

BRIEF FOR RESPONDENT

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 20-1006

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NATIONAL LIFELINE ASSOCIATION,  
PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION  
AND UNITED STATES OF AMERICA,  
RESPONDENT.

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ON PETITION FOR REVIEW OF AN ORDER OF THE  
FEDERAL COMMUNICATIONS COMMISSION

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

### 1. Parties.

All parties, intervenors, and amici appearing in this Court are listed in Petitioner's Brief.

### 2. Rulings under review.

The ruling under review is *Bridging the Digital Divide for Low-Income Consumers; Lifeline and Link Up Reform and Modernization; Telecommunications Carriers Eligible for Universal Service Support*, 34 FCC Rcd 10886 (2019)

### 3. Related cases.

The ruling under review has not previously been before any court.

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## GLOSSARY

Act	Communications Act of 1934, 47 U.S.C. § 151 <i>et seq.</i>
Cure period	A 15-day period during which a Lifeline subscriber must use Lifeline service to remain enrolled in the Lifeline program.
ETC	Eligible Telecommunications Carrier. A carrier certified by a state public utility commission or designated by the FCC to provide Lifeline service.
Lifeline	An FCC program that provides qualifying low-income consumers a standard monthly discount on voice and broadband Internet access services.
NaLA	Petitioner National Lifeline Association.
NaLA Petition	National Lifeline Association Petition for Declaratory Ruling, WC Docket No. 11-42 <i>et al.</i> (filed Feb. 7, 2018).
Non-usage rule	47 C.F.R. 54.407(c)(2). An FCC rule that provides that an ETC is not eligible for Lifeline reimbursement for subscribers who have not used Lifeline service in 30 consecutive days or have not used Lifeline service for 15 days after receiving notice from an ETC of possible de-enrollment based on non-usage.
<i>Order</i>	<i>Bridging the Digital Divide for Low-Income Consumers; Lifeline and Link Up Reform and Modernization; Telecommunications Carriers Eligible for Universal Service Support</i> , 34 FCC Rcd 10886 (2019).
Snapshot date	The date on which an ETC must file with USAC the subscriber counts used to calculate its Lifeline reimbursement amount. Under 47 C.F.R. § 54.407(a), the snapshot date is the first day of the month.

USAC	Universal Service Administrative Company. A not-for-profit corporation that administers the Lifeline program for the FCC.
<i>2012 Lifeline Order</i>	<i>Lifeline and Link Up Reform and Modernization</i> , 27 FCC Rcd 6656 (2012).
<i>2015 Lifeline Order</i>	<i>Lifeline and Link Up Reform and Modernization et al.</i> , 30 FCC Rcd 7818 (2015).
<i>2016 Lifeline Order</i>	<i>Lifeline and Link Up Reform and Modernization et al.</i> , 31 FCC Rcd 3962 (2016).

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BRIEF FOR RESPONDENT

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**INTRODUCTION**

The Commission’s Lifeline program provides qualifying low-income consumers a standard monthly discount on voice and broadband Internet access services to make those services more affordable. The carrier providing those services—an Eligible Telecommunications Carrier (“ETC”)—receives a federal subsidy in the amount of the Lifeline discount to offset the ETC’s cost of providing service.

In 2012, the Commission found that ETCs frequently were being reimbursed for offering service to Lifeline subscribers who were not actually

using the service. The Commission concluded that compensating ETCs for those consumers wastes Lifeline funds and gives ETCs an incentive to claim reimbursement for Lifeline subscribers who are not using or have discontinued their service.

To address this problem, the Commission adopted a rule providing that a Lifeline subscriber who had not used the service for 60 days would be de-enrolled from the Lifeline program if, after receiving 30 days' notice from the subscriber's ETC, the subscriber still did not use the service. (The Commission subsequently reduced the non-usage period from 60 days to 30 days, and the notice period from 30 days to 15 days.) The Commission also adopted a separate rule (the "non-usage rule"), which provides that ETCs that do not charge their Lifeline subscribers a monthly fee can only receive Lifeline reimbursement for subscribers who have actually used the service within the past 30 days, or who have cured their non-usage within the 15-day notice period.

In the *Order* on review, the Commission denied a Petition for Declaratory Ruling filed by the National Lifeline Association ("NaLA"), a trade association of Lifeline carriers. *See Order* ¶¶ 115-24 (JA\_\_). The petition asked the Commission to determine that affected ETCs can claim Lifeline support for all eligible subscribers enrolled in the program, including

those who have not used their service for more than 30 days, or have received notice of possible de-enrollment but are still in the 15-day cure period. The Commission determined that NaLA's request was contrary to the text of the non-usage rule, which states that ETCs "shall only continue to receive" Lifeline reimbursement for "subscribers who have used the service within the last 30 days, or who have cured their non-usage." 47 C.F.R. § 54.407(c)(2).

NaLA contends that because ETCs' Lifeline reimbursement amounts are determined by the number of eligible Lifeline subscribers they serve on the first day of each month (the "snapshot date"), an ETC is entitled to reimbursement for all subscribers that it *offers* to serve on that date—including those who are in the 15-day cure period. But, under the plain language of its regulations, the non-usage rule places a specific restriction on that general reimbursement provision by barring ETCs from receiving reimbursement for Lifeline subscribers who have not already cured their non-usage. The Commission's interpretation represents the best reading of its rules and the most sensible way to read the non-usage rule and snapshot date in harmony.

Nor does NaLA find support in purportedly conflicting (and since rescinded) guidance from the Commission's Lifeline program administrator, the Universal Service Administrative Company ("USAC"). USAC—which

lacks authority to interpret the Commission's rules—cannot, through a posting on its website, create an entitlement to Lifeline reimbursement that the Commission's rules deny.

Finally, though NaLA contends that the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, and the Takings Clause of the Constitution, U.S. Const., amend. V, entitle ETCs to reimbursement for Lifeline subscribers who are not using Lifeline service, this Court lacks jurisdiction to consider the former argument because it was not presented to the Commission, and both arguments are meritless, in any event.

### **JURISDICTION**

The *Order* on review was released on November 14, 2019, and published in the Federal Register on December 27, 2019. *Bridging the Digital Divide for Low-Income Consumers; Lifeline and Link Up Reform and Modernization; Telecommunications Carriers Eligible for Universal Service Support*, 34 FCC Rcd 10886 (2019); 84 Fed. Reg. 71308. This Court's jurisdiction rests on 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

### **QUESTIONS PRESENTED**

1. Whether the Commission correctly interpreted its rules to prohibit ETCs from claiming Lifeline reimbursement for Lifeline subscribers who have not used the service for the preceding 30 days, or have not cured their non-usage as of the snapshot date.

2. Whether ETCs were entitled to rely on guidance posted on USAC's website stating that they can claim Lifeline reimbursement for Lifeline subscribers who have not used the service after receiving a 15-day notice of possible de-enrollment for non-usage in the face of the Commission's contrary rules.
3. Whether the Commission's interpretation of its Lifeline rules is foreclosed by section 214(e)(1)(A) of the Act, 47 U.S.C. § 214(e)(1)(A), which provides that ETCs shall offer supported universal services throughout their service areas.
4. Whether the Commission's determination that ETCs cannot claim reimbursement for Lifeline subscribers who do not use Lifeline service effects a taking of property without just compensation under the Fifth Amendment to the U.S. Constitution?

## **STATUTES AND REGULATIONS**

The pertinent statutes and regulations are attached in an addendum to this brief.

## **COUNTERSTATEMENT**

### **I. THE LIFELINE PROGRAM**

In the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, Congress sought to “make available, so far as possible, to all the people of the United States ... a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges.” *Id.* § 151.

In service of this goal, the Commission established the Lifeline program in 1985 to ensure that low-income consumers had access to

affordable telephone service in the wake of the break-up of the AT&T monopoly. *See MTS and WATS Market Structure, and Amendment of Parts 67 and 69 of the Commission's Rules and Establishment of a Joint Board*, 50 Fed. Reg. 939 (1985). Initially, the program was designed to prevent service disconnections by reimbursing telephone companies for waiving certain charges for low-income customers. *See id.*

In 1996, Congress codified the Commission's obligation to ensure the availability of affordable telephone service to all Americans. In the Telecommunications Act of 1996, Congress directed that "the Commission shall base policies for the preservation and advancement of universal service" on several principles, 47 U.S.C. § 254(b), including that "quality services" should be available at "affordable" rates and that "consumers in all regions of the nation, including low-income consumers, ... should have access to telecommunications and information services." *Id.* § 254(b)(1), (3).

The Commission implemented the universal service directives in section 254(b) of the Act by making Lifeline a stand-alone universal service program. *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 8952 (¶¶ 326-328) (1997), *aff'd in relevant part, Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("*TOPUC*"). Today, qualifying low-income customers receive up to a \$9.25 monthly discount on voice or

broadband Internet access service, or “bundled” services (a combination of voice and data services), and those who live on Tribal lands can receive up to a \$34.25 monthly discount. *Order* ¶ 3 (JA \_\_\_); 47 C.F.R. § 54.403(a). Low-income consumers can apply the Lifeline discount to any service or bundled service provided by the ETC that meets the Commission’s minimum service standards. 47 C.F.R. § 54.401. Consumers can qualify for the Lifeline program by participating in a “qualifying assistance program” (such as the Supplemental Nutrition Assistance Program (SNAP)), or by having an income at or below 135 percent of the Federal Poverty Guidelines. *Lifeline and Link Up Reform and Modernization*, 31 FCC Rcd 3962, 3965 (¶ 7) (2016) (“*2016 Lifeline Order*”). Consumers residing on Tribal lands can qualify by meeting those criteria or by participating in a designated Tribal federal assistance program. *2016 Lifeline Order* ¶ 7; 47 C.F.R. § 54.409(b).

