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May 21, 2014

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Notice of Oral *Ex Parte* Presentation; WC Docket Nos. 11-42, 09-197

Dear Ms. Dortch:

On May 19, 2014, John Heitmann and Joshua Guyan of Kelley Drye & Warren LLP met with Radhika Karmakar, Jonathan Lechter, Garnet Hanly, Michelle Schaefer and Melanie Tiano of the Wireline Competition Bureau (“Bureau”) to discuss the Lifeline program on behalf of multiple clients.¹ We congratulated the Bureau and the Commission on successfully implementing the National Lifeline Accountability Database (“NLAD”), which is a major turning point for the Lifeline program. We continue to work with the Bureau and the Universal Service Administrative Company (“USAC”) to address issues with and improvements to the NLAD, but it is important to note this milestone achievement by the Commission and USAC with substantial industry input and support.

¹ The Lifeline eligible telecommunications carriers (“ETCs”) represented at the meeting were Assist Wireless, LLC; Blue Jay Wireless, LLC; Boomerang Wireless, LLC; Easy Telephone Services Company; Express Cash and Phone, Inc.; Global Connection Inc. of America; Head Start Telecom, Inc.; i-wireless LLC; LTS Rocky Mount; NewPhone Wireless, L.L.C.; Pinnacle Telecommunications Group, LLC; TAG Mobile, LLC; TelOps International, Inc.; Telrite Corporation; TX Mobile, LLC; and Unity Telecom, LLC.

Marlene H. Dortch, Secretary
May 21, 2014
Page Two

Compliance Plans and Federal ETC Petitions

According to the Commission's website that tracks Lifeline petitions for ETC designation in the federal jurisdiction states and compliance plans, there are 39 federal ETC petitions and 55 compliance plans pending with the Bureau for action.² Many of the federal ETC petitions have been pending for years, including one since 2010. The Bureau has not approved a compliance plan since December 2012 or a federal ETC petition since August 2012. These delays have artificially restricted competition among ETCs for Lifeline customers in all states, but especially in the twelve federal jurisdiction states. Restricting competition reduces the incentive to improve the Lifeline benefit for low-income consumers. Nearly a decade ago when there were only two major wireless Lifeline providers, the standard offering was a 68 minutes plan. As additional wireless competitors entered the market, the standard offering has increased to 250 minutes, for essentially the same reimbursement amount. Similarly, handset quality and customer care have improved in more competitive markets such as Oklahoma.³ That offering can continue to improve, and incorporate broadband data, if there is a healthy wireless Lifeline ecosystem with many ETCs approved to compete for low-income subscribers.

Further, the Lifeline benefit belongs to the eligible low-income individual, not any particular ETC. Therefore, there are a set number of eligible individuals at any given time no matter how many ETCs are designated to provide Lifeline service. With the NLAD now having completed a successful nationwide launch, designating more ETCs does not contribute to the problems that are now in the Lifeline program's past. Prior to the implementation of the NLAD, however, a greater number of designated ETCs could result in additional duplicate accounts because ETCs did not know whether an applicant was served by another ETC. Now that the NLAD is in "live" production in all states, the duplicate accounts are being removed and this is no longer a concern for designating new ETCs to compete for Lifeline eligible customers. It is time for the Bureau to begin acting on the pending federal ETC petitions and compliance plans.

Further, commitments made in compliance plans that have been overtaken by subsequent rules, requirements or circumstances should be modified to ensure a modified playing field. For example, if an ETC agreed to collect photo identification (or government-

² See <http://www.fcc.gov/encyclopedia/lifeline-compliance-plans-etc-petitions> (last checked May 21, 2014 and last updated Apr. 30, 2014). It is a near certainty that a number of these filings have been abandoned as investors and job creators could not tolerate the regulatory uncertainty created by the Commission's effectively having put on hold these items for as many as four years.

³ The Oklahoma Corporation Commission deserves credit for recognizing that consumers rather than regulators should pick winners and losers in the marketplace.

Marlene H. Dortch, Secretary
May 21, 2014
Page Three

issued photo identification) in a compliance plan prior to the NLAD's implementation, that commitment should be supplanted by the Third Party Identity Verification ("TPIV") that is part of the NLAD duplicate screen. USAC has provided guidance regarding what documentation can be used to override a TPIV failure in an enrollment, including unexpired driver's license and birth certificate.⁴ The Bureau and USAC have put an identity verification system in place for all ETCs through the NLAD. The Bureau should not require some ETCs to also view government-issued photo ID when other ETCs do not have that obligation.

