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Comprehensive Low-Income Program Reform

The Federal Communications Commission (“FCC” or “Commission”) released an Order on February 6, 2012 to comprehensively reform the low-income program of the Universal Service Fund to eliminate Link Up in non-Tribal areas; impose uniform eligibility, certification and verification requirements in part through the use of duplicates and eligibility databases; begin the process of modernizing the program to shift to supporting broadband and constrain the growth of the \$2.1 billion low-income fund by \$200 million in 2012 and by an estimated \$2 billion over the next three years. Many of the new rules will be effective 30 days after publication of the Order in the Federal Register, however, there will be important deadlines for eligible telecommunications carriers (“ETCs”) throughout the year. At the same time, the FCC released a Further Notice of Proposed Rulemaking (“FNPRM”) seeking comment on a number of issues presented by its reform of the program. Comments and reply comments on the issues raised in the FNPRM are due 30 days and 60 days, respectively, after publication of the FNPRM in the Federal Register.

The Elimination of Link Up Support in Non-Tribal Areas

The Link Up program was created in 1987 to address the barriers faced by low-income consumers when trying to obtain telephone service, and was extended to wireless ETCs in 2003. It permitted ETCs to receive up to \$30.00 to offset half of the customary charge for commencing telecommunications service to eligible consumers. Funding to the program has grown by over 230 percent in the last three years largely due to the introduction of Lifeline-only wireless (and often prepaid) ETCs to the market.

In the Order, despite Link Up’s success, the Commission decided to eliminate the program to shift funding to improve and modernize the Lifeline program. Therefore, ETCs will not be permitted to claim Link Up reimbursements for any customers enrolled in the Lifeline program after **March 31, 2012**. The cited reasons for this change included the existence of several large wireless

Lifeline-only ETCs that provide Lifeline service without charging customers an activation fee or collecting Link Up, concerns that Link Up provided incentives to maximize reimbursements from the low-income fund, and concerns that Link Up is not an efficient means of increasing phone subscribership. Finally, due to the continuing deployment and access challenges on Tribal lands, the Commission determined that ETCs can still claim enhanced Link Up support for eligible residents, but only if the ETC also receives high-cost support on Tribal lands.

Phase Down and Elimination of Toll Limitation Service (“TLS”) Support

TLS includes both toll blocking (prevents long distance and international calls for which the subscriber would be charged) and toll control (limits the amount of long distances charges that can be incurred per month) and the FCC has historically required ETCs to provide it for free to low-income consumers. Due to decreases in long distance rates, the Commission has decided to phase down and then eliminate support for TLS. First, as of April 2012 disbursements, TLS support will no longer be available for subscribers who have a Lifeline calling plan that includes a set number of calling minutes that can be used for local or domestic long distance. Second, TLS reimbursements will be reduced to \$3.00 per month per TLS subscriber from April 1, 2012 through the end of the year. Support will then be reduced to \$2.00 in 2013 and eliminated as of January 1, 2014.

Facilities, Blanket Forbearance for Resellers and Compliance Plans

In the November 2011 Connect America Fund (“CAF”) order, the FCC revised the definition of supported services

for purposes of ETC designation to remove, among others, directory assistance and operator services from the list of functionalities that an ETC could provide in order to be considered a facilities-based provider of “voice telephony service.” This Order conforms the Lifeline rules, thereby precluding many Lifeline-only ETCs from meeting the statutory requirement that an ETC provide the supported service using its own facilities or a combination of its own facilities and resale. In the subsequent CAF Order on Reconsideration, certain ETCs, which had been designated as such prior to December 29, 2011, were given a grace period until **July 1, 2012** to continue to receive Lifeline reimbursements and adjust their business plans as necessary.

In the Lifeline Order, the Commission determined to grant blanket forbearance from the “own facilities” requirement to Lifeline-only ETCs, as long as they: (1) comply with certain 911 requirements as of the effective date of the Order; and (2) receive approval of a compliance plan from the Wireline Competition Bureau (“Bureau”).