Lifeline service can only be provided by an ETC certified by a state public utility commission or designated by the FCC. 47 U.S.C. § 214(e)(2), (6). An ETC “must [m]ake available Lifeline service ... to qualifying low-income consumers.” 47 C.F.R. § 54.405(a); *see* 47 U.S.C. § 214(e)(1). In return, an ETC receives reimbursement equivalent to the Lifeline discount to reduce its cost of providing Lifeline service. 47 C.F.R. § 54.403(a)(1).

### A. The Emergence Of Wireless And Prepaid Lifeline Service

From the inception of the Lifeline program until 2004, only carriers that used their own facilities to provide service could be designated ETCs; thus, only “facilities-based carriers” could participate in the Lifeline program. *Order* ¶ 4 (JA \_\_\_\_). During that period, the Lifeline program distributed less than \$1 billion in subsidies each year. *Id.*

That changed in 2005, when the Commission allowed entirely non-facilities-based carriers to participate in the Lifeline program—specifically, “wireless resellers” that use only service purchased from other wireless carriers to serve their own customers. *See Lifeline and Link Up Reform and Modernization*, 27 FCC Rcd 6656, 6668 (¶ 21) (2012) (“*2012 Lifeline Order*”). Since then, a number of wireless resellers have become “Lifeline-only ETCs,” or ETCs that participate in the Lifeline program, but not the Commission’s other universal service programs, such as the high-cost support program for rural and insular areas. *Order* ¶ 4 (JA \_\_\_\_). Many wireless reseller ETCs offer “pre-paid service,” which allows a customer to pay in advance for an allowance of minutes, texts, or data. *Id.* In the Lifeline program, these “pre-paid” carriers often compete for Lifeline customers by offering them free Lifeline service, and sometimes free phones. *Id.*

By 2012, more than 40 percent of Lifeline support was distributed to pre-paid wireless ETCs. *See 2012 Lifeline Order* ¶ 23. Participation of those ETCs in the Lifeline program increased enrollments of low-income consumers, but it also rapidly increased the amount of subsidy disbursements. *Id.* Between 2009 and 2012, annual Lifeline spending grew to \$2.2 billion, more than double the amount distributed in 2004. *Order* ¶ 4 (JA \_\_\_\_).

Accompanying the increased designation of pre-paid wireless ETCs were reports of waste, fraud, and abuse attributable, in part, to the manner in which those ETCs deliver service to low-income consumers. *2012 Lifeline Order* ¶ 257. Because pre-paid wireless ETCs often price their service offerings at exactly the Lifeline support amount and do not require a Lifeline subscriber to pay for a set amount of voice minutes, data, and texts, those carriers (unlike carriers that bill monthly) do not have a billing relationship with their subscribers or a means to track whether their subscribers remain interested in continuing to receive Lifeline service. *Id.* The absence of that relationship enabled some pre-paid wireless ETCs to receive Lifeline support for customers who had discontinued or never used the service. *Id.* The Commission concluded that “[t]his wastes Lifeline support, because the program is not actually benefiting the customer for which it is intended.” *Id.* ¶ 255.

## B. The “Non-Usage Rule”

In 2012, the Commission implemented reforms to the Lifeline program to address waste, fraud, and abuse. Among other actions, the Commission adopted a “consumer usage requirement” to ensure that ETCs only receive Lifeline support for low-income customers who actually use the ETCs’ service. *2012 Lifeline Order* ¶¶ 255-263. To that end, the Commission adopted a rule (47 C.F.R. § 54.407(c)(2)) providing that when ETCs do not assess monthly fees for Lifeline service, they are barred from being reimbursed for Lifeline subscribers who have either not initiated service, or who have not used the service in the past 60 days. *2012 Lifeline Order* ¶¶ 260-261. To “make sure consumers are fully informed about the consequences of non-usage,” the Commission adopted a separate rule that required ETCs to provide notice that a subscriber must “cure” the non-usage within 30 days or be de-enrolled from the Lifeline program. This is known as the “cure period.” *Id.* ¶ 257; 47 C.F.R. § 54.405(e)(3) (2013).

To assist Lifeline ETCs with implementation of the new requirement, the Commission delineated ways that a subscriber can establish that he or she is using the service. Specifically, the Commission held that an account will be considered active if the subscriber does any of the following during any 60-day period:

makes a monthly payment; purchases minutes from the ETC to add to an existing pre-paid Lifeline account; completes an outbound call; answers an incoming call from anyone other than the ETC, its representative, or agent; or affirmatively responds to a direct contact from the ETC confirming that he or she wants to continue receiving the Lifeline supported service. *2012 Lifeline Order* ¶ 261.

These activities “impose an appropriately small burden on the subscriber,” the Commission determined, and “clearly establish for ETCs the few actions they must monitor.” *Id.*

The Commission imposed the usage requirement only when an ETC offers pre-paid Lifeline service to subscribers, based on a record showing that this type of Lifeline service presents a greater risk of inactivity than services for which an ETC bills on a monthly basis (a “post-paid” service). *Id.* ¶ 263. The Commission explained that “[t]he possibility that a wireless phone had been lost, is no longer working, or the subscriber has abandoned or improperly transferred the account is much greater for pre-paid services,” where the subscriber does not have a billing relationship with the ETC. *Id.* Because tracking a subscriber’s usage is the only means to determine whether a subscriber to pre-paid service is receiving the benefit of Lifeline support, the Commission found it necessary to impose the usage requirement only on ETCs providing pre-paid services, not post-paid services. *Id.*

In 2016, the Commission revisited the usage requirement, and amended it in two ways. First, “based on the reality” that text messages are often consumers’ primary means of communication, the Commission designated the sending of a text message by the subscriber as “usage.” *2016 Lifeline Order* ¶ 414. Second, having eased consumers’ ability to demonstrate usage, the Commission “f[ou]nd it appropriate” to shorten the non-usage period from 60 to 30 days, and correspondingly to reduce from 30 to 15 days the period in which a subscriber can cure its non-usage and maintain enrollment. *Id.* ¶ 415.

### **C. The “Snapshot Date”**

The Commission has designated the Universal Service Administrative Company (“USAC”) as administrator of the agency’s universal service programs. 47 C.F.R. § 54.701. USAC is an independent not-for-profit corporation that, under policies created by the Commission, collects and distributes support for the FCC’s universal service programs, including the Lifeline program. *Id.* § 54.702.

Every month, each ETC reports to USAC the number of Lifeline subscribers for which it claims reimbursement for that month. Prior to 2015, ETCs reported their subscriber counts to USAC on different days of the month. To make administration of the Lifeline program more efficient, the

Commission in 2015 amended its general Lifeline reimbursement rule (47 C.F.R. § 54.407(a)) to require ETCs to use a uniform “snapshot date,” which it designated as the first day of the month. *Lifeline and Link Up Reform and Modernization et al.*, 30 FCC Rcd 7818, 7898 (¶ 242) (2015) (“*2015 Lifeline Order*”). Under the rule, as amended, universal service support is provided to an ETC “based on the number of actual qualifying low-income customers it serves directly as of the first day of the month.” *Id.* Thus, for example, an ETC’s support for the month of April depends on the number of Lifeline subscribers that are using its service on May 1. *Id.* n.478; Public Notice, Wireline Competition Bureau Provides Guidance on the Lifeline Reimbursement Payment Process Based on NLAD Data (WCB Jan. 10, 2018) (JA \_\_\_\_).

## II. THE *ORDER* ON REVIEW

On February 7, 2018, NaLA asked the Commission to permit ETCs to obtain reimbursement for all Lifeline subscribers listed in the snapshot taken on the first day of the month, including those subscribers in the 15-day cure period. National Lifeline Association Petition for Declaratory Ruling, WC Docket No. 11-42 *et al.* (filed Feb. 7, 2018) (“NaLA Petition”) (JA \_\_\_\_).

In the *Order*, the Commission denied the petition, holding that NaLA’s request was contrary to the text of the non-usage rule. *Order* ¶ 119 (JA \_\_\_\_).

As the Commission explained, that rule states that an ETC offering Lifeline service without assessing monthly fees “shall only continue to receive universal service support for reimbursement for such Lifeline service provided to subscribers who have used the service within the last 30 days, or who have cured their non-usage as provided for in § 54.405(e)(3).” *Id.* (quoting 47 C.F.R. § 54.407(c)(2)). Although ETCs must provide Lifeline subscribers 15 days’ notice of possible “service termination for non-usage,” the “plain language of the rules does not confer any right for the ETC to receive reimbursement” during that period. *Order* ¶ 119 (JA \_\_\_\_). The Commission pointed out that NaLA’s position “is intended effectively to extend the non-usage period by 50%.” *Id.*

The Commission rejected NaLA’s assertion that the non-usage rule conflicts with section 54.407(a) of the Commission’s rules, which provides that an ETC’s monthly reimbursement amount be based on the number of “actual qualifying low-income customers” that the ETC serves on the first day of the month. 47 C.F.R. § 54.407(a). The Commission explained that the non-usage rule “places a specific restriction” on that general rule by “declaring which subscribers an ETC can claim for reimbursement,” and “clearly states” that an ETC “shall only continue to receive universal service support reimbursement’ for subscribers who have used their service within a

30 consecutive day period.” *Order* ¶ 121 (JA \_\_\_\_ ) (quoting 47 C.F.R. § 54.407(c)(2)). Also, the Commission explained, the “alternative to the 15-day cure period is to require an ETC to immediately de-enroll a subscriber from the Lifeline program on day 30 of non-usage,” without notice, which would be “contrary to the public interest.” *Order* ¶ 121 (JA \_\_\_\_ ).