Retention of Proof of Eligibility

Many ETCs remain convinced that the Lifeline program will benefit from a rule change that would permit ETCs to retain proof of eligibility for audit purposes and in order to respond to negative media stories that claim an ETC did not require proof of eligibility. We understand the Commission's and other parties' concerns raised by this proposal regarding Lifeline subscriber privacy rights, and we also seek to ensure that strict privacy controls are maintained. For that reason, the Lifeline Reform 2.0 Coalition⁵ proposed in its Petition for Rulemaking that the Commission require that the electronic storage of documentation of eligibility be encrypted according to a reasonable standard.⁶ Further, the Coalition has proposed a limited retention period to allow for USAC auditing and to respond to media inquiries or reports.⁷ In addition, after discussions with Lifeline stakeholders, the Coalition also supported the concept of having a trusted third party such as USAC or another entity retain the documentation of eligibility, rather than the ETCs.⁸ In this manner, a single encryption standard can be chosen and all private information can be stored in a single location rather than at multiple locations with multiple ETCs. We will continue to reach out to industry and consumer interest groups on this topic.

⁴ See NLAD Dispute Resolution page at <http://www.usac.org/li/tools/nlad/nlad-dispute-resolution.aspx>.

⁵ The Lifeline Reform 2.0 Coalition is presently comprised of Telrite Corporation; Blue Jay Wireless, LLC; Global Connection Inc. of America; and i-wireless LLC.

⁶ See Lifeline Reform 2.0 Coalition's Petition for Rulemaking To Further Reform The Lifeline Program, WC Docket Nos. 11-42, 03-109, CC Docket No. 96-45 at 7 (filed June 28, 2013) ("Petition").

⁷ See Notice of Ex Parte Presentation of Telrite Corporation, Boomerang Wireless and i-wireless, WC Docket No. 11-42 at 6 (filed Dec. 11, 2013).

⁸ See Reply Comments of the Lifeline Reform 2.0 Coalition, WC Docket Nos. 11-42, 03-109, CC Docket No. 96-45 at 8 (filed Aug. 29, 2013).

Marlene H. Dortch, Secretary
May 21, 2014
Page Four

State Eligibility Database Minimum Standards

We also discussed the minimum state eligibility database standards that have been proposed by the Lifeline Reform 2.0 Coalition and the goal of ensuring that eligible consumers are not denied benefits owed due to issues with state eligibility databases.⁹ The ETCs represented here work with many state eligibility databases and most need improvement. However, we believe that the New York and Florida databases (when functioning) meet the Coalition's proposed minimum standards and several other databases are close. We are also able to accept the Maryland and Puerto Rico databases because even though they do not provide a real-time API, they provide the subscriber database to ETCs, which can upload those lists for real-time enrollment checks. We will provide more comprehensive information about the strengths and weaknesses of various state eligibility databases in the near future.

There is some ambiguity regarding the Commission's rules governing the use of state eligibility databases, which can result in *eligible consumers being denied Lifeline benefits*. To avoid this untenable outcome, the most reasonable reading of the Commission's Lifeline enrollment rules allows eligible Lifeline applicants to enroll in Lifeline service by showing documentation of eligibility even if they are not found in a state eligibility database. Section 54.410(c)(1)(i)(B) of the Commission's rules regarding program-based eligibility provides, "If an [ETC] cannot determine a prospective subscriber's program-based eligibility for Lifeline by accessing eligibility databases, the [ETC] must review documentation demonstrating that a prospective subscriber qualifies for Lifeline under the program-based eligibility requirements."¹⁰ Section 54.410(b)(1)(i)(B) of the rules provides the same language with respect to income-based eligibility.¹¹

If the applicant is found in the database, the applicant's eligibility has been determined and the ETC can enroll the applicant in Lifeline. If the applicant is not found in the state eligibility database, then the applicant's eligibility cannot be determined by the state database, and the ETC must review documentation of eligibility from the applicant to enroll the applicant in Lifeline. This reasonable interpretation of Sections 54.410(c)(1)(i)(B) and 54.410(b)(1)(i)(B) of the Commission's rules allows ETCs to enroll demonstrably eligible low-income consumers in Lifeline rather than having to turn them away.

⁹ See Lifeline Reform 2.0 *Ex Parte*, WC Docket No. 11-42 at 5-9 (Apr. 14, 2014).

¹⁰ 47 C.F.R. § 54.410(c)(1)(i)(B).

¹¹ See 47 C.F.R. § 54.410(b)(1)(i)(B).

Marlene H. Dortch, Secretary
May 21, 2014
Page Five

Requiring Non-Commission Based Review and Approval of Enrollments, Regardless of Where the Enrollment Takes Place

Some have suggested that because the Lifeline benefit is disbursed on a per-month, per-subscriber basis, it is irreparably prone to errant payments.¹² Others suggest that the in-person distribution of handsets is more prone to abuse than delivery by mail (notwithstanding that company's solicitations to a sitting United States Senator highlighting the fact that the Commission's prior rules required consumers to show no proof of eligibility¹³ and other media coverage featuring phones being mailed to the deceased).¹⁴ Some suggest that moving agents under a permanent roof will somehow reduce opportunities for waste, fraud and abuse.¹⁵ We respectfully disagree. Agents or employees behaving poorly is not caused by tents or tablets and is not cured by putting them in call centers or under a roof. Rather, it is a byproduct of inadequate controls.

