

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
Lifeline and Link Up Reform and Modernization	)	WC Docket No. 11-42
	)	
Telecommunications Carriers Eligible for Universal Service Support	)	WC Docket No. 09-197
	)	
Connect America Fund	)	WC Docket No. 10-90

**NATIONAL LIFELINE ASSOCIATION APPLICATION FOR REVIEW OF  
LIFELINE MINIMUM SERVICE STANDARD WAIVER ORDER**

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December 16, 2020

## SUMMARY

The National Lifeline Association (NaLA), by and through the undersigned counsel, and pursuant to Section 1.115 of the Federal Communications Commission's (FCC's or Commission's) rules, 47 C.F.R. § 1.115, hereby submits this application for review of the Wireline Competition Bureau's (Bureau's) Order adopted on delegated authority granting in part the NaLA Waiver Petition,<sup>1</sup> but increasing the mobile broadband minimum service standard (MSS) from 3 GB to 4.5 GB as of December 1, 2020.<sup>2</sup>

The 2020 MSS Waiver Order erroneously found that NaLA and other parties did not provide substantial evidence that an increase in the mobile broadband MSS to 4.5 GB per month would risk making Lifeline service unaffordable for providers and many Lifeline subscribers. Further, the 2020 MSS Waiver Order conflicts with the Communications Act, case precedent and established Commission policy requiring that the Commission ensure Lifeline service will be accessible and affordable for low-income Americans. Finally, the Commission's policy of annually increasing the mobile broadband MSS by 50 percent by waiver with no affordability analysis should be overturned and revised to hold the MSS steady unless it conducts a proper analysis that determines the increased MSS will be affordable for Lifeline subscribers.

Therefore, the Commission should revise the 2020 MSS Waiver Order to retain the mobile broadband MSS at 3 GB pending completion of the Lifeline Marketplace Report and final resolution of the outstanding reconsideration petitions that have been pending for nearly

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<sup>1</sup> National Lifeline Association Petition for Waiver of Lifeline Mobile Broadband Minimum Service Standard and Voice Support Phase-Down, WC Docket No. 11-42 *et al.* (filed Aug. 27, 2020) (NaLA Waiver Petition).

<sup>2</sup> See *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 *et al.*, Order, DA 20-1358 (WCB Nov. 16, 2020) (2020 MSS Waiver Order).

four and a half years.<sup>3</sup> Such action will ensure that Lifeline mobile broadband does not become less affordable and accessible for the growing number of low-income Americans that need access to affordable communications services more now than ever because of the worsening COVID-19 health and economic crisis.

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<sup>3</sup> See 47 C.F.R. § 1.115(b)(3), (4) (“The application for review shall state with particularity the respects in which the action taken by the designated authority should be changed” and “state the form of relief sought.”).

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The National Lifeline Association<sup>4</sup> (NaLA), by and through the undersigned counsel, and pursuant to Section 1.115 of the Federal Communications Commission’s (FCC’s or Commission’s) rules, 47 C.F.R. § 1.115, hereby submits this application for review of the Wireline Competition Bureau’s (Bureau’s) Order adopted on delegated authority granting in part the NaLA Waiver Petition,<sup>5</sup> but increasing the mobile broadband minimum service standard (MSS) from 3 GB to 4.5 GB as of December 1, 2020.<sup>6</sup>

The 2020 MSS Waiver Order erroneously found that NaLA and other parties did not provide substantial evidence that an increase in the mobile broadband MSS to 4.5 GB per month would risk making Lifeline service unaffordable for providers and many Lifeline subscribers. Further, the 2020 MSS Waiver Order conflicts with the Communications Act, case precedent and

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<sup>4</sup> NaLA is the only industry trade group specifically focused on the Lifeline segment of the communications marketplace. It supports eligible telecommunications carriers (ETCs), distributors, Lifeline supporters and participants, and partners with regulators to improve the program through education, cooperation and advocacy. See <https://www.nalalifeline.org/>.

<sup>5</sup> National Lifeline Association Petition for Waiver of Lifeline Mobile Broadband Minimum Service Standard and Voice Support Phase-Down, WC Docket No. 11-42 *et al.* (filed Aug. 27, 2020) (NaLA Waiver Petition).

<sup>6</sup> See *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 *et al.*, Order, DA 20-1358 (WCB Nov. 16, 2020) (2020 MSS Waiver Order).

established Commission policy requiring that the Commission ensure Lifeline service will be accessible and affordable for low-income Americans. Finally, the Commission’s policy of annually increasing the mobile broadband MSS by 50 percent by waiver with no affordability analysis should be overturned and revised to hold the MSS steady unless it conducts a proper analysis that determines the increased MSS will be affordable for Lifeline subscribers.