The Commission was also unpersuaded by NaLA’s asserted reliance on “informal staff guidance” and information on “USAC’s website” stating that ETCs could seek reimbursement for non-using subscribers who were in the 15-day cure period. *Id.* ¶ 120 (JA \_\_\_\_ ). Relying on its precedent, the Commission reaffirmed “that carriers must rely on the Commission’s rules and orders even in the face of conflicting informal advice or opinion from USAC or Commission staff.” *Id.*

Lastly, the Commission found meritless NaLA’s claim that the failure to reimburse ETCs for subscribers in the 15-day cure period would violate the Takings Clause of the Fifth Amendment. *Id.* ¶¶ 122-123 (JA \_\_\_\_ ). The Commission determined there was no taking, because its rules “deny compensation only where there is no use.” *Id.* ¶ 122 (JA \_\_\_\_ ). In contrast, “where there is actual use,” the Commission explained, “ETCs would receive compensation.” *Id.* The Commission observed that ultimately, “the burden” on the ETC is merely that of “providing a wholly unused service for fifteen

days.” *Id.* ¶ 123 (JA \_\_\_\_). It noted that neither NaLA nor any other ETC provided “information on the weight of this burden,” but if they had, it would be too insubstantial to constitute a *per se* or regulatory taking. *Id.*

### SUMMARY OF ARGUMENT

1. The Commission in the *Order* relied on the plain language of its Lifeline non-usage rule to conclude that ETCs may not collect Lifeline subsidies for subscribers who have not used the service in 30 consecutive days, or who have not cured their non-usage after being provided 15 days’ notice to do so. Since 2012, that rule has straightforwardly provided that when an ETC does not charge its subscribers a monthly fee for Lifeline service, it “shall only continue to receive universal service support reimbursement for such Lifeline service provided to subscribers who have used the service within the last 30 days, or who have cured their non-usage.” 47 C.F.R. § 54.407(c)(2). This express restriction on Lifeline reimbursement is, as the Commission found, an exception to the more general rule that Lifeline subsidies shall be provided to ETCs for Lifeline subscribers the ETC “serves directly as of the first of the month.” 47 C.F.R. § 54.407(a).

2. The Commission adopted a “snapshot date” to improve the administration of the Lifeline program by establishing a uniform date for ETCs to report the subscriber counts used to determine their Lifeline

reimbursement amounts in a given month. But in doing so, the Commission did not repeal or amend the rule providing that when an ETC offers Lifeline service without assessing a monthly fee, it cannot collect Lifeline subsidies for subscribers who are not using the service. And there is no evidence that denying reimbursement for those subscribers will impose significant administrative burdens on ETCs.

3. The only “burdens” imposed on ETCs by the *Order*’s adherence to the non-usage rule are (1) the obligation to offer a service for which they will not be reimbursed if it is not used and (2) certain unspecified administrative costs. Though NaLA contends those burdens are so substantial that they will threaten the availability of Lifeline service, the record contains no evidence to support that claim—only a cursory list of the types of costs that ETCs generally incur to offer service to Lifeline subscribers, without any quantification of those costs or how they vary depending on whether the subscriber actually uses the Lifeline service. That is not enough to overrule the Commission’s determination that the burden (if any) on ETCs to provide a service that is not used will be light. *Order* ¶ 123 (JA \_\_\_).

4. Nor can ETCs rely on (since-rescinded) guidance on USAC’s website stating that ETCs can claim Lifeline subsidies for those subscribers, particularly given Commission and Circuit precedent holding that parties

should rely on the Commission's rules and orders, not informal guidance from Commission staff or USAC.

5. NaLA did not give the Commission the requisite opportunity to pass on its argument that if ETCs are not reimbursed for offering Lifeline service to every one of their subscribers on the snapshot date (including those who have not used the service for a month or more), they will be in violation of their obligation to “offer the services that are supported by Federal universal service support mechanisms” under section 214(e)(1)(A) of the Act, 47 U.S.C. § 214(e)(1)(A); thus, it is statutorily foreclosed, *id.* § 405(a). The argument otherwise lacks merit, because as this Court and others have held, ETCs' statutory obligation to offer “supported services” does not entitle them to universal service subsidies.

6. Lastly, requiring ETCs to offer uncompensated, unused Lifeline service during the 15-day cure period does not result in a regulatory taking. Voluntary participation in a government program defeats a taking claim, and here, NaLA's members opted to become ETCs. Even if that were not the case, the rules do not impose a significant economic burden on NaLA's members or interfere with their reasonable investment-backed expectations, and they serve the important purpose of ensuring the Lifeline subsidies are not wasted by supporting services that subscribers are not using.

## STANDARD OF REVIEW

NaLA bears a heavy burden to establish that the *Order* is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). “Under this ‘highly deferential’ standard of review, the court presumes the validity of agency action ... and must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment.” *Cellco P’ship v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004); *see also NTCH, Inc. v. FCC*, 841 F.3d 497, 502 (D.C. Cir. 2016). The party challenging the agency action bears the burden of proof. *Abington Crest Nursing & Rehab. Ctr. v. Sebelius*, 575 F.3d 717, 722 (D.C. Cir. 2009).

A constitutional challenge to agency action is subject to *de novo* review. *Nat’l Oilseed Processors Ass’n v. Occupational Safety & Health Admin.*, 769 F.3d 1173, 1179 (D.C. Cir. 2014).

## ARGUMENT

NaLA contends that the Commission in the *Order* misinterpreted its Lifeline rules when it determined that ETCs that do not assess a monthly fee for Lifeline service are not entitled to Lifeline subsidies for subscribers who have not used the service for 30 consecutive days or have not cured their non-usage. NaLA’s argument is foreclosed by the text of the Commission’s non-usage rule, which since 2012 has stated that ETCs offering pre-paid Lifeline

service will not be reimbursed for offering that service to subscribers who do not use it. Because the rule is clear, there is no reason for the Court to reach NaLA's various claims about how the Commission's interpretation will undermine ETCs' ability to continue to provide Lifeline service (which NaLA has also failed to substantiate).

Aside from its interpretive challenge, NaLA's statutory and constitutional challenges to the *Order* similarly fail. NaLA has waived its argument that the Commission's interpretation of its rules violates section 214(e)(1)(A) Act, 47 U.S.C. § 214(e)(1)(A), which in any event finds no support in the language of that statutory provision and is contrary to precedent in this Circuit and others. NaLA likewise has not shown that requiring ETCs to offer Lifeline service for no more than 15 days without compensation violates the Takings Clause of the Constitution.

**I. THE COMMISSION'S LIFELINE RULES FORECLOSE REIMBURSEMENT FOR SUBSCRIBERS WHO DO NOT USE LIFELINE SERVICE FOR 30 CONSECUTIVE DAYS OR WHO HAVE NOT CURED THEIR NON-USAGE**

**A. The Commission's Interpretation Of Its Lifeline Rules Is Correct Under Established Canons Of Interpretation.**

NaLA raises a host of APA and constitutional arguments in its Opening Brief, but its interpretive challenge to the *Order* begins and ends with the text of section 54.407(c)(2) of the Commission's rules, which since 2012 has

stated that when an ETC does not charge its Lifeline subscribers a monthly fee, it “shall only continue to receive universal service support reimbursement for such Lifeline service provided to subscribers who have used the service within the last 30 days or who have cured their non-usage” (by actions which can be as simple as sending a text message) within the 15-day cure period. 47 C.F.R. § 54.407(c)(2); *see 2012 Lifeline Order* ¶¶ 260-261; *2016 Lifeline Order* ¶¶ 414-415. The rule is clear: an ETC may receive reimbursement for a subscriber who uses Lifeline services within the prior 30 days; it may not for a subscriber who does not use it, unless and until that subscriber cures his or her non-usage.

Instead, NaLA asserts that because a different rule (the “snapshot rule”) broadly states that Lifeline support “shall be provided directly to an [ETC] based on the number of actual qualifying low-income customers ... that the [ETC] serves directly as of the first of the month,” 47 C.F.R. § 54.407(a), an ETC is entitled to reimbursement for each of its subscribers on that date, including those in the cure period. Br. 40-42. But as the Commission explained, the non-usage rule “places a specific restriction” on that general reimbursement provision by barring ETCs from claiming support for Lifeline subscribers who have not used the service in the prior 30 days, or who have not cured their non-usage. *Order* ¶ 121 (JA \_\_\_\_). The

Commission's reading is consistent with the well-established canon of statutory construction that where, as here, "a general permission or prohibition is contradicted by a specific prohibition or permission ... the specific provision is construed as an exception to the general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 663 (2007).

