Corrected Public Version

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

In the Matter of	)	File No. EB-IHD-13-00010656
i-wireless, LLC	)	NAL/Acct. No. 201432080003
Notice of Apparent Liability for Forfeiture	)	FRN: 0016194292

I-WIRELESS, LLC'S RESPONSE TO THE NOTICE OF APPARENT LIABILITY FOR FORFEITURE

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SUMMARY

In 2012, the Federal Communications Commission ("FCC" or "Commission") comprehensively reformed and modernized the Lifeline program. The 2012 Lifeline Reform Order substantially strengthened protections against waste, fraud and abuse; improved program administration and accountability; and improved enrollment processes and consumer disclosures, among other things, in order to ensure the orderly and efficient administration of the program. *In re Lifeline and Link-Up Reform and Modernization*, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11 (rel. Feb. 6, 2012) ("2012 Lifeline Reform Order"). At the same time, the Commission affirmed its steadfast commitment to "ensuring that eligible low-income consumers who do not have the means to pay for telephone service can maintain their current voice service through the Lifeline program and those who are not currently connected to the networks will have the opportunity to benefit from this program and the numerous opportunities and security that telephone service affords." *Id.*, ¶ 1.

One of the principal reforms of the 2012 Lifeline Reform Order was a continuation of the Commission's efforts to update and improve the program's rules in order to ensure that eligible consumers could benefit from the program while minimizing duplicate and erroneous payments. To that end, the Commission imposed significant new requirements on Lifeline Eligible Telecommunications Carriers ("ETCs") and consumers participating in the Lifeline program. i-wireless, LLC ("i-wireless") complies with the new requirements and follows a rigorous compliance process that meets or exceeds the compliance commitments made in its FCC-approved compliance plan.

i-wireless supports these and other reforms that seek to make the Lifeline program more efficient and accountable. The Notice of Apparent Liability ("NAL") issued to i-wireless, and

others like it, however, departs significantly from these rational steps taken by the Commission to protect and preserve the Lifeline program. The NALs expose Lifeline ETCs to potential fines of millions of dollars for ETC conduct that complies with the rules – and, at least in i-wireless's case, for conduct that meets and exceeds requirements of the rules – and that produces valid enrollments well over 99% of the time. Rather than recognizing the comprehensive and overwhelmingly successful measures i-wireless has taken to eliminate duplicative support, the NAL proposes to hold i-wireless strictly liable for alleged duplicates that are not in fact duplicate subscriber accounts. This theory of liability is unlawful, and ultimately undermines the Lifeline program, rather than strengthens it.

The NAL should be cancelled for many reasons. First, the NAL imposes fines based on standards that are impermissibly vague. Due process requires an agency to give fair notice of applicable legal requirements so parties "know what is required of them so they may act accordingly." *Fed. Commc'n. Comm'n. v. Fox Television Stations, Inc.* 567 U.S. __ (2012), Slip Op. at 12. The NAL fails to meet this most basic of legal requirements. This is in no small part due to the fact that the Commission has failed to provide a clear definition of what constitutes a "duplicate" in the NAL or elsewhere. For its In-Depth Validation ("IDV") process, the Universal Service Administrative Company ("USAC") appears to use an unarticulated definition of duplicate that departs materially from the guidance provided to it by the Commission's Wireline Competition Bureau ("WCB"). Indeed, virtually each time the Commission has provided an indication of what it considers to be a duplicate it has said something different. With the advent of the NAL and others like it, the Commission has turned Lifeline compliance into a multi-million dollar shell game.

The Commission also has failed – in the NAL or elsewhere – to identify the actions to detect potential duplicates that were required of Lifeline ETCs like i-wireless or explain how Lifeline ETCs knew of those requirements in advance. Finally, the NAL's failure to sufficiently identify the violations on which the proposed forfeiture is based prejudices i-wireless and violates due process. While i-wireless appreciates the Commission's attempt not to propose duplicate penalties for the same alleged infractions, the Commission impermissibly has left the company to guess as to the particular violations being alleged. For these reasons, the Commission is barred from imposing any penalty for the failure to detect what USAC deems to be a duplicate subscriber account.

Second, the NAL unlawfully seeks to apply the Commission's Lifeline rules in an arbitrary and capricious manner. The Commission appears to interpret the Lifeline rules to impose strict liability on an ETC for the existence of a duplicate, regardless of the actions it took to prevent or detect the duplicate and without any consideration of whether the particular consumers who allegedly have received duplicate Lifeline benefits did so in violation of the Commission's rules (possibly committing perjury in the process). The Commission has no authority to impose such a strict liability standard on ETCs. Even if it did, imposing on ETCs a penalty based on strict liability in these circumstances would be arbitrary and capricious. i-wireless complied with the procedures for enrolling subscribers established in the rules. While i-wireless's procedures achieved nearly a 100% success rate in blocking the kind of enrollment attempts USAC has deemed to be duplicates, no process can be perfect. Nor is it reasonable for the Commission to expect perfection, especially in light of the fact that the majority of the alleged duplicates in the NAL come from time periods during which the Commission's own duplicate screening mechanism – the National Lifeline Accountability Database ("NLAD") was

supposed to have been available for screening all duplicate enrollment attempts. By the time the NLAD becomes fully operational, the Commission will have missed its self-imposed deadline by more than a year and the subsequent commitment it made to Congress by several months. *See The Lifeline Fund: Money Well Spent?: Hearing Before the H. Subcomm. on Commc'n and Tech.*, 113th Cong., p. 4 (2013) (statement of Julie A. Veach, Chief, Wireline Competition Bureau), *available at* http://docs.house.gov/meetings/IF/IF16/20130425/100759/HHRG-113-IF16-Wstate-VeachJ-20130425.pdf.

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[END CONFIDENTIAL] For this reason and others, i-wireless committed none of the rule violations alleged in the NAL.

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[END CONFIDENTIAL] *See* 2012 Lifeline Reform Order, ¶ 305.

Finally, the proposed forfeitures are unreasonable, grossly excessive and unlawful for still other reasons. The proposed fines grossly exceed the Commission's prior Lifeline enforcement actions and also grossly exceed prior enforcement actions involving other alleged improper payment violations under other support programs administered by the FCC. The proposed fines also fail to adhere to the FCC's *Forfeiture Guidelines.* Moreover, by now repeating the forfeiture structure used to propose these fines eleven times without variation, the Commission has engaged in rulemaking without notice and comment as required by the Administrative Procedure Act ("APA").

In the end, the theories of liability and severity of the fines proposed in the NAL run counter to sound public policy. The NAL punishes a good actor for failing to achieve perfection in meeting an unarticulated standard. Contrary to the Commission's claims, the NAL does nothing to separate good and bad actors in the Lifeline program. Indeed, the NAL appears to be an attempt to mask the fact that the Commission has failed to do just that. By adopting such a draconian and ill-conceived enforcement posture, the Commission threatens harm to all

legitimate providers of Lifeline service, as well as the consumers for whom these providers provide essential communications services.

The strict liability standard proposed in the NAL, if applied consistently across the entire industry (as the Commission would be obligated to do), would expose every Lifeline provider to an unavoidable and excessive risk of liability. The potential liability is so high that even a 0.2% error rate would result in penalties exceeding the provider's gross revenues for the remaining 99.8% of orders deemed valid. Under such circumstances, rational investors, business men and women, and the ETCs they own and run will exit the Lifeline market, leaving consumers with fewer service providers and service options and making Lifeline services less available to those who need it. This result would be contrary to Congress's universal service mandate and would starkly undermine the Commission's Lifeline program goals, including the goal of extending the program to support broadband access for eligible low-income Americans. If the NAL and others like it are allowed to stand, all of the Commission's efforts over the past few years could be wasted and the Lifeline program will have little hope of meeting its statutory mandate or the publicly stated goals for it adopted by the Commission. Such a result cannot be what the Commission intended in these enforcement actions.

i-wireless supports rational and effective enforcement. Rational and effective enforcement requires fairness, balance and a careful consideration of both the applicable legal requirements and the factual circumstances of each situation. Otherwise, enforcement becomes arbitrary and can undermine the very policies the Commission is trying to protect. i-wireless respectfully submits that the NAL reflects none of the required fairness, balance and careful consideration, and is not an example of rational and effective enforcement. The Commission can correct this giant misstep by cancelling the NAL and crafting in its place a rational

enforcement policy based on clearly defined requirements that punishes only those who violate those requirements.

TABLE OF CONTENTS

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I-WIRELESS LLC'S RESPONSE TO THE NOTICE OF APPARENT LIABILITY FOR FORFEITURE

i-wireless, LLC ("i-wireless"), by and through its attorneys, hereby responds to the Notice of Apparent Liability for Forfeiture ("NAL" or "i-wireless NAL") issued to it by the Federal Communication Commission ("FCC" or "Commission") on November 1, 2013.[1] i-wireless has participated in the Commission's Lifeline program for a long time. It supports the Commission's efforts to reform the program to eliminate waste, fraud and abuse and to ensure that it meets the communications needs of the nation's low-income consumers. i-wireless also supports the on-going development and implementation of the Commission's long past-due National Lifeline Accountability Database ("NLAD") and other efforts to reduce duplicate enrollments in the program. The i-wireless NAL, however, represents a significant departure from the rational course the Commission had taken to protect and preserve the Lifeline program. Ultimately, the NAL is a misguided and counterproductive attempt by the Commission to answer

[1] *In re i-wireless, LLC*, Notice of Apparent Liability for Forfeiture, File No. EB-IHD-13-00010656 (rel. November 1, 2013). The FCC's Enforcement Bureau granted i-wireless's request for an extension of the timeframe to file this response and re-set that timeframe to on or before January 10, 2014. *See* November 14, 2013 Email from T. Cavanaugh, FCC to J. Heitmann, Kelley Drye & Warren LLP, *et al.*

critics by "getting tough" on abuses because it arbitrarily and capriciously targets an eligible telecommunications carrier ("ETC") with a nearly perfect record in duplicate prevention for failing to actually achieve perfection in detecting and preventing potentially fraudulent duplicate enrollment attempts by consumers.

As shown below, the NAL seeks to impose penalties on i-wireless for a failure to meet a duty to eradicate duplicates that is impermissibly vague and impossible to meet. Indeed, the standard the NAL imposes is stricter than the one Congress imposes on the FCC to prevent improper payments and is based on a definition of duplicates that the Commission has not chosen for the NLAD, biennial Lifeline audits or anything else (including the audits upon which the NAL is based). Compounding this lack of due process, the NAL proposes fines that (a) are grossly disproportionate in comparison to anything the Commission has ever imposed in the past, (b) bear no relationship to the "nature, circumstances, gravity and extent" of the violation, and (c) ultimately will drive legitimate providers out of the business and undermine the ability of Lifeline to provide the assistance it is designed to provide.

For all these reasons, as explained fully below, the Commission should cancel the i-wireless NAL[2] and instead continue its efforts to develop reasonably effective controls over duplicate enrollments through the NLAD and, to the extent necessary, through further notice and comment rulemaking.

[2] In the alternative, i-wireless respectfully requests that the Commission treat this response as a written request to eliminate or substantially reduce the proposed forfeiture.

FACTUAL BACKGROUND

I. LIFELINE AND I-WIRELESS HISTORY

A. The Evolution of Lifeline and the FCC's Administration of the Program

The Lifeline program was established in the 1980s with the purpose of providing telecommunications service to low-income households. 47 U.S.C. § 254. Codified in 1996, the program initially provided a discount to eligible consumers for a single residential landline telephone service. In 2005 and in recognition of the changing marketplace, the FCC expanded the program to include non-facilities based providers, including wireless carriers. The Commission and Congress have recognized that "a cell phone can literally be a Lifeline for families and provide low-income families, in particular, the means to empower themselves." *In re Lifeline and Link-Up Reform and Modernization*, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11, ¶ 17 (rel. Feb. 6, 2012) ("2012 Lifeline Reform Order").

In 2010, the Universal Service Administrative Company ("USAC") released an annual report indicating that low-income consumers may be receiving discounted service from multiple providers and providers may be providing multiple accounts to a single consumer. *See USAC Independent Auditor's Report,* Audit No. LI2009BE006; *see In re Lifeline and Link-Up Reform and Modernization*, Report and Order, FCC 11-97, ¶ 2 (rel. June 21, 2011) ("2011 Duplicative Payments Order"). In response, the Commission issued a Notice of Proposed Rulemaking ("NPRM") and subsequently a report and order representing its first attempt to address duplicate accounts for a single subscriber. *See 2011 Lifeline and Link Up Reform and Modernization; Federal-State Joint Board on Universal Service; Lifeline and Link Up,* Notice of Proposed Rulemaking, 26 FCC Rcd 2770 (2011); *see generally,* 2011 Duplicative Payments Order. With this order, the Commission clarified that each eligible consumer is entitled to only one Lifeline benefit and required the industry as a whole to inquire whether a subscriber or potential

subscriber already is receiving a Lifeline discount from another carrier. 2011 Duplicative Payments Order, ¶¶ 8, 9. The Commission further ordered USAC to develop a process for detecting and resolving duplicative claims and outlined the basics of a de-enrollment process when duplicate accounts were discovered. *Id.*, ¶¶ 13-15.

The Commission next issued its seminal Lifeline Reform Order in February 2012. *See generally,* 2012 Lifeline Reform Order. In the 2012 Lifeline Reform Order, the Commission's principal focus was to address what it then candidly acknowledged as shortcomings in its Lifeline rules that contributed to real *and perceived* waste, fraud and abuse in the Lifeline program. *Id.* Based on the Commission's February 2013 report that Lifeline is the only major Universal Service Fund ("USF") program *not* to be at risk due to an unacceptable level of improper disbursements,[3] it appears that media reports[4] and congressional inquiries[5] – and, regrettably, the Commission's own press releases[6] – have fueled a perception of waste, fraud and abuse that exceeds reality.

