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

In the Matter of	)	
	)	
Lifeline and Link Up Reform	)	WC Docket No. 11-42
and Modernization	)	

To: Chief, Wireline Competition Bureau

SMITH BAGLEY, INC.
PETITION FOR PARTIAL WAIVER

Smith Bagley, Inc. ("SBI"), pursuant to Section 1.3 of the Commission's Rules, respectfully requests that the Commission grant a partial waiver of its final Biennial Audit Plan ("Audit Plan") released April 2, 2014.[1] The Audit Plan requires an independent auditor to "randomly select one month during the audit period and three states or territories where the ETC is designated."[2] SBI is the only Lifeline ETC that operates in exactly three states, and as a result, would be the only multi-state operator to be required to have 100% of its operations audited. The underlying purpose of the rule – namely, to review a *sample* of a Lifeline ETC's operations – does not require an audit of 100% of SBI's operations across three states in order to accomplish that purpose.[3] Further, application of the rule would be inequitable and unduly burdensome.[4]

[1] Wireline Competition Bureau Announces Release of Final Lifeline Biennial Audit Plan, DA 14-450, rel. April 2, 2014, Attachment 3, Biennial Audit Plan, Universal Service Fund – Lifeline Program, General Standard Procedures for Biennial Independent Audits Required Under the Lifeline Reform Order, for the Period January 1 through December 31 ("Audit Procedures").

[2] Audit Procedures at ¶ 23.

[3] *See* 47 C.F.R. § 1.925(b)(3).

[4] *Id.*

SBI requests a waiver such that the independent auditor would be instructed to select one of SBI's two largest states, and conduct the audit for that state. The sample size would be entirely consistent with the underlying purpose of the rule, and with the sample size of other audited Lifeline ETCs.

I. BACKGROUND

In its *Lifeline Reform Order*, the Commission adopted a requirement that all Lifeline providers drawing $5 million or more on an annual basis must hire an independent audit firm "to assess the ETC's *overall compliance* with the [Lifeline] program's requirements."[5] The FCC specified that such audits will be performed once every two years,[6] and later clarified that "[i]f there are no material findings in a carrier's first independent audit, the Wireline Competition Bureau (the "Bureau") has the authority to relieve the ETC of its obligation to perform the Independent Audits going forward."[7] In adopting the audit requirement, the Commission explained that:

> Rather than performing an audit at the individual study area, we expect these audits to focus on the company's overall compliance program and internal controls regarding Commission requirements as implemented on a nationwide basis.[8]

The audit requirement is codified in Section 54.420 of the Commission's Rules.[9]

The Audit Plan, adopted by the Bureau acting on delegated authority, implements the biennial audit requirement. Specifically, the Audit Plan requires that:

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[5] *In the Matter of Lifeline and Link Up Reform et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656, 6782 (¶291) (2012)(emphasis added)*("Lifeline Reform Order").*

[6] *Id.*

[7] *Information Collection Being Submitted to Office of Management and Budget ("OMB") for Emergency Review and Approval*, Notice and Request for Comments, 77 Fed. Reg. 52,718 (Aug. 30, 2012) and *FCC Supporting Statement* (Sep. 2012) at 6, OMB Control Number 3060-00819.

[8] *Lifeline Reform Order* at ¶ 292.

[9] 47 C.F.R. § 54.420.

> the independent auditor shall randomly select one of the three states or territories where the ETC received the largest amount of Lifeline support and two additional states or territories randomly selected by the independent auditor.[10]

The initial audit plan proposed by the Bureau would have required ETCs to submit a National Subscriber List of all of their Lifeline customers. In the Audit Plan, the Bureau reduced the requirement to subscribers in three states, "[b]ased on concerns raised by commenters that the sample was too broad."[11] The Bureau did not explain how it selected three states as the appropriate sample size.

A total of 29 ETCs will be audited.[12] Of the 29 ETCs to be audited, six operate in only one state.[13] Eighteen of the ETCs operate in eight or more states and territories, and of these, thirteen operate in fifteen or more states and territories.[14] SBI is the only ETC that operates in exactly three states and territories.

II. REQUEST FOR WAIVER

SBI respectfully requests a waiver of the Audit Plan insofar as it requires an independent audit of all three of the states in which SBI operates. SBI requests that the Bureau instruct the independent auditor to select one of SBI's two largest states, and conduct the audit for that state.

Section 1.3 of the Commission's Rules provides the Commission with discretion to waive the application of any of its rules upon a showing of good cause.[15] In addition, Section

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[10] Audit Plan at 3.

[11] Audit Plan at 3.

[12] Audit Plan, Attachment 2 (List of Carriers Subject to the First Lifeline Biennial Audit Plan Based on Low-Income Disbursements for Calendar Year 2013). One Lifeline ETC, Icon, shut down in September 2013.

[13] *See* Exhibit A attached hereto, List of Carriers Subject to First Biennial Audit. This list was compiled based on Form 555 data filed in January 2014 for calendar year 2013.