Therefore, Commission should revise the 2020 MSS Waiver Order to retain the mobile broadband MSS at 3 GB pending completion of the Lifeline Marketplace Report and final resolution of the outstanding reconsideration petitions that have been pending for nearly four and a half years.<sup>7</sup> Such action will ensure that Lifeline mobile broadband does not become less affordable and accessible for the growing number of low-income Americans that need access to affordable communications services more now than ever because of the worsening COVID-19 health and economic crisis.

## **I. FACTUAL BACKGROUND**

This year it once again fell upon the Commission to address the “flawed” mobile broadband MSS established in the 2016 Lifeline Modernization Order, which “results in drastic year-over-year increases” that threaten low-income consumers’ access to affordable Lifeline plans and continue to undermine the entire Lifeline program.<sup>8</sup> In the 2016 Order, the Commission established fixed and mobile broadband and voice MSS with the laudable goal of “providing consumers with services that allow them to experience **many** of the Internet’s

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<sup>7</sup> See 47 C.F.R. § 1.115(b)(3), (4) (“The application for review shall state with particularity the respects in which the action taken by the designated authority should be changed” and “state the form of relief sought.”).

<sup>8</sup> FCC, “FCC Chairman Pai Circulates Order to Ensure Predictable Increases in Minimum Standard for Lifeline Mobile Broadband Service,” 1 (July 30, 2020) (MSS Press Release).

offerings, but **not mandating the purchase of prohibitively expensive offerings.**<sup>9</sup> The Commission established a formula for mobile broadband MSS that is based on average mobile data usage per household.<sup>10</sup> If applied at the time, it would have resulted in a mobile broadband MSS of 2 GB, but the Commission decided instead to adopt a “more gradual phase-in of this standard.”<sup>11</sup> The mobile broadband MSS started at 500 MB on December 1, 2016 and increased to 1 GB on December 1, 2017 and then to 2 GB on December 1, 2018.<sup>12</sup>

Several parties filed petitions for reconsideration following the adoption of the 2016 Order, many of which urged the Commission to undo its imposition of the MSS and each of which remains pending more than four years later. For example, NaLA member eligible telecommunications carriers (ETCs) and one wholesale supplier of wireless services to ETCs sought reconsideration of the 2016 Order and “urged[d] the Commission to reconsider its minimum service standard for broadband, which relies on an unworkable multi-person household formula untethered to the Lifeline program’s ‘central touchstone’ of affordability, and replace it with a formula that respects single individual households and includes an affordability safety valve.”<sup>13</sup> TracFone challenged the broadband MSS as well, explaining that it would “deny low-income consumers the ability to choose services that best meet their communications needs and . . . thwart the Commission’s efforts to narrow the digital divide by expanding low-income

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<sup>9</sup> See *Lifeline and Link Up Reform and Modernization, et al.*, WC Docket 11-42, *et al.*, Third Report and Order, Further Report and Order, and Order on Reconsideration, FCC 16-38, ¶ 71 (2016) (2016 Order) (emphasis added).

<sup>10</sup> *Id.*, ¶ 94.

<sup>11</sup> *Id.*, ¶ 95.

<sup>12</sup> *Id.*, ¶ 93.

<sup>13</sup> Joint Lifeline ETC Petitioners’ Petition for Partial Reconsideration and Clarification, WC Docket No. 11-42, *et al.*, 3 (June 23, 2016).

consumers' access to broadband service.”<sup>14</sup> In addition, CTIA challenged the mobile broadband MSS, explained that the standard ignores “the statutory universal service principle of affordability” and requested that the Commission adopt “a more economically justifiable standard” that is “grounded in record evidence.”<sup>15</sup> Those petitions for reconsideration remain pending nearly four and a half years later. On November 19, 2020, NaLA and one of its members Assist Wireless, LLC filed a petition for writ of mandamus requesting that the United States Court of Appeals for the District of Columbia Circuit require the Commission to issue an order granting or denying the reconsideration petitions and maintain jurisdiction so that, in the event of an adverse decision, petitioners can seek appellate relief before the Court.<sup>16</sup>

On December 1, 2019, the mobile broadband formula would have applied for the first time and would have increased the mobile broadband MSS from 2 GB to 8.75 GB.<sup>17</sup> On June 27, 2019, CTIA and several public interest, consumer and civil rights organizations filed a petition to pause implementation of the December 2019 MSS.<sup>18</sup> The petitioners asked the Commission to hold the Lifeline mobile broadband MSS steady at 2 GB.<sup>19</sup> On November 19, 2019, just 12 days before the scheduled changes, the Commission adopted an order waiving the

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<sup>14</sup> Petition for Reconsideration of TracFone Wireless, Inc., WC Docket No. 11-42, *et al.*, i (June 23, 2016).

<sup>15</sup> Petition for Reconsideration of CTIA, WC Docket No. 11-42, *et al.*, 2 (June 23, 2016).