NaLA nevertheless contends that the specific-governs-the-general canon does not apply here, because sections 54.407(a) and (c)(2) can be read together to entitle ETCs to Lifeline subsidies for subscribers in the 15-day cure period. Br. 43-44. According to NaLA, "[t]he Snapshot rule establishes the right of ETCs to receive reimbursement for all Lifeline subscribers served as of the snapshot date, regardless of cure period status, while Section 54.407(c)(2) creates a process for eliminating future reimbursement for de-enrolled subscribers once the non-usage and cure periods have elapsed." Br. 44; *id.* 30-31. But NaLA misreads the non-usage rule, which provides that when an ETC offers Lifeline service without assessing a monthly fee, it "shall only continue to receive" reimbursement for "subscribers who have used the service within the last 30 days, *or* who have cured their non-usage." 47 C.F.R. § 54.407(c)(2) (emphasis added). Subscribers who have not cured

their non-usage during the 15-day cure period are in neither category, and thus the ETC is not entitled to reimbursement.

Indeed, NaLA's interpretation of the non-usage rule would impermissibly deprive that rule of any effect. *See RadLAX*, 566 U.S. at 645. By operation of sections 54.407(a) and 54.405(e)(3) (the "de-enrollment rule"), a subscriber who fails to use his or her service by the end of a 15-day cure period that ends mid-month (*e.g.*, April 12) will be de-enrolled from the Lifeline program and thus will not be included in the customer count on the next snapshot date (May 1). Consequently, the ETC will not receive Lifeline support for that subscriber for the prior month (April). If subsection 54.407(c)(2) were simply prospective in effect, as NaLA contends, then like subsection 54.407(a), it would serve only to deny an ETC Lifeline support for that subscriber in April. (The Commission's interpretation of the non-usage rule would also retroactively deny support for March.) In other words, under NaLA's reading, there would be no need for the non-usage rule, because the Commission's other rules already cut-off Lifeline subsidies prospectively. That would render the non-usage rule superfluous. *See id.* at 646-647.

NaLA complains that because the Commission in the *2016 Lifeline Order* "did not state or even suggest" that an ETC could not claim support for subscribers in the 15-day cure period, it must be the case that they could. Br.

22. But there was no need for the Commission to reiterate the restriction on reimbursement that had been plainly stated in its rules since 2012. Indeed, the *2016 Lifeline Order* simply shortened the non-usage period from 60 days to 30 days, and the cure period from 30 days to 15 days. Nor did the Commission have an intent to “make it more difficult for ETCs to continue serving [Lifeline subscribers],” as NaLA alleges, Br. 22, especially because the *2016 Lifeline Order* expanded the ability of subscribers to demonstrate usage by sending texts. *2016 Lifeline Order* ¶ 414.

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Applying traditional tools of construction, the Commission’s reading of its Lifeline rules is reasonable and permissible. Indeed, as set forth above, the Commission’s interpretation of the non-usage rule is the best reading of that rule because it is most consistent with the rule’s language.<sup>1</sup>

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<sup>1</sup> Given that the non-usage rule expressly states that when an ETC offers Lifeline service without assessing a monthly fee, it is not entitled to Lifeline reimbursement for subscribers who are not actually using the service, the Court need not apply the multi-factor test in *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019), to determine whether the Commission’s interpretation of that rule in the *Order* is reasonable and thus entitled to the Court’s deference. But even if the Court finds that the non-usage rule is truly ambiguous, and the Commission’s interpretation is not entitled to deference under *Kisor*, the Court should still affirm the Commission’s interpretation of the rule because it is persuasive, both as the better reading of the rule’s text and as an

*Footnote continues on the next page.*

**B. The Commission’s Interpretation Of The Non-Usage Rule Does Not Undermine Other Provisions In Its Lifeline Rules.**

NaLA also claims that it is contrary to the intent and purpose of the snapshot rule to deny ETCs reimbursement for Lifeline subscribers in the 15-day cure period and that the Commission’s interpretation would “read the first-of-the month snapshot date out of the Lifeline Rules.” Br. 45. Not so. Giving effect to the non-usage rule does not undermine the snapshot date’s function of utilizing a uniform date for ETCs to report the subscriber counts used to determine their ultimate Lifeline reimbursement amounts. In this way, the snapshot date continues to protect against the possibility that multiple ETCs might “receive full support for providing service for the same subscriber in the same calendar month,” and makes it “easier for USAC to adopt uniform audit procedures.” *2015 Lifeline Order* ¶ 241.

NaLA nonetheless argues that the *Order* “ignores” the snapshot date’s purpose “in establishing ETC reimbursement claim amounts.” Br. 19-21. However, in establishing the snapshot date, the Commission did not hold that ETCs are entitled to Lifeline subsidies for each of an ETC’s subscribers on

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appropriate balancing of the policies underlying the statute. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

the first day of the month. At the time the snapshot date was adopted, section 54.407(c)(2) had for three years stated that an ETC shall only claim reimbursement for subscribers who have used Lifeline service in the past 60 days, or who have cured their non-usage. The snapshot date adopted in the *2015 Lifeline Order* did not override that restriction—in fact, the *2015 Lifeline Order* did not even mention it. *See 2015 Lifeline Order* ¶¶ 238-243.

The Commission in the *Order* also did not “carve out subscribers in a cure period from an ETC’s snapshot date,” as NaLA alleges. Br. 21. Subscribers in the 15-day cure period are included in the ETC’s subscriber count on the snapshot date; the ETC just cannot claim reimbursement for them. 47 C.F.R. § 54.407(c)(2). Indeed, NaLA’s position that ETCs can claim reimbursement for those subscribers would effectively “extend the non-usage period by 50%.” *Order* ¶ 119 (JA \_\_\_\_). It also would be flatly inconsistent with the non-usage rule’s specification that ETCs shall only be reimbursed for subscribers who have used the service in the past 30 days, or who have cured their non-usage. 47 C.F.R. § 54.407(c)(2).

Nor does the Commission’s reading of its Lifeline rules “undercut the function of Section 54.405(e)(3),” which requires an ETC to provide a Lifeline subscriber 15 days’ notice of possible de-enrollment for non-usage. Br. 45; 47 C.F.R. § 54.405(e)(3). On the contrary, the notice requirement

continues to serve the important purposes of (1) notifying Lifeline subscribers that they will be de-enrolled from the program if they do not use the service for 30 consecutive days, and (2) providing subscribers an opportunity to cure their non-usage to prevent de-enrollment. Section 54.405(e)(3) does not even mention whether and when an ETC is reimbursed, a subject that is instead governed by the non-usage rule, *id.* § 54.407(c)(2).

**C. The Commission’s Lifeline Rules Treat Usage And Eligibility Problems Differently, And The Commission Applied Those Rules Consistently In The *Order*.**

Finally, NaLA insists that the *Order* results in “inconsistent enforcement” of the Lifeline rules. When ETCs provide Lifeline subscribers notice of possible de-enrollment due to questions about a subscriber’s eligibility, the argument goes, ETCs receive Lifeline support during the notice period. Br. 28-29; 47 C.F.R. § 54.405(e)(1), (4).

But this is not an inconsistency in enforcement; it is simply a difference in the applicable rules. The non-usage rule (47 C.F.R. § 54.407(c)(2)) provides that an ETC may not claim reimbursement for Lifeline subscribers in the 15-day cure period for non-usage; but it does not impose a comparable restriction on an ETC’s ability to claim Lifeline support during the ineligibility and recertification notice periods. That difference in approach has been in place since 2012, and the time for NaLA to challenge it

is long past. *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1) (60 days to petition for review of FCC orders).

Also, that distinction in the rules is based on the Commission’s determination in the *2012 Lifeline Order* that reimbursing ETCs for subscribers who are not using Lifeline service “wastes Lifeline support,” and gives ETCs an incentive to claim support for subscribers who have discontinued their service. *Id.* at ¶¶ 255, 258. That type of “waste” is not an issue for subscribers with eligibility and recertification issues, because when those subscribers are provided notice of possible de-enrollment, they are actually using Lifeline service. Moreover, if a subscriber uses Lifeline service before the end of the cure period for non-usage, the ETC can claim Lifeline subsidies, just as it can for subscribers in the cure period for eligibility issues.

*Order* ¶¶ 122-123 (JA \_\_\_\_).<sup>2</sup>

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<sup>2</sup> NaLA also complains that the Commission in the *Order* did not “provide a reasoned justification for” this alleged inconsistency. Br. 29. But declining to explain in the *Order* why two distinct rules lead to two distinct outcomes was not arbitrary and capricious. The Commission explained why, under its Lifeline rules, ETCs cannot claim Lifeline subsidies for subscribers in the 15-day cure period for non-usage. *Order* ¶¶ 119, 121 (JA \_\_\_\_). The Commission considered the relevant factors when making that determination, including the language of the rule, the specter of waste in the Lifeline program, and the alleged expectations of and burdens on participating ETCs (*Order* ¶ 117-24), and that is sufficient under the APA. *Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir. 1984) (“[t]he failure to respond to comments is significant only

*Footnote continues on the next page.*

## **II. THE COMMISSION’S ADHERENCE TO THE NON-USAGE RULE DOES NOT REDUCE THE AVAILABILITY OF LIFELINE SERVICE.**

Because the non-usage rule clearly states that ETCs cannot collect Lifeline subsidies for subscribers who are not actually using Lifeline service, there is no basis for this Court to consider NaLA’s various policy-based challenges to the Commission’s interpretation of that rule. Whatever NaLA’s concerns about the impact of the rule, the language of the rule controls. *Cf. Flat Wireless, LLC v. FCC*, 944 F.3d 927, 929-930 (D.C. Cir. 2019) .

