

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of

Request for Review by UTPhone, Inc. of a
Decision of the Universal Service
Administrator (USAC Audit No.
L12013BE021)

WC Docket No. 03-109
WC Docket No. 11-42

**UTPHONE, INC.
REQUEST FOR REVIEW OF USAC AUDIT REPORT**

James M. Smith
Danielle Frappier
Adam Shoemaker
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, NW, Suite 800
Washington, DC 20006-3401
(202) 973-4200

Attorneys for UTPhone, Inc.

SUMMARY

On April 28, 2014, the High Cost & Low Income Committee of the Universal Service Administrative Company (“USAC”) Board of Directors approved a final audit report of UTPhone, Inc. (“UTPhone”) which consisted of ten findings that USAC’s auditors claimed showed evidence of noncompliance with the Commission’s rules regarding the Lifeline program.

USAC’s report was flawed in many respects, and several of its conclusions were based on flagrantly incorrect interpretations of Commission rules and impermissible unauthorized policy positions. UTPhone seeks review of three of these findings in particular. First, USAC erroneously concluded that UTPhone failed to comply with a rule of the Oklahoma Corporation Commission (“OCC”) regarding re-certification for purposes of a state-specific Lifeline fund, and that such noncompliance is relevant to a determination of the company’s compliance with federal rules. USAC’s position and its interpretation of the state rule are utterly unsupported by any authority. As such, this finding must be reversed.

Second, USAC undertook a flawed analysis of the manner in which UTPhone passes through Lifeline support to its customers. This analysis contradicts the Commission’s position on partial-month support claims, and must also be reversed.

Third, USAC takes issue with the timing of UTPhone’s de-enrollment procedures for the 2012 re-certification process, the deadlines for which are set out in Commission’s rules and which were followed scrupulously by UTPhone. Nevertheless, USAC concluded that it has the authority to disregard these rules and to impose penalties on UTPhone based on its own

interpretation of a Bureau-level Public Notice. It does not have such authority, and its interpretation ignores the plain language of the Commission's rules. This finding must be reversed as well.

TABLE OF CONTENTS

Introduction.....	1
A. No Federal or State Rule Required UTPhone to Review Proof of Program Participation or Income Eligibility During the Annual Re-certification Process.....	2
B. USAC Erred in Impermissibly Interpreting the Commission’s Policy on Subscribers Who Receive Service for Partial Months.....	10
C. De-enrollment After the End of the Re-certification Process Is Subject to a Separate Deadline that UTPhone Met	16
Conclusion	20

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of

Request for Review by UTPhone, Inc. of a
Decision of the Universal Service
Administrator (USAC Audit No.
L12013BE021)

WC Docket No. 03-109

WC Docket No. 11-42

UTPhone’s Request for Review of USAC Audit Report

INTRODUCTION

UTPhone, Inc. (“UTPhone”), by its attorneys and pursuant to sections 54.719(c) and 54.722 of the Commission’s rules (47 C.F.R. §54.719(c) and 47 C.F.R. § 54.722), hereby requests review of the decision of the Universal Service Administrative Company (“USAC”) to approve the final “Independent Auditor’s Report on UTPhone’s Compliance with Low Income Support Mechanism Rules” (“Audit Report”) (audit no. L12013BE021).

UTPhone is a small, competitive telecommunications service provider that focuses on serving low income subscribers exclusively in the state of Oklahoma. It provides Lifeline service solely on a wireline basis to low income Oklahomans. USAC’s Internal Audit Division performed the subject audit of UTPhone’s compliance with the Commission’s Lifeline rules for an audit period encompassing January 2013. UTPhone requests review of three findings included in the Audit Report. Each of these conclusions is unsupported by law or Commission rules. Further, each is based on USAC’s misinterpretation of rules or determination to make

policy, which is impermissible under Commission rules barring USAC from making policy or unilaterally interpreting unclear provisions of Commission rules.¹

A. No Federal or State Rule Required UTPhone to Review Proof of Program Participation or Income Eligibility During the Annual Re-certification Process

The Audit Report found that UTPhone violated section 165:59-9-5 of the Oklahoma Corporation Commission’s (“OCC”) rules. That state rule provides:

Each telecommunications carrier that provides service to residential customers who qualify for participation in the [Oklahoma] Lifeline Service Program shall, annually, require documentation for each Lifeline Service Program participant, for the purpose of determining their continued eligibility for Lifeline Service Program credits.²

The Audit Report explained USAC’s interpretation of this rule as such: “The Beneficiary is required to adhere to the standards established by the [OCC] to ensure compliance with the state Lifeline program The OCC requires that all ETCs in Oklahoma review subscribers’ proof of eligibility documentation on an annual basis to verify the subscribers’ continued eligibility to receive Lifeline Program support”³ USAC found that UTPhone failed to comply with this rule and calculated a “monetary effect” of \$832,528 for this finding, but it “d[id] not recommend recovery of funds . . . since [UTPhone] confirmed its subscribers’ continued eligibility through a review of subscriber re-certification forms.”⁴

This finding should be vacated for two reasons. First, as a threshold matter, the Oklahoma regulation cited by USAC expressly does not apply to the receipt of federal funds.

¹ 47 C.F.R. § 54.702(c) (“The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission’s rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.”)

² Chapter 59, Oklahoma Universal Service, Permanent Rules, § 165:59-9-5 (Oklahoma Corporation Commission 2012).

³ Audit Report at 5.