<sup>16</sup> *See Petition for Writ of Mandamus, Nat'l Lifeline Ass'n, et. al. v. FCC*, No. 1460 (D.C. Cir. Nov. 19, 2020). On November 30, 2020, the Court set a briefing schedule.

<sup>17</sup> *See Wireline Competition Bureau Announces Updated Lifeline Minimum Service Standards and Indexed Budget Amount*, WC Docket No. 11-42, Public Notice, DA 19-704 (2019).

<sup>18</sup> *See Joint Petition to Pause Implementation of December 2019 Lifeline Minimum Service Standards Pending Forthcoming Marketplace Study*, WC Docket Nos. 11-42, 09-197, 10-90 (June 27, 2019).

<sup>19</sup> *See id.*, 2.



mobile broadband MSS to the extent it would exceed 3 GB per month between December 1, 2019 and November 30, 2020.<sup>20</sup>

On July 31, 2020, the Bureau released a Public Notice setting the December 1, 2020 Lifeline mobile broadband MSS at 11.75 GB per month.<sup>21</sup> On July 30, 2020, Chairman Pai issued a press release announcing a draft order circulated regarding the Lifeline mobile broadband MSS that would have set the standard at 4.5 GB.<sup>22</sup> The MSS Press Release correctly recognized that the formula adopted in 2016 is “flawed” and “results in drastic year-over-year increases that could impact the ability of Lifeline carriers to continue providing affordable service.”<sup>23</sup> The press release claimed that the draft order “would permanently clean up the mess caused by the 2016 order” and avoid further MSS “fluctuations that risk making Lifeline service unaffordable for many current subscribers.”<sup>24</sup>

However, the proposal to reset the mobile broadband MSS at a level 50 percent higher than the 3 GB MSS was met by widespread opposition and criticism from industry, public interest and civil rights organizations, and by members of Congress from both parties.<sup>25</sup> No stakeholder supported an increase in the mobile broadband MSS as of December 1, 2020 and no consumer has complained that “free” but limited access to the same world-leading wireless networks is “second class” service. The Chairman removed the draft order from circulation on

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<sup>20</sup> See *Lifeline and Link Up Reform and Modernization et. al.*, WC Docket No. 11-42 *et al.*, Order, FCC 19-116, ¶ 13 (2019).

<sup>21</sup> See *Wireline Competition Bureau Announces Updated Lifeline Minimum Service Standards and Indexed Budget Amount*, WC Docket No. 11-42, Public Notice, DA 20-820 (rel. July 31, 2020).

<sup>22</sup> MSS Press Release.

<sup>23</sup> *Id.*, 1.

<sup>24</sup> *Id.*

<sup>25</sup> See National Lifeline Association Notice of Oral *Ex Parte* Presentation, WC Docket No. 11-42, *et al.*, Exhibit (Nov. 3, 2020) (NaLA Nov. 3 *Ex Parte*).

October 30, 2020, which we understood was because a majority of Commissioners opposed it and were unwilling to vote for it.<sup>26</sup>

Left without recourse, and on the precipice of regulatory changes that would devastate the Lifeline marketplace, NaLA had sought waiver of the 2020 mobile broadband MSS and voice support phase-out.<sup>27</sup> NaLA emphasized that the primary tenets of the program remain access and affordability, which would be undermined by allowing the 2020 mobile broadband MSS increase to take effect.<sup>28</sup> NaLA demonstrated that any mobile broadband MSS increase above the 3 GB per month standard applicable at the time would mandate unaffordable service offerings and result in less access to Lifeline by those the program is intended to serve.<sup>29</sup> NaLA further noted that all Lifeline stakeholders, including Lifeline ETCs, public interest, civil rights, and consumer advocates, and policymakers of both parties agreed that the Commission should pause the mobile broadband MSS at 3 GB.<sup>30</sup> As a result, NaLA requested that the Commission waive implementation of the 2020 mobile broadband MSS increase pending completion of the State of the Lifeline Marketplace Report in 2021 and final resolution of the outstanding petitions

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<sup>26</sup> *See id.*, 2.

<sup>27</sup> *See* NaLA Waiver Petition.

<sup>28</sup> *Id.*, 9-10. *See* National Lifeline Association Notice of Oral *Ex Parte*, WC Docket No. 11-42, *et al.*, 2 (July 7, 2020) (NaLA July 7 *Ex Parte*).

<sup>29</sup> NaLA Waiver Petition, 10-14. *See* NaLA July 7 *Ex Parte*, 4; National Lifeline Association Notice of Oral *Ex Parte*, WC Docket No. 11-42, *et al.*, 2 (Aug. 24, 2020) (NaLA Aug. 24 *Ex Parte*).