But even if the Court did reach those arguments, they all lack merit. Though NaLA contends that those ETCs offering Lifeline service without assessing monthly fees “will have difficulty maintaining current service offerings” if they are not reimbursed for subscribers in the cure period on the snapshot date, Br. 25, that claim is belied by the record.

### **A. The Commission Considered And Rejected The Unsubstantiated Argument That ETCs Will Not Be Able To Provide Lifeline Service If They Are Not Reimbursed For Subscribers Who Are Not Actually Using The Service.**

NaLA wrongly insists that the Commission failed to consider that ETCs “will have difficulty maintaining current service offerings” if they

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insofar as it demonstrates that the agency’s decision was not based on a consideration of the relevant factors”); *see also Covad Commc ’ns Co. v. FCC*, 450 F.3d 528, 550 (D.C. Cir. 2006).

cannot claim Lifeline support for subscribers in the cure period on the snapshot date. Br. 25. The Commission considered that argument in the context of its takings analysis and found it unpersuasive in light of the limited effect of its ruling. *Order* ¶¶ 122-123 (JA \_\_\_\_). As the Commission explained in the *Order*, its Lifeline rules “deny compensation only when there is no use” of the ETCs’ service. *Id.* ¶ 122 (JA \_\_\_\_). Where there is “[a]ny actual use of an ETC’s network—even the sending of a single text message”—an ETC can claim Lifeline subsidies for a subscriber. *Id.* And if a subscriber eventually cures his or her non-usage, the ETC can file a subsequent claim for reimbursement for that subscriber. Thus, the Commission observed, the only “burden” imposed on ETCs is the obligation “of providing a wholly unused service for fifteen days,” which would be “light.” *Id.* ¶ 123 (JA \_\_\_\_).

NaLA now points to comments filed by Sprint, which it asserts “detailed the significant investments ETCs make to provide Lifeline service to cure period subscribers.” Br. 25 (JA \_\_\_\_) (citing Comments of Sprint Corporation, WC Docket Nos. 11-42 *et al.*, at 2-3 (filed March 12, 2018) (JA \_\_\_\_)). But Sprint’s filing offered no detail or quantification of costs, instead identifying only the categories of costs (such as “account maintenance fees” and “customer care” assistance) that it purportedly incurs for Lifeline

subscribers, including those in the cure period. Nor does Sprint compare those purported costs to those it incurs when a Lifeline subscriber actually uses its service. And Sprint does not provide any estimate of the number of Lifeline subscribers in a cure period on the first day of each month.<sup>3</sup> Without that data (which should be readily available to Sprint and other ETCs), there is no basis for NaLA's assertion that if ETCs cannot claim Lifeline support for subscribers who are not using their service on the snapshot date, those ETCs will not be able to continue to provide Lifeline service at all. *Cf. Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1104 (D.C. Cir. 2009) (because wireless ETCs “include[d] no cost data showing they would, in fact, have to leave customers without service,” the Court had “no valid reason to believe” that their universal service support would be “insufficient”).

ETCs also are not under any “regulatory compulsion” to offer Lifeline service without assessing a monthly fee, and thus incur the (unsubstantiated) costs mentioned by Sprint. Br. 26. The non-usage rule only applies to ETCs offering this type of Lifeline service, 47 C.F.R. § 54.407(c)(2), and nothing in

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<sup>3</sup> If the number of subscribers is small, that would undermine NaLA's contention that the burden on ETCs is large. Though a large number of subscribers might support a burden claim (a determination that would also require cost information), it would also support the Commission's conclusion that the non-usage rule is necessary to prevent Lifeline subsidies from being wasted on subscribers who are not actually using Lifeline service.

the Commission's rules requires any ETC to forego billing its customers. *See* pp. 44-45, below. ETCs “structured their business models and Lifeline service offerings” to offer Lifeline service without monthly fees because they determined it is profitable to do so. *See 2012 Lifeline Order* ¶ 23; *Order* ¶ 4 (JA \_\_\_\_). If offering Lifeline service without Lifeline subsidies to some subscribers for 15 days makes NaLA's members less profitable than they had anticipated, they are not obligated to continue this approach to providing Lifeline service. *2012 Lifeline Order* ¶ 263.

The Commission thus did not ignore record evidence. Br. 26-27. It considered the comments filed by NaLA and other ETCs—which was not evidence at all but merely unsubstantiated assertions—and correctly determined that the burden of offering Lifeline service for 15 days (if there is one) would be light. *Order* ¶ 123 (JA \_\_\_\_). NaLA's “failure to offer any data or even informed hypothesizing leaves [the Court] without authority to disturb the agency's factual finding.” *Union Pac. R.R. Co. v. Pipeline and Hazardous Materials Safety Admin.*, 953 F.3d 86, 90 (D.C. Cir. 2020); *Order* ¶ 123 (JA \_\_\_\_).

**B. No Record Evidence Supports NaLA's Claim That The Order Will Impose An Undue Administrative Burden On ETCs.**

NaLA also claims that those ETCs offering Lifeline service without charging a monthly fee will be burdened with significant “paperwork” and “claim-processing” inefficiencies if they must file reimbursement claims for subscribers who cure their non-usage after the snapshot date. Br. 24. But providing those ETCs an additional 15 days of Lifeline subsidies just to reduce their administrative burden is contrary to the stated purpose of the non-usage rule, which is to ensure that Lifeline subsidies benefit those for whom they are intended, subscribers actually using the service. *2012 Lifeline Order* ¶¶ 255-263.

Regardless, NaLA has not shown that the *Order* “results in exactly the increased administrative costs the Commission sought to avoid by adopting the Snap Shot Rule.” Br. 23. The snapshot date was adopted after the Commission enacted the non-usage rule, and that rule has plainly stated since 2012 that when ETCs offer Lifeline service without charging the subscriber a monthly fee, they can only claim reimbursement for Lifeline subscribers who are using the service. Moreover, USAC has a longstanding process for adjusting Lifeline reimbursement claims that is commonly used by ETCs. *See* <https://www.usac.org/lifeline/reimbursement/claim-reimbursement/>. These

“true-ups” are routinely published on USAC’s website, and ETCs have informed the Commission that they “regularly file upward and downward revisions” to their “subscriber counts” with USAC. Comments on the Lifeline Joint Commenters, WC Docket Nos. 11-42 *et al.*, at 80 (filed Aug. 31, 2015) (JA \_\_\_).

NaLA now faults the Commission for “ignoring the significant impact of its about-face on regulated entities” and “neglect[ing] to consider or respond to any of these arguments in the [Order].” Br. 24. As a preliminary matter, the Commission made clear in the *Order* that there was no about-face and that its interpretation of the non-usage rule was consistent with the rule’s language. *Order* ¶ 119 (JA \_\_\_). Regardless, there was no evidence of any impact (let alone a “significant” one) on ETCs if they were denied reimbursement for Lifeline subscribers in the non-usage cure period. *See* Br. 23-24; *Order* ¶ 122 (JA \_\_\_). Indeed, NaLA and ETCs have never quantified the “increased paperwork burdens and USAC claim processing costs” that they alleged in their comments, even though that information should be readily available to them. Br. 24 (quoting Sprint comments at 3) (JA \_\_\_). This Court has long held that the APA “has never been interpreted to require the agency to respond to every comment, or to analyze every issue or alternative raised by the comments, no matter how insubstantial.” *Thompson*,

741 F.2d at 408. Here, the conclusory statements about the alleged “impact” on ETCs due to paperwork burdens, which were unsupported by data or any other evidence, did not necessitate a direct response from the Commission. *See Nat’l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 217 (D.C. Cir. 2013).

### **III. ADVICE ON USAC’S WEBSITE COULD NOT OVERRIDE THE PLAIN TERMS OF THE NON-USAGE RULE.**

In its Petition for Declaratory Ruling, NaLA asserted that in “late 2016,” NaLA’s counsel, representing a number of ETCs, obtained “informal advice” from the Commission’s Wireline Competition Bureau that service providers “may include subscribers in the cure period in their monthly snapshot.” USAC later published guidance to the same effect on its website. NaLA Petition at 3 (JA \_\_\_\_). NaLA acknowledges that, at the time it filed its Petition (in February 2018), USAC’s website stated that “[s]ervice providers may not request reimbursement for customers who are in the cure period.” *Id.* (emphasis added).

NaLA now contends that the *Order* “failed to seriously consider” the “reliance interests” that ETCs had in the prior statement and “the significant retroactive liability” now faced by ETCs for having filed claims that they

now know are unsupported by the rules. Br. 30. In fact, the Commission did consider those arguments, and found them lacking.