⁴ *Id.*

Second, and more to the point, UTPhone *did not violate* the Oklahoma rule. USAC’s interpretation of that rule is utterly unfounded and devoid of record support.

USAC claims that section 54.416(c) of this Commission’s rules requires UTPhone to follow an Oklahoma re-certification rule that purportedly requires ETCs to review proof of program participation or requisite income level during the annual re-certification process.

Section 54.416(c), which was amended in 2012, provides that:

States that mandate Lifeline support may impose additional standards on eligible telecommunications carriers operating in their states to ensure compliance with **state Lifeline programs**.⁵

The plain language of the rule limits the authority of states to imposing additional Lifeline rules for *state* Lifeline programs. It does not add a federal USF regulation and has no relevance to eligibility for receiving federal funding. As the *Lifeline Reform Order* explains, “States may supplement the federal re-certification methodology with their own procedures specifically tailored to **state-specific program** requirements.”⁶

Prior to the January 2012 *Lifeline Reform Order*, the Commission’s rules actually did delegate to most states the task of regulating the re-certification process for subscribers receiving federal funding. Specifically, the Commission’s rules previously stated that “in states that mandate state Lifeline support [the ETC] must comply with state verification procedures to validate consumers’ continued eligibility for Lifeline.”⁷ At that time, most states, including Oklahoma, were classified as “mandating” state Lifeline support.⁸ This now-superseded rule

⁵ 47 C.F.R. § 54.416(c) (emphasis added).

⁶ *In Re Lifeline and Link Up Reform and Modernization; Federal State Joint Board on Universal Service; 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, 27 FCC Rcd 6656 (FCC Rel. Feb. 6, 2012) at ¶ 140 (emphasis added) (“*Lifeline Reform Order*”).

⁷ 47 C.F.R. §410(c)(1) (2001) (subsequently amended in the *Lifeline Reform Order*).

⁸ *See Lifeline and Link Up Reform and Modernization; Federal State Joint Board on Universal Service; Lifeline and Link Up*, Notice of Proposed Rulemaking, 26 FCC Rcd 2770 (FCC rel. Mar. 4, 2011) (“*Lifeline Reform NPRM*”) at

required ETCs in these states to follow any state re-certification process. If no such process existed in these states, then the ETC was to follow federal rules, which did not include a re-certification process.⁹

The *Lifeline Reform Order*, however, changed this construct. Instead of having the re-certification process governed mostly by the states, the *Order* created a new federal process applicable to all states for the receipt of federal funding, and specifically instructed the states to only add processes for the receipt of state funding. Again, the *Lifeline Reform Order* provides that:

States may supplement the federal re-certification methodology with their own procedures specifically tailored to **state-specific program** requirements. Those supplemental procedures, however, must be performed in addition to, but not lieu of, the uniform, minimum standards we adopt today for those ETCs who receive support from the federal Universal Service Fund.”¹⁰

The *Lifeline Reform Order* and the resulting new rule 54.416(c), therefore, makes a clear distinction between rules governing receipt of funding under a state program, and support received under the federal program.

The Oklahoma rules are in accord with the new Commission construct for the re-certification process: the rules found in Subchapter 9 of Chapter 59, Title 165 of the Oklahoma Administrative Code apply explicitly and solely to the receipt of Oklahoma state Lifeline program funding, and it is in this Subchapter that the re-certification rule upon which USAC relies is found. Specifically, section 165:59-9-1 of the Oklahoma Administrative Code provides that:

n.29 (noting that Oklahoma, which had its own state Lifeline program, was not a “federal default” state, which was the term for states that did not mandate state Lifeline support).

⁹ See 47 C.F.R. §54.409(c)(1)-(2) (2011).

¹⁰ *Lifeline Reform Order*” at ¶ 140 (emphasis added).

- (a) This Subchapter [9] establishes guidelines for the administration of the Oklahoma Lifeline Fund (“OLF”) that are consistent with 17 O.S. (Supp. 1997) §§ 139.105 and 139.107 and 47 C.F.R. § 69.104 (k)(1). . . .
- (c) The Oklahoma Lifeline Fund is a state fund administered by the Oklahoma Corporation Commission, for the purpose of funding the Lifeline Service Program¹¹

The particular Oklahoma rule on which USAC relies, O.A.C. § 165:59-9-5, is located in this very subchapter and refers to “documentation for each Lifeline Service Program participant.”¹² The “Lifeline Service Program,” in turn, is also defined to apply to the state program only:

165:59-9-3 Lifeline Service Program

- (a) The Lifeline Service Program is a program designed to **operate in conjunction with the Federal Lifeline program**¹³

Thus, the definition clearly distinguishes the Lifeline Service Program from the federal program, such that the rules in Subchapter 9 apply only to funding under the state program.

Even more flawed is USAC’s finding that UTPhone violated the cited Oklahoma rule. That finding is circular and plainly incorrect. As noted above, the current rule— which the OCC has twice in the past year acknowledged to be vague and in need of amendment— provides that ETCs “shall, annually, require documentation for each Lifeline Service Program participant . . .”¹⁴ The Audit Report found that UTPhone violated this state rule because it did not “review subscribers’ proof of eligibility documentation on an annual basis to verify the subscribers’ continued eligibility to receive Lifeline Program support,” citing only an e-mail from an OCC

¹¹ O.A.C. § 165:59-9-1 (emphasis added). *c.f.* Subchapter 23, Chapter 55, Title 165 of the Oklahoma Administrative Code, the only Oklahoma provision governing the receipt of federal Lifeline funding, applies strictly to wireless carriers and does not address the annual re-certification process.