To achieve its indisputably laudable goal of reducing waste, fraud and abuse in the Lifeline program, the Commission in 2012 imposed significant new procedural requirements for qualifying and enrolling new Lifeline subscribers. *See, e.g.,* 2012 Lifeline Reform Order, ¶¶ 91,

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[3] *See* FCC Fiscal Year 2012 Agency Financial Report, 85 (Feb. 27, 2013), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-319168A1.doc.

[4] *See e.g.* Spencer E. Ante, *Millions Improperly Claimed U.S. Phone Subsidies*, Wall Street Journal, Feb. 11, 2013; *cf.* Mignon Clyburn, Acting Chairwoman, Fed. Communications Comm'n, Prepared Remarks at New America Foundation: "Communications Safety Net: How Lifeline Connects Families and Communities" (Sept. 12, 2013), *available at* http://www.fcc.gov/document/clyburn-remarks-lifeline-new-america-foundation.

[5] *See e.g.,* Letter from the Sen. Claire McCaskill to the Acting Chairwoman Mignon Clyburn (Sept. 12, 2013), *available at* http://www.mccaskill.senate.gov/LifelineLtr%20toFCCDOJurginginvestigationreScrippsreporting.pdf.

[6] *See e.g.,* Press Release, FCC, "FCC Proposed More than $14.4 Million in Forfeitures to Combat Duplicative Lifeline Service, Protect Lifeline Program" (Sept. 30, 2013), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-323565A1.pdf.

100-105 (requiring Lifeline ETCs to review eligibility documentation and requiring proof of eligibility to be presented at the time of enrollment). In addition, the new rules required certain disclosures to be made to consumers – including, notably, the disclosure that only one Lifeline benefit per household is permitted – and required new subscribers to sign a *certification under penalty of perjury* that they are not already receiving Lifeline supported service. *See, id.*, ¶¶ 69, 91. Further, the new rules expanded the identifying information to be collected when enrolling subscribers, such as requiring Lifeline ETCs to collect the subscriber's date of birth and last four digits of his or her Social Security Number ("SSN"). *See, id.*, ¶¶ 118. Finally, the Commission adopted measures to resolve potential duplicates, such as the Independent Economic Household form for use when multiple economic units reside at the same address. *See, id.*, ¶¶ 69, 76-78.

The Commission's signature long-term protection against duplicate enrollments, however, is the NLAD. The FCC directed USAC to create a database of Lifeline subscribers so that duplicates can be identified and eliminated. *Id.*, ¶¶ 179-187. As the Order states "[t]here is widespread agreement that a permanent solution to duplicative claims requires that ETCs are able to determine if a prospective subscriber is already receiving a Lifeline benefit at the time the subscriber requests service or seeks a Lifeline benefit from that ETC" and, to that end, directed USAC to create a database that is capable of providing verification upon inquiry of whether a subscriber is already receiving Lifeline support. *Id.*, ¶ 199. The NLAD was to be fully operational as of February 6, 2013. 2012 Lifeline Reform Order, ¶ 185. According to the latest update from USAC, it will be more than a year past this deadline by the time this requirement has been met. *See* USAC Press Release, "Modification to NLAD Schedule" (Dec. 27, 2013) *available at* http://www.usac.org/about/tools/news/default.aspx. The March 27, 2014 target date for full implementation of the NLAD, *id.*, is nearly three months past the post-deadline delivery

commitment made by the Commission in testimony before Congress. *Id.*; Statement of Julie A. Veach, Chief, Wireline Competition Bureau, Before the Subcommittee on Communications and Technology, U.S. House of Representatives, p. 4 (Apr. 25, 2013).

B. i-wireless's Processes for Verifying Eligible Accounts

i-wireless's compliance procedures and processes, just like those developed and used by the FCC and USAC, have evolved and become more effective over time and with experience. i-wireless diligently and consistently has complied with FCC Lifeline program requirements and continues to do so. As explained in the declaration of Paul McAleese, i-wireless employs a multi-tiered approach to qualify subscribers and to prevent the enrollment of ineligible or duplicative accounts.

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[7] The IDD is a database consisting of the Lifeline customers of participating CGM, LLC ("CGM") clients. Confidential Declaration of Chuck Campbell ("Campbell Decl."),¶ 10. CGM pro-actively created this database solution at its own expense so that it could provide to the industry a solution for eliminating inter-company duplicates while the NLAD was being developed. It permits participating ETCs to conduct an inter-company duplicate check against the customer databases of approximately two dozen CGM clients. *Id.* Until the NLAD becomes fully operational, it likely remains the only way that ETCs can conduct an inter-company duplicate check prior to submitting requests for Lifeline reimbursement in a Form 497. **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL] i-wireless's voluntary and pro-active participation in the IDD demonstrates a commitment to preserving the integrity of the Lifeline program unmatched by many of the largest ETCs.

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C. The USAC IDV Findings

i-wireless, like all ETCs, has been the subject of multiple IDVs. i-wireless has responded to each as required.

1. *The IDVs*

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[8] All "duplicates" identified by USAC through the IDV process are handled differently, with USAC engaging in "self-help" for alleged intra-company duplicates. Depending on i-wireless's independent disposition of the accounts, USAC's self-help often results in double-recovery by USAC.

[9] The April 8 letter states that the number of duplicates identified is , but the accompanying spreadsheet indicates there were alleged duplicates and the amount that USAC stated it was recovering corresponds with duplicates.

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2. *The Alleged "Duplicates"*

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[10] While the NAL proposes sanctions based only on 1,684 of the alleged duplicates, as discussed *infra* at 28-30, despite extensive efforts, i-wireless has been unable to determine which of the alleged duplicates identified in the NAL IDV Findings constitute the 1,684 accounts on which the FCC is basing the NAL. Because i-wireless cannot determine which accounts are included in the FCC's calculation of 1,684 "duplicates", the discussions herein regarding the data differences in the alleged duplicates are based on the total number of duplicates identified in the eight IDV findings cited in the NAL **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]**, rather than the undefined subset of 1,684 lines on which the FCC bases the proposed forfeiture.

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[12] [BEGIN CONFIDENTIAL]

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II. THE NAL

On November 1, 2013, the FCC, without notice and without having ever contacted i-wireless about the duplicates claimed in the USAC IDV Findings, issued an NAL to i-wireless for alleged duplicate Lifeline enrollments and reimbursement requests. *See* i-wireless NAL. In the i-wireless NAL, the FCC adopts the Ohio USAC IDV Finding, North Carolina USAC IDV Finding, Tennessee USAC IDV Finding, West Virginia USAC IDV Finding, New York IDV Finding, Indiana & South Carolina USAC IDV Finding, and Initial and Second Illinois USAC IDV Findings wholesale and, based on that adoption, concludes that i-wireless apparently has violated 47 C.F.R. §§ 54.407, 54.409 and 54.410 and proposes a $8,753,074 forfeiture. i-wireless NAL, ¶¶ 1, 11. The FCC does not appear to have conducted any additional investigation of the alleged duplicates identified in the NAL IDV Findings. Its conclusion is based entirely on USAC's conclusions.

The Commission also issued NALs on September 30, November 1, and December 11, 2013 to ten other ETCs that allegedly submitted Form 497 requests for reimbursement that included ineligible subscribers. Each of the NALs is substantially similar both in the allegations and the method for calculating the proposed forfeiture penalty.[13]

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[13] *See generally In re Easy Telephone Services Company d/b/a Easy Wireless,* Notice of Apparent Liability for Forfeiture, FCC 13-129, File No. EB-IHD-13-00010590 (rel. September 30, 2013) ("Easy NAL"); *In re ICON Telecom, Inc.*, Notice of Apparent Liability for Forfeiture, FCC 13-130, File No. EB-IHD-13-00010650 (rel. September 30, 2013); *In re Assist Wireless*, FCC 13-131, Notice of Apparent Liability for Forfeiture, File No. EB-IHD-00010791 (rel. September 30, 2013); *In re UTPhone, Inc.*, Notice of Apparent Liability for Forfeiture, FCC 13-132, File No. EB-IHD-13-00010650 (rel. September 30, 2013); *In re TracFone Wireless, Inc.*, Notice of Apparent Liability for Forfeiture, FCC 13-133, File No. EB-IHD-13-00010650 (rel. September 30, 2013); *In re Conexions, LLC d/b/a Conexion Wireless*, Notice of Apparent

The issuance of the first of these eleven NALs was accompanied by much fanfare. When it issued the first five ETC NALs, the Commission touted the steps being taken against these ETCs for having "ignored" the FCC's rules and for having "exploited" the Lifeline program. *See, e.g.,* Easy NAL, ¶ 1. In separate statements, then Acting Chairwoman Clyburn and Commissioner Pai each emphasized the goal of the forfeiture was to act as a deterrent to the entire ETC industry. *See* Easy NAL, attachments. In his statement accompanying the first five ETC NALs, Commissioner Pai asserted that these actions were "just the tip of the iceberg" and pledged strong action to combat waste, fraud and abuse. *Id.*

ARGUMENT

I. THE IMPOSITION OF A FORFEITURE FOR THE CONDUCT DESCRIBED IN THE NAL WOULD VIOLATE DUE PROCESS

The Due Process Clause of the Fifth Amendment to the U.S. Constitution provides procedural protections against the imposition of penalties in enforcement proceedings. In the present case, the Commission cannot impose a penalty against i-wireless because the Commission has not defined a "duplicate," has not provided notice of the standard of conduct to which Lifeline ETCs will be held for the detection of potential duplicates, and has not provided sufficient notice of the duplicates upon which the NAL is based. These failures are fatal to any enforcement action against i-wireless, just as similar failures were fatal to the Commission's attempt to enforce its indecency rules in the context of fleeting expletives. *See Fox Television,*

Liability for Forfeiture, FCC 13-145, File No. EB-IHD-13-00010793 (rel. Nov. 1, 2013); *In re True Wireless, LLC*, Notice of Apparent Liability for Forfeiture, FCC 13-148, File No. EB-IHD-13-00011727 (rel. Nov. 1, 2013); *In re Telrite Corp. d/b/a Life Wireless*, Notice of Apparent Liability for Forfeiture, FCC 13-154, File No. EB-IHD-13-00010674 (rel. Dec. 11, 2013); *In re Global Connection Inc. of America d/b/a Stand Up Wireless*, Notice of Apparent Liability for Forfeiture, FCC 13-155, File No. EB-IHD-00010970 (rel. Dec. 11, 2013); *In re Cintex Wireless, LLC*, Notice of Apparent Liability for Forfeiture, FCC 13-156, File NO. EB-IHD-13-00010671 (rel. Dec. 11, 2013) (collectively the "ETC NALs").

567 U.S. __, Slip Op. at 11-12; *see also CBS Corp., v. Fed. Commc'n. Comm'n.*, 663 F.3d 122, 143 (D.C. Cir. 2011) (an agency's enforcement policy cannot be arbitrary and capricious).

A. Due Process Requires that the FCC Give Fair Notice of the Conduct that Is Prohibited or Required

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *Fox Television*, 567 U.S. __, Slip Op. at 11-12; *see also General Electric Co. v. U. S. Environmental Protection Agency*, 53 F.3d 1324, 1328 (D.C. Cir. 1995) ("Due process requires that parties receive fair notice before being deprived of property"). When "for example, the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability." *General Electric*, 53 F.3d at 1328-29.[14]

For example, in *Fox Television*, the Supreme Court vacated the FCC's enforcement actions against two broadcast networks for airing fleeting expletives or brief nudity on broadcast television. The FCC had a longstanding prohibition on the airing of indecent material on broadcast television. Prior to the 2002 NALs at issue in the case, the FCC's indecency policy did not necessarily prohibit the use of all expletives. Instead, the FCC examined a range of factors, including whether the material was repeatedly and persistently shown and, if the material was fleeting, it tended to not rise to the level of indecency. *See Fox Television*, 567 U.S. __, Slip Op. at 5. Despite the then-existing multi-factor policy, the FCC imposed significant forfeitures on Fox Broadcasting ("Fox") and ABC Television Network ("ABC") for three alleged indecent broadcasts: two where fleeting expletives aired on live awards shows and one where brief partial nudity aired. *Id.* at 6-7. The Court found that, because Fox and ABC had no notice that fleeting

[14] *See also Maxcell Telecom Plus, Inc. v. Fed. Commc'n. Comm'n.*, 815 F.2d 1551, 1558 (D.C. Cir. 1987) (*quoting Bamford v. Fed. Commc'n. Comm'n.*, 535 F.2d 78, 82 (D.C. Cir. 1976) ("elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected").

language and images would be considered a violation of the indecency standard, that the FCC could not impose a sanction on them for having done so. *Id.* at 13-17.