To address the "real or perceived risks associated with [agent-initiated] enrollments" that could be attributable to "commission-based compensation,"¹⁶ the Lifeline Reform 2.0 Coalition has proposed to require that ETCs conduct a non-commission-based review and approval of all enrollments.¹⁷ Under this proposal, an ETC could have an employee

¹² See McCallister, Laura and Olivas, Sandra, *McCaskill says free cell phone program filled with fraud*, KCTV 5, (Feb. 11, 2014), available at <http://www.kctv5.com/story/24697648/mccaskill-says-free-cell-phone-program-filled-with-fraud> ("When you pay people per person, you are creating an incentive for them to manufacture applications.").

¹³ See TracFone Notice of Ex Parte Presentation; WC Docket No. 11-42 (Dec. 23, 2011) (expressing regrets that the mailer was sent to Senator McCaskill at her residence in Washington, DC and noting that it discontinued use of mailers that say "no proof necessary" or "pre-approved.").

¹⁴ See *Petition for Rulemaking to Prohibit In-Person Distribution of Handsets to Prospective Lifeline Customers; Lifeline and Link Up Reform and Modernization et al.*, Petition for Rulemaking, WC Docket Nos. 11-42 et al., CC Docket No. 96-45 (May 13, 2013) ("TracFone Petition") and Barnini Chakraborty, *Lawmaker looks to rein in program after free cellphones sent to dead people*, FoxNews.com (Mar. 11, 2013); Ben Terris, *2 Dead People Got Free Phones, 1 GOP Lawmaker Eyes an Opening*, National Journal (Feb. 26, 2013).

¹⁵ See Nexus Communications, Inc. Ex Parte Communication, WC Docket Nos. 11-42 and 03-109 (May 10, 2013) (proposing to limit Lifeline enrollments to brick and mortar stores).

¹⁶ Petition at 8.

¹⁷ See *id.* at 9. The Coalition originally proposed that an employee conduct the review, but based on feedback from other Lifeline stakeholders, modified its proposal to require the

Marlene H. Dortch, Secretary
May 21, 2014
Page Six

that is not paid a commission for approving Lifeline enrollments review the application and supporting documentation or have an independent party that is not compensated based on approving an enrollment conduct the eligibility review. The authorization for every enrollment is determined by the ETC and any commission-based agents or field representatives merely assist the applicant to review the appropriate disclosures, provide the required information and make the required certifications. The proposal garnered widespread support from the commenters and the Coalition believes it remains an important proposal for further reform.

NLAD Safe Harbor and In-Depth Validation Appeals

We discussed the proposal raised by several ETCs in In-Depth Validation (“IDV”) appeals and the Lifeline Reform 2.0. Coalition that a Lifeline provider that has conducted appropriate due diligence to identify duplicate subscribers should not be liable for retroactive reimbursements to the Universal Service Fund and would not be subject to forfeitures or other penalties if USAC or the Commission, through additional scrutiny, determines that an account is a duplicate.

The safe harbor should identify the steps a Lifeline ETC should take in order to check for duplicate enrollments in its own records. The steps should be satisfied by evidence that the ETC (1) has obtained a valid certification from the subscriber attesting, under penalty of perjury, that the subscriber is not receiving another Lifeline-supported service, *and* (2) has submitted the subscriber’s record to an electronic screening process using the NLAD or an applicable state duplicates database.

We also discussed the status of the IDV appeals that were filed with the Bureau in late 2013 and early 2014 and understood that the Bureau has taken the additional ninety days for taking action on those appeals.¹⁸

Industry Consolidation

Finally, we discussed the potential for Lifeline industry consolidation and the restrictions in the Lifeline Reform Order that are unclear. Specifically, it is unclear why footnote

review prior to including a subscriber on a Form 497 reimbursement request by someone that is not paid on a commission basis for approving enrollments.

¹⁸

See 47 C.F.R. § 54.724(a).

Marlene H. Dortch, Secretary
May 21, 2014
Page Seven

1000 to the Lifeline Reform Order seems to provide for different treatment for ETCs designated before December 29, 2011 and those ETCs designated after that date.¹⁹

This letter is being filed electronically for inclusion in the public record of the above-referenced proceeding. Please feel free to contact the undersigned with any questions.

Respectfully submitted,



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Joshua T. Guyan

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¹⁹ 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*, WC Docket No. 11-42, WC Docket No. 03-109, CC Docket No. 96-45, WC Docket No. 12-23, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11, n. 1000 (rel. Feb. 6, 2012).