As the Commission explained in the *Order*, its “precedent is clear that carriers must rely on the Commission’s rules and orders even in the face of conflicting informal advice or opinion from USAC or Commission staff.” *Order* ¶ 120 & n.338 (citing *Kojo Worldwide Corp. et al.*, 24 FCC Rcd 14890 (2009) & *Sullins Academy*, 17 FCC Rcd 23829 (2002) (JA \_\_\_\_)).<sup>4</sup> *See also Malkan FM Assocs. v. FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991) (statement by “FCC insider, at an official seminar” in conflict with FCC rules “should not engender reliance”). Similarly, “[t]his court has repeatedly held that a ‘lower component of a government agency’ does not bind the agency as a whole.” *SNR Wireless LicenseCo, LLC v. FCC*, 868 F.3d 1021, 1037 (D.C. Cir. 2017) (quoting *Comcast v. FCC*, 526 F.3d 763, 769 (2008)). Thus, in claiming Lifeline reimbursement, ETCs were obligated to rely on the

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<sup>4</sup> NaLA fails to distinguish *Kojo Worldwide* and *Sullins Academy*, which reaffirmed the agency’s general rule. Br. 34. Unlike USAC, the Commission’s staff can interpret the Commission’s Lifeline rules. Br. 34; 47 C.F.R. §§ 0.91 & 0.291. Also, as in those two cases, the Commission’s rules “clearly establish[ed]” that ETCs may not claim support for Lifeline subscribers in the non-usage cure period, Br. 34; *see* pp. 20-24, above, and ETCs should have “clearly understood” that prohibition (and some actually did). Br. 33; *see* pp. 38-39, below.

Commission's codified rules and orders, not informal staff advice or USAC statements relating to those rules.

NaLA concedes that the principle that carriers must rely on the Commission's rules rather than informal staff advice or USAC opinion "generally is true." Br. 32. However, it attempts to distinguish the principle's application here on the ground that its members relied on "official, written guidance published by USAC as the FCC's Lifeline administrator," and that USAC "is not akin to an FCC staffer." *Id.* at 34. First, the "formal" USAC guidance to which NaLA refers is hardly that. Instead, it is a phrase contained in a single sentence on a page on the USAC website entitled "De-Enroll Ineligible Subscribers." NaLA Petition, Exh. I (JA\_\_). In any event, as NaLA itself understands, USAC's position as the Lifeline administrator only makes it "responsible for the collection, processing, and disbursement of [Universal Service Fund] support"; USAC has no power to "independently promulgate policy." Br. 35. In fact, under the Commission's rules, USAC may not "make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress." 47 C.F.R. § 54.702.

NaLA further argues that "there was no reason for ETCs to think that USAC's initial guidance ... was unauthorized by the FCC." Br. 35. On the contrary, ETCs had every reason to know that the guidance was inconsistent

with the language of the non-usage rule, which they were obligated to follow “even in the face of conflicting informal advice or opinion from USAC or Commission staff.” *Order* ¶ 120 (JA \_\_\_\_).

This Court rejected a similar argument in *SNR-Northstar*, 868 F.3d at 1037, where it held that the petitioners, applicants for small business bidding credits in a spectrum auction, could not assume that the prior grant of bidding credit applications by the Commission’s staff, “without opinion or any public statement of reasons,” represented the Commission’s position. The Court explained that it “ha[d] no assurance that the Commission ever accepted those decisions as correct even on their own terms, nor even that the Commission scrutinized the details of the filings on which petitioners now claim to rely.” *Id.* Likewise here, ETCs could not assume that the Commission had reviewed or sanctioned the informal guidance on USAC’s website.

Finally, the record shows that NaLA’s asserted understanding of the Commission’s rules was not shared by other ETCs. As the Commission noted in the *Order*, “a group of ETCs with at least some overlap with the current NaLA Petitioners” understood “that the Commission’s rules require ETCs to keep Lifeline subscribers enrolled in the program during the cure period without requesting reimbursement.” *Order* ¶ 120 & n.339 (JA \_\_\_\_ ) (citing Wireless ETC Petitioners’ Petition for Reconsideration and Clarification, WC

Docket Nos. 11-42 *et al.*, at 11 (filed Aug. 13, 2015) (JA \_\_\_)). NaLA claims that the filing cited by the Commission does not undermine its position here, because the filing describes the operation of the Lifeline rules before the Commission adopted the snapshot date in the *2015 Lifeline Order*. Br. 36-37. But even after that order, some ETCs acknowledged that they could not claim Lifeline support for subscribers in the non-usage cure period on the snapshot date. *See Lifeline Connects Coalition Petition for Waiver*, WC Docket Nos. 11-42 *et al.*, at 18-20 (filed Oct. 25, 2016) (JA \_\_\_) (asking the Commission to waive section 54.407(c)(2) of its rules, which petitioners read to deny ETCs reimbursement for subscribers in the 15-day cure period for non-usage on the first day of the month).

For all of these reasons, USAC's website provided an inadequate basis for NaLA and its ETC members to assume, in the face of the non-usage rule, that they would be reimbursed for subscribers in the cure period on the snapshot date.

Regardless, any "costs" to ETCs resulting from their purported reliance on USAC can hardly be "significant," because that guidance appeared on USAC's website for approximately 12 months (December 2016 to December 2017). Br. 31. After USAC corrected the statement on its website, ETCs had no reliance interest in claiming reimbursement for Lifeline subscribers in the

cure period. Moreover, under the Lifeline rules, ETCs have always been able to claim Lifeline support for subscribers who cure their usage problem. *See* p. 30, above. Though NaLA asserts that the *Order* creates liability that “would extend back to” the *2012 Lifeline Order*, that claim is unsupported under its own theory of the case. Throughout its brief, NaLA argues that ETCs are entitled to Lifeline support for subscribers in the cure period *on the snapshot date* that the Commission adopted in the Commission’s *2015 Lifeline Order*. *See, e.g.*, Br. 36-37. Thus, at most, ETCs’ liability would extend back to the effective date of the snapshot rule (August 15, 2016).

#### **IV. NALA’S ARGUMENT THAT THE ORDER VIOLATES THE ACT IS WAIVED AND ALSO LACKS MERIT.**

This Court cannot reach NaLA’s argument that the Commission’s interpretation of its Lifeline rules in the *Order* violates the ETC provisions in 47 U.S.C. § 214, because NaLA failed to satisfy the administrative exhaustion requirement in Section 405(a) of the Act, 47 U.S.C. § 405(a). That provision deprives this Court of jurisdiction to hear arguments on which the Commission has not been “afforded [an] opportunity to pass.” *See NTCH*, 841 F.3d at 508. Neither NaLA nor any other party in the proceeding below contended that the Commission’s adherence to its non-usage rule would violate section 214 of the Act. Accordingly, the argument is waived.

Even were the Court to reach it, the argument lacks merit. Section 214(e)(1)(A) of the Act requires ETCs to “offer the services that are supported by Federal universal service support mechanisms.” 47 U.S.C. § 214(e)(1)(A) (emphasis added). The statute does not state that ETCs will be reimbursed for offering those services. NaLA contends that because section 54.401(a)(1) of the Commission’s rules defines “Lifeline service” as a voice and/or broadband service “for which qualifying low-income consumers pay reduced charges as a result of application of the Lifeline support amount,” an ETC cannot comply with its section 214(e)(1)(A) obligation to offer “a supported Lifeline service” if it is not reimbursed by the Lifeline program. Br. 47; 47 C.F.R. § 54.401(a)(1). That makes no sense—the offering of a service eligible for a subsidy and the payment of the subsidy are two separate things. In fact, under the Commission’s rules, an ETC always “offers” Lifeline service without Lifeline support—it is reimbursed, not paid in advance. 47 C.F.R. § 54.407(a).

Further, this Court and others have rejected the premise that an ETC’s section 214(e)(1)(a) obligation to “offer the services that are supported by Federal universal service support mechanisms” entitles it to universal service support. “ETC designation simply makes a carrier eligible for USF. Nothing in the language of § 214(e) entitles an ETC to USF funding.” *In re FCC 11–*

161, 753 F.3d 1015, 1088 (10th Cir. 2014); *see also, e.g., AT&T, Inc. v. FCC*, 886 F.3d 1236, 1247-1248 (D.C. Cir. 2018) (rejecting petitioner’s argument that it could not provide the “services that are supported” under section 214(e)(1) in areas where it did not receive high-cost universal service support); *TOPUC*, 183 F.3d at 412 (approving the Commission’s reading of the statute, requiring that ETCs be “eligible” for funding, not that they receive “support ... equal [to] the actual costs incurred”). Under that precedent, requiring ETCs to offer Lifeline service for 15 days, without compensation when that service is not used, does not violate the Act.

**V. NALA HAS NOT ESTABLISHED A REGULATORY TAKING CLAIM.**

NaLA asserts that those ETCs offering Lifeline service without assessing monthly fees have a “property interest in the voice/data usage allotments purchased to provide Lifeline service to subscribers in the cure period,” and the *Order* effects a regulatory taking of that property “by requiring ETCs to provide Lifeline service to subscribers in a cure period as of the snapshot date without reimbursement.” Br. 51-52. The Court should reject NaLA’s standing claim because it is foreclosed by the ETCs’ voluntary participation in the Lifeline program and in any event the Commission’s non-usage rule does not impose a sufficiently significant burden on ETCs.

Under the Takings Clause of the Fifth Amendment, “private property” shall not “be taken for public use, without just compensation.” U.S. Const., amend. V. Although physical occupation of property is the paradigmatic taking, the Supreme Court has recognized that “government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster,” and thus effects a taking. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

To determine whether a regulation amounts to an unconstitutional taking of property without just compensation, the courts consider the three factors set forth in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 124 (1978): (1) “[t]he economic impact of the regulation on the claimant”; (2) “the extent to which the regulation has interfered with distinct investment-backed expectations”; and (3) “the character of the government action.” This “inquiry turns in large part ... upon the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.” *Lingle*, 544 U.S. at 540.