Notably, even if the administrative agency may have discretion to interpret a statute or rule as it did, it may not impose forfeitures where sufficient notice of the interpretation is not given in advance. *General Electric*, 53 F.3d at 1329; *see also U. S. v. Chrysler Corp.*, 158 F.3d 1350 (D.C. Cir. 1998). In *General Electric*, the company engaged in pre-disposal processing of a dangerous chemical – polychlorinated biphenyls ("PCBs") – that allowed it to recycle certain non-dangerous portions of a solvent containing PCBs. The Environmental Protection Agency ("EPA") contended that its regulations did not permit the pre-disposal processing of PCBs done by General Electric ("GE"), and that GE thus had violated its rule. On appeal, the D.C. Circuit found the EPA's interpretation of the pre-disposal processing rule to be within its discretion under the statute, but reversed the fine imposed because the agency had not given fair notice of the interpretation prior to the conduct engaged in by GE. *General Electric*, 53 F.3d at 1330; *see also Satellite Broadcasting Co., Inc. v. Fed. Commc'n. Comm'n.*, 824 F.2d 1, 3-4 (D.C. Cir. 1987) (even though the FCC's interpretation of its filing rules merits deference, the FCC "cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules."); *Trinity Broadcasting of Florida, Inc. v. Fed. Commc'n. Comm'n.*, 211 F.3d 618, 632 (D.C. Cir. 2000) ("Where, as here, the regulations and other policy statements are unclear, where the petitioner's interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not 'on notice' of the agency's ultimate interpretation of the regulations, and may not be punished").

B. The FCC Has Failed to Define What Constitutes a "Duplicate"

Here, due process is not satisfied because no definition of a "duplicate" exists. Relevant FCC orders reference duplicates but do not provide precise guidance for determining whether

two accounts are, in fact, duplicates. In practice, multiple subscriber information variations may appear in accounts, and the Commission simply has not addressed which variations indicate separate accounts and which indicate a duplicative account.

Notably, no FCC rule or order defines or describes what constitutes a duplicate. In the *2011 Duplicative Payments Order*, the Commission adopted a rule that "no qualifying customer" is permitted to receive more than one Lifeline subsidy concurrently. *2011 Duplicative Payments Order*, 26 FCC Rcd at 9027, ¶ 8.[15] A "qualifying customer" is not defined in the order. The Commission states only that this rule addresses "duplicative Lifeline subsidies received by the *same individual*." *Id.* at 9028, ¶ 11 (emphasis in original). Concurrent with the *2011 Duplicative Payments Order*, the FCC's Wireline Competition Bureau ("WCB") issued instructions to USAC for conducting IDVs. *See* DA 11-1082, Letter from Sharon E. Gillett, Chief, WCB, to D. Scott Barash, Acting Chief Executive Officer, USAC (June 21, 2011). With respect to duplicates on the same provider's network, the Bureau's guidance refers to only two types of such "duplicates." First, in what it refers to as Track 2-A duplicates, WCB describes "different individuals, same address" duplicates. *Id.* For these duplicates, the provider will look for "other information in its possession" which either validates or refutes the existence of a duplicate. *Id.* Second, WCB refers to "intra-company duplicates," which it describes as "same name, same address" duplicates.[16] *Id.* Most recently, WCB has proposed audit procedures for

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[15] The Commission adopted a parallel rule to require a Lifeline ETC to offer one Lifeline service per "qualifying low-income consumer" that is not currently receiving Lifeline service from that or any other provider. *Id.*

[16] USAC, which may only implement FCC policies, not create them, 47 C.F.R. § 54.702, appears to have ignored this guidance because very few of the alleged duplicates involve accounts with the same name and same address. By identifying alleged duplicates in a manner that differed from the FCC's guidance, USAC acted beyond the scope of its authority. Furthermore, USAC has provided little to describe how it went astray from the FCC's guidance. In its IDV training materials, USAC states only that it has built a "Low Income Duplicate Detection System" to (1) "standardize addresses" through the USPS's address matching system and (2) conduct name

the Lifeline Biennial Audits that would require independent auditors to define a "subscriber" as having a match of name, date of birth *and* last four digits of the SSN.[17]

None of the FCC's orders provides fair notice on how to resolve information variances in customer names and addresses. Similarly, none of the orders provides notice of how "other information" in the Lifeline ETC's possession – such as the SSN or date of birth required to be collected by the 2012 Lifeline Reform Order – are to be considered to determine what in fact constitutes a duplicate. In the absence of further guidance from the Commission, it is reasonable for Lifeline ETCs to rely on electronic screening techniques to detect duplicates. These electronic screening techniques have relied principally on the identification of accounts with identical information.

The NAL IDV Findings illustrate the core of the problem. **[BEGIN CONFIDENTIAL]**

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comparison using "lexical and phonetic approaches" to determine name variances. Presentation, FCC-USAC Joint Training Event, In-Depth Data Validations, June 19, 2012, at 11. USAC does not disclose what "lexical and phonetic approaches" are used, nor does it state whether any manual processes or judgments are used to identify or resolve conflicts.

[17] *See Wireline Competition Bureau Seeks Comment on the Lifeline Biennial Audit Plan*, Public Notice, DA 13-2016, at Attachment 2, p. 15 (rel. Sept. 30, 2013) ("Lifeline Biennial Audit Plan Notice"). Moreover, independent auditors are instructed to conduct this review "using computer-assisted audit techniques," suggesting that an electronic data matching is an acceptable duplicate screening process. *Id.*

[END CONFIDENTIAL]

The fact that a Lifeline ETC cannot with certainty determine how to resolve such variances renders the penalty proposed here in conflict with due process principles. Like the television networks in *Fox Television*, i-wireless has not been provided with "fair notice of what is prohibited." *Fox Television*, 567 U.S. __, Slip Op. at 13; *see General Electric*, 53 F.3d at 1328-29; *Trinity Broadcasting,* 211 F.3d 628-30; *Satellite Broadcasting,* 824 F.2d 3-4.

C. The FCC Has Not Established a Standard of Conduct for Detecting Duplicates

The FCC's Lifeline rules also fail to provide adequate notice of what affirmative conduct is required of ETCs in order to detect duplicates (however the term might be defined). Because no standard of conduct has been set, imposition of a fine for the failure to detect duplicates would violate due process.

1. *The FCC's Lifeline Rules Fail to Provide Notice of the Conduct Required or Standard To Be Applied*

The Commission's regulations impose extensive requirements on Lifeline ETCs. 47 C.F.R. §§ 54.400 *et seq.* While the i-wireless NAL only cites to three regulations as the basis for the proposed forfeiture, whether one looks at those three regulations or all of the Lifeline regulations, the conclusion is the same: the FCC has failed to provide notice of the standard that the FCC will apply to determine whether a Lifeline ETC has adopted sufficient procedures to guard against the submission of reimbursement requests for duplicate benefits provided to consumers attesting to their eligibility under penalty of perjury. *See* 47 C.F.R. §§ 54.405, 54.407, 54.410, 54.417, 54.222.

The standard of conduct for detecting duplicates is not present in regulations that govern the information an ETC must present to a subscriber or receive from the subscriber at the time of

application. For example, the rules require ETCs to inform subscribers of the "one-per-household" rule and to obtain an attestation under penalty of perjury from subscribers stating that they understand the eligibility requirements and that they are eligible. 47 C.F.R. § 54.410. This rule undoubtedly has benefit in preventing duplicates (fewer subscribers will inadvertently or knowingly seek duplicate support), but it does nothing to detect duplicate subscriber certifications that may nevertheless be submitted.

The standard of conduct for detecting duplicates also is not present in regulations specifying the identification information a Lifeline ETC must obtain from eligible consumers. These Lifeline regulations include requirements for ETCs to (1) obtain the last four numbers of an applicant's Social Security Number and a date of birth for each consumer, (2) review of proof of Lifeline eligibility, (3) use state eligibility databases when available, (4) retain certain documents such as the self-certification form for each consumer, and (5) annually recertify the eligibility of their subscribers. 47 C.F.R. § 54.410.[18] Lifeline ETCs have limited discretion to determine, based on this information, whether the subscriber is qualified to receive Lifeline service.

Finally, Section 54.410(a) requires ETCs to "implement policies and procedures for ensuring that their Lifeline subscribers are eligible to receive Lifeline services." 47 C.F.R. § 54.410(a). But this section does not identify the content of the policies and procedures that are

[18] The i-wireless NAL also cites to Sections 54.407 and 54.409 as regulations violated by i-wireless. Neither of these regulations provides explicit requirements related to ETC duplicate detection. Moreover, i-wireless has complied with all of the requirements of these two regulations. *See* 47 C.F.R. §§ 54.407 & 54.409. Section 54.407 includes the general statement that ETCs may receive Lifeline support for qualifying customers and requires ETCs to certify that they are in compliance with all of the Lifeline regulations and have the required forms on file for every subscriber. 47 C.F.R. § 54.407. It also includes provisions relating to subscriber rates and reimbursement, and revenue record-keeping. *Id.* Section 409 applies to Lifeline subscribers and does not address Lifeline ETCs' compliance obligations. 47 C.F.R. § 54.409. Rather, this section defines the qualification criteria for a subscriber to qualify for Lifeline reimbursement (*i.e.*, qualifying programs and income qualification guidelines and the one account-per-household requirement). *Id.*

required. As explained *supra* at 4-7, i-wireless *has implemented* policies and procedures to accomplish this goal. And even if every alleged duplicate turned out to be an actual duplicate, i-wireless still would have been 99.74% effective (*i.e.,* nearly perfect) in screening for duplicates. If the Commission wishes to punish i-wireless for deficiencies in those policies and procedures, it must first provide fair notice of what conduct is required or is prohibited. This has not been done, and no general obligation to "implement policies and procedures" can overcome that lack of specificity.

Just like the plaintiffs in *General Electric*, *Satellite Broadcasting* and *Trinity Broadcasting*, i-wireless has reasonably interpreted the regulations to require certain specific procedures, but not to mandate any particular duplicate detection methodology. *See General Electric*, 53 F.3d at 1328-29; *Trinity Broadcasting,* 211 F.3d 628-30; *Satellite Broadcasting,* 824 F.2d 3-4. The FCC is not permitted to play "gotcha" by picking a different standard and applying it without notice. *See Fox Television*, 567 U.S. __, Slip Op. at 11-12; *General Electric*, 53 F.3d at 1328-29; *Trinity Broadcasting,* 211 F.3d 628-30; *Satellite Broadcasting,* 824 F.2d 3-4.

2. *Prior FCC Enforcement Actions Do Not Establish a Standard of Conduct*

Looking beyond the FCC's Lifeline rules and related orders, the FCC's prior enforcement actions do not establish a standard of conduct for detecting duplicates either. Prior to the ETC NALs, the FCC imposed or proposed imposing penalties on Lifeline ETCs for submitting duplicate accounts to USAC in three cases. None of these cases provides the required notice to i-wireless of what the applicable standard was or is.

The first of these was the VCI NAL. *See In the Matter of VCI Company Apparent Lifeline for Forfeiture*, File No. EB-07-IH-3985, Notice of Apparent Liability for Forfeiture and Order, 22 FCC Rcd 15933 (rel. Aug. 15, 2007) ("*VCI*" or "VCI NAL"). At the outset, i-wireless notes that *VCI* has no formal precedential value. *VCI* is merely an NAL. As such, it does not

satisfy due process notice requirements. *CBS*, 663 F.3d at 130 (an NAL "reflects only 'tentative conclusions' of the FCC and, in our view, provides insufficient notice of the FCC's official policy"). Moreover, *VCI* does not give notice that the standard the Commission will apply amounts to a strict liability policy for detecting duplicates. In *VCI*, the Commission evaluated the processes that VCI had in place and the reasons for the duplicates and found both of those patently insufficient. *VCI*, 22 FCC Rcd. 15933, ¶¶ 9, 14-15. The FCC also explicitly noted that, for a significant period of time, VCI failed to take steps to fix known computer errors or file Form 497 revisions. *Id.* ¶ 9, 14.[19] Thus, not only was *VCI* not based on strict liability, but the basis for the proposed forfeiture involved a failure to take corrective action.

The remaining two cases involve consent decrees. *See In the Matter of TerraCom, Inc.*, Consent Decree, 28 FCC Rcd 1527 (rel. Feb. 26, 2013); *In the Matter of YourTel America, Inc.*, Consent Decree, 28 FCC Rcd 1539 (rel. Feb. 26, 2013). These two orders are equally inapplicable. A consent decree is a non-precedential settlement agreement between specific parties. *See N.Y. State Dept. of Law v. Fed. Commc'n. Comm'n.*, 984 F.2d 1209 (D.C. Cir. 1993) (consent decree had no binding or precedential effect beyond the parties to the case); *see generally, YourTel*, Consent Decree, 28 FCC Rcd 1539; *TerraCom*, Consent Decree, 28 FCC Rcd 1527. Neither the Adopting Order nor the Consent Decree itself contain any detail to identify the standard of conduct to which the Lifeline ETCs were held, nor which alleged duplicates (or how many) in the USAC IDV were the basis of the enforcement action. *See generally, YourTel*, Consent Decree, 28 FCC Rcd 1539; *TerraCom*, Consent Decree, 28 FCC

[19] It is also important to note that *VCI* was issued in 2007. This was prior to the substantial reforms the FCC adopted in the 2012 Lifeline Reform Order. As a result, even if *VCI* articulated any type of standard, it would not constitute notice of such standard because that standard would have been superseded by a new regulatory scheme.

Rcd 1527. Therefore, nothing in the consent decrees could put a Lifeline ETC on notice of what conduct is required or is prohibited.

As a result, prior to the time it proposed sanctioning i-wireless, the FCC never articulated the applicable standard of conduct in any way that could satisfy due process requirements.

D. Without a Clear Definition of a Duplicate or Standard of Conduct, Enforcement Is Susceptible to Arbitrary and Discriminatory Application

Satisfaction of the requirements of due process is fundamental to lawful enforcement by an administrative agency. Specifically, "[p]recision and guidance [in agency regulations] are necessary so that those enforcing the law do not act in an arbitrary and discriminatory way." *Fox Television*, 567 U.S. __, Slip Op. at 12, *citing, Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Statutes and regulations "must provide explicit standards for those who apply them to avoid resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Cunney v. Bd. of Trustees of the Village of Grand View, NY*, 660 F.3d 612, 621 (2nd Cir. 2011), *quoting*, *Grayned*, 408 U.S. at 108-09 (internal quotes omitted).