<sup>30</sup> NaLA Waiver Petition, 10-16. *See* Letter from Congressman Mark Green to The Honorable Ajit Pai (Aug. 13, 2020); House of Representatives, Committee on Energy and Commerce Letter to The Honorable Ajit Pai (Aug. 13, 2020); TracFone *Ex Parte* Letter, WC Docket No. 11-42, *et al.* (July 27, 2020); Sage Telecom Communications, LLC d/b/a TruConnect Notice of Oral *Ex Parte* Communications, WC Docket No. 11-42, *et al.* (Aug. 10, 2020); CTIA Notice of *Ex Parte* Presentation, WC Docket No. 11-42 (Aug. 14, 2020); Public Interest, Consumer and Civil Rights Organizations Notice of Oral *Ex Parte* Communications, WC Docket No. 11-42, *et al.* (Aug. 17, 2020).

for reconsideration of the 2016 Order.<sup>31</sup> Commenters unanimously supported the NaLA Waiver Petition.<sup>32</sup>

On September 14, 2020, eight Lifeline ETCs filed a letter in support of the NaLA Waiver Petition clearly stating that:

- providing 4.5 GB of mobile broadband each month to Lifeline subscribers would cost significantly more than the \$9.25 reimbursement in network costs alone;
- network costs do not include the other substantial costs to providing Lifeline service, including marketing and outreach, customer acquisition, customer service and compliance;
- considering the need to provide bundles of mobile broadband with voice minutes and texts because those bundles are what consumers overwhelmingly prefer, and even considering “breakage” (when customers do not use their entire allotment of megabytes, minutes or texts), the ETCs expect that the costs of providing service bundles including 4.5 GB would exceed the \$9.25 monthly Lifeline reimbursement, and therefore the ETCs cannot offer a bundle with 4.5 GB at no cost (*i.e.*, “free”) to new customers;
- with respect to existing subscribers (or the subscriber base), the ETCs are still assessing what to do as of December 1, 2020, but the ETCs are likely to charge a co-pay if the mobile broadband MSS is increased to 4.5 GB;

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<sup>31</sup> NaLA Waiver Petition, 19.

<sup>32</sup> See Comments of CTIA, WC Docket Nos. 11-42, *et al.* (Sep. 14, 2020); Sage Telecom Communications, LLC d/b/a TruConnect’s Comments on the National Lifeline Association Petition for Waiver of Lifeline Mobile Broadband Minimum Service Standard and Voice Support Phase-Down, WC Docket Nos. 11-42, *et al.* (Sep. 14, 2020) (TruConnect Comments); TracFone Wireless Comments on National Lifeline Association Petition for Waiver of the Lifeline Mobile Broadband Minimum Service Standard and Voice Support Phase-Down, WC Docket Nos. 11-42, *et al.* (Sep. 14, 2020) (TracFone Comments); Joint Public Interest Comments in Support of NaLA Petition [for] Waiver of Lifeline Mobile Broadband Minimum Standard and Voice Support Phase-Down, WC Docket Nos. 11-42, *et al.* (Sep. 14, 2020) (Joint Public Interest Comments); Comments of the National Association of Regulatory Utility Commissioners Supporting the Request to Waive Implementation of the Scheduled December 2020 Lifeline Minimum Standards, WC Docket Nos. 11-42, *et al.* (Sept. 14, 2020) (NARUC Comments); National Lifeline Association Reply to Comments on its Petition for Waiver of the Lifeline Mobile Broadband Minimum Service Standards and Voice Support Phase-Down, WC Docket Nos. 11-42, *et al.* (Sep. 21, 2020); *see also* Letter from Senator David A. Perdue to The Honorable Ajit Pai (Oct. 2, 2020); NaLA Nov. 3 *Ex Parte*, 2-3, Attachment (noting and providing list of supporters that agree that the Commission should not increase the mobile broadband MSS, but rather should pause the mobile broadband MSS at 3 GB and study the Lifeline marketplace next year in conjunction with the State of the Lifeline Marketplace Report).

- based on the ETCs’ experience in Lifeline, the vast majority of the ETCs’ subscribers would not be able to pay a monthly co-pay either because they do not have the disposable income, or do not have the means to make monthly payments (e.g., valid credit or debit cards), or both.<sup>33</sup>

On October 5, 2020, Q Link Wireless LLC, the third largest Lifeline service provider with over 1.2 million Lifeline subscribers, and PWG Network Solutions, which is affiliated with Prepaid Wireless Wholesale, LLC, a premier wholesale provider of wholesale mobile voice and data services to 18 wireless Lifeline ETCs, filed a letter and a declaration respectively in the record, reiterating these same facts regarding the cost of providing 4.5 GB of mobile broadband.<sup>34</sup> Three days later, NaLA filed a letter summarizing the factual statements regarding costs in the record and noted that the Lifeline resellers were not permitted to provide copies of their contracts with their underlying or wholesale carriers because of strict confidentiality provisions, but that apparently the network operators were not asked for the contracts.<sup>35</sup>

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<sup>33</sup> Global Connection Inc. of America, Easy Telephone Services Company, Telrite Corporation, Boomerang Wireless, LLC, TruConnect Communications, Inc., Amerimex Communications Corp., Assist Wireless, LLC and American Broadband & Telecommunications Company Written *Ex Parte* Presentation, WC Docket No. 11-42 et al., (Sept. 14, 2020).