¹² O.A.C. § 165:59-9-5, *supra* note 2.

¹³ O.A.C. § 165:59-9-3 (emphasis added).

¹⁴ O.A.C. § 165:59-9-5, *supra* note 2.

staff member.¹⁵ USAC determined a “monetary effect” of over \$800,000 for this finding, but “d[id] not recommend recovery of funds,” because it also found that UTPhone had “confirmed its subscribers’ continued eligibility through a review of subscriber re-certification forms.”¹⁶ Nevertheless, USAC management determined that it would “notify the Oklahoma Corporation Commission of the Beneficiary’s failure” in this regard.¹⁷

UTPhone’s response pointed out that the Oklahoma rule does not define or otherwise illuminate what is meant by the phrase “require documentation,” and that it arguably requires no more than this Commission’s current rule that an ETC require an annual re-certification document itself. The Audit Report expressly acknowledged that UTPhone had satisfied that requirement and, further, that it had reviewed those re-certification forms to “confirm[] continued eligibility.”¹⁸ UTPhone observed that “[i]f the OCC had intended to require a second review of documents demonstrating participation in a qualifying program or of the requisite income level, it could have written the rule in a way that clearly imposed such a requirement. If this was the OCC’s intent, however, it was not clearly provided in the final rule.”¹⁹ The Audit Report ignored this defense, except to state summarily that “it is the Beneficiary’s responsibility to confirm its understanding.”²⁰

In fact, the record reveals clearly that USAC had no basis for its interpretation of the Oklahoma rule, yet it found a violation and attached a monetary effect of \$832,528 to it. Indeed, the record underlying both the Audit Report and the Oklahoma rule itself shows that not only is there no basis for USAC’s unstated yet impactful finding that the state rule required UTPhone to

¹⁵ Audit Report at 5& nn.3, 8. *See also id.* at 9 (“The Beneficiary operates in Oklahoma, where ETCs are required to annually review a subscriber’s proof of eligibility to verify that they remain eligible to receive Lifeline Program support”).

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 9.

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 6.

²⁰ *Id.* at 8.

do more than gather and review the completed annual recertification forms. In fact, the record actually reveals both that USAC's field auditor had *credited* UTPhone's interpretation of the state rule, and that the Oklahoma Commission is *itself* unsure of what the current rule requires in terms of review of documentation.

First, the Audit Report's interpretation of the rule relied solely on—but failed to describe or append—an email exchange between USAC's auditors and OCC staff.²¹ That correspondence evidently was not part of the record reviewed by USAC's management or Board,²² and—even more remarkably—it demonstrably does not support USAC's interpretation. Rather, it discusses this question posed by a USAC auditor:

. . . **165:59-9-5 Recertification** it states 'each telecommunications carrier that provides service to residential customers who qualify for participation in the Lifeline Service Program shall, annually, require documentation for each Lifeline Service Program participant, for the purpose of determining their continued eligibility for Lifeline Service Program credits.' *Can you provide clarification on what the 'documentation' consists of? Does it consist of just the recertification form, or does the state expect the carriers to review eligibility proof, too?*²³

Importantly, this email shows that the USAC auditor identified two alternative interpretations of the rule, one of which was the one followed by UTPhone in conducting its annual re-certification process.

The auditor's email then continues by reciting *his characterization* of oral statements by an OCC staff person during a telephone conversation, and asks her to "confirm [the following] understanding based on our conversation":

As it states above, carriers are required to review for continued eligibility the eligibility documents for each subscriber. *Oklahoma currently has a mixture of*

²¹ See *id.* at 5, 8 and nn.3 & 8 (citing "Email from Maribeth Snapp, Telecom Policy Director, OCC, received November 12, 2013") ("*OCC Email*").

²² The *OCC Email* was not included in the Audit Report, but it was provided to UTPhone at UTPhone's request after the issuance of the Final Report. Email from Jennifer Crowe, USAC, to Jason Ledlow, UTPhone, May 8, 2014, appended hereto as Exhibit A.

²³ *OCC Email*, Exhibit A at p. 2 (emphasis added).

*carriers who actually review the eligibility documents and others that re-certify via a form stating they are still eligible or via contact over the phone. In the event that a carrier does not review the eligibility documents, would this preclude the carrier from receiving State Lifeline or Federal Lifeline support?*²⁴

The OCC staff's emailed reply did not respond to the auditor's question. Rather, it states: "With regard to the comments in response to the questions we discussed, you have accurately reflected my answers to your questions below."²⁵ Thus, despite the fact that the OCC staff is aware that some ETCs review proof of benefits during the re-certification process and some do not, the staff does *not* necessarily think that failure to do so would preclude the receipt of state or federal Lifeline funding.

Thus, in direct contrast to the Audit Report's finding, the email correspondence upon which it exclusively relies actually reveals that: (1) the USAC auditor *expressly credited* the interpretation that UTPhone had followed as one of two possible interpretations of the rule ("Does [documentation] consist of just the recertification form, or does the state expect the carriers to review eligibility proof, too?"); (2) OCC staff confirmed that some carriers do *not* review eligibility documentation on an annual basis, *without* offering an opinion as to whether the rule requires more ("Oklahoma currently has a mixture of carriers who actually review the eligibility documents and others that re-certify via a form stating they are still eligible or via contact over the phone"); and (3) OCC staff simply did not answer USAC's ultimate question of whether "[i]n the event that a carrier does not review the eligibility documents, would this preclude the carrier from receiving State Lifeline or Federal Lifeline support?"²⁶

²⁴ *Id.* (emphasis added).