Here, the absence of standards for what constitutes duplicates and for what Lifeline ETCs must do to detect them invites arbitrary and discriminatory application. For example, with no definition of duplicate, the FCC can pick and choose which accounts with similar but not identical information it considers to be "duplicates" and which ETCs it decides to sanction for such "duplicates". In the absence of clear articulable standards, whether a sanction is imposed could depend on which staffer reviews the information and/or which ETCs are or are not in favor at the FCC.

In fact, it appears that such discriminatory application may have already taken place. Since the Commission instructed USAC to commence IDVs, there have been dozens of audits (if not more than a hundred) with findings of alleged intra-company duplicate accounts. And yet,

the FCC has issued NALs against only 11 Lifeline ETCs for alleged duplicates. Though only the Commission knows how it went about selecting some ETCs to shoulder the blame for alleged duplicates while sheltering others, there likely is no defensible reason as to why these 11 ETCs have been selected as targets and others with similar and perhaps even higher numbers of alleged duplicates have not been selected. For i-wireless and other Lifeline ETCs unlucky enough to have been selected for unknown reasons to have USAC IDV duplicate findings converted into NALs, it undeniably leads to arbitrary and inconsistent enforcement in violation of due process.

E. The FCC Has Not Provided Sufficient Notice of the Violations on Which the NAL Is Based

The i-wireless NAL violates due process by failing to provide sufficient notice of the specific violations on which it is based. Due process requires sufficient notice of the conduct that forms the basis of the sanction or enforcement action so that the subject of such action can properly defend itself. *Pierre v. Holder*, 588 F.3d 767, 776 (2d Cir. 2009) ("At the core of Due Process is the right to notice of the nature of the charges and a meaningful opportunity to be heard."); *see also Kindhearts for Charitable Humanitarian Development, Inc. v. Geithner*, 710 F.Supp. 2d 637, 656-57 (N.D. Oh. 2010); *Gete v. Immigration and Naturalization Service*, 121 F.3d 1285, 1295-99 (9th Cir. 1997). Because i-wireless has been left to guess as to which of the alleged duplicates identified in the NAL IDV Findings form the basis for the NAL, the Commission has not provided the necessary notice.

The NAL states that the proposed forfeiture is based on IDV audits conducted in eight states for 13 data months. i-wireless NAL, ¶ 9. It further states that "i-wireless apparently had 1,684 individual duplicate lines for which i-wireless improperly sought Lifeline support reimbursement." *Id.* The NAL includes a vague footnote stating "[f]or the purposes of applying the second prong of our three-part forfeiture framework (a base forfeiture of $5,000 per

duplicate), given the unique circumstances presented by Lifeline intra-company duplicate cases involving multiple months of duplicate service, we have counted each intra-company duplicate line once, regardless of the number of months in which i-wireless sought and/or received reimbursement for that line. We account for the duration of each intra-company duplicate line (*i.e.*, the number of months that i-wireless sought compensation for each intra-company duplicate line) in the first and third prongs of our forfeiture calculation." *Id.*, ¶ 9 n. 30.

The NAL never identifies the specific alleged duplicate lines on which it bases its forfeiture. *See generally* i-wireless NAL. Instead, the NAL references IDVs conducted in eight states and eight USAC IDV findings. The number of alleged duplicate accounts in these eight IDV findings is **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** i-wireless does not know which 1,684 of these form the basis of the NAL.

i-wireless has made numerous and extensive attempts to determine and replicate the methodology applied by the Commission to arrive at 1,684 alleged duplicates. Based on the footnote, i-wireless's best guess is that (1) all of the duplicates identified in the Ohio USAC IDV Finding, North Carolina USAC IDV Finding, Tennessee USAC IDV Finding, West Virginia USAC IDV Finding, New York IDV Finding, and Indiana & South Carolina USAC IDV Finding, are included in the 1,684 lines that form the basis of the NAL, and (2) because six consecutive months of data were the subject of the Initial and Second Illinois USAC IDV Findings, only a subset of unique duplicates among all of the duplicates identified in the Initial and Second Illinois USAC IDV Findings form the basis of the NAL. If this is indeed the FCC's reasoning for the number of alleged duplicate lines – something which is not clear – then how the FCC determined which lines were unique duplicates in Illinois is indiscernible. i-wireless has made numerous attempts to determine which of the alleged Illinois duplicates are subject to

the NAL but it has been unable to replicate the 1,684 and, therefore, it has not been provided with sufficient notice as to which alleged duplicates form the basis of the NAL.

Because the NAL does not clearly identify – nor can i-wireless discern – the duplicate lines upon which the NAL is based, i-wireless cannot fully defend itself. The imposition of sanctions based on "duplicates" that have not been sufficiently identified in the NAL and which cannot be identified by i-wireless would violate due process.[20] *Pierre*, 588 F.3d at 776; *Kindhearts*, 710 F.Supp. 2d at 656-57; *Gete*, 121 F.3d at 1295-99.

II. IMPOSITION OF A FORFEITURE WOULD VIOLATE THE LAW BECAUSE APPLICATION A STRICT LIABILITY STANDARD WOULD BE BOTH OUTSIDE THE SCOPE OF FCC AUTHORITY AND ARBITRARY AND CAPRICIOUS AND THE NAL DOES NOT COMPLY WITH SECTION 503

Perhaps because there is no standard of conduct set forth in the rules, the NAL in effect applies strict liability to the existence of what USAC deems to be a duplicate account in i-wireless's Form 497s. *See* i-wireless NAL, ¶ 11 (i-wireless violated the rules "by concurrently requesting Lifeline support reimbursement for 1,684 individual intra-company duplicate lines."). That is, the NAL proposes liability for the mere fact that (allegedly) duplicate accounts existed, *regardless* of the reason a duplicate appears and without consideration of whether the ETC should have – or even could have – prevented the duplicate. In the absence of explicit statutory authorization, the FCC lacks authority to impose strict liability on an entity. *AT&T Corp. v. Fed. Commc'n. Comm'n.*, 323 F.3d 1081 (D.C. Cir. 2003). Furthermore, even if statutory authority exists, the standard is impossible to meet and therefore imposition of a penalty would be arbitrary and capricious. *See CBS*, 663 F.3d at 143-44 (an agency's enforcement policy cannot be arbitrary and capricious); 5 U.S.C. § 706.

[20] Of course, if i-wireless's interpretation of footnote 30 of the NAL is incorrect, then the violation of due process and lack of notice is even more far-reaching because i-wireless would not know which of the alleged duplicates from any of the NAL IDV findings actually are subject to the NAL.

In addition, Section 503 imposes very specific requirements on the FCC in issuing an NAL – requirements that the FCC did not comply with here. Specifically, Section 503 requires the NAL to set out the exact violations upon which the NAL is based. 47 U.S.C. § 503. The NAL does not identify the specific conduct of i-wireless as required because it does not sufficiently identify the alleged duplicates on which the proposed forfeiture is based. i-wireless has made extensive attempts to the identify the 1,684 accounts cited in the NAL, but it has been unable to do so. As a result, the NAL does not comply with Section 503 and cannot form a valid basis for a forfeiture order.

A. Imposing a Strict Liability Standard Would Be Unlawful

The NAL's sole theory of liability amounts to strict liability. Imposing such a standard in this context is beyond the scope of FCC authority. *AT&T*, 323 F.3d 1081.

This is not the first time the FCC has attempted to impose strict liability. In the decade after the break-up of the Bell System, the unauthorized switching of a subscriber's telephone carrier (known as "slamming") was a significant problem. The Commission combatted this problem with a series of rulemaking orders and enforcement actions aiming to prevent unauthorized switches and to rid the industry of deceptive or fraudulent practices. Among the FCC's efforts was a rule that prescribed procedures for obtaining a customer's authorization to switch telephone services. 47 C.F.R. § 64.1100, *et seq.* In a separate action, the FCC imposed a fine against AT&T for violating its slamming rules, concluding that, although AT&T had followed the verification processes, it did not obtain the authorization of the actual subscriber and, therefore, it switched the customer's service unlawfully. The FCC admitted on appeal that its standard amounted to strict liability.

The D.C. Circuit rejected the FCC's attempt to impose strict liability against AT&T. *AT&T*, 323 F.3d 1081 (invalidating a strict liability standard for instances of slamming). The

D.C. Circuit concluded that it was unlawful for the FCC to sanction AT&T under an "actual authorization" standard. The court concluded that such a standard "charge[d] carriers that engage in telemarketing with a virtually impossible task: guaranteeing that the person who answers the telephone is in fact authorized to make changes to that telephone line." *Id.* The Court went on to acknowledge that carriers "have little choice but to depend on the veracity of the person answering the phone" and placing the order. *Id.* The Court held that imposing an "actual-authorization requirement" exceeds the scope of the Commission's authority and is unlawful. *Id.*

In coming to its conclusion that the strict liability standard was impermissible, the D.C. Circuit first looked at whether the statute authorized application of the standard. *Id.* It found that the relevant statutory provision neither imposed an actual authorization requirement nor permitted the FCC to do so. The court concluded that, when Congress intended an actual authorization requirement, it expressly included such a requirement in the Communications Act. *Id.* The absence of an actual authorization requirement from the statute related to slamming demonstrated that Congress intended no such requirement. *Id.*

As with the statute relating to slamming at issue in *AT&T*, nothing in Sections 214 or 254 provides any basis for the FCC's imposition of a strict liability standard for enrolling duplicate accounts in the Lifeline program. *See* 47 U.S.C. §§ 214 & 254. Nor is there any indication outside the language of the statute that Congress wished to impose a strict liability standard on ETCs.[21] *Id.* In the absence of express authorization of such a standard, the FCC cannot impose one. *AT&T*, 323 F.3d at 1086-87.

[21] Lifeline regulations and procedures have likewise evidenced no intent of a strict liability standard prior to the September NALs. The applicable Lifeline regulations are all focused on the enrollment steps that ETCs must take to help ensure eligibility and USAC explicitly provides for the submission of Form 497 revisions to remove prior requests for duplicate accounts. *See* 2012

B. Imposing a Strict Liability Standard Would Be Arbitrary and Capricious

Because a strict liability standard for submission of duplicates is impossible to meet, imposing liability based on it would be arbitrary and capricious and would not survive scrutiny. *See CBS,* 663 F.3d at 143-44; 5 U.S.C. § 706. As the FCC's consumer citations illustrate, consumer fraud is a significant problem in the Lifeline program. No Lifeline ETC, no matter how thorough and exhaustive its procedures are, can prevent every case of consumer fraud. Moreover, other Lifeline program standards – the Improper Payments Elimination and Recovery Act of 2010 ("IPERA"), the NLAD and the proposed Lifeline Biennial Audit Plan – recognize that it is not possible to eliminate all duplicates, and thus none of these standards requires (or achieves) perfection in duplicate-detection and prevention. It is arbitrary and capricious to hold i-wireless to a standard that requires a zero percent duplicate-detection error rate and therefore unfairly and unreasonably makes it a guarantor of the veracity of every consumer certification, including those made by a limited number of unscrupulous consumers willing to provide false information despite the threat of FCC enforcement.

1. *Imposition of an Impossible to Meet Standard Would Be Arbitrary and Capricious*

Imposition of an impossible-to-meet standard would be arbitrary and capricious. The NAL seeks to hold i-wireless strictly liable for an act – the submission of a reimbursement request for a duplicate – that is impossible to avoid entirely. No matter what verification procedures and other measures it takes, no ETC could eliminate entirely the possibility of an erroneous order being submitted on an FCC Form 497.

Lifeline Reform Order, ¶ 305; 47 C.F.R. §§ 54.405, 54.407, 54.410, 54.417, 54.222; "FCC Form 497 FAQs: General Questions", USAC, *available at* http://www.usac.org/li/about/getting-started/faq-online-497-general.aspx (Response to Q7: "Carriers can revise any form that was submitted offline as long as it falls within the current administrative window."); "High Cost and Low Income News", USAC (March 2011), *available at* http://www.usac.org/_res/documents/hc/pdf/newsletters/2011/hcli-newsletter-march-2011.pdf.

The Commission frequently has acknowledged that there are consumers committing fraud in connection with the Lifeline program. *See e.g.* Exhibit 3 (Letter from Commissioner Clyburn to Sen. Jeff Sessions, Sept. 27, 2013). In fact, the FCC has issued citations to hundreds of individual consumers for violating the Lifeline regulations and having multiple Lifeline accounts. *See id.; see e.g., In re EXXC Finley1,* File No. EB-13-IH-0296, DA 13-473, Citation and Order for Illegal Receipt of Duplicate Lifeline Support, (rel. March 21, 2013); *In re SXXX Hopkins 1,* File No. EB-13-IH-0316, DA 13-493, Citation and Order for Illegal Receipt of Duplicate Lifeline Support, (rel. March 22, 2013). These citations to consumers acknowledge, as they must, the culpability of these individuals in obtaining multiple Lifeline accounts:

> As you should know, your household can have only one Lifeline-supported phone service. When you signed up for Lifeline-supported phone service, you should have signed a form where you certified, under penalty of perjury, that you and other members of your household do not already have Lifeline-supported phone service. You also should have certified that you were eligible for Lifeline service, and that all of the information in your application was truthful. . . By obtaining Lifeline service from multiple providers, you violated the rule limiting each household to only one Lifeline-supported phone service, and you apparently made multiple false certifications that are punishable by law.