<sup>34</sup> See Q Link Wireless LLC Written *Ex Parte* Presentation, WC Docket No. 11-42, et al. (Oct. 5, 2020); Written *Ex Parte* Presentation, Declaration of Brandt Mensh, President of PWG Network Solutions, WC Docket No. 11-42, et al., Attachment (Oct. 5, 2020); see also TruConnect Oct. 28 *Ex Parte*, 6 (“ETCs cannot profitably provide service over 3GB of data unless they charge subscribers a monthly co-pay.”); TracFone Comments, 1 (“TracFone simply cannot meet the increased data standards without charging a co-payment from participants.”); Joint Public Interest Comments, 5 (“Lifeline providers cannot profit off Lifeline subscribers using the updated minimum service amount without imposing a co-pay on Lifeline subscribers.”); see also National Lifeline Association Notice of Oral *Ex Parte*, WC Docket No. 11-42, et al., 4 (Sept. 21, 2020); NaLA Aug. 24 *Ex Parte*, 3; National Lifeline Association Written *Ex Parte* Presentation, WC Docket No. 11-42, et al., 1 (Aug. 17, 2020); National Lifeline Association Notice of Oral *Ex Parte*, WC Docket No. 11-42, et al., 2 (Aug. 6, 2020); National Lifeline Association Notice of Oral *Ex Parte*, WC Docket No. 11-42, 3 (July 29, 2020) (stating that even a slight increase in the mobile broadband MSS would force ETCs to impose a co-pay requirement); NaLA July 7 *Ex Parte*, 4.

<sup>35</sup> NaLA Written *Ex Parte Presentation*, WC Docket No. 11-42, et al., 2-3 (Oct. 8, 2020) (“In response to a request for cost information from Chairman Pai’s office, NaLA and numerous wireless Lifeline eligible telecommunications carriers (ETCs) have informed the Commission that we cannot provide copies of Lifeline ETCs’ contracts with their underlying or wholesale carriers because such agreements are subject to exceptionally strict confidentiality provisions that do not allow them to be shared absent legal compulsion. We have explained that sharing

With no Commission action on the NaLA Waiver Petition for months, NaLA filed an emergency petition to stay the MSS increase with the Commission on November 9, 2020.<sup>36</sup> No party opposed the Stay Petition. On November 16, 2020, the Bureau issued the 2020 MSS Waiver Order partially denying the NaLA Waiver Petition and increasing the mobile broadband MSS to 4.5 GB as of December 1, 2020.<sup>37</sup> On the same day, the Bureau denied NaLA's MSS Stay Petition almost entirely on the basis of having granted the waiver bringing the MSS down from 11.75 GB to 4.5 GB.<sup>38</sup>

## II. QUESTIONS PRESENTED

Pursuant to Section 1.115(b) of the Commission's rules, the following questions presented warrant Commission consideration:

- (1) Did the Bureau's 2020 MSS Waiver Order erroneously find that NaLA and other parties did not provide substantial evidence that an increase in the mobile broadband MSS from 3 GB to 4.5 GB per month would risk making Lifeline service unaffordable for providers and many Lifeline subscribers?
- (2) Did the 2020 MSS Waiver Order increase the mobile broadband MSS without considering Lifeline's primary tenets of access and affordability in conflict with the Communications Act, court precedent and established Commission policy?

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any details in the contracts could subject NaLA members to legal action or other forms of retribution from wholesale partners. We understand that no similar request for contracts was made to network operators.”).

<sup>36</sup> NaLA Emergency Petition For Stay of Implementation of Section 54.408(b)(2)(ii)(D) of the Federal Communications Commission's Rules Governing the Lifeline Mobile Broadband Minimum Service Standard, WC Docket No. 11-42 *et al.*, (Nov. 9, 2020) (NaLA MSS Stay Petition).

<sup>37</sup> 2020 MSS Waiver Order.

<sup>38</sup> See *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 *et al.*, Order Denying Stay Petition, DA 20-1359 (WCB Nov. 16, 2020) (Stay Denial Order).

(3) Should the Commission’s apparent new policy of annually increasing the mobile broadband MSS by 50 percent each year by waiver with no affordability analysis be overturned and revised to hold the MSS steady unless it conducts a proper affordability analysis?