²⁵ *Id.* at p. 1.

²⁶ *See id.* The first sentence stating that review of documents is "required" is belied by the completely contradictory statements in the next two sentences.

Accordingly, it is manifestly unjustifiable and erroneous for USAC to have concluded that UTPhone violated the Oklahoma rule on the evidence of this email exchange; yet the Audit Report did exactly that. Indeed, on the basis of this inconclusive email correspondence, USAC should have reached the opposite conclusion, and exonerated UTPhone on this issue.

Indeed, a close review of OCC pronouncements regarding its own rule actually favors UTPhone's interpretation over the Audit Report's finding. Specifically, in an OCC *Notice of Inquiry* adopted last September—as the audit of UTPhone was being conducted—the OCC posed the following question: “Should ETCs be required to review eligibility documents when there is a recertification, since customers who signed up prior to June 2012 were only required to sign an affidavit that they qualified and were not required to show documentation of their eligibility during the federal recertification process that was to take place by December 31, 2012?”²⁷ Quite obviously, the OCC need not have asked this question if its rule is already clear that documentation must be reviewed annually at recertification, as the Audit Report now insists. Thus, the OCC and the Audit Report are at odds on this issue and finding.

Finally, in January of this year, the OCC issued a *Notice of Proposed Rulemaking* seeking, among other things, to amend the rule at issue in order “to clarify the requirements for reviewing documentation regarding continued eligibility for Lifeline support and establish a record keeping requirement for that documentation, in order to prevent waste, fraud and abuse.”²⁸ The proposed revised rule states:

165:59-9-5. Recertification. Each ETC, whether receiving Lifeline support from the Oklahoma Lifeline Fund and/or the federal Lifeline Fund, shall, annually, require each end-user subscriber to show documentation confirming their continued eligibility for the State or Federal Lifeline program. A copy of such documentation shall be retained by the ETC and made available for inspection by

²⁷ Oklahoma Corporation Commission, *Notice of Inquiry* in Cause No. PUD 201300159 (Sept. 12, 2013) at p. 1.

²⁸ Oklahoma Corporation Commission, *Notice of Proposed Rulemaking* in Cause No. RM 201400003 (Jan. 16, 2014) at p. 3 (emphasis added).

the Director of the Public Utility Division or his designee no later than March 1 of the year following the recertification year. The Director may accept access to a digital copy of the required documentation. The ETC shall retain a copy of the documentation for five (5) years.²⁹

It is strikingly evident that the OCC itself is unsure of what its current rule requires in terms of “documentation,” and therefore it has proposed a wholesale amendment of that section. Accordingly, USAC could not reasonably have found that UTPhone was required under the rule to review new documentation, over and above the annual recertification forms, to further confirm eligibility. Such an interpretation is belied by both the record underlying the Audit Report and by pronouncements of the OCC.³⁰ This finding of the Audit Report is clearly erroneous and must be reversed.

B. USAC Erred in Impermissibly Interpreting the Commission’s Policy on Subscribers Who Receive Service for Partial Months

The second finding is based on an impermissible and incorrect interpretation of Commission rules and should be vacated. USAC’s position is that when a customer receives

²⁹ *Id.* (proposed amended language in italics). On March 4, 2014, the OCC decided to table consideration of this and other proposed rule amendments.

³⁰ Even the proposed revisions to the rule are maddeningly unclear. The term “documentation” is too vague without further clarification because—as is evident from the USAC auditor’s questions to OCC staff—it could be interpreted as referring to the re-certification form itself rather than documentation demonstrating participation in a qualifying program or demonstrating that the applicant has the requisite income level. The proposed rule simply refers to “documentation confirming . . . [the subscriber’s] continued eligibility for the State or Federal Lifeline program.” The re-certification form itself contains information which, if satisfactorily completed, confirms eligibility. Moreover, the revisions propose to require ETCs to retain these “documents” for five years. If interpreted to refer to documents that demonstrate program participation or income level, then the proposed rule would be preempted by federal rules, which very explicitly *prohibit* ETCs from retaining such information. Specifically, the federal Lifeline rules provide that ETCs “[m]ust not retain copies of the documentation of a prospective subscriber’s income-based eligibility . . . [or] program-based eligibility for Lifeline services.”³⁰ See *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713, (1985) (“Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when ‘compliance with both federal and state regulations is a physical impossibility’”); see also *Printz v. United States*, 521 U.S. 898, 913, 117 S. Ct. 2365, 2374, 138 L. Ed. 2d 914 (1997) (finding uncontroversial “the duty owed to the National Government, on the part of all state officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law.”).

The draft regulation, therefore, should be interpreted to avoid such a result, meaning that the term “document” should be interpreted to refer to the re-certification form itself. This then suggests that the more reasonable interpretation of the term as used in the current rule is also to refer to the re-certification form rather than documents demonstrating requisite program participation or income level.

Lifeline service during a period that falls within more than one calendar month, but for less than 30 days total, an ETC may not claim Lifeline support for that customer on more than one FCC Form 497. However, USAC does not and cannot point to any Commission rule or decision supporting this novel position. The Commission's rules bar USAC from making policy or interpreting unclear provisions of Commission rules.³¹ The second finding, therefore, must be vacated.