See id.

Just as with carriers in the slamming context, Lifeline ETCs such as i-wireless "have little choice but to depend on the veracity of the person" applying for the program and certifying that the information they are giving is accurate and they do not already have a Lifeline account. *See AT&T,* 323 F.3d at 1086. It is impossible to determine the veracity of consumer certifications with 100% accuracy. Imposing a forfeiture for "a goal that the Commission itself has admitted may be impossible to accomplish" puts the ETCs in the position of guessing what methods to use to prevent duplicates "and hold[s] them liable if those methods 'prove unsuccessful.'" *Id.* at 1087.

i-wireless's "guesses" as to the necessary methods to prevent duplicates were comprehensive and highly successful. Even if the 1,684 accounts identified in the NAL IDV Findings are determined by the FCC to be duplicates, i-wireless still prevented duplicates 99.74% of the time. This exceptional duplicate prevention rate is the result of the extensive quality control procedures and fraud prevention measures that i-wireless incorporates into every step of its enrollment process: **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL] Because of issues like consumer fraud, however, even a conscientious ETC like i-wireless with extensive duplicate prevention processes in place cannot meet the strict liability standard proposed for the first time in the ETC NALs.

Sanctioning i-wireless for failing to achieve perfection in screening what USAC deems to be duplicates would be arbitrary and capricious.

2. *Other Lifeline Program Standards Neither Require Nor Achieve Perfection in Duplicate Detection*

In the i-wireless NAL, the Commission seeks to hold i-wireless strictly liable for any failure to block enrollments defined as duplicates by USAC pursuant to an undisclosed duplicate

definition and detection process created by USAC for purposes of its IDVs. However, the FCC is itself held, not to a 0% error rate, but to a 1.5-2.5% error rate in administering its own disbursement programs. Similarly, the FCC's NLAD cannot at this point (or likely ever) detect all errors leading to duplicate submissions, and the FCC (reasonably) has proposed a much more permissive threshold for error detection in the biennial audits ordered in the 2012 Lifeline Reform Order. The application of different standards for the FCC's administration of the Lifeline program, for the NLAD and for biennial audits makes plain the arbitrary and capricious nature of holding i-wireless to a standard of strict liability for failure to foresee the definition of duplicates and process used by USAC to detect them in the IDVs.

a. *The FCC Is Not Subject to the Equivalent of a Strict Liability Standard Under the IPERA*

The FCC itself is not subject to a strict liability standard in administering the Lifeline program. The IPERA sets forth an acceptable error rate for federal executive agencies managing disbursement programs. *Improper Payments Elimination and Recovery Act of 2010*, P.L. 111-204 (Jul. 22, 2010); 31 U.S.C. § 3321, note. Under the IPERA, federal agencies are required to conduct risk assessments of programs the agencies administer and identify programs susceptible to "significant improper payments." *Id.* "[S]ignificant improper payments" under the IPERA are, for fiscal years prior to September 2012, those that exceed either (1) 2.5% of program outlays and $10 million of all program payments or (2) payments of $100 million. The IPERA's 2.5% significant improper payment threshold decreases to 1.5% for fiscal years beginning after September 30, 2012.

The IPERA's establishment of additional compliance requirements that are applicable only to those improper payments defined as significant[22] is a tacit acknowledgement by Congress

[22] *See e.g.*, IPERA § 2(c).

that no federal agency disbursement program will ever be completely error-free. Had federal agencies been expected to maintain a one hundred percent accuracy rate for disbursement program payments, it would not be necessary for the IPERA to establish a two-tiered compliance standard based on differing error rates.

The IPERA's 2.5% significant improper payment threshold essentially establishes an "acceptable" error rate for improper payments by federal agencies. This threshold sets the error rate standard below which an agency is not required to take specified additional compliance measures. The IPERA improper payment threshold applies to payments made by all executive branch federal agencies and, thus, is an example of a reasonable standard of error that could be considered acceptable for any federal program.

As discussed above, even if the FCC were to determine that all 1,684 alleged duplicates subject to the NAL are duplicates, i-wireless's error rate here for failing to detect alleged duplicates is approximately 0.26%. Sanctioning i-wireless for a 0.26% error rate is clearly inconsistent with Congress' implicit acknowledgement, as reflected in the IPERA, that, for any government program, disbursement errors will occur and that an error rate below a certain threshold still will permit the agency to advance the government's interest in the program.

Instead of establishing a de facto zero error policy, the FCC should clearly define what a duplicate is and then utilize a reasonable error rate standard for identifying Lifeline providers that could be subjected to enforcement actions. While all Lifeline providers should strive for perfection in screening for duplicates, the FCC must acknowledge that there will be errors and the agency should not pursue enforcement action against those providers that make reasonable efforts at compliance and experience no more than pre-defined acceptable levels of error.[23] The

[23] There is value in striving for perfection even though it is unattainable. As legendary football coach Vince Lombardi said, "[W]e will chase perfection, and we will chase it relentlessly,

gross disparity between the error rate applicable to the FCC in the administration of its programs and the error rate (0) that the FCC seeks to impose on i-wireless illustrates that imposition of such a strict liability standard on i-wireless would be arbitrary and capricious.

b. *The NLAD Does Not Meet a Strict Liability Standard*

The duplicates database that USAC is establishing at the direction of the FCC does not at present meet a strict liability standard either. In fact, the NLAD presently is capable of catching far fewer "duplicates" than i-wireless's current processes catch.

The Lifeline Reform Order required USAC to have a national database capable of screening for duplicates in real-time operational as soon as possible and no later than February 6, 2013. *Id.*, ¶ 185. Implementation, however, apparently has been more complicated than the Commission originally anticipated. In December, ten months past that February 2012 deadline, the NLAD became available for limited testing and is scheduled to become fully operational in Maryland on February 13, 2014 and on a rolling basis in the remaining participating states by March 27, 2014 (well over a year past the FCC's deadline). As an initial step toward achieving fully operational status, Lifeline ETCs are required to submit their customer lists in a specified format into the NLAD database. At initialization on December 16, 2013, the database appears to (1) validate addresses using the U.S. Postal Service, (2) check for exact matches of the last name, the last four numbers of the Social Security Number and date of birth, and (3) if there is another name associated with the address provided, require an Independent Economic Household form to be completed. *See* NLAD Connectivity Workshop, September 18, 2013, Slide 13.

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knowing all the while we can never attain it. But along the way, we shall catch excellence." Chuck Carlson, *Game of My Life: 25 Stories of Packers Football*, 149 (2004).

[24] USAC's IDV process on the other hand apparently categorizes at least certain accounts that have a single letter or number different as duplicate accounts and the FCC has included such accounts in the i-wireless NAL.

[25] The NLAD will only accept subscriber information that includes a SSN and date of birth. As a result, not all of the accounts that i-wireless believes to be included in the NAL could be tested or entered into the NLAD. **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL]

[END CONFIDENTIAL] It would be arbitrary and capricious for the FCC to impose a standard on ETCs that the NLAD at this time is not able to meet.

It is important to note that a substantial number of the alleged duplicates upon which the NAL is based (because i-wireless does not know which ones those are, it can only make a guess as to how many) are for data months and time periods after the FCC's February 6, 2013 deadline for full implementation of the NLAD. If NLAD had been operational by the FCC's deadline, one can only wonder what the basis for the NAL would be – especially in light of the fact that the NLAD would not have identified any of the alleged duplicates included in the NAL IDV Findings accounts as a duplicate. It is perhaps in this light that the NAL appears most inequitable and irrational.

c. *Biennial Audits Required under the 2012 Lifeline Reform Order Will Not Impose a Strict Liability Standard*

In the 2012 Lifeline Reform Order, the Commission directed ETCs that receive $5 million or more in Lifeline support in a year to submit to a biennial audit conducted by an independent audit firm. The audit will assess the ETC's overall compliance with the Lifeline program rules and requirements, according to standard procedures to be developed by the FCC's WCB. The WCB released those audit standards for public comment on September 30, 2013 – the same day that the Commission issued the first round of the ETC NALs. *See Wireline Competition Bureau Seeks Comment on the Lifeline Biennial Audit Plan*, Public Notice, DA 13-2016 (rel. Sept. 30, 2013) ("Lifeline Biennial Audit Plan Notice").

The Lifeline Biennial Audit Plan describes standard procedures for independent auditors to use in performing these audits. To maximize the administrative efficiency and benefit to the Commission of these audits, the Biennial Audit Plan identifies the key risk areas and specific audit program requirements to be examined. The Biennial Audit Plan sets forth fieldwork testing procedures in each risk area, including, as most relevant here, Consumer Qualification for Lifeline (Objective II) and Subscriber Eligibility Determination and Certification (Objective III). These fieldwork test procedures establish a very different – and more reasonable – standard than is applied in the i-wireless NAL.

First, the fieldwork test procedures for examining customer qualification would not treat as duplicates any of the alleged duplicate accounts identified in the NAL IDV Findings. The instruction to auditors for testing consumer qualification (Objective II) directs the auditor to test the company's national subscriber list for various data integrity conditions "using computer-assisted audit techniques." Lifeline Biennial Audit Plan Notice, Attachment 2 at 15. This instruction appears to require a computer analysis of the subscriber database, *i.e.*, one conducted solely through automated matching processes, without a subjective or manual review of the data. Further, the instructions to auditors provide guidance on identifying a duplicate that requires use of all of the data required to be collected under the Commission's Lifeline rules. Instead of reviewing only name and address information, as USAC appeared to do in the IDVs, the Biennial Audit Plan (rationally) directs auditors to examine SSN and date of birth as well. *Id.* For a record to be considered the "same subscriber" it must contain identical information in **all** identification fields. *See id.* (defining "same subscriber" as "same name, birth date and last four of Social Security Number"). Thus, unlike the flawed IDV process, the Biennial Audit Plan would recognize only exact data matches across all subscriber data information deemed

necessary for collection by the Commission, as detected by computer-assisted data detection procedures, as duplicates.

Second, with respect to an ETC's procedures for determining subscriber eligibility (Objective III), the Biennial Audit Plan proposes a standard for a significant error rate rather than an expectation of 100% perfection. In the fieldwork test procedures for examination of the ETC's policies and procedures, the Biennial Audit Plan directs auditors to randomly select at least 100 subscribers from the ETC's subscriber list for testing. Testing would examine the eligibility information collected on subscriber certification forms to ensure its completeness. *Id.*, Attachment 2 at 17-18. This analysis, however, does not require that certification forms be complete in every single instance. Instead, auditors are directed to test the first 50 subscribers randomly sampled. If – and only if – the auditor finds an error rate of more than 5% during its examination of the first 50 forms, then the auditor proceeds with a more in-depth assessment and examines the remaining selected subscribers. *Id.*[26] Thus, unlike the i-wireless NAL, the proposed Biennial Audit Plan does not even require additional scrutiny (much less mandate a negative finding) for small rates of errors in customer documentation. Instead, the Plan adopts thresholds that recognize a certain level of error is inevitable and does not threaten program objectives. The i-wireless NAL's failure to recognize some reasonable threshold for errors (as was done in the Biennial Audit Plan Notice) is arbitrary and capricious.

C. The NAL Fails to Comply With the Requirements of Section 503

The i-wireless NAL cannot lead to any forfeiture because it fails to meet statutory requirements. The Communications Act is quite clear about the required contents of a Notice of

[26] Notably, for purposes of this examination, auditors are instructed to disregard forms collected from subscribers before the effective date of the most recent Lifeline reforms, in June 2012. Lifeline Biennial Audit Plan Notice, Attachment 2 at 18 n. 20.

Apparent Liability. Specifically, Section 503(b)(4) sets forth the procedures for imposing penalties via a Notice of Apparent Liability:

> [N]o forfeiture penalty shall be imposed under this subsection against any person unless and until —
> (A) the Commission issues a notice of apparent liability, in writing, with respect to such person;
> (B) such notice has been received by such person, or until the Commission has sent such notice to the last known address of such person, by registered or certified mail; and
> (C) such person is granted an opportunity to show, in writing, within such reasonable period of time as the Commission prescribes by rule or regulation, why no such forfeiture penalty should be imposed.

47 U.S.C. § 503(b)(4). Notices of Apparent Liability must contain the specific information necessary to identify the violations alleged and the facts supporting the allegations. The Act requires as follows:

> Such a notice shall
> (i) identify each specific provision, term, and condition of any Act, rule, regulation, order, treaty, convention, or other agreement, license, permit, certificate, instrument, or authorization which such person apparently violated or with which such person apparently failed to comply;
> (ii) set forth the nature of the act or omission charged against such person and the facts upon which such charge is based; and
> (iii) state the date on which such conduct occurred. Any forfeiture penalty determined under this paragraph shall be recoverable pursuant to section 504(a) of this title.

Id.

The NAL does not comply with these statutory requirements. The statute states that "the notice ***shall***... set forth the nature of the act or omission charged against such person," state "the facts upon which such charge is based" and "state the date on which such conduct occurred." 47 U.S.C. 503(b)(4) (*emphasis added*). Despite these clear and unequivocal requirements, the NAL does not identify the duplicate accounts for which it is proposing to sanction i-wireless. Instead, the NAL states that it is basing its proposed forfeiture on i-wireless's submission of

reimbursement requests for 1,684 duplicate accounts identified by USAC in eight IDVs. As explained *supra* at 25-26, the NAL fails to identify with sufficient specificity the 1,684 alleged duplicates on which it is based. The FCC's failure to identify specific violations here has important consequences. This lack of information of the specific violations or accounts materially compromises i-wireless's ability to defend itself by showing that alleged duplicates are not duplicates. Thus, the NAL fails to comply with the statute and that failure is fatal. As a result, the FCC cannot impose a sanction on i-wireless for any of the alleged duplicates it failed to identify with clarity in the NAL.