**III. THE 2020 MSS WAIVER ORDER ERRONEOUSLY FOUND THAT NALA AND OTHER PARTIES DID NOT PROVIDE SUBSTANTIAL EVIDENCE THAT AN INCREASE IN THE MOBILE BROADBAND MSS TO 4.5 GB PER MONTH WOULD RISK MAKING LIFELINE SERVICE UNAFFORDABLE FOR PROVIDERS AND MANY LIFELINE SUBSCRIBERS**

The 2020 MSS Waiver Order erroneously dismissed record evidence that carriers serving the majority of Lifeline subscribers (63 percent) cannot provide 4.5 GB for free to Lifeline subscribers,<sup>39</sup> which is a critical fact to the waiver analysis.<sup>40</sup> Further, agency action is arbitrary and capricious when the agency “offered an explanation for its decision that runs counter to the evidence before the agency.”<sup>41</sup> The Bureau found that “the record here contains no substantial evidence that an increase to 4.5 GB/month would risk making Lifeline service unaffordable for providers or many current subscribers.”<sup>42</sup> That finding was erroneous and counter to the evidence before the Bureau.

The Bureau rejected NaLA’s assertion that an increase to the MSS would prevent affordable “free-to-the-end-user service” because NaLA “relies upon retail pricing data rather than cost data to support its position.”<sup>43</sup> First, retail price data is the most relevant because the Lifeline program was designed as a reimbursement for a discount off retail services. Second,

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<sup>39</sup> National Lifeline Association Written *Ex Parte* Presentation, WC Docket No. 11-42 et al., Exhibit (Nov. 18, 2020) (NaLA Nov. 18 *Ex Parte*); *see supra* 7-8.

<sup>40</sup> *See* 47 C.F.R. § 1.115(b)(2)(iv) (factors that warrant Commission consideration include “[a]n erroneous finding as to an important or material question of fact.”).

<sup>41</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>42</sup> 2020 MSS Waiver Order, ¶ 16.

<sup>43</sup> *Id.*

even though the largest Lifeline provider Assurance, which is owned by the network owner T-Mobile, agreed at the last minute to provide 4.5 GB for free, many ETCs and a wholesale aggregator provided cost information showing that 4.5 GB of broadband would cost significantly more than the \$9.25 reimbursement in network costs alone.

First, the Lifeline program was designed as a discount off of retail services, not a cost reimbursement program. Section 54.401(a) of the Commission’s rules defines Lifeline as “a non-transferable **retail** service offering provided directly to qualifying low-income consumers...[f]or which qualifying low-income consumers **pay reduced charges as a result of application of the Lifeline support amount described in §54.403.**”<sup>44</sup> Section 54.403(b) addresses application of the Lifeline support amount and states (for carriers, like wireless carriers, that do not charge an End User Common Line charge), “[o]ther eligible telecommunications carriers must apply the federal Lifeline support amount, plus any additional support amount, to **reduce the cost of any generally available residential service plan or package offered** by such carriers that provides at least one supported service as described in §54.101(a), and charge Lifeline subscribers the resulting amount.”<sup>45</sup> Therefore, the Commission clearly designed the Lifeline program as a discount off of retail rates, and did not set up a process for the agency to collect and analyze wholesale costs (and other costs) to set a reimbursement amount, retail rates or MSS. The 2020 MSS Waiver Order does not address or refute this. Wireless rates are set by competition in a competitive market.<sup>46</sup> Therefore, the retail rates

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<sup>44</sup> 47 C.F.R. § 54.401(a).

<sup>45</sup> 47 C.F.R. § 54.403(b).

<sup>46</sup> See *Communications Marketplace Report et al.*, GN Docket No. 18-231 et al., Report, FCC 18-181, ¶ 24 (2018) (“Mobile wireless service providers compete by offering consumers a large variety of mobile wireless devices and differentiated services at a variety of prices.”).

introduced into the record—4-5 GB mobile data plans today retail for \$25-40 per month<sup>47</sup>—are the most relevant data for consideration and should not have been dismissed by the Bureau.

Second, the Bureau’s only evidence that an increase to 4.5 GB would not “prevent free-to-the-end-user service”<sup>48</sup> was a letter filed by T-Mobile and posted to ECFS just minutes before the release of the 2020 MSS Waiver Order and Stay Denial Order stating its willingness to offer an Assurance retail brand Lifeline plan with 4.5 GB to subscribers at no monthly charge.<sup>49</sup>

However, T-Mobile owns the facilities used to provide Lifeline services. **What T-Mobile’s last minute letter does not say is that it will make 4.5 GB affordable for its wholesale partners to provide each month at no cost to Lifeline subscribers.** When T-Mobile made an additional 5 GB of monthly mobile broadband available for Lifeline subscribers in March due to the COVID-19 pandemic, it clearly stated that it was working with its Lifeline partners (*i.e.*, wholesale customers) to provide customers the extra data each month, and it did so.<sup>50</sup> T-Mobile has not made any such statement or commitment with regard to the additional 1.5 GB of mobile broadband now required to be provided to Lifeline subscribers receiving \$9.25 in support as of December 1, 2020. While T-Mobile’s commitment for Assurance is commendable, it does not make continuation of free mobile broadband MSS service possible for its wireless Lifeline service competitors (90 percent of whose lines are obtained from T-Mobile through wholesale

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<sup>47</sup> See NaLA July 7 *Ex Parte*, Exhibit; NaLA Aug. 24 *Ex Parte*, 2.