The Commission first addressed the question of whether an ETC may claim Lifeline support for a customer who receives service for a partial month in its 2011 *Lifeline Reform NPRM*.³² The origin of this question was a February 23, 2010 letter from Richard A. Belden, then CEO of USAC, to Sharon Gillett, then Chief of the Commission's Wireline Competition Bureau, in which Mr. Belden asked the Commission for guidance on the issue. Specifically, Mr. Belden wrote:

USAC notes that audits of the low-income program have identified carriers that have not prorated requests for Lifeline support amounts for customers whose Lifeline service is initiated or terminated mid-month, and asks the Commission what recovery action, if any, USAC should take against an ETC that has failed to pro-rate support claims for partial-month Lifeline customers.

The Commission teed up this question in paragraph 67 of the *Lifeline Reform NPRM*, where the Commission proposed a new rule that would require ETCs to "report partial or pro rata dollars when claiming reimbursement for Lifeline customers who receive service for less than a month." It then sought comment on this proposal.³³

Ultimately, the Commission declined to adopt this proposal, and the resulting *Lifeline Reform Order* does not impose any requirement that ETCs claim pro rata support amounts.³⁴

³¹ 47 C.F.R. § 54.702(c).

³² See *Lifeline Reform NPRM*, *supra* note 8.

³³ *Id.*, 26 FCC Rcd 2770, 2793-94 (2011).

³⁴ *Lifeline Reform Order*, *supra* note 6.

The Commission subsequently took a separate, affirmative action to eliminate the question of pro rata claims when it revised Form 497 to remove the line on which carriers could have reported partial support amounts (*i.e.*, the former “line 9”).³⁵ There is therefore no way for an ETC to make a partial claim even if it tried to. The Commission’s decision not to adopt a pro rata claim rule, combined with the revision to Form 497, demonstrates its intent to permit carriers to claim for a full month of funding for all customers provided Lifeline service during the month. The Commission has never indicated that it intended to apply a different standard to subscribers whose last support claim is based on a billing cycle that straddles two calendar months.

Unable to base a recovery on a pro rata theory, USAC instead claims that finding #2 is based on the rule that Lifeline ETCs pass through to their subscribers the support that they receive (47 C.F.R. § 54.403(a)(1)), and its finding that “after these subscribers disconnected, the Beneficiary continued to claim these subscribers on the Form 497 for periods in which the subscribers were not active and did not receive any Lifeline support.”³⁶ Despite how it was described in the Audit Report, USAC actually made this finding based on whether the subscriber in question de-enrolled before or after the end of the billing cycle of the subscriber rather than whether there were periods during the month when the subscriber was inactive.

³⁵ Compare *FCC Form 497*, July 2008 Edition (available at <http://www.usac.org/res/documents/li/pdf/forms/Form-497-FCC-OMB-USAC--NO-calculations.pdf>) with *FCC Form 497*, April 2012 Edition (available at <http://www.usac.org/res/documents/li/pdf/forms/FCC-form-497-082012.pdf>).

³⁶ Audit Report at 13.

To illustrate its position, USAC included the following graphic in the Audit Report:

December 2012		January 2013	
Billing Cycle \$9.25-\$36.25 passed through to subscriber			
12/21/2012 Billing cycle start date		1/2/2013 Disconnect date	1/20/2013 Billing cycle end date
Subscriber Lifeline Program support amount claimed on December 2012 Form 497		Same subscriber Lifeline Program support amount also claimed on January 2013 Form 497	

USAC’s argument fails for several reasons. First, its statement that UTPhone continued to claim subscribers for periods in which they were not active is incorrect. Because ETCs are not required or even permitted to make pro rata claims for Lifeline support, claims may instead be based on accounts in which the subscriber was active at any point in the month. The relevant “period” therefore is the month, not some subset of days in that month. The sample subscriber in the graphic was claimed in both December and January because he or she was active in both months.

Second, USAC’s apparent position is that an account must be active until a specific date in order to qualify for support. Here, that day is January 21—the first day following the end of the last billing cycle. The Commission rule cited by USAC as the legal basis for its finding, section 54.403(a)(1), says nothing about billing cycles, de-enrollment dates or periods of inactivity.³⁷ USAC’s “billing cycle rule” has never been addressed, let alone adopted, by the

³⁷ Section 54.403(a)(1) provides “[f]ederal Lifeline support in the amount of \$ 9.25 per month will be made available to an eligible telecommunications carrier providing Lifeline service to a qualifying low-income consumer, if that carrier certifies to the Administrator that it will pass through the full amount of support to the qualifying low-income consumer and that it has received any non-federal regulatory approvals necessary to implement the rate reduction.” 47 C.F.R. § 54.403(a)(1).

Commission. It is merely USAC's gloss on the Commission's rules. As such it is impermissible under Commission rules and cannot be binding on any ETC, including UTPhone.

Third, the specific date on which USAC bases its finding for any particular subscriber is a moving target. Some ETCs begin and end the billing cycles of all their subscribers on the same day. The norm, however, is that carriers spread customers' billing cycles throughout the calendar month. Especially in the case of prepaid providers, billing cycles often are set by the date on which the subscriber enrolled or changed service packages. Within the entire subscriber base of one of these providers, there are likely as many billing cycle start- and end-dates as there are days in the month. Basing Lifeline support claims on this myriad of billing cycles would be extremely burdensome, and would require the ETC to create a unique tracking mechanism for each subscriber. That is the only way an ETC could possibly comply with the "rule" that USAC is seeking to enforce. For most ETCs, complying with USAC's demands would mean manually sorting through tens of thousands of subscribers (which is an unworkable proposition), followed by expensive programming changes to their systems to implement a complex, computerized tracking mechanism.