III. I-WIRELESS DID NOT VIOLATE SECTIONS 54.407, 54.409 OR 54.410

The i-wireless NAL finds that "i-wireless apparently willfully and repeatedly violated Sections 54.407, 54.409, and 54.410 of the rules by concurrently requesting Lifeline support reimbursement for 1,684 subscribers who were already receiving i-wireless Lifeline service." i-wireless NAL, ¶ 11. This finding is fundamentally flawed. i-wireless did not violate any Lifeline program rule. **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL]

A. The Rules Set Forth Procedures for Submitting Reimbursement Requests; They Do Not Require Perfect or Error-Free Screening for Duplicative Consumer Benefits

The Lifeline program rules are extensive and detailed. The goal of many rules undoubtedly is to help prevent subsidies being paid for ineligible subscriber accounts. Nowhere in those extensive and detailed regulations, however, is it stated that ETCs are barred from submitting Form 497s that include reimbursement requests for duplicate benefits provided to the

same subscriber. Thus, the rules do not explicitly bar the submission of a reimbursement request for a duplicate — alleged or otherwise. This is because the Lifeline regulatory framework is a process-based, not a results-based, framework. 47 C.F.R. §§ 54.405, 54.407, 54.410, 54.417, 54.222. Whether only the three regulations cited as the basis for the i-wireless NAL are examined or all of the Lifeline regulations are examined, the process-based framework is patently clear. *Id.*

The majority of the regulations address the process through which Lifeline ETCs collect Lifeline applications. For example, the regulations include requirements for obtaining a consumer self-certification form, obtaining the last four numbers of an applicant's Social Security Number and a date of birth, reviewing proof of Lifeline eligibility, and use of state eligibility databases when available. 47 C.F.R. §§ 54.405, 54.407, 54.410, 54.417, 54.222. These regulations further detail exactly what information must be communicated to the consumer during the application process so that the consumer is aware of the requirements and, if consumers are truthful, only eligible people are enrolled. *Id.* These requirements also impose record-keeping requirements to enable the Commission and USAC review of compliance with the required procedures. *Id.* Furthermore, the regulations state that ETCs "must implement policies and procedures for ensuring that their Lifeline subscribers are eligible to receive Lifeline services." 47 C.F.R. § 54.410(a).

The existence of a revisions process for Form 497 filings also supports the inevitable conclusion that the Lifeline rules are process-based rules. The FCC and USAC explicitly allow ETCs to file revisions to correct Form 497 errors, including submissions to account for duplicates. *See* 2012 Lifeline Reform Order, ¶ 305; "FCC Form 497 FAQs: General Questions", USAC, *available at* http://www.usac.org/li/about/getting-started/faq-online-497-general.aspx

(Response to Q7: "Carriers can revise any form that was submitted offline as long as it falls within the current administrative window."). The existence of a revision process recognizes that the enrollment and reimbursement request process will involve some level of errors or mistakes. The revisions process provides an orderly way to rectify those problems, thereby rationally avoiding exclusive reliance on any ETC's initial screening processes.

All of the mandates in these regulations, from the explicit requirements to the statement that ETCs must have policies to ensure eligibility, are related to process, not results. Contrary to the NAL's conclusion, i-wireless cannot violate the rules simply by submitting a Form 497 that contains accounts the FCC or USAC deems to be duplicates. Instead, i-wireless can only violate the above rules by failing to follow the procedures specified therein. The NAL fails to identify any such failure and, based on the processes discussed *supra*, clearly none exists.

Because the regulations impose a process-oriented regulatory regime and i-wireless complied with the requirements of that regime, no violation of the regulations occurred.

B. Only [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] of the Cited Accounts Have Identical Subscriber Information

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[27] The FCC has stated that the basis for a forfeiture order must be proven by a preponderance of the evidence. *See In re SBC Communications, Inc.*, Forfeiture Order (rel. April 15, 2002). While the law does not actually support the assertion that that is the appropriate standard, *see* 47 U.S.C. § 213(d), application of this standard in this case indicates that there should be no forfeiture because there is no evidence proving the existence of actual duplicate Lifeline enrollments.

[28] **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL]

[29] The NAL's reliance on USAC's conclusions is inconsistent with the de novo review standard that applies to appeals from USAC decisions. *See* 47 C.F.R. § 54.723.

[END CONFIDENTIAL]

[30] **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL]

[31] In fact, USAC ultimately recouped the support for these **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]** accounts twice. It first recovered the support as a result of i-wireless's Form 497 revisions. It recouped the amount a second time after the USAC IDV Findings, when USAC reduced i-wireless's Lifeline reimbursement for the following month by the amount of support associated with the duplicates it identified.

C. Even if the Rules Prohibit Requests of the Type Submitted by i-wireless, i-wireless Did Not Willfully Violate the Rules

The FCC concluded that i-wireless "willfully and repeatedly" violated the Lifeline regulations. i-wireless NAL, ¶ 11. Section 503 addresses forfeitures for violations, providing, in part, that any person that is determined by the Commission to have "willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter" is subject to forfeiture. 47 U.S.C. § 503(b)(1)(B). Courts have disagreed on what is required under the willfully standard. Using the traditional definitions, courts have held that it requires a "voluntary, intentional violation of a known legal duty." *U.S. v. Simpson,* 561 F.2d 53, 62 (7th Cir. 1977). Other courts have held that it is not necessary to know that a law has been violated, but merely that the act that constitutes a violation itself was intentional. *See U.S. v. Baxter,* 841 F. Supp.2d 378, 393 (D. Me. 2012); *In re Amendment of Section 97.114 of the Amateur Radio Service Rules,* 1985 WL 260382, n. 1 (F.C.C. 1985).

Under either standard applied, i-wireless did not willfully violate the regulations. The act i-wireless is accused of committing is the act of filing a Form 497 that contained duplicates. i-wireless did not willfully commit that act and i-wireless's conduct makes that clear. i-wireless's conduct both with respect to the extensive steps it takes to prevent duplicates and its response when it discovers duplicates – or voluntarily decides to treat accounts as though they are duplicates – unambiguously shows not only that i-wireless did not intentionally file a Form 497 with duplicate accounts, but that it takes reasonable steps to prevent filing for reimbursement for any duplicates in the first place.

As discussed above, *supra* at 4-7, i-wireless has always had a multi-layered, proactive approach to screening for and preventing duplicates. As the industry's knowledge and experience has grown, so have the extent and effectiveness of i-wireless's duplicate prevention

processes. A few examples of the myriad compliance processes in place include **[BEGIN CONFIDENTIAL**

[END CONFIDENTIAL] All of these processes have eliminated thousands of duplicate and potentially duplicative accounts from being enrolled and included in a Form 497 filing. i-wireless undeniably works hard to eliminate duplicates and fraud, but no system is perfect, particularly when consumer-initiated fraud exists.

Because of all of the steps that i-wireless takes, its duplicate rate is by any measure extremely low. For the data months in question, the duplicates that USAC asserts were included constitute 0.26% of its subscriber lines in those months. A duplicate rate of roughly one quarter of one percent does not happen with the willful filing of duplicate reimbursement requests, but occurs only when an ETC takes reasonable steps to prevent duplicates and screen them from its Form 497 submissions.

[BEGIN CONFIDENTIAL]

[END CONFIDENTIAL]

IV. THE PROPOSED FORFEITURES ARE UNREASONABLE AND EXCESSIVE

The penalties proposed in the i-wireless NAL – 359 times the alleged harm to the Fund – are exorbitant and unprecedented. First, the proposed forfeitures are completely disproportionate to any previous penalties imposed in similar Lifeline enforcement actions. Second, the proposed forfeitures grossly exceed the penalties imposed in other Commission enforcement actions, including high profile cases involving allegations of improper reimbursements and improper billing to consumers. Third, the proposed forfeitures are excessive when compared to the nature, circumstances, gravity and extent of the violation, both because the trebled upward adjustment is unlawfully excessive and because the proposed fines would threaten the entire Lifeline program. Finally, by imposing a new draconian penalty framework in an identical manner on eleven separate Lifeline ETCs without notice and an opportunity to comment, the Commission has violated Section 553 of the APA. For each of these reasons, the proposed forfeiture is unlawful and the imposition of fines based on the Commission's new forfeiture framework would not survive judicial review.

A. The Proposed Forfeitures Are Excessive in Comparison to Past Lifeline Enforcement Actions

In the i-wireless NAL, the Commission proposes a forfeiture that is both a dramatic departure from and grossly disproportionate in comparison to its past Lifeline enforcement actions. This departure from past practice without notice is arbitrary and capricious.[32] Moreover, the magnitude of the proposed fine – 359 times the alleged harm to the fund – is so egregiously punitive that it offends American constructs of justice and could not withstand constitutional review.[33]

The Commission first considered a Lifeline forfeiture standard in its NAL issued against VCI Company. *See* VCI NAL.[34] In *VCI*, the Commission found that VCI had improperly received support payments for 8,665 duplicate accounts spanning 18 months. Although VCI's violation was more serious than any alleged in the present proceeding because VCI's violation appeared to be deliberate and egregious, this represents the only case in which the FCC had previously proposed a forfeiture for duplicate Lifeline accounts. Thus, *VCI* – a case involving deliberate and egregious conduct – has stood for six years as the only formal guidance into the FCC's consideration of such violations.

In setting forth its proposed forfeiture, the Commission recognized that VCI's misconduct was not explicitly covered by the Commission's forfeiture guidelines, and therefore instituted a forfeiture framework based on the statutory factors. The proposed framework consisted of (1) a $20,000 fine for each of 16 inaccurate Form 497s submitted over the period; (2) a $20,000 fine for each of 18 months in which VCI received excess Lifeline and TLS

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[32] *CBS Corp* at 133 ("an agency may not apply a policy to penalize conduct that occurred before the policy was announced").

[33] *BMW of N. Am. v. Gore,* 517 U.S. 559, 574 (U.S. 1996) (holding that the guaranty of substantive due process under the Fourteenth Amendment prohibits unreasonable punitive fees).

[34] The FCC never converted this NAL to a Forfeiture Order.

support; and (3) an upward adjustment of one-half of the excess funds received from USAC ($57,000). *See id.* at 15939-43, ¶¶ 16-28. As a result, the Commission found VCI apparently liable for $417,000 based on $114,000 in Lifeline and TLS reimbursement, a penalty 3.6 times the claimed harm to the Fund.

After *VCI*, the Commission did not consider any cases involving Lifeline duplicates until earlier this year, when it entered into consent decrees with two Lifeline ETCs, TerraCom, Inc. and YourTel America, Inc. *See TerraCom*, Consent Decree, 28 FCC Rcd 1527; *YourTel*, Consent Decree, 28 FCC Rcd 1539. In both cases, USAC conducted IDVs that found that the companies had requested duplicative support from the same households "to such extent that further inquiry was warranted." *See TerraCom*, 28 FCC Rcd at 1544, ¶ 8; *YourTel*, 28 FCC Rcd at 1532, ¶ 8. The consent decrees suggest that the existence of duplicates was extensive and possibly intentional. Based on the amount of reimbursement agreed to by each provider, the volume of duplicates (actual or alleged) likely was, in the case of TerraCom, approximately 16 times higher than for i-wireless (alleged over-recovery of $402,760 vs. $24,358), and, in the case of YourTel, approximately 50% higher than for i-wireless (alleged over-recovery of $37,886 vs. $24,358).

In its consent decree, TerraCom agreed to pay $402,760 in reimbursements and to make a $440,000 voluntary contribution into the U.S. Treasury. *See TerraCom*, 28 FCC Rcd at 1535, ¶ 19. Similarly, YourTel agreed to pay $37,886 in reimbursements and to make a $160,000 voluntary contribution to the U.S. Treasury. *See YourTel*, 28 FCC Rcd at 1547, ¶ 19. Compared to the size of the harm to the Fund, the Commission's penalties in *TerraCom* and *YourTel* were 1.09 and 4.2 times the improper reimbursement, respectively.

Here, the Commission's proposed forfeiture against i-wireless is wildly disproportionate to the *VCI*, *TerraCom*, and *YourTel* actions. The i-wireless NAL proposes a forfeiture of $8,753,074 for $24,358 in allegedly improper reimbursements received by i-wireless. Viewed in comparison to the size of the alleged harm to the Fund, the i-wireless NAL is excessive. The amount that the Commission claims i-wireless improperly received is 50% *less than* the amount in *YourTel*, 4.6 times *less than* the amount in *VCI*, and 16 times *less than* the amount in *TerraCom*. In other words, the alleged actions of i-wireless involved far fewer subscribers and involve less purported harm to the Lifeline program. Nevertheless, the NAL proposes a forfeiture against i-wireless that is ***over 359 times*** the alleged harm to the fund.[35] There is no discussion of the forfeiture amount compared to the extent of harm in these prior cases.

Moreover, the Commission departs from the forfeiture structure it had used in *VCI* without adequate explanation. Because the nature of the alleged violations (duplicates) is identical in *VCI*, the Commission has an obligation to explain any differences in treatment in the NAL.[36] If the *VCI* formula were used in this case, the proposed forfeiture (prior to consideration of any other mitigating statutory factors) would be $532,179 ($260,000 for the submission of thirteen inaccurate Form 497s, plus $260,000 for thirteen months in which i-wireless received excessive Lifeline support, plus one-half of $24,358 in excessive support received).