[14] *Id.*

[15] 47 C.F.R. § 1.3.

1.925(b)(3) is instructive -- it provides that the Commission may grant a waiver where it is shown that:

> (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or
>
> (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.[16]

Federal courts have recognized that the Commission may "exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest."[17]

III. DISCUSSION

There are compelling reasons for the Bureau to grant expeditiously the requested partial waiver. First, the underlying purpose of the Audit Plan would not be served by its application in this particular case. Second, application of the literal terms of the Audit Plan would be highly burdensome and inequitable, and entirely contrary to the public interest, because of the unique circumstances of this case.

The Commission made clear in the *Lifeline Reform Order* that the biennial audit is designed to assess an ETC's *overall compliance* with the Lifeline program's requirements. The Commission's language makes clear that the audit should examine a *sample* of the ETC's subscribers. In adopting the final Audit Plan, the Wireline Bureau recognized that a sample was appropriate to assess an ETC's overall compliance, and limited the sample size to three states. When applied to a carrier with operations in more than three states, this sample size serves the Commission's objective of measuring a sampling of states.

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[16] 47 C.F.R. § 1.925(b)(3).

[17] *Northwest Cellular Telephone Co.*, 897 F.2d at 1166 (citing *WAIT Radio*, 418 F.2d at 1159).

In SBI's case, the "one size fits all" sample size of three states clearly does not fit. For the eighteen carriers that operate in eight or more states, an audit of three states equates to a sample size of 37.5% or less.[18] For the 13 ETCs that operate in fifteen or more states and territories, the sample size is 20% or less.[19] Of the 29 ETCs to be audited, six operate in only one state.[20] The sample size cannot be less than one state, and thus, the Commission has no choice but to audit the operations of the one state in which these ETCs operate.

SBI is uniquely situated. It operates in exactly three states. Therefore, without a waiver, SBI will be the only multistate Lifeline provider to be required to have 100% of its operations audited. An audit of 100% of SBI's operations is entirely inconsistent with the Commission's objective to audit a sample of a Lifeline provider's operations. Further, the cost burden on SBI will be inequitable and unduly burdensome. While its larger competitors will face an audit of 37.5% or fewer of their state operations, SBI will face an audit of 100% of its state operations.[21]

An audit of 100% of SBI's state operations is entirely unnecessary to achieve the Commission's goal of assessing SBI's *overall compliance* with the Lifeline program's requirements. On its Forms 555 due on January 31, 2014, SBI reported (in Column A) the following number of subscribers claimed on February (2013) FCC Form 497: Arizona – 43,743 (65.6% of SBI customers); New Mexico – 22,162 (33.3%); and Utah – 729 (1.1%). The purpose of the rule can be entirely fulfilled by having an independent auditor select – and audit -- one of SBI's two largest states.

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[18] *See* Exhibit A.

[19] *Id.*

[20] *See* Exhibit A. No carrier to be audited operates in only two states.

[21] SBI notes that since the adoption of the new Lifeline rules in February 2012, SBI has undergone a half dozen USAC inquiries consisting of IDVs and PQAs examining its operations in all three of its Lifeline states.

In fact, such an audit will result in the review of roughly the same, or a much larger, percentage of SBI's operations (depending upon which state is selected) than the audits of the eighteen carriers operating in eight or more states. Auditing one of SBI's two largest states will clearly meet the Commission's stated objective of determining whether SBI "has procedures in place to limit Lifeline to qualifying low income consumers and ensure that Lifeline service is limited to a single subscription per household."[22]

V. CONCLUSION

SBI respectfully requests, for good cause shown, a waiver of the Audit Plan insofar as it requires an independent audit of all three of the states in which SBI operates. The underlying purpose of the Audit Plan would not be served by the application of the three-state rule in this particular case. Further, application of the literal terms of the Audit Plan would be highly inequitable, because it would require an audit of 100% of SBI's multi-state operations – a burden that no other multi-state carrier faces.

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[22] *Lifeline Reform Order* at ¶291.

SBI requests that the Bureau instruct the independent auditor to select one of SBI's two largest states, and conduct the audit for that state. An audit of one of SBI's two largest states will more than fulfill the Commission's objective to assess an ETC's *overall compliance* with the Lifeline program's requirements.

Respectfully submitted,

Smith Bagley, Inc.