NaLA’s taking claim cannot succeed. In the first place, it is well-established that voluntary participation in a regulated program like Lifeline defeats a challenge under the Takings Clause. In *Bowles v. Willingham*, 321 U.S. 503 (1944), the Supreme Court rejected a taking challenge to a federal

rent control statute—even though the statute resulted in a reduction of property value—because the statute did not compel landlords to rent their apartments; instead, they could leave the apartments vacant. *Id.* at 517-518. A long line of cases following *Bowles* likewise instructs that “no taking occurs where a person or entity voluntarily participates in a regulated program or activity.” *Baker Cty. Med. Svcs., Inc. v. U.S. Atty. Gen.*, 763 F.3d 1274, 1276, 1278-1279 (11th Cir. 2014) (requiring a hospital to treat federal detainees at the Medicare rate was not a taking, because the hospital voluntarily undertook the obligation) (cataloguing cases).

Like the landlords in *Bowles*, NaLA is challenging its members’ “rate of compensation in a regulated industry for an obligation that [its members] voluntarily undertook”—in this case, providing Lifeline service to low-income customers. *Baker Cty. Medical Servs.*, 763 F.3d at 1279. Though ETCs are required under the Commission’s rules to provide Lifeline service to eligible low-income customers, upon request, 47 C.F.R. § 54.405(a), neither the Act nor the Commission’s rules and orders compelled NaLA’s members to become ETCs, the prerequisite to providing federally supported Lifeline service. The *Order* simply limits the amount of Lifeline support that a carrier will receive if it chooses to become an ETC offering Lifeline services. And as we have explained, *see* p. 11, above, the non-usage rule only

applies to a Lifeline ETC that does not “assess and collect a monthly fee from its subscribers,” 47 C.F.R. § 54.407(c); ETCs remain free to collect a monthly fee and avoid the strictures of the rule. To be sure, NaLA contends that “[m]ost Lifeline service is provided free of charge to the subscriber,” and “Lifeline reimbursement is the only revenue anticipated by ETCs.” Br. 52.<sup>5</sup> But a “strong financial inducement to participate” in a regulated program does not render participation in the program involuntary. *Minnesota Ass’n of Health Facilities v. Minnesota Dept. of Pub. Welfare*, 742 F.2d 442, 446 (8th Cir. 1984).

Even if it were necessary to examine the *Penn Central* factors to resolve NaLA’s taking claim, they do not weigh in NaLA’s favor.

First, as the Commission concluded in the *Order*, its economic impact “would be light.” *Order* ¶ 123 (JA \_\_\_\_). At most, the non-usage rule restricts an ETC’s use of the minutes allotted to a subscriber during the 15-day cure period. Indeed, NaLA does not contend that an ETC cannot use those minutes

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<sup>5</sup> In its petition for designation as an ETC, a carrier must represent that it is “financially and technically capable of providing the Lifeline service,” 47 C.F.R. § 54.202(a)(4), which includes an examination of “whether the [ETC] applicant intends to rely exclusively on USF disbursements to operate, [and] whether the applicant receives or will receive revenue from other sources.” *2012 Lifeline Order* ¶ 388. If an ETC relies solely on Lifeline support to operate its business, that could contradict the representations it made its petition.

later; only that those allotments sit “economically idle without reimbursement” during the cure period. Br. 52 (quotation marks and citation omitted).

NaLA nonetheless contends that the economic impact is significant, primarily relying on comments filed by Sprint. Br. 53; *id.* 25. But as we have explained above, *see* pp. 30-31, and in the *Order*, ¶ 123 (JA \_\_\_), Sprint made only vague references to “the costs associated with an active account,” *id.* ¶ 118, and then listed the types of costs it allegedly incurs for subscribers in the 15-day cure period. It did not (1) quantify those costs or (2) document the number of subscribers in the cure period in a typical month. Without that information, which should be available to Sprint, it is impossible to quantify what (if any) impact the *Order* has on Sprint or any other Lifeline ETC. *See Dist. Intown Props. v. Dist. of Columbia*, 198 F.3d 874, 883 (D.C. Cir. 1999) (petitioner must provide “striking evidence of economic effects” “to prevail” under *Penn Central’s ad hoc* inquiry).

Second, NaLA has not demonstrated that it had a reasonable investment-backed expectation to receive Lifeline support for subscribers in the cure period as of the snapshot date. Lifeline ETCs, whose entitlement to subsidies has long been regulated by the Commission, have been on notice since the *2012 Lifeline Order* that they may not claim Lifeline support for

those subscribers. *See Full Value Advisors LLC v. SEC*, 633 F.3d 1101, 1110 (D.C. Cir. 2011) (no taking where disclosure requirement was in effect before petitioner's information was disclosed to the SEC). ETCs had no reasonable expectation that they would be reimbursed indefinitely for offering Lifeline service to subscribers that do not actually use the service given a Commission rule that unambiguously stated they would not.

Lastly, the character of the government's action weighs against a regulatory taking claim here. The non-usage rule serves an overriding purpose—ensuring that funds from the Lifeline program are used only for those subscribers who are actually using and benefitting from Lifeline service. *2012 Lifeline Order* ¶ 257.

### CONCLUSION

This Court should dismiss NaLA's petition for review for failure to exhaust to the extent it asserts a violation of section 214(e)(1)(A) of the Act and for lack of standing to the extent it asserts a regulatory taking claim. The Court should deny the remainder.

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**CERTIFICATE OF FILING AND SERVICE**

I, Maureen K. Flood, hereby certify that on June 10, 2020, I filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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# Statutory Addendum

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**U.S. Const., amend. V.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**28 U.S.C. § 2342**  
**Jurisdiction of court of appeals**

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

- (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

\* \* \*

**28 U.S.C. § 2344****Review of orders; time; notice; contents of petition; service**

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of-

- (1) the nature of the proceedings as to which review is sought;
- (2) the facts on which venue is based;
- (3) the grounds on which relief is sought; and
- (4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

**47 U.S.C. § 151****Purposes of chapter; Federal Communications Commission created**

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the “Federal Communications Commission”, which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

**47 U.S.C. § 214**  
**Extension of lines or discontinuance of service;**  
**certificate of public convenience and necessity**

\* \* \*

(e) Provision of universal service

(1) Eligible telecommunications carriers

A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received—

- (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and
- (B) advertise the availability of such services and the charges therefor using media of general distribution.

(2) Designation of eligible telecommunications carriers

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

\* \* \*

#### (4) Relinquishment of universal service

A State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier. An eligible telecommunications carrier that seeks to relinquish its eligible telecommunications carrier designation for an area served by more than one eligible telecommunications carrier shall give advance notice to the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) of such relinquishment. Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an area served by more than one eligible telecommunications carrier, the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier. The State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall establish a time, not to exceed one year after the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) approves such relinquishment under this paragraph, within which such purchase or construction shall be completed.

\* \* \*

#### (6) Common carriers not subject to State commission jurisdiction

In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the Commission consistent with applicable Federal and State law. Upon request and consistent with the public interest, convenience and necessity, the Commission may, with respect to an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated under this paragraph, so long as each additional requesting carrier

meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the Commission shall find that the designation is in the public interest.

**47 U.S.C. § 254**  
**Universal Service**

\* \* \*

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(1) Quality and rates

Quality services should be available at just, reasonable, and affordable rates.

(2) Access to advanced services

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) Specific and predictable support mechanisms

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).

(7) Additional principles

Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.

(c) Definition

(1) In general

Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services--

(A) are essential to education, public health, or public safety;

(B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;

(C) are being deployed in public telecommunications networks by telecommunications carriers; and

(D) are consistent with the public interest, convenience, and necessity.

(2) Alterations and modifications

The Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.

(3) Special services

In addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h).

\* \* \*

**47 U.S.C. § 402**  
**Judicial review of Commission's orders and decisions**

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

\* \* \*

**47 U.S.C. § 405****Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order**

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which

the Commission gives public notice of the order, decision, report, or action complained of.

**47 C.F.R. § 0.91**  
**Functions of the Bureau.**

The Wireline Competition Bureau advises and makes recommendations to the Commission, or acts for the Commission under delegated authority, in all matters pertaining to the regulation and licensing of communications common carriers and ancillary operations (other than matters pertaining exclusively to the regulation and licensing of wireless telecommunications services and facilities). The Bureau will, among other things:

\* \* \*

(b) Act on requests for interpretation or waiver of rules.

\* \* \*

**47 C.F.R. § 54.401**  
**Lifeline defined.**

- (a) As used in this subpart, Lifeline means a non-transferable retail service offering provided directly to qualifying low-income consumers:
- (1) For which qualifying low-income consumers pay reduced charges as a result of application of the Lifeline support amount described in § 54.403; and
  - (2) That provides qualifying low-income consumers with voice telephony service or broadband Internet access service as defined in § 54.400. Toll limitation service does not need to be offered for any Lifeline service that does not distinguish between toll and non-toll calls in the pricing of the service. If an eligible telecommunications carrier charges Lifeline subscribers a fee for toll calls that is in addition to the per month or per billing cycle price of the subscribers' Lifeline service, the carrier must offer toll limitation service at no charge to its subscribers as part of its Lifeline service offering.
- (b) Eligible telecommunications carriers may allow qualifying low-income consumers to apply Lifeline discounts to any residential service plan with the minimum service levels set forth in § 54.408 that includes fixed or mobile voice telephony service, broadband Internet access service, or a bundle of broadband Internet access service and fixed or mobile voice telephony service; and plans that include optional calling features such as, but not limited to, caller identification, call waiting, voicemail, and three-way calling.
- (1) Eligible telecommunications carriers may permit qualifying low-income consumers to apply their Lifeline discount to family shared data plans.
  - (2) Eligible telecommunications carriers may allow qualifying low-income consumers to apply Lifeline discounts to any residential service plan that includes voice telephony service without qualifying broadband Internet access service prior to December 1, 2021.
  - (3) Beginning December 1, 2016, eligible telecommunications carriers must provide the minimum service levels for each offering of mobile voice service as defined in § 54.408.