The i-wireless NAL devotes only a single paragraph to the difference in the forfeiture structure. In that paragraph, the i-wireless NAL adopts a $5,000 per subscriber penalty, rather than the per-month penalty used in VCI. The i-wireless NAL justifies this new penalty as reflecting the duration of the violation and the magnitude of the harm. i-wireless NAL, ¶ 16. At

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[35] Such an egregiously punitive fine could not survive constitutional scrutiny under any circumstances, let alone those presented here. *See, e.g., BMW,* 517 U.S. at 574.

[36] *See infra* at 65-67.

best, this explanation attempts to address the change from a per-month to a per-subscriber penalty amount.[37] Critically, the NAL fails to explain the basis for the $5,000 penalty amount, compared to any other per-subscriber amount.

This $5,000 per subscriber amount significantly influences the total forfeiture proposed. Indeed, this factor alone accounts for 99% of the total forfeiture proposed against i-wireless. Other than a bare assertion that this amount reflects the "magnitude of the harm" the NAL is devoid of any analysis of the $5,000 penalty amount. Importantly, the i-wireless NAL does not explain why $5,000 per subscriber adequately reflects the magnitude of harm here, when in other cases the total fine is a small multiple of the overall harm alleged in previous cases. Here, the proposed forfeiture is over 359 times the magnitude of any alleged harm to the fund, whereas, in the three previous Lifeline cases, the proposed forfeiture was less than 4.2 times the magnitude in every instance. The Commission's failure to justify the $5,000 penalty amount is arbitrary and capricious.

Commissioner Pai's statement accompanying the Easy NAL demonstrates that the Commission initially had considered to propose forfeitures *fifty times less* than those ultimately proposed. Easy NAL, attachments (Statement of Commissioner Ajit Pai). Commissioner Pai does not explain the change that led to the fiftyfold increase in the proposed penalty, but the amount suggests that the Commission had considered using the *VCI* structure here. The i-wireless NAL's failure to justify the increase and radical departure from past practice renders the proposed forfeiture arbitrary and capricious.

[37] Even as to that point, the explanation is so exceedingly sparse that it could not be considered adequate.

B. The Proposed Forfeitures Are Excessive in Comparison to Other Enforcement Actions Related to Improper Reimbursements or Improper Billing to Consumers

Not only is the proposed forfeiture here grossly out of line with the Commission's past actions in the Lifeline context, it is also disproportionate when compared to fines in other high profile enforcement actions involving allegations of improper reimbursements or improper billing to consumers. As with the Lifeline precedents, the Commission fails to demonstrate that the nature, circumstances, extent or gravity of the offense here justifies the disparate treatment. This failure renders the proposed forfeiture arbitrary and capricious.

In the context of Telecommunications Relay Service ("TRS") Fund, the Commission has reached a number of high-profile consent decrees with large carriers for allegedly having received improper reimbursements from the TRS fund, none of which reach the proportions proposed here. First, in a 2010 consent decree with Purple Communications, the Commission addressed allegations that Purple improperly received over $18,459,064 in payments for TRS and VRS services that the Commission claimed were either unsubstantiated or ineligible for payment. *In the Matter of Hands On Video Relay Services, Inc., Go America, Inc. and Purple Communications, Inc.*, File Nos. EB-07-TC-4008, EB-07-TC-2806, EB-09-TC-238, Account. No. 201032170006, FRN 0015419872, Consent Decree, 255 FCC Rcd. 13090, 13092-93 (rel. Sept. 20, 2010). In the consent decree, the Commission agreed to allow Purple Communications to make a voluntary contribution of $550,000 in addition to its $18.5 million reimbursement—a penalty .029 times the size of the harm. Next, in the Commission's recent consent decree with AT&T over improper TRS reimbursements, AT&T agreed to make an $11,250,000 voluntary contribution in addition to a reimbursement of $7,000,000 in improperly received TRS funds—a penalty representing 1.6 times the alleged harm. *See In the Matter of AT&T*, File No.: EB-TCD-12-00000337, Acct. No.: 201332170011, FRN: 0005193701, Order, 28 FCC Rcd. 5994, 6004-05

(rel. May 7, 2013). In addition, on May 28, 2013, the Commission reached a consent decree with Sorenson Communications, Inc., the terms of which included a $4,240,000 reimbursement to the TRS fund and an $11,510,000 voluntary contribution to the fund. *See In the Matter of Sorenson Communications, Inc.*, File No. EB-TCD-12-00000370, Acct. No.: 201332170012, FRN: 00015648942, Order, 28 FCC Rcd. 7841, 7851-52 (rel. May 28, 2013). While this voluntary contribution is the largest of the three TRS penalties listed above, it is still only 2.7 times larger than the reimbursement owed.

Each of these actions involve closely analogous violations – the alleged receipt of support payments for which the provider was not eligible under the program rules. The magnitude of the penalty varied slightly, presumably in consideration of the remaining factors under section 503(b)(2)(e), but all were in a similar range compared to the amount of the alleged improper reimbursement in each case.

Lastly, in the truth-in-billing context, the Commission's penalties have been similarly proportional to the amounts that the carrier improperly received. For example, in its consent decree with Verizon Wireless over the carrier's $1.99/MB data usage charges to customers who did not expect to receive such charges, Verizon agreed to make a voluntary contribution of $25 million in addition to its $52.8 million refund to over 15 million affected customers. *See In the Matter of Verizon Wireless Data Usage Charges*, File No. EB-09-TC-458, Account No. 201132170001, FRN No. 0019212406, 25 FCC Rcd. 15105, (rel. Oct. 28, 2010). Here too, the Commission's ultimate penalty against Verizon was less than one-half of the harm as measured by the amount the carrier improperly received due to the violation.

As these cases demonstrate, the Commission has generally imposed its penalties within a narrow band of multipliers— less than five times the improper payments or revenues resulting

from the violation. Here, however, the Commission has stepped dramatically out of bounds to propose a penalty approximately *359 times larger* than the purported harm to the Fund. The NAL does not discuss this difference in treatment. Moreover, it contains no explanation whatsoever of any differences in the nature, extent or gravity of the alleged violations that would justify the difference in the penalty proposed here. Because these other cases involve alleged violations that are similar in nature and gravity, the proposed fines – which should not be imposed – should fall within a similar range. The Commission's departure from that range – without explanation – is the epitome of arbitrary and capricious agency action.

C. The Proposed Forfeitures Are Excessive Considering the Nature, Circumstances and Extent of the Alleged Violation

Even without comparison to the Commission's past practice, it is clear that the proposed forfeitures are excessive under the applicable statutory factors. First, the proposed forfeiture is unlawfully excessive in light of the Commission's *Forfeiture Guidelines*. Second, the proposed forfeitures would threaten the entire Lifeline program by driving carriers and investors from the market.

1. *The NAL Does Not Adequately Consider the Statutory Factors*

The Commission's proposed forfeiture, including the upward adjustment in this case—three times the amount that the Commission alleges i-wireless improperly received from the Fund—is unlawfully excessive. As set forth in Section 503(b)(2)(E), when determining a forfeiture penalty, the Commission must "take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." *See* 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(6). To comply with this element of the statute, the Commission has set forth detailed criteria to use in determining upward and downward

adjustments to proposed fines. *See In the Matter of the Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, CI Docket No. 95-6, 12 FCC Rcd 17087, 17100-01, ¶ 27 (1997). The goal of such forfeiture guidelines, the Commission explained, is to promote uniformity and predictability in the imposition of penalties under the statute. *Id.*

The Commission's upward adjustment criteria include (1) egregious misconduct; (2) the ability to pay or relative disincentive; (3) an intentional violation; (4) substantial harm; (5) any prior violations of any FCC requirements, (6) substantial economic gain; and (7) repeated or continuous violation. *See FCC Forfeiture Guidelines*, Section II., Adjustment Criteria for Section 503 Forfeitures. On the other hand, the Commission may make downward adjustments to forfeitures based on (1) a minor violation; (2) good faith or voluntary disclosure; (3) a history of overall compliance; and (4) an inability to pay. *See id.*

The FCC must consider these factors before imposing a forfeiture. *American Radio Relay League, Inc. v. Fed. Commc'n. Comm'n.*, 524 F.3d 227, 233 (D.C. Cir. 2008) (holding that the FCC must "consider relevant factors"); *see also Motor Vehicles Manufacturers' Assoc. v. State Farm Insurance*, 463 U.S. 29, 44 (1983) (the agency erred when it was silent as to reasoning and failed to address significant issues and objections); *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947) (the Court will not "guess" as the agency's reasoning); *Common Cause v. FEC*, 906 F.2d 705, 706-7 (D.C. Cir. 1990) (the agency erred because there was no mention of one of the relevant factors); *Katzon Bros., Inc. v. U.S. Environmental Protection Agency*, 839 F.2d 1396, 1401 (10th Cir. 1988) (penalty vacated because administrator was statutorily required "to consider the effect of the penalty on the ability of a business to continue and the gravity of the violation" and did not). An agency's inquiry into the facts needs to be "'searching and

careful'" and, if it is not, it is arbitrary and capricious. *Burgin v. Office of Personnel Management*, 120 F.3d 494, 498 (4th Cir. 1997), *citing, Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

In comparable cases, the Commission has engaged these factors in detail when crafting forfeiture penalties. For example, in *VCI*, the Commission presented a detailed explication of the facts and circumstances surrounding VCI's apparent violation of the Lifeline rules. In that case, VCI sought and received support for 8,665 duplicates through a deliberate course of fraudulent conduct spanning 18 months and syphoning $114,000 in Lifeline and TRS funds. Moreover, VCI "steadfastly refused to refile or file revised requests for support that did not contain duplicates." *VCI*, 22 FCC Rcd at 15940, ¶ 19. Based on these facts, the Commission issued a proposed forfeiture reflecting "the delinquent carrier's culpability and the consequential damage it causes to the goal of universal service," as well as "the damage caused by an ETC's receipt of excessive support." *See VCI*, 22 FCC Rcd at 15942, ¶ 25. And yet, the upward adjustment imposed against VCI was only $57,000, representing one-half of the $114,000 in ill-gotten reimbursements and reflecting 8,665 duplicates spanning 18 months of willful fraud. *See id.*

Here, the FCC acknowledged that it is required to consider the factors enumerated in Section 503(b)(2)(E) in determining its forfeiture amount and any upward adjustment. *See* i-wireless NAL, ¶ 12. And yet, despite its quotation of the mandatory factors it must consider, the NAL disregards them. Indeed, the FCC's inquiry into the facts as a general matter was not only not "searching and careful," it was nonexistent. The NAL includes no indication that the FCC examined how USAC came to its findings, the criteria USAC applied to determine the existence of duplicates, whether USAC's deviation from WCB guidance was lawful, or the facts relied upon or ignored by USAC. There is, in fact, no indication that the FCC conducted any

independent inquiry into the facts to reach the conclusions asserted in the NAL. *See generally* i-wireless NAL. This renders the proposed forfeiture contrary to law and invalid. *See Common Cause*, 906 F.2d at 706-7; *Katzon Bros.*, 839 F.2d at 1401.

That is not, however, the only error the FCC made when determining the amount of the proposed forfeiture. The FCC also failed to properly consider with respect to i-wireless, the alleged violator, the degree of culpability and history of prior offenses. In fact, the Commission goes out of its way to state that the amount of this penalty is only nominally based on i-wireless's conduct and is instead meant to impose a severe and damaging enough penalty that it deters an entire industry (evidently) from failing to comply with an unwritten and impossible to meet obligation to detect and deny all fraudulent attempts by consumers seeking duplicative Lifeline benefits. *See e.g.* i-wireless NAL, ¶¶ 13-19 ("a significant forfeiture should achieve broader industry compliance with Lifeline rules"). There is no mention of any history of violations by i-wireless (because there is none). No assessment of i-wireless's degree of culpability was made. Such an assessment would necessarily include at least an analysis of the exemplary measures that i-wireless takes to prevent and correct suspected fraudulent duplicate enrollment attempts by consumers and consideration of how tiny the alleged problem is relative to the size of i-wireless's subscriber base. Such culpability does not exist in this case. Instead, i-wireless consistently has demonstrated a pattern of compliance with Lifeline program rules.

The Commission also failed to meaningfully address the upward and downward adjustment criteria set forth in its own rules. Had the Commission performed such an analysis, it would have determined that, in comparison to similar cases like *VCI*, *TerraCom*, and *YourTel*, the alleged harm to the fund and necessary reimbursement here is small; that i-wireless's violation was neither egregious nor intentional; and that i-wireless's conduct evidences a good

faith and a long-standing commitment to and pattern of compliance with the Commission's rules. Based on the facts of this case and the Commission's past practice in similar NALs, it is clear that the Commission failed to perform the necessary due diligence when proposing the upward adjustment here. Therefore, the proposed forfeiture against i-wireless is excessive and contrary to law. *See Common Cause*, 906 F.2d at 706-7; *Katzon Bros.*, 839 F.2d at 1401.

2. *The Proposed Fines Threaten the Entire Lifeline Program*

Grossly disproportionate penalties of the magnitude proposed in the i-wireless NAL will, at a minimum, reduce competition in the marketplace. More disturbing, however, is that forfeitures like those proposed here will sound the death knell for ETCs providing Lifeline service. As explained in more detail in Section III.B, *supra*, the Commission here is seeking to hold Lifeline providers to an unattainable standard of perfection. The fact is that while companies like i-wireless work strenuously to prevent any and all duplicates, given the ever-present risk of consumer fraud based on submission of multiple certifications containing different personal information, even the best systems retain some risk of an unwitting violation. Nevertheless, as proposed, the Commission here has set a base penalty for a single duplicate at approximately $25,000: (1) $5000 per duplicate, or approximately 540 times the typical Lifeline reimbursement of $9.25 per month and over 145 times the maximum reimbursement of $34.25 per month for tribal areas; (2) between $27.75 and $102.75 per customer in trebled reimbursements; and (3) an additional $20,000 if the duplicate appears on a Form 497. Indeed, for a single alleged duplicate subscriber in the state of West Virginia who allegedly received $9.25 in duplicative benefits, the Commission proposes to fine i-wireless $25,027.75.