Robert S. Koppel

David A. LaFuria
Steven M. Chernoff
Robert S. Koppel

LUKAS, NACE, GUTIERREZ & SACHS, LLP
8300 Greensboro Drive, Suite 1200
McLean, VA 22102
(703) 584-8669

Its Attorneys

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EXHIBIT A

LIST OF CARRIERS SUBJECT TO FIRST BIENNIAL AUDIT

Name of Carrier	Number of States	List of States	Source	Percent Audited
American Broadband + Telecom (American Assistance Lifeline)	8	OH, MD, MI, IL, IN, KY, WV, WI	Website	37.5%
Assist Wireless	4	AR, MD, MO, OK	Form 555 (2013)	75%
AT&T	20	CA, TX, AK, AL, AR, ID, KY, LA, MI, MS, ND, OR, PR, SD, TX, VA, WA, WI, WV, GA	Form 555 (2013)	15%
Boomerang Wireless	19	AR, AZ, CO, IA, IN, KS, KY, LA, MD, MI, MN, MO, ND, OH, OK, SC, TX, WI, WV	Form 555 (2013)	16%
Budget	33	AZ, AR, CO, FL, GA, HI, ID, IN, IA, KS, KY, LA, ME, MD, MA, MI, MS, MO, NE, NC, NV, ND, OH, OK, PA, PR, RI, SC, SD, TN, TX, UT, VT	Form 555 (2013)	9%
CenturyLink	40	AL, AR, AZ, CO, FL, GA, ID, IL, IN, IA, KS, LA, MI, MN, MS, MI, MT, NE, NV, NJ, NM, NC, ND, OH, OR, PA, SC, SD, TN, TX, UT, VA, WA, WI, WY	Form 555 (2013)	7.5%
Cox Communications	13	AZ, AR, CA, CT, FL, GA, KS, LA, NE, NV, OK, RI, VA	Form 555 (2013)	23%
Cricket Communications	28	AR, AZ, CA, CO, DC, GA, ID, IL, IN, KY, KS, MD, MO, NC, NE, NM, NV, NY, OH, OK, OR, PA, SC, TX, UT, VA, WA, WI	Form 555 (2013)	11%
Easy Telephone	5	AR, FL, KY, MO, OK	Form 555 (2013)	60%
GCI	1	AK	Form 555 (2013)	Single state carrier
Global Connection Of America	19	AL, AR, AZ, FL, GA, KS, LA, MA, MD, MI, MN, MO, NC, OH, PA, SC, TX, WI, WV	Form 555 (2013)	16%
Head Start / Dart Phone	1	OK	Form 555 (2013)	Single state carrier
Icon*	N/A	N/A	N/A	N/A
i-Wireless	31	AL, AR, AZ, CO, CT, DE, FL, GA, IL, IN, KS, KY, LA, MD, MI, MN, MO, MS, NC, NH, NV, NY,	Form 555 (2013)	10%

* Shut down in September 2013

		OH, SC, TN, TX, UT, VA, WA, WI, WV		
Nexus Communications (TSI)	34	AL, AR, CA, CO, FL, GA, ID, IL, IN, IA, KY, KS, LA, MD, MI, ME, MI, MN, MO, NE, NC, NV, NJ, OH, OK, PA, RI, SC, TN, TX, UT, SI, WV, WY	Form 555 (2013)	11%
PlatinumTel (CareWireless)	1	IL	Website	Single state carrier
PR Wireless	1	PR	Form 555 (2013)	Single state carrier
Puerto Rico Telephone	1	PR	Form 555 (2013)	Single state carrier
Smith Bagley	3	AZ, NM, UT	Form 555 (2013)	100%
Tag Mobile	15	AR, CO, KS, KY, LA, MD, MI, OK, PA, TX, WI, WV, SC, NV, ME	Form 555 (2013)	20%
Telrite	30	AR, AZ, CO, GA, IA, IL, IN, KS, KY, LA, MD, ME, MI, MO, MN, NE, ND, NV, OH, OK, PA, PR, RI, SC, TX, UT, VT, WA, WI, WV	Form 555 (2013)	10%
Terracom	15	WI, OK, NV, MN, WV, IN, MD, TX, AZ, NE, LA, AR, IA, CO, USVI	Form 555 (2013)	20%
TracFone	41	AL, AR, AZ, CT, DC, DE, FL, GA, HI, IA, IL, IN, KS, KY, LA, MA, MD, ME, MI, MO, MS, NC, NH, NJ, NM, NV, NY, OH, OR, PA, PR, RI, SC, TN, TX, UT, VA, VT, WA, WI, WV	Form 555 (2013)	7%
True Wireless	5	AR, OK, MD, RI, TX	Form 555 (2013)	60%
UTPhone	1	OK	Form 555 (2013)	Single state carrier
Verizon	12	CA, DC, DE, FL, MA, MD, NJ, NY PA, RI, TX, VA	Form 555 (2013)	25%
Virgin Mobile	41	AL, AR, AZ, CA, CO, CT, DE, FL, GA, IA, ID, IN, KS, KY, LA, ME, MA, MI, MO, MD, MN, DC, MS, NC, NH, NJ, NM, NV, NY, OH, PA, RI, SC, RN, UT, VA, WA, WI, WV, TX, OR	Form 555 (2013)	7%
Windstream / Alltel	18	AL, AR, FL, GA, IA, KY, MN, MO, MS, NC, NE, NM, NY, OH, OK, PA, SC, TX	Form 555 (2013)	17%
Yourtel	8	KS, WA, RI, PA, OK, MO, ME, IL	Form 555 (2013)	37.5%