- ETCs will continue to receive Lifeline reimbursements pending approval of their compliance plans in the states in which they currently serve Lifeline subscribers, as long as they submit a compliance plan by **July 1, 2012**.
- No reimbursements will be available for states where the ETC was not designated as of December 29, 2011 until the ETC’s compliance plan is approved. Carriers with ETC applications pending at the FCC or the states must file compliance plans with the Bureau. The Bureau must approve an ETC’s compliance plan prior to its receipt of additional state ETC designation grants.

- The Order says no further state or federal ETCs will be designated after December 29, 2011, but we are aware that several states have in fact granted ETC designations during that time. We expect that ETCs receiving designations after December 29, 2011 may have difficulty collecting Lifeline or Link Up disbursements from the Universal Service Administrative Company (“USAC”) prior to Bureau approval of a compliance plan.

A compliance plan must outline the measures the ETC will take to implement the obligations contained in the Order, including enrollment procedures and submitting forms for reimbursements, materials related to initial and ongoing certifications and sample marketing materials, as well as further safeguards against waste, fraud and abuse the Bureau may deem necessary. A compliance plan also must include a detailed description of how the carrier offers service, the geographic areas in which it offers service and a description of the carrier’s various Lifeline service plan offerings, including rates, number of included minutes and types of plans available.

Uniform, Interim Lifeline Support Amount

The Order removes the old four tier system for determining federal support amounts for Lifeline and replaces it on an interim basis with a flat \$9.25 reimbursement, which will begin with April 2012 disbursements. An additional \$25.00 per month is available for serving an eligible resident of Tribal lands. The Commission seeks further comment on these amounts in the FNPRM discussed below.

Consumer Eligibility and Enrollment

The Order now requires all states to utilize, at a minimum, the income and program eligibility criteria currently utilized in federal default states for initial and continuing eligibility. ETCs must develop policies and procedures by **June 1, 2012** to ensure that consumers are eligible and continue to be eligible for Lifeline benefits. Somewhat different rules apply if the state Lifeline administrator or other state agency is responsible for eligibility for enrollment and/or re-certifications.

Consumer Eligibility. To qualify for support as of **June 1, 2012**,

- The consumer’s income must be at or below 135% of the Federal Poverty Guidelines or the consumer must receive benefits from one of seven federal assistance programs, including the most often used Medicaid or the Supplemental Nutrition Assistance Program (SNAP).
- The consumer cannot already receive Lifeline service, nor can anyone in his or her household. The Order codifies the “one-per-household” rule and defines a “household” as any individual or group living together at the same address as one economic unit, *i.e.*, all adults contributing and sharing in the income and expenses of a household (families).

Certification Form. An ETC may not seek reimbursement unless it receives a certification of eligibility from the prospective subscriber. The ETC’s certification form must:

- Include certain disclosures to the consumer, including that only one Lifeline service is permitted per household (and defining household) and that making false statements to obtain a benefit can result in fines, imprisonment, de-enrollment or being barred from the program.
- Collect certain information from subscribers, including date of birth, the last four digits of the Social Security number and the name of the qualifying program (if applicable).
- Require subscribers to make certifications under penalty of perjury, including that the subscriber is eligible for the benefit, is not already receiving a Lifeline benefit, will notify the carrier within 30 days if the subscriber is no longer eligible or moves to a new address, and the subscriber acknowledges the re-certification requirement, which can result in de-enrollment if not completed. ETCs can use interactive voice response systems for this purpose.

Database or Proof. An ETC also may not seek reimbursement unless it confirms the subscriber's eligibility (and retains accurate records regarding the source used) by: (1) accessing an income database if possible; or (2) viewing proof of eligibility, such as a Medicaid or SNAP card. Note that the ETC should not retain this proof. There are numerous information privacy concerns with doing so.

Activation. An ETC offering Lifeline service "that does not require the [ETC] to assess or collect a monthly fee from its subscribers" (*i.e.*, prepaid) may not receive Lifeline support for a subscriber until the subscriber activates the

service. Activation can include any use of the service, such as making an outbound call, receiving a call from someone other than the ETC or purchasing additional minutes.

Annual Eligibility Re-certification. ETCs must conduct annual eligibility re-certifications of their entire customer base on a rolling basis throughout the year by: (1) querying the appropriate eligibility or income databases; or (2) obtaining a signed certification from the subscriber meeting the certification requirements discussed above. ETCs can use interactive voice response systems or text messages for annual re-certification and they need not view proof of eligibility. If the ETC cannot re-certify the subscriber within 30 days, it must de-enroll the subscriber according to the process described below (and subscribers must be informed of this possibility). The results of this re-certification must be submitted annually to USAC and the designating state commission.