Fourth, even assuming for argument's sake that USAC were permitted to adopt its own interpretations of the Commission's rules, the interpretation it seeks to impose would lead to widely varying results among accounts that are inactive for some portion of the same calendar month. Following the example from USAC's graphic, suppose that a second account with the same billing cycle was disconnected on January 21. This would leave a ten-day period during which this second account was inactive, yet in USAC's view, it would be permissible to claim this account because it was disconnected after the end of the billing cycle. Yet both accounts were inactive for some portion of the month, during which neither subscriber received Lifeline

support. The Commission has created a system for claiming Lifeline support that is based on calendar months, and it does not recognize or allow claims of support for partial months only. In light of the Commission's refusal to adopt a pro rata system for partial claims in a calendar month, there is no rational basis for USAC's policy of denying support "for periods [of the calendar month] in which the subscribers were not active and did not receive any Lifeline support." It is the Commission's rules—which are based on the calendar month—that govern despite USAC's insistence on hair-splitting.

UTPhone passed through the Lifeline support for all months or partial months in which its subscribers' accounts were active. UTPhone's Lifeline subscribers receive unlimited local minutes. There is no double-counting or double-recovery by UTPhone; rather, the subscriber has the full benefit of the subsidy for the entire time his or her account remains active. There is appropriately no requirement that an ETC tie its claims to a subscriber's billing cycle or service period, and like most prepaid service providers, UTPhone does not do so.

USAC's position would be especially problematic for wireless ETCs, which typically load their subscribers' handsets with a full allotment of minutes at the beginning of a billing cycle or at set dates every month.³⁸ In the case of a service that provides a finite number of minutes, it is entirely possible that a subscriber could consume his or her full allotment of minutes within the first week, or conceivably on first day of a billing cycle. But under USAC's theory, if this subscriber de-enrolled before the end of a 30-day billing cycle that happens to straddle two calendar months, the ETC would not be permitted to claim the last month of service. Take, for example, a subscriber that enrolled on January 15, 2014 for a 500 minute plan, and received his full allotment of minutes on that day and thereafter on the 1st of each month. The

³⁸ Some wireless ETCs stagger multiple load dates throughout the month to avoid overloading their systems by loading all minutes to all handsets on the same day.

ETC issued bills on January 15 and then bills on the 15th of each month thereafter (reflecting charges already paid). Then, during the period of June 1-13, the subscriber used all 500 minutes that had been allocated on June 1. On June 14, he de-enrolled. Under USAC's theory, the ETC could not claim the subscriber for the month of June even though he received and used a full allotment of minutes in June simply because the person de-enrolled prior to the end of the then-current billing cycle. This example demonstrates why billing cycles do not provide a meaningful benchmark by which to evaluate the appropriateness of the claim for subsidy in the context of a prepaid service, especially for a wireless carrier that may load minutes on a schedule that is not driven by billing cycles.

In summary, by declining to adopt a pro rata requirement and by eliminating ETCs' ability to claim pro rata support amounts on the Form 497, the Commission has instituted a rule that ETCs may claim the full support amount for any month in which a subscriber is active. Any other reference point, including the subscriber's billing cycle, is irrelevant. USAC's second finding is based on an impermissible and contrary interpretation—an *ultra vires* act—that, given the Commission's prohibition against interpretation or policy-making by USAC, cannot be supported or sustained.³⁹

C. De-enrollment After the End of the Re-certification Process Is Subject to a Separate Deadline that UTPhone Met

The fifth finding should be vacated as contrary to Commission rules and instructions. As UTPhone stated in its response to the draft audit report, USAC's finding improperly conflates the annual Lifeline re-certification process with the de-enrollment process. While a subscriber's failure to re-certify for Lifeline benefits necessarily leads to his or her de-enrollment from the

³⁹ 47 C.F.R. § 54.702(c).

program, the two processes are distinct and sequential, and the Commission's rules expressly assign them different deadlines, both of which UTPhone indisputably met.

The rule governing the annual re-certification process, 47 C.F.R. § 54.410(f), requires ETCs to annually re-certify the eligibility of each Lifeline subscriber. For the 2012 re-certification process, the Wireline Competition Bureau explained in a Public Notice that the re-certification process must be completed by December 31, 2012:

ETCs and state agencies must re-certify their base of subscribers as of June 1, 2012 and must complete the re-certification process by December 31, 2012.⁴⁰

Under Commission rules, an ETC is to begin de-enrollment procedures once the re-certification process is complete. Subsection 54.410(f)(5) provides that if the ETC is unable to re-certify a subscriber, it must then comply with the de-enrollment requirements of § 54.405(e)(4), which explicitly directs ETCs to de-enroll subscribers from the Lifeline program “within five business days after the expiration of the subscriber’s time to respond to the re-certification efforts.”⁴¹ The Public Notice explains that the de-enrollment process was required to begin by December 31, 2012:

Each ETC must report the results of its re-certification process to the Commission and USAC by January 31, 2013 using FCC Form 555. The re-certification process is not considered “complete” until the ETC has de-enrolled all subscribers that failed to respond to a re-certification request or are no longer eligible, or where a database query by the ETC or state agency indicates the subscriber is no longer eligible and the subscriber has not provided a valid re-certification pursuant to section 54.410(d). In those states where state agencies perform re-certification, state agencies must provide sufficient notice to each ETC so that the ETC can *initiate* all de-enrollments by December 31, 2012 and can file its annual recertification report by January 31, 2013. For 2013, an ETC may elect to have USAC undertake that ETC’s re-certifications.⁴²

⁴⁰ *Wireline Competition Bureau Reminds Carriers that They Must Re-Certify Eligibility of All Lifeline Subscribers by December 31, 2012*, Public Notice, 27 FCC Rcd 12327 (WCB Oct. 11, 2012) at 1.