Viewed another way, across all subscribers, the risks imposed by the proposed forfeiture structure vastly exceed those of an ordinary deterrent. Here, the FCC proposed a fine of more than $8.7 million for 1,684 alleged duplicate subscriber accounts. At virtually any volume of

customers, such a fine would exceed the total reimbursement from the Lifeline fund for the ETC's entire subscriber base. For example, an ETC with 25,000 subscribers would generate $231,648 in gross Lifeline reimbursements for non-tribal subscribers. If this ETC had an error rate of only 0.17% in a month (*i.e.,* 99.83% are valid orders), it would generate 43 duplicates and $398 in excessive reimbursement. Under the i-wireless NAL's formula, however, this ETC would face a fine of $236,193, *more than the total it receives from the Fund for all subscribers.* Even a Lifeline ETC with a larger base of subscribers faces an excessive fine if even a minute percentage of customers are duplicates. A Lifeline ETC with 200,000 subscribers would face a fine exceeding its total Lifeline reimbursement with an error rate as low as 0.182%.[38]

This extreme level of financial risk involved as a result of the September, November and December NALs, if allowed to stand, would drive rational participants from the market—from carriers seeking to enter the Lifeline market to investors seeking to support those who provide low-income wireless service. And while such penalties are clearly designed to penalize carriers, the ultimate victims of these excessive forfeitures are those who the program and carriers are attempting to serve – low-income Americans seeking a lifeline to job opportunities, healthcare, emergency services, families, schools and communities. As Lifeline providers exit the program, Lifeline services will become less available and will provide fewer choices to low-income consumers. Ultimately, as enough providers exit the program, the program itself will fail to achieve its goal of providing low-income Americans with access to vital communications services. For these reasons, such a penalty is both unjust and arbitrary and capricious.

[38] 200,000 subscribers x 0.182% errors = 364 duplicates. Under the Commission's formula, 364 duplicates would generate a fine of $1,850,101 ($20,000 + (364 x $5,000) + ($3367 reimbursement/2)). This would exceed the $1,850,000 the ETC would receive from the 99.82% of customers that are not duplicates.

D. The FCC Exceeded its Authority in Establishing an Entirely New Lifeline Penalty Framework without Engaging in Notice and Comment Rulemaking

Since September 30, 2013, the Commission has issued eleven NALs against Lifeline providers for purported intra-company duplicates, each employing the same draconian three-part framework for such violations. The consistency of the Commission's adherence to this formula evidences an intent to be bound by the framework in all instances. The Commission cannot lawfully establish such a framework without engaging in notice and comment rulemaking. *See United States Telephone Association v. Fed. Commc'n. Comm'n.*, 28 F.3d 1232 (D.C. Cir. 1994) ("USTA"). In USTA, the D.C. Circuit vacated the Commission's 1994 Forfeiture Guidelines, which the Commission had imposed as a more predictable alternative to case-by-case adjudication of rule violations. *See id.* at 1233. In setting forth its 1994 guidelines, the Commission took pains to stress that the guidelines were merely a "policy statement," and therefore were exempt from notice and comment rulemaking. *See id.* at 1234. The Court disagreed, holding that the forfeiture guidelines were rules, rather than a policy statement, because the Commission's actions had demonstrated that it intended to be bound by the guidelines. *See id.*

As the Commission explained in *VCI*, forfeitures for violations of the Commission's Lifeline rules do not fall within any of the enumerated forfeiture guidelines. *VCI*, 22 FCC Rcd. at 15939. Therefore, the Commission must propose a penalty on a case-by-case basis while adhering to the broad guidelines established in the statute. In the i-wireless NAL and the other ETC NALs, however, the Commission followed a framework as if it were an adopted guideline. In each NAL, it proposed a penalty with these same components: (1) a $20,000 fine for the submission of a Form 497 seeking reimbursement for alleged duplicate subscriber accounts; (2) a $5,000 base forfeiture for each allegedly ineligible subscriber; and (3) an upward adjustment of

three times the reimbursements requested for those allegedly ineligible subscribers. *See* i-wireless NAL, ¶¶ 15-18. The variance in proposed fines is simply a mathematical computation, not a case-by-case determination of a penalty under the statutory factors. Notably, the penalty framework contains three striking determinations in its *de facto* guideline. First, the Commission here abandons its practice of basing penalties on the duration of the violation in favor of a heretofore unannounced policy of basing penalties on the number of allegedly invalid subscribers. Second, the Commission adopts a $5,000 per-subscriber forfeiture amount that grossly inflates all associated penalties. Third, the Commission replaces the *VCI* upward adjustment of one-half the reimbursement amount with an upward adjustment of three times the reimbursement amount. These modifications are more than a mere "reorient[ation]" of past considerations, they represent the establishment of a new forfeiture guideline.

Were this framework used in isolation, the Commission perhaps could contend that it was simply exercising its discretion within the bounds of Section 503. However, i-wireless is not the only ETC subject to these forfeitures. Instead, the Commission's new "aggressive forfeiture framework" has been proposed against a curiously select group of eleven generally large Lifeline providers. And there is no doubt that the Commission intended to establish a single framework to apply to all duplicates cases. In fact—the other ETC NALs explicitly rely on the Easy NAL to establish the framework. *See generally* ETC NALs. The Commission's industry-wide consistency in issuing these excessive fines under an identical framework demonstrates that, as in *USTA*, the FCC intends to be bound by its newly pronounced framework. Therefore, pursuant to Section 553(b)(3)(A) of the APA, the Commission is obligated "to put its proposed position out for comment and be prepared to justify whatever rule it fashions to the public and, if necessary, to the judiciary." *See USTA*, 28 F.3d at 1236. The Commission cannot apply its

"aggressive" framework as if it were a rule, as it has done here. Because the NAL unlawfully applies a rule that has not been adopted through notice and comment procedures, the NAL must be cancelled.

V. THE PROPOSED FORFEITURES ARE CONTRARY TO SOUND PUBLIC POLICY

The NAL asserts a goal of striking a balance between the "need to protect the Fund and [the need to] send a clearer deterrent message to the industry." i-wireless NAL, ¶ 16. In her separate statement accompanying the NAL, Acting Chairwoman Clyburn echoed the need for balance in order to promote the goals of the Lifeline program. Acting Chairwoman Clyburn noted that the proposed fines were "purposely large" but expressed concern that its actions avoid "harming the legitimate service [Lifeline] providers bring to their subscribers." Easy NAL, attachments at 10 (Statement of Acting Chairwoman Mignon L. Clyburn). She instructed the Enforcement Bureau to carefully consider each response, with the objective of eliminating waste, fraud and abuse while promoting the availability of Lifeline services to those who need it. *Id.* Unfortunately, the strict liability standard applied in the NAL and the excessive fines proposed run contrary to that objective.

As discussed previously, the fines proposed in the i-wireless NAL and other ETC NALs go beyond a "purposely large" deterrence to bad behavior. The NALs, if allowed to stand, would subject every Lifeline ETC to an extreme level of financial risk as a result of actions that are beyond an ETC's reasonable control. Although these penalties would be directed to the Lifeline providers, the ultimate victims of these excessive forfeitures will be the subscribers the program is intended to serve. As rational Lifeline providers exit the program due to the excessive potential harm, Lifeline services will become less widely available and will provide fewer choices for low-income consumers, undermining the goals of the Lifeline program itself.

A. The Strict Liability Standard and Forfeiture Framework Set Forth in the ETC NALs Threatens Legitimate Lifeline ETCs

Since its inception in the 1980s, the Commission has strongly supported the Lifeline program. While reforming the program in 2012, the Commission affirmed its commitment to ensuring widespread availability of communications services to low-income consumers. The Lifeline program, the Commission noted, "has been instrumental in increasing the availability of quality voice service to low-income individuals." 2012 Lifeline Reform Order, ¶ 15. Lifeline plays an important role in the FCC's universal service policies. It provides low-income consumers with the means to participate in today's society – to hold a job, to be accessible for a child's school or day care providers, to participate in commerce and to communicate in emergencies. As Acting Chairwoman Clyburn recognized, the Commission's enforcement both must provide an adequate deterrence and protect the integrity of the Lifeline program.

Unfortunately, the NAL achieves none of the balance Acting Chairwoman Clyburn had hoped to achieve. By adopting a strict liability standard and then proposing excessive fines, the Commission threatens harm to all legitimate providers of Lifeline services. Lifeline providers serve millions of subscribers, each one of whom is qualified for the program using eligibility rules and procedures mandated by the FCC. If the NAL's approach is applied across the industry, every provider faces a significant and unmanageable risk of forfeitures based on its participation in the program. When multiplied by the thousands, hundreds of thousands or millions of subscribers served by a provider, the potential risk of fines can truly threaten the viability of any business. Indeed, as discussed previously, even miniscule error rates would result in an ETC facing a fine that exceeds the amount it receives from the Fund for all subscribers.

Moreover, this risk is unmanageable.. The ETC NALs shows no consideration of the ETC's culpability in the existence of an alleged duplicate. It recognizes no "safe harbor" which an ETC may follow in order to avoid liability. An ETC literally has no way to ensure that it will never generate a duplicate reimbursement request and no way to ensure that it will not be subject to a significant fine as a result of providing Lifeline service to a consumer who attests to his or her eligibility under penalty of perjury.

Such draconian forfeitures inevitably would drive all rational businesses from the Lifeline program. It is hard to see how any provider could voluntarily subject itself to such an extraordinary level of financial risk. The proposed fines so far exceed the amount in potential reimbursement for subscribers that no business could expect to recoup its gross revenues, let alone generate a reasonable profit from providing Lifeline service. The wholly rational response to this situation may well be to exit the market entirely, in order to avoid the risk of owing more in fines than were earned from all subscribers combined. Inevitably, providers will exit the market, leaving fewer choices and less widespread availability of service (including those offering broadband). Contrary to Acting Chairwoman Clyburn's goals, these fines, if left to stand, will harm the program itself and deny low-income consumers access to vital communications services. This cannot be the outcome the Commission allows to occur.

B. The i-wireless NAL Proposes to Punish a Good Actor for Failing to Achieve Perfection

The forfeiture framework adopted in each of the ETC NALs will fail to provide the deterrent effect the Commission seeks. Deterrence has two purposes: (i) to restrain the wrong-doer from repeatedly indulging in the wrongful activity, and (ii) to set an example for others to deter and prevent them from committing crimes or violating laws. In order for deterrence to be effective, the action that is unlawful must be clearly communicated and, more importantly, it

must be avoidable. It is not possible to deter a person from an action that he or she is not aware of or has no control over.

The approach taken in the ETC NALs – if applied in a nondiscriminatory manner to all Lifeline ETCs with USAC IDVs finding intra-company duplicates – would punish all providers indiscriminately, whether they employed adequate protections or not. For the reasons explained elsewhere in this Response, the actions the Commission seeks to deter are undefined. It is not clear precisely what actions i-wireless (or any of the other entities so far that have been unlucky enough to have received an NAL, for that matter) failed to take in order to prevent a duplicate (however defined) from occurring. It also is not clear what actions i-wireless may take in the future to avoid repeated violations of the "no duplicates" rule. It appears that every provider would be subject to liability, simply because the provider is unable to achieve perfection. As a result, the NAL does not separate "good" actors from "bad" actors – an essential element of any deterrence scheme.

Indeed, the NAL leaves i-wireless with no guidance on what action is intended to be deterred in the first place. Instead, the NAL proposes a fine against an entity that has taken more than the minimum actions required to avoid improper reimbursement requests. By punishing a good actor such as i-wireless, the Commission sends a message opposite from that which it intended to send with the NAL. The message is not that "bad" providers need to improve their procedures; instead, it is that no actor is immune from a fine, regardless of what actions it takes. Under these circumstances, deterrence can have little effect.

Further, the NAL runs contrary to the Commission's policies for the enrollment and qualification of Lifeline subscribers. In the 2012 Lifeline Reform Order, the FCC carefully balanced policy considerations for Lifeline, balancing measures that promote the widespread

availability of Lifeline service to those who need it with policies necessary to ensure the efficient administration of the Fund. *See, e.g.*, *2012 Lifeline Reform Order*, ¶ 80 (rejecting a one-per-residential-address rule because it would "potentially have the unintended consequence of excluding low-income consumers from participation in Lifeline"). Unfortunately, the NAL does not promote the policies of the Lifeline program. It instead operates to undermine those policies, ultimately making it harder for consumers who qualify for Lifeline service to have access to that very service.

CONCLUSION

The NAL is legally and factually without basis. i-wireless has not engaged in any culpable conduct. To the contrary, it has employed extensive policies and procedures that should be acknowledged and encouraged by the Commission, not punished in a misguided attempt to "get tough" on duplicates. Effective enforcement requires fairness, balance and a careful consideration of applicable legal requirements and the factual circumstances of each situation. Otherwise, enforcement becomes arbitrary and can undermine the very policies the Commission is trying to protect. i-wireless respectfully submits that this balance has been upended with the NALs. The Commission can correct that balance, however, by cancelling the NAL and crafting a regulatory framework and enforcement policy that clearly defines the standards of conduct and then punishes only those who violate that defined standard.

Respectfully submitted,

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