In addition, ETCs must conduct a special re-certification this year. All ETCs must re-certify their existing Lifeline customer base as it exists on **June 1, 2012** by the end of 2012 and report the results to USAC by **January 1, 2013**. Further, the current rule requiring annual re-certifications is replaced as of the effective date of the new rule. Therefore, ETCs' annual verifications due this year pursuant to the old rule are no longer required, unless it is an independent requirement of the state ETC designation order.

The Order directs USAC to work with ETCs and the Bureau to develop a plan for USAC to conduct annual re-certifications starting in 2013 at the option of ETCs.

Otherwise, ETCs must continue to file re-certification reports annually on January 31st.

ETC Annual Certification to USAC. ETCs annual certification to USAC, due on **January 31, 2013** and annually thereafter, must be signed by an officer and certify under penalty of perjury that the ETC: (1) has procedures in place to confirm consumer eligibility, (2) is in compliance with the certification procedures; and (3) has obtained a valid certification form for each consumer for whom the ETC is seeking a reimbursement.

Marketing Materials

Within six months of the effective date of the Order, all ETC “marketing materials” (*i.e.*, all media, including Internet, outdoor signage, application and certification forms) must inform consumers in clear, easily understood language:

- that the offering is a Lifeline-supported service;
- that only eligible consumers may enroll in the program;
- what documentation is necessary for enrollment;
- that the program is limited to one benefit per household, wireline or wireless; and
- that Lifeline is a government benefit program and consumers who willfully make false statements in order to obtain the benefit can be punished by fine or imprisonment or barred from the program.

The Role of Databases for Duplicates and Enrollment

The Order directs USAC to establish a National Accountability Database (“duplicates database”) to detect and prevent duplicative support on an ongoing basis in the Lifeline/Link Up program. The Commission expects that use of a duplicates database will greatly facilitate the elimination and prevention of duplicate claims for benefits and thus will achieve significant cost savings for the program.

States can opt-out of the duplicates database requirement if they certify one time to the Commission that they have a comprehensive system in place to check for duplicative federal Lifeline support that is as at least as robust as the processes adopted by the Commission and that covers all ETCs operating in the state and their subscribers. Where states have exercised their opt-out rights, ETCs in those states have no obligations with respect to the duplicates database.

The duplicates database will contain information on Lifeline/Link Up subscribers, including the name, address, and phone number of each subscriber, the subscriber’s service initiation and de-enrollment dates (when de-enrollment occurs), the means through which the subscriber qualified for support, the last four digits of the Social Security number and date of birth of the subscriber, and the amount of Lifeline support received by the subscriber each month. ETCs are required to supply this information to the duplicates database and update it as appropriate. The Commission expects the duplicates database to be operational as soon as possible and no later than February 6, 2013.

Once the duplicates database is operational and has been populated with the initial subscriber information necessary to check for duplicative support, USAC will identify those subscribers currently receiving duplicative support and resolve those claims pursuant to a “scrubbing” process similar to the process currently used by USAC for resolving duplicate claims. Thereafter, ETCs will be required to check the duplicates database and determine whether the applicant is already receiving Lifeline/Link Up benefits from another ETC, or whether another individual at the applicant’s address is currently receiving Lifeline/Link Up-supported service. If a carrier does not query the duplicates database prior to signing up a consumer or has not received notice from a state Lifeline administrator or its agent that it has performed a query on behalf of the ETC, the ETC may not receive Lifeline benefits for that consumer, regardless of whether the ETC has already provided a Lifeline discount to the consumer.