⁴¹ 47 C.F.R. §§ 54.410(f), 54.405(e)(4).

⁴² *Id.* at 3 (emphasis added).

Under the plain meaning of section 54.405(e)(4) of the Commission’s rules, ETCs then had five business days to complete the de-enrollment process.⁴³

UTPhone’s interpretation of these rules in the 2012 re-certification process, therefore, was not only an entirely reasonable one—it was the one prescribed by the Commission: the process of contacting subscribers *and* obtaining re-certifications was completed by December 31, 2012 in compliance with section 54.410(f). It then undertook the process of initiating and completing the de-enrollment process by January 5, 2013, in compliance with section 54.405(e)(4).

Astonishingly, USAC disagrees, finding that UTPhone had been required to both re-certify all subscribers and de-enroll those it was unable to re-certify by the same date—December 31, 2012. USAC relies on a novel interpretation of a sentence in the above paragraph of the Public Notice rather on the Commission’s rules, to wit: “[t]he re-certification process is not considered ‘complete’ until the ETC has de-enrolled all subscribers that failed to respond to a re-certification request or are no longer eligible.” This interpretation of the Public Notice’s instructions simply cannot be squared with the unequivocal language of the Commission’s rules or even the remainder of the Public Notice, which differentiates between re-certification (the process of contacting subscribers and determining their continued eligibility for Lifeline) and de-enrollment (the process of removing from the rolls those subscribers who failed to re-certify). That distinction is crystal clear in sections 54.410(f) (governing re-certification) and 54.405(e)(4) (governing de-enrollment, to be completed “within five business days after the expiration of the

⁴³ 47 C.F.R. § 54.405(e)(4).

subscriber's time to respond to the re-certification efforts").⁴⁴ It is even clear in the Public Notice itself, which specifies that while re-certification efforts should be completed by December 31, 2012, de-enrollment efforts must be "initiated" by December 31, 2012. Yet under its interpretation in this finding, USAC would have to believe that all de-enrollments must be both initiated and completed on the same day.

That the stray sentence fragment cited by USAC might, in isolation, be ambiguous is not material. USAC acknowledges, as it must, that the Commission's rules control. It claims that the Public Notice is also part of the "Rules," but provides no support for the novel contention that the instructions contained in the Bureau-released Public Notice have equal authority with the Code of Federal Regulations (which they do not) or that in the case of a conflict between the rules and the Public Notice, USAC is entitled to deem that the Public Notice trumps the rules (which it may not).

Even if the Commission's rules were unclear, USAC is not entitled to make policy or interpret unclear provisions.⁴⁵ Even if USAC believes that the Bureau's Public Notice was meant to contradict the Commission's rules 54.410 and 54.405, it is not permitted to act on that interpretation or to enact the policy it claims to discern between the lines of the Public Notice. Instead, USAC is required, just as UTPhone is, to follow the letter of the applicable regulations. Those regulations clearly mandate a re-certification process to be followed by a de-enrollment process. The Public Notice instructed ETCs to finalize their re-certification efforts on December 31, 2012, and to begin the subsequent de-enrollment process on the same day. UTPhone did *exactly* that, completing the required de-enrollments on January 5, 2013, in accordance with

⁴⁴ *Id.*

⁴⁵ 47 C.F.R. § 54.702(c).

section 54.405(e)(4). Nothing in the Commission's rules or instructions required UTPhone to complete this process earlier. USAC's attempts to impose an earlier deadline on UTPhone, therefore, must be vacated.

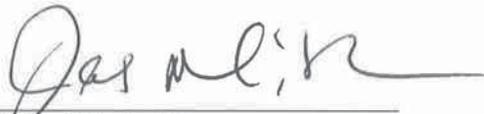
CONCLUSION

In light of the foregoing, UTPhone respectfully requests that the Bureau reverse findings 1, 2, and 5 of USAC's Audit Report.

Respectfully submitted,

UTPHONE, INC.

By:



James M. Smith
Danielle Frappier
Adam Shoemaker
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006-3401
(202) 973-4200

Its Attorneys

June 27, 2014

Exhibit A

From: "Jennifer Crowe" <jcrowe@usac.org>

To: "Jason Ledlow" <jason@utphone.com>

Subject: Lifeline Audit: Email Communication with OK Corporate Commission

Jason,

I received an email yesterday from Danielle requesting a copy of the email from Maribeth Snapp at the OCC cited in footnote 3 of the UTPhone audit report. Please see attached for the reference email.