<sup>48</sup> 2020 MSS Waiver Order, ¶ 16.

<sup>49</sup> T-Mobile Notice of Oral *Ex Parte* Presentation, WC Docket No. 11-42 *et al.*, 2 (Nov. 16, 2020) (T-Mobile *Ex Parte*). The T-Mobile *Ex Parte* also states, “T-Mobile supports efforts to rationalize the process for determining Lifeline mobile broadband MSS, as well as to more broadly reform the Lifeline program to benefit consumers,” but the Bureau failed to do either.

<sup>50</sup> See “T-Mobile Update on COVID-19 Response,” Mar. 13, 2020, *available at* <https://www.t-mobile.com/news/community/t-mobile-update-on-covid-19-response>.



agreements) and it does not form a reasoned basis for setting the MSS at a level that other Lifeline providers cannot possibly meet.

Therefore, the statements repeatedly entered into the record by NaLA and others that wireless resellers cannot provide 4.5 GB of mobile broadband to Lifeline subscribers for free because that amount of broadband would cost significantly more than the \$9.25 reimbursement in network costs alone,<sup>51</sup> remain true and are the best cost information that could be provided by the resellers. The resellers were not permitted to provide copies of their contracts with their underlying or wholesale carriers because of strict confidentiality provisions, and apparently the network operators were not asked for the contracts.<sup>52</sup> Therefore, the Lifeline providers' cost assertions in the record should not have been dismissed by the Bureau. Although Lifeline providers have had little time to react and adjust to the 2020 MSS Waiver Order prior to the December 1, 2020 increase, several have already been forced to establish co-pays for their 4.5 GB plans,<sup>53</sup> others are implementing the co-pays but waiving them temporarily to get the necessary systems and processes in place,<sup>54</sup> and others appear to be offering free service on an

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<sup>51</sup> See *supra* 7-8.

<sup>52</sup> See *supra* 8.

<sup>53</sup> TruConnect charges a \$15 co-pay for new customers to enroll in its plan with unlimited voice minutes, unlimited text and 4.5 GB of data where no state funding is available to supplement the \$9.25 per month. See <https://www.truconnect.com/plans>. SafetyNet Wireless charges a \$15 co-pay for new customers to enroll in its plan with 350 minutes, unlimited texts and 4.5 GB of data where no state funding is available to supplement the \$9.25 per month. See <https://safetynetwireless.com/lifeline-plans-other-states/>. Assist Wireless charges a \$25 co-pay for new customers to enroll in its plan with unlimited voice, unlimited texts and 4.5 GB of data where no state funding is available to supplement the \$9.25 per month. See, e.g., <https://www.assistwireless.com/lifeline-plans/maryland/>. Life Wireless has announced that a co-pay will be required for its 500 minute, unlimited text and 4.5 GB plan. See <https://www.lifewireless.com/plans/south-carolina-lifeline-free-phone-service>.

<sup>54</sup> StandUp Wireless will require a \$10 co-pay for its 1,000 minutes, unlimited text and 4.5 GB data plan as of February 28, 2021. See <https://standupwireless.com/lifeline/>.

interim or promotional basis hoping for relief from the Commission, Congress, T-Mobile or a combination thereof.

**IV. THE 2020 MSS WAIVER ORDER CONFLICTS WITH THE COMMUNICATIONS ACT, CASE PRECEDENT AND ESTABLISHED COMMISSION POLICY REQUIRING THAT THE COMMISSION ENSURE LIFELINE SERVICE WILL BE ACCESSIBLE AND AFFORDABLE**

In the 2020 MSS Waiver Order, the Bureau improperly found “that a freeze to the scheduled increase is...unreasonable and counter to our statutory obligations and the Commission’s goals.”<sup>55</sup> Those statutory obligations and Commission goals asserted are “to ensure that Lifeline supports an evolving level of service”<sup>56</sup> and “striking ‘a balance between the demands of affordability and reasonable comparability,’ consistent with the Commission’s relevant governing statute.”<sup>57</sup> In the 2020 MSS Waiver order, the Bureau once again misstates the Commission’s evolving level of service and reasonable comparability obligations, which do not mandate or support increased MSS, and fails to assess the impact of the MSS increase on Lifeline’s primary goals of access and affordability in conflict with the Communications Act, case precedent and long-established Commission policy.<sup>58</sup>

The statutory obligation to ensure that “Lifeline supports an evolving level of service” addresses what services should be defined as supportable by federal universal service, not minimum service standards. Section 254(c)(1) states “[u]niversal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section,

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<sup>55</sup> 2020 MSS Waiver Order, ¶ 15.