The Order also directs the Bureau and USAC to establish an eligibility database, *i.e.*, an automated means to determine Lifeline eligibility. The eligibility database must be in place for the three most common programs through which consumers qualify for Lifeline/Link Up – Medicaid, the SNAP, and Supplemental Security Income (“SSI”) – no later than the end of 2013. The Commission states that it must gather additional information, including information regarding how to facilitate the access of eligibility data from state social service agencies and existing federal databases and how to manage consumer privacy risks, before implementing the eligibility database. Accordingly, the eligibility database is a primary focus of the FNPRM (discussed below). The Order directs the Bureau to reach out to the other federal government agencies responsible

for the qualifying programs to help facilitate access to the data necessary to determine subscriber eligibility. The Order also directs the Bureau to host a series of workshops including non-governmental entities such as ETCs, technical experts, and database vendors to identify pragmatic solutions to issues regarding the establishment of an eligibility database.

De-Enrollment and Non-Usage

Under the new rules, there are several situations where ETCs are required to de-enroll subscribers from the program.

- **Ineligibility.** Generally, if an ETC has a “reasonable basis” to believe that a subscriber no longer meets the eligibility criteria for Lifeline, the ETC must notify the subscriber of impending termination of service and allow the subscriber 30 days to demonstrate eligibility pursuant to the annual re-certification requirements described above before terminating service.
- **Duplication.** If an ETC is informed by USAC that a subscriber is a duplicate (*i.e.*, that the subscriber is receiving Lifeline service from more than one ETC) or that more than one member of the subscriber’s household is receiving a Lifeline benefit, then the ETC must de-enroll the subscriber within **5 business days**. Note that there is a “scrubbing” process to identify a default ETC for such duplicates pursuant to the duplicates database, however, the Order does not address how to determine which ETC’s service the subscriber can retain during the period before the database is up and running.

- **Non-Usage.** If a prepaid (as defined above) ETC's subscriber does not "use" the Lifeline service for 60 consecutive days, the ETC must send a notice of service termination giving the subscriber 30 days to respond before terminating service. "Use" of a service includes making payments, completing an outbound call, receiving a call from someone other than the ETC or its agent or responding to the ETC that the subscriber wants to keep the service. Prepaid ETCs must notify customers at service initiation regarding the non-transferability of the service and the 60 day non-usage de-enrollment. Further, prepaid ETCs must update the national database within one business day of de-enrolling a subscriber for non-use and submit a non-usage de-enrollment report annually to USAC.
- **Re-certification.** If a subscriber does not respond to an ETC's annual re-certification attempts within 30 days, the ETC must send the subscriber a notice giving the subscriber another 30 days notice to respond before being de-enrolled.

The Reimbursement Process

The Order sets forth a new USAC reimbursement process to shift disbursements from payments based on projected subscriber counts to actuals beginning on **July 1, 2012** with completion by October 2012. ETCs can undertake a three month transition to actuals anytime after the rules are effective, but they must notify USAC which study areas to transition during which month by **June 1, 2012** and they must complete the transition by the end of October 2012. By October, all ETCs (except those that choose to file quarterly) will file FCC Form 497 by the eighth day of

the month and will receive disbursements the same month. (ETCs can start as of July 1, 2012.) Finally, there is a rolling one year deadline to submit claims, which is shortened from 15 months.

Audits and Enforcement

Pursuant to the new audit rules, ETC's drawing \$5 million or more annually from the fund (as determined at the holding company level) must hire an independent licensed certified public accounting firm to conduct a biennial audit according to government accounting standards (GAGAS) to assess the ETC's overall compliance with the program's requirements. Reports must be submitted to USAC, the FCC and relevant states, and will not be considered confidential. To this end, ETCs will be required to report annually the the names of the company's holding company, operating companies and affiliates, and any branding, as well as universal service identifiers for each entity.

In addition, USAC will audit all new carriers (carriers activating a new Study Area Code to provide Lifeline service for the first time) within the first 12 months of seeking support. This will include ETCs that received their first Study Area Code in 2011 and the audit will be conducted for the first study area the ETC was designated after the first annual re-certification is completed.

When USAC finds a violation or inadequate documentation, it shall notify the ETC of the failure and give it 30 days to provide the necessary documentation and comply. USAC has the discretion to suspend further payments to the carrier pending USAC's receipt and evaluation of the carrier's response to the notification, but only with

respect to Study Area Code where the ETC is operating in violation. Therefore, if an ETC receives a notice alleging violations in one state or Study Area Code, USAC cannot suspend all payments in other states or Study Area Codes.