Thank you,

Jen Crowe

Supervisor | Internal Audit Division

USAC

(202) 772-6257 (ph)

jcrowe@usac.org <mailto:jcrowe@usac.org> | www.usac.org <http://www.usac.org/>

The information contained in this electronic communication and any attachments and links to websites are intended for the exclusive use of the addressee(s) and may contain confidential or privileged information. If you are not the intended recipient, or the person responsible for delivering this communication to the intended recipient, be advised you have received this communication in error and that any use, dissemination, forwarding, printing or copying is strictly prohibited. Please notify the sender immediately and destroy all copies of this communication and any attachments.

From: [Maribeth Snapp](#)
To: [AJ Kimi](#)
Cc: [Peter Lischick](#); [Grace Cruz](#); [Mark Argenbright](#)
Subject: RE: Oklahoma State Rules
Date: Tuesday, November 12, 2013 7:01:37 PM
Attachments: [wireless ETC rule changes 7-11-13.doc](#)
[wireless ETC rule change 7-12-12.doc](#)
[wireless ETC rules adopted 2004.pdf](#)
[Wireless ETC rule changes effective 7-1-05.doc](#)

AJ,

I apologize for my delay in getting this information to you. Initially, I was having difficulty locating a copy of the Oklahoma Register, where the 2004 rules were published. The 2004 rules reflect the initial rules that were in effect, with few changes, until 2012. I finally recalled that the Commission has documents, in-house, that reflect the initial rules from 2004. After that, there was a change to a couple of rules in 2005, and then there were no changes until 2012 and again in 2013.

The pdf document reflects the changes that were made in 2005. Unfortunately, when I did a cut-and-paste of the document from the Oklahoma Register, the rule numbers were lost in the left margin. Although I typed in the full name of the rule numbers that were changed, you may want to review the original in the Oklahoma Register, located at <https://www.sos.ok.gov/oar/online/viewRegisters.aspx> The rule changes are in Volume 22, Number 16. Probably the most significant change was to the minimum service rule, 165:55-23-11, which was modified in 2005 to require unlimited local calling for Lifeline subscribers. A carrier may only modify that by Commission order that grants a waiver of that rule.

With regard to the comments in response to the questions we discussed, you have accurately reflected my answers to your questions below.

Please let me know if I can provide additional information.

Maribeth D. Snapp

Telecom Policy Director
Oklahoma Corporation Commission
Public Utility Division
Phone: (405) 522-1409
Fax: (405) 521-3336
E-mail: M.Snapp@occemail.com

From: AJ Kimi [mailto:akimi@usac.org]
Sent: Wednesday, October 30, 2013 9:20 AM
To: Maribeth Snapp
Cc: Peter Lischick; Grace Cruz
Subject: RE: Oklahoma State Rules

Hi Maribeth,

I hope all is well. I just wanted to see if you were able to locate the red line rules dating back to 2008 for us? Also, if you wouldn't mind confirming our understanding below it would be greatly appreciated.

Thanks,

A.J. Kimi
Senior Internal Auditor
202-572-5707

From: Anthony Kimi
Sent: Friday, October 18, 2013 4:03 PM
To: m.snapp@occeemail.com
Cc: Grace Cruz; Anitha Damarla
Subject: Oklahoma State Rules

Maribeth,

Thank you again for taking the time to meet with us regarding the Oklahoma Lifeline rules. I just wanted to follow up with an email to confirm our understanding based on our conversation:

- 1) On page 3 and 4, we did not see NSLP listed for non-tribal subscribers or Household income at 135% of the federal poverty guidelines. Should the carriers in the state be using these two criteria to determine subscriber eligibility?

Based on 165:59-9-3, the income limit of 135% of the federal poverty guidelines is not considered for Non-tribal or tribal state lifeline support. Also, the National School Lunch Program (NSLP) is not considered for eligibility purposes for Non-tribal state lifeline support.

- 2) On page 4 (165:59-9-3(h)) states that "each telecommunications service provider with approved Lifeline Service tariffs shall advertise the availability of the Lifeline Service Program within its exchange(s) or service territory on, at a minimum, an annual basis." Has the state provided guidance to the carriers about this advertising requirement? This appears to be more specific than the federal Rules.

Carriers are to advertise within its exchange(s) or service territory at least annually.

- 3) On page 5 for **165:59-9-5 Recertification** it states "each telecommunications carrier that provides service to residential customers who qualify for participation in the Lifeline Service Program shall, annually, require documentation for each Lifeline Service Program participant, for the purpose of determining their continued eligibility for Lifeline Service Program credits." Can you provide clarification on what the "documentation" consists of? Does it consist of just the recertification form, or does the state expect the carriers to review eligibility proof, too?

As it states above, carriers are required to review for continued eligibility the eligibility documents for each subscriber. Oklahoma currently has a mixture of carriers who actually review the eligibility documents and others that re-certify via a form stating they are still eligible or via contact over the phone. In the event that a carrier does not review the eligibility documents, would this preclude the carrier from receiving State Lifeline or Federal Lifeline support?

Thanks,

Anthony Kimi
Senior Internal Auditor Universal Service Administrative Company
2000 L Street NW, Suite 200, Washington, DC 20036 www.usac.org
(p) 202-572-5707 (f) 202-776-0080 akimi@usac.org

The information contained in this electronic communication and any attachments and links to websites are intended for the exclusive use of the addressee(s) and may contain confidential or privileged information. If you are not the intended recipient, or the person responsible for delivering this communication to the intended recipient, be advised you have received this communication in error and that any use, dissemination, forwarding, printing or copying is strictly prohibited. Please notify the sender immediately and destroy all copies of this communication and any attachments.