"); *City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 663 (D.C. Cir. 1984) (noting that the scope of review of a waiver determination by the Commission "is narrow and constrained"). As the D.C. Circuit has observed, the Commission's waiver determinations are entitled to heightened deference because "the agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety-value procedure for consideration of an application for exemption based on special circumstances." *AT&T Wireless Services, Inc. v. AT&T*, 270 F.3d 959, 965 (D.C. Cir. 2001) (internal quotation marks omitted).

⁷ *WALT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

⁸ *Northeast Cellular*, 897 F.2d at 1166; *see also Allband Communications Cooperative, Petition for Waiver of Sections 69.2(hh) and 69.601 of the Commission's Rules*, WC Docket No. 05-174, *Order*, 2005 FCC LEXIS 4527 (Aug. 11, 2005).

The Commission's *Order* significantly changes the role of the states in the federal Lifeline program, and USTelecom generally supports the Commission's Lifeline reform efforts. Although the program historically has operated "under a patchwork of state and federal requirements," the *Order* adopts mandatory requirements to which all states must now comply.⁹ In states where a Lifeline administrator or other state agency is responsible for initially determining a subscriber's eligibility for Lifeline, these new requirements include: (i) collecting from a prospective Lifeline subscriber a certification form that contains specified disclosures and requests specific information from the subscriber; and (ii) providing to the serving ETC a copy of the subscriber's completed certification form as well as notice that the subscriber meets either the Commission's income- or program-eligibility criteria for Lifeline benefits. *See* 47 C.F.R. §§ 54.410(b)(2), (c)(2), & (e).¹⁰

Likewise, because of the "unintended consequences" of state automatic enrollment programs by which ETCs are generally required to apply Lifeline discounts automatically to subscribers who meet certain state-determined criteria, the Commission required that states "modify those programs, as necessary, to comply with our rules" *Order* ¶ 173. Thus, states where subscribers are enrolled in Lifeline without the consumer submitting an application or

⁹ *Order* ¶ 19; *see also id.* ¶ 69 (limiting Lifeline benefits to a single subscription per household); 47 C.F.R. § 54.409 (establishing uniform eligibility criteria for Lifeline benefits).

¹⁰ USTelecom has questioned the utility of the requirement that a state provide a copy of the certification form to the ETC before the ETC can claim Lifeline reimbursement and has petitioned the Commission to reconsider this issue. *See* Petition for Reconsideration and Clarification of the United States Telecom Association, WC Docket No. 11-42, at 6 (filed April 2, 2012). Although the Commission should grant reconsideration as requested by USTelecom, doing so would not obviate the need for the limited waiver sought by USTelecom here because a state Lifeline administrator or other state agency would still be required to provide the ETC with notice that the subscriber qualifies for Lifeline before the ETC could seek reimbursement.

expressly authorizing the enrollment will no longer be permitted to do so and will be expected to comply with the notice and certification form requirements in rule 54.410.¹¹

USTelecom and its member companies understand all too well the time and effort required to implement changes to the Lifeline program. These challenges are likely magnified for state governments that must coordinate new processes and procedures across multiple levels of government and with multiple stakeholders – challenges states will have to overcome in order to comply with the *Order*.¹² However, for a state with responsibility for making initial determinations regarding a subscriber's eligibility for Lifeline benefits or with an automatic or coordinated enrollment program, any failure to comply with the notice and certification form requirements in the *Order* may have significant repercussions on Lifeline-eligible consumers and ETCs in that state.

Specifically, as a prerequisite to receiving reimbursement under the Lifeline program, an ETC "must certify, as part of each request for reimbursement, that it is in compliance with all of the [Commission's Lifeline rules], and, to the extent required [under these rules] has obtained

¹¹ Because the *Order* does not specify a date certain by which states must modify their automatic or coordinated enrollment programs, USTelecom and others requested that the Commission clarify that section 54.407(d) does not require an ETC to certify that it has confirmed a subscriber's eligibility for participation in Lifeline prior to enrolling that subscriber in the program in those states with automatic or coordinated enrollment programs. Industry Lifeline Waiver Petition at 9-10. Granting USTelecom's instant waiver petition would render moot the previous request for clarification on this issue.