- (4) Beginning December 1, 2021, eligible telecommunications carriers must provide the minimum service levels for broadband Internet access service in every Lifeline offering.

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**47 U.S.C. § 54.403**  
**Lifeline support amount.**

(a) The federal Lifeline support amount for all eligible telecommunications carriers shall equal:

(1) Basic support amount. Federal 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, except as provided in paragraph (a)(2) of this section, 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.

\* \* \*

(3) Tribal lands support amount. Additional federal Lifeline support of up to \$25 per month will be made available to a eligible telecommunications carrier providing facilities-based Lifeline service to an eligible resident of Tribal lands, as defined in § 54.400(e), if the subscriber's residential location is rural, as defined in § 54.505(b)(3)(i) and (ii), and the eligible telecommunications carrier certifies to the Administrator that it will pass through the full Tribal lands support amount to the qualifying eligible resident of Tribal lands and that it has received any non-federal regulatory approvals necessary to implement the required rate reduction.

\* \* \*

**47 C.F.R. § 54.405**  
**Carrier obligation to offer Lifeline.**

All eligible telecommunications carriers must:

- (a) Make available Lifeline service, as defined in § 54.401, to qualifying low-income consumers.
- (b) Publicize the availability of Lifeline service in a manner reasonably designed to reach those likely to qualify for the service.
- (c) Indicate on all materials describing the service, using easily understood language, that it is a Lifeline service, that Lifeline is a government assistance program, the service is non-transferable, only eligible consumers may enroll in the program, and the program is limited to one discount per household. For the purposes of this section, the term “materials describing the service” includes all print, audio, video, and web materials used to describe or enroll in the Lifeline service offering, including application and certification forms.
- (d) Disclose the name of the eligible telecommunications carrier on all materials describing the service.
- (e) De-enrollment—
  - (1) De-enrollment generally. If an eligible telecommunications carrier has a reasonable basis to believe that a Lifeline subscriber no longer meets the criteria to be considered a qualifying low-income consumer under § 54.409, the carrier must notify the subscriber of impending termination of his or her Lifeline service. Notification of impending termination must be sent in writing separate from the subscriber's monthly bill, if one is provided, and must be written in clear, easily understood language. A carrier providing Lifeline service in a state that has dispute resolution procedures applicable to Lifeline termination that requires, at a minimum, written notification of impending termination, must comply with the applicable state requirements. The carrier must allow a subscriber 30 days following the date of the impending termination letter required to demonstrate continued eligibility. A subscriber making such a demonstration must present proof of continued eligibility to the carrier consistent with applicable annual re-certification

requirements, as described in § 54.410(f). An eligible telecommunications carrier must de-enroll any subscriber who fails to demonstrate eligibility within five business days after the expiration of the subscriber's time to respond. A carrier providing Lifeline service in a state that has dispute resolution procedures applicable to Lifeline termination must comply with the applicable state requirements.

(2) De-enrollment for duplicative support. Notwithstanding paragraph (e)(1) of this section, upon notification by the Administrator to any eligible telecommunications carrier that a subscriber is receiving Lifeline service from another eligible telecommunications carrier or that more than one member of a subscriber's household is receiving Lifeline service and therefore that the subscriber should be de-enrolled from participation in that carrier's Lifeline program, the eligible telecommunications carrier must de-enroll the subscriber from participation in that carrier's Lifeline program within five business days. An eligible telecommunications carrier shall not be eligible for Lifeline reimbursement for any de-enrolled subscriber following the date of that subscriber's de-enrollment.

(3) De-enrollment for non-usage. Notwithstanding paragraph (e)(1) of this section, if a Lifeline subscriber fails to use, as “usage” is defined in § 54.407(c)(2), for 30 consecutive days a Lifeline service that does not require the eligible telecommunications carrier to assess and collect a monthly fee from its subscribers, an eligible telecommunications carrier must provide the subscriber 15 days' notice, using clear, easily understood language, that the subscriber's failure to use the Lifeline service within the 15-day notice period will result in service termination for non-usage under this paragraph. Eligible telecommunications carriers shall report to the Commission annually the number of subscribers de-enrolled for non-usage under this paragraph. This de-enrollment information must be reported by month and must be submitted to the Commission at the time an eligible telecommunications carrier submits its annual certification report pursuant to § 54.416.

(4) De-enrollment for failure to re-certify. Notwithstanding paragraph (e)(1) of this section, an eligible telecommunications carrier must de-enroll a Lifeline subscriber who does not respond to the carrier's attempts to obtain re-certification of the subscriber's continued eligibility as required by § 54.410(f); or who fails to provide the annual one-per-household re-certifications as required by § 54.410(f). Prior to de-enrolling a subscriber

under this paragraph, the eligible telecommunications carrier must notify the subscriber in writing separate from the subscriber's monthly bill, if one is provided, using clear, easily understood language, that failure to respond to the re-certification request will trigger de-enrollment. A subscriber must be given 60 days to respond to recertification efforts. If a subscriber does not respond to the carrier's notice of impending de-enrollment, the carrier must de-enroll the subscriber from Lifeline within five business days after the expiration of the subscriber's time to respond to the re-certification efforts.

(5) De-enrollment requested by subscriber. If an eligible telecommunications carrier receives a request from a subscriber to de-enroll, it must de-enroll the subscriber within two business days after the request.

**47 C.F.R. § 54.407**  
**Reimbursement for offering Lifeline.**

- (a) Universal Service support for providing Lifeline shall be provided directly to an eligible telecommunications carrier based on the number of actual qualifying low-income customers listed in the National Lifeline Accountability Database that the eligible telecommunications carrier serves directly as of the first of the month. Eligible telecommunications carriers operating in a state that has provided the Commission with an approved valid certification pursuant to § 54.404(a) must comply with that state administrator's process for determining the number of subscribers to be claimed for each month, and in those states Universal Service support for providing Lifeline shall be provided directly to the eligible telecommunications carrier based on that number of actual qualifying low-income customers, according to the state administrator or other state agency's process.
- (b) For each qualifying low-income consumer receiving Lifeline service, the reimbursement amount shall equal the federal support amount, including the support amounts described in § 54.403(a) and (c). The eligible telecommunications carrier's universal service support reimbursement shall not exceed the carrier's rate for that offering, or similar offerings, subscribed to by consumers who do not qualify for Lifeline.
- (c) An eligible telecommunications carrier offering a Lifeline service that does not require the eligible telecommunications carrier to assess and collect a monthly fee from its subscribers:
- (1) Shall not receive universal service support for a subscriber to such Lifeline service until the subscriber activates the service by whatever means specified by the carrier, such as completing an outbound call; and
  - (2) After service activation, an eligible telecommunications carrier shall only continue to receive universal service support reimbursement for such Lifeline service provided to subscribers who have used the service within the last 30 days, or who have cured their non-usage as provided for in § 54.405(e)(3). Any of these activities, if undertaken by the subscriber, will establish "usage" of the Lifeline service:
    - (i) Completion of an outbound call or usage of data;

- (ii) Purchase of minutes or data from the eligible telecommunications carrier to add to the subscriber's service plan;
- (iii) Answering an incoming call from a party other than the eligible telecommunications carrier or the eligible telecommunications carrier's agent or representative;
- (iv) Responding to direct contact from the eligible communications carrier and confirming that he or she wants to continue receiving Lifeline service; or
- (v) Sending a text message.

\* \* \*

**47 C.F.R. § 54.701****Administrator of universal service support mechanisms.**

- (a) The Universal Service Administrative Company is appointed the permanent Administrator of the federal universal service support mechanisms, subject to a review after one year by the Federal Communications Commission to determine that the Administrator is administering the universal service support mechanisms in an efficient, effective, and competitively neutral manner.
- (b) The Administrator shall establish a nineteen (19) member Board of Directors, as set forth in § 54.703. The Administrator's Board of Directors shall establish three Committees of the Board of Directors, as set forth in § 54.705: (1) the Schools and Libraries Committee, which shall oversee the schools and libraries support mechanism; (2) the Rural Health Care Committee, which shall oversee the rural health care support mechanism; and (3) the High Cost and Low Income Committee, which shall oversee the high cost and low income support mechanism. The Board of Directors shall not modify substantially the power or authority of the Committees of the Board without prior approval from the Federal Communications Commission.

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**47 C.F.R § 54.702****Administrator's functions and responsibilities.**

- (a) The Administrator, and the divisions therein, shall be responsible for administering the schools and libraries support mechanism, the rural health care support mechanism, the high-cost support mechanism, and the low income support mechanism.
- (b) The Administrator shall be responsible for billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds.
- (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.
- (d) The Administrator may advocate positions before the Commission and its staff only on administrative matters relating to the universal service support mechanisms.