Modernization and Broadband

In order to modernize the low-income program and transition to support for broadband, the Order: (1) permits ETCs to allow qualifying consumers to apply Lifeline discounts to bundled packages of voice and data services, including plans that include optional calling features (*e.g.*, caller ID, call waiting, voicemail, three-way calling); and (2) initiates a broadband pilot program.

With respect to the broadband pilot, the Order authorizes USAC to disburse up to \$25 million to ETCs for an 18 month pilot program that will select a relatively small number of varied projects to test the impact on broadband adoption. The Bureau will release a Public Notice regarding application procedures and other details within 15 days of Paperwork Reduction Act approval. Although many details presently are unknown, the Order states that the Bureau will select a diversity of projects with different amounts and duration of subsidies, geographic areas, networks and technologies. The Order also directs the Bureau to give preference to projects that: (1) offer speeds of at least 4 Mbps downstream and 1Mbps upstream; and (2) include partnership with third parties that have experience with broadband adoption barriers (such as grantees of the Broadband Technology Opportunities Program).

ETCs chosen for the pilot must be designated ETCs in the areas that they propose to serve and will commit to extensive data gathering and sharing requirements (which can be funded). The Bureau will support projects that agree to offer voice services bundled with broadband or standalone broadband. The funds will be used to reduce the cost of service provided by the ETC, but funds can also support administrative functions and non-recurring activation fees. Although the Commission encourages applicants to provide no-cost or low-cost equipment or devices, and directs the Bureau to consider that factor when choosing projects, the pilot funds will not subsidize equipment purchases.

The Further Notice of Proposed Rulemaking

In the FNPRM, the Commission requests comment on a number of issues related to the Lifeline/Link Up program, including issues related to the establishment of an eligibility database, use of low-income program funding for digital literacy training, limits on resale of Lifeline service, Lifeline support amounts, Tribal lands Lifeline and Link Up support, and various ETC requirements. Comments are due 30 days after publication of the FNPRM in the Federal Register. Reply comments must be submitted no later than 60 days following publication. Specific issues on which the FCC requests comment include the following:

- Issues presented by the design and implementation of the eligibility database, such as how the Commission can encourage the accelerated deployment of state databases; whether the Commission should establish a national eligibility database instead of or in addition to state databases; the federal or state privacy requirements implicated in the establishment of a national or state

eligibility database; and how the Commission should best partner with other relevant agencies to share information housed in other agencies' databases.

- The use of universal service funding to enhance digital literacy among low-income Americans.
- Whether ETCs should receive Lifeline support from the fund only when they provide Lifeline service directly to subscribers.
- Whether incumbent LECs should be relieved of the obligation to resell their Lifeline discounted voice telephony services at wholesale rates.
- The optimal level of Lifeline discount, including the appropriate structure of support and how the level or levels of support should be determined.
- Whether eligible residents of Tribal lands should be allowed to apply their allotted Tribal lands discount amount to more than one supported service per household.
- Whether the Link Up program for residents of Tribal lands should be altered or eliminated.
- Whether the Special Supplemental Nutrition Assistance Program for Women, Infants, and Children ("WIC") should be added to the list of qualifying federal assistance programs for Lifeline.
- Measures that would enable veterans who lack any income, but are not otherwise enrolled in a qualifying program, to demonstrate eligibility for Lifeline.

- Whether ETCs should be required to allow subscribers to apply their Lifeline discount on any bundle that includes a voice component.
- Whether there is a need to establish additional uniform standards for the designation of Lifeline-only ETCs.
- Whether the Commission should allow incumbent wireline Lifeline providers to opt out of the Lifeline program.
- Whether the Commission should extend the retention period for Lifeline documentation, including subscriber-specific eligibility documentation, to at least ten years.

Please be advised that attorneys in Kelley Drye & Warren's Telecommunications practice group have extensive experience working on low-income program matters, as well as Federal Communications Commission technical and regulatory compliance; certification and reporting obligations; and enforcement matters. For more information regarding this client advisory, please contact John Heitmann at (202) 342-8544, Joan Griffin at (202) 342-8573, Joshua Guyan at (202) 342-8566, your usual Kelley Drye attorney or any member of the Telecommunications practice group. For more information on the Telecommunications practice group, please [click here](#).