¹² The problems confronted by states in implementing the *Order* are underscored by the petitions recently filed by state public service commissions seeking a waiver of the June 1, 2012 deadline to comply with the Commission's new eligibility criteria. See, e.g., Petition for Waiver Jointly Submitted by the Public Utility Commission of Oregon and the Oregon Telecommunications Association, WC Docket No. 11-42 (filed April 19, 2012) (seeking a waiver until July 1, 2013 because implementation of the *Order* will require passage of legislation to conform state Lifeline eligibility criteria to the Commission's new requirements); Petition for Waiver of the Colorado Public Utilities Commission, WC Docket No. 11-42 (filed April 6, 2012) (same); Petition for Waiver of the Montana Public Service Commission, WC Docket No. 11-42 (filed March 20, 2012) (seeking a waiver until June 1, 2013).

valid certification and re-certification forms from each of the subscribers for whom it is seeking reimbursement.” 47 C.F.R. § 54.407(d). Likewise, in states with initial Lifeline eligibility responsibility, an ETC “must not seek reimbursement for providing Lifeline service to a subscriber” unless and until it has received from the state Lifeline administrator or other state agency: (i) notice that the prospective subscriber meets the income- or program-eligibility criteria under the Commission’s rules; and (ii) a copy of the subscriber’s certification that complies with the Commission’s rules. 47 C.F.R. §§ 54.410(b)(2), (c)(2).

Under the circumstances, ETCs are in an untenable position unless and until an affected state is in compliance with rule 54.410. While conceivably an ETC could seek reimbursement in an affected state without the notice and certification form from the state mandated by rules 54.410(b)(2) and (c)(2), doing so would put the ETC at risk of being held in violation of the Commission’s rules. Thus, absent a waiver, affected ETCs will most likely be forced to decline to enroll subscribers in the Lifeline program in an affected state until that state is in compliance with rule 54.410.

Based on information provided by two large ETCs, USTelecom estimates that in four affected states alone – California, Florida, New York, and Texas – more than 50,000 low-income subscribers will see their Lifeline benefits denied or at the very least delayed every month. The denial or delay of Lifeline benefits – even for a short period of time – is a draconian result that the Commission should make every effort to avoid.

Accordingly, in order to protect low-income consumers and consistent with the public interest, good cause exists for the Commission to waive rule 54.407(d) and rules 54.410(b)(2) and (c)(2) under the following circumstances: (1) in a state where responsibility for making initial Lifeline eligibility determinations currently rests with a state Lifeline administrator or

other state agency, or where subscribers are enrolled in the Lifeline program on an automatic or coordinated basis; and (2) the state is unable to modify its Lifeline enrollment procedures to meet the June 1, 2012 deadline.¹³

III. CONCLUSION

For the foregoing reasons, the Commission should grant USTelecom's Waiver Petition.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By: /s/ Jonathan Banks
Jonathan Banks
David B. Cohen
607 14th Street, N.W.
Suite 400
Washington, D.C. 20005

April 25, 2012

¹³ The Commission previously has granted waivers to avoid harm to consumers that would otherwise result. *See, e.g., Application of Choice Communications LLC For a New Educational Broadband Service Station on the A Group Channels at St. Thomas, Virgin Islands*, Memorandum Opinion and Order, 20 FCC Rcd 10906, ¶ 15 (2005) (granting a waiver of the filing freeze imposed on new Educational Broadband Service channels, noting that denial "would harm consumers" by "limit[ing] their ability to receive expanded competitive broadband services"); *Federal-State Joint Board on Universal Service*, Memorandum Opinion and Order, 15 FCC Rcd 21996, ¶ 12 (2000) (granting waivers to permit the retroactive distribution of universal service support to ETCs, finding that denying the petitions would "unjustly harm" consumers, "including many low-income consumers").

APPENDIX 1
TO THE UNITED STATES TELECOM ASSOCIATION'S
PETITION FOR WAIVER

The following states manage initial Lifeline eligibility determinations for at least some Eligible Telecommunications Carriers ("ETCs"). The United States Telecom Association ("USTelecom") seeks a waiver solely for those ETCs for which the state performs or has assumed this function and the state is unable to change its Lifeline enrollment procedures to provide ETCs with the notice and certification form required by section 54.410 of the Commission's rules by the June 1, 2012 deadline.

Arizona
California
Colorado
District of Columbia
Idaho
Kansas
Montana
Nebraska
New Jersey
New York
Oregon
Texas
Utah
Vermont
Washington

The following states have assisted or coordinated enrollment programs, and state agencies send lists to at least some ETCs of customers that the state agencies have determined are eligible for Lifeline. USTelecom seeks a waiver limited to such Lifeline enrollments based on such state lists, where the state is unable to change its Lifeline enrollment procedures to provide ETCs with the notice and certification form required by section 54.410 of the Commission's rules by the June 1, 2012 deadline.

Florida
Nevada
Ohio
Tennessee
United States Virgin Islands