<sup>56</sup> *Id.*, ¶¶ 9, 13

<sup>57</sup> *Id.*, ¶ 3 (citing 47 U.S.C. § 254(b)(1), (3)).

<sup>58</sup> *See* 47 C.F.R. § 1.115(b)(2)(i) (factors that warrant Commission consideration include “[t]he action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.”).

taking into account advances in telecommunications and information technologies and service.”<sup>59</sup> It goes on to set forth considerations for establishing a supported service, which the Commission did when it established broadband as a supported service. It does not mandate, nor even support, MSS for any universal service program or any annual increases in MSS for such services.

The statutory “obligation” to ensure that all consumers, including low-income consumers have access to reasonably comparable services at reasonably comparable rates is designed to make sure that services and rates between rural and urban areas are reasonably comparable.<sup>60</sup>

Section 254(b)(3) states,

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high costs areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.<sup>61</sup>

This section also does not mandate MSS or any annual increases, but rather addresses comparable services and rates between urban and rural areas. The service plans offered by wireless Lifeline service providers do not typically differ between urban and rural areas.

However, in the 2016 Order, the Commission stated the MSS goal as “providing consumers with services that allow them to experience **many** of the Internet’s offerings, but **not**

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<sup>59</sup> 47 U.S.C. § 254(c)(1).

<sup>60</sup> Discussions of weighing reasonable comparability and affordability for low-income consumers necessarily include a discussion of the reimbursement amount. But since the reimbursement amount has not been changed since 2012 and cannot be changed in considering the instant application for review, the Commission should focus on preserving affordability and access for this decision.

<sup>61</sup> 47 U.S.C. § 254(b)(3).

**mandating the purchase of prohibitively expensive offerings.”**<sup>62</sup> The D.C. Circuit has recently affirmed that affordability and access are the Commission’s “long-stated primary tenets for the program.”<sup>63</sup> Therefore, when weighing whether to require an increased quantity of mobile broadband service to be included in Lifeline service offerings, the Communications Act<sup>64</sup> and case precedent demand adherence to Lifeline’s primary tenets of affordability and access. Unless the record evidence clearly supports the conclusion that an increase in mobile broadband MSS will not reduce the affordability of Lifeline service (*e.g.*, by forcing the substitution of plans that require co-pays in place of plans that require no out-of-pocket expense from the consumer) or access to it by making service offerings less available through the reduction of active distribution of services or relinquishment of designations by ETCs, the Commission, at a minimum, is compelled to reject such increases.

The 2020 MSS Waiver Order contained no analysis of the affordability of 4.5 GB other than noting that the largest Lifeline provider, Assurance, which is owned by the network owner T-Mobile, agreed to provide 4.5 GB for free.<sup>65</sup> The Bureau determined that an increase to 11.75 GB would “require significantly greater network resources and, in turn, the associated costs would ultimately be passed on to consumers,”<sup>66</sup> but that somehow 4.5 GB would be affordable, without any analysis of the record evidence or the wireless marketplace regarding the prices or costs to provide either. The Bureau merely asserted that the Lifeline marketplace follows “the

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<sup>62</sup> 2016 Order, ¶ 71.

<sup>63</sup> *See Nat’l Lifeline Ass’n, et. al. v. FCC*, 915 F.3d 19, 28 (D.C. Cir. 2019).

<sup>64</sup> Specifically, the Communications Act directs the FCC to ensure that “low-income consumers...have access to telecommunications and information services” that are “available at just, reasonable, and affordable rates.” 47 U.S.C. § 254(b)(1), (3).

<sup>65</sup> 2020 MSS Waiver Order, ¶ 16; *see supra* 12-13.

<sup>66</sup> 2020 MSS Waiver Order, ¶ 11.

broader telecommunications marketplace trend of decreasing consumer prices over time”<sup>67</sup> without any evidence of such decreasing consumer prices or analysis of those price decreases and whether they would support an additional 1.5 GB without requiring a co-pay.<sup>68</sup> Therefore, the Bureau failed to properly consider the primary tenets of the Lifeline program, affordability and access, in conflict with the Communications Act, case precedent and established Commission Lifeline policy.

In the 2020 MSS Waiver Order, the Bureau also conflicts with established Commission policy against imposing a minimum charge or co-pay for Lifeline services. While 94 percent of Lifeline subscribers rely on no-cost service,<sup>69</sup> the record showed that 4.5 GB cannot be profitably provided by all but the Lifeline provider owned by T-Mobile for the \$9.25 Lifeline reimbursement without imposing a co-pay on subscribers.<sup>70</sup> However, the Commission previously considered and rejected requiring a minimum consumer charge for Lifeline.<sup>71</sup> The Commission rejected it because the agency properly considered access and affordability principles and determined that Lifeline “is serving the truly neediest of the population in the most dire economic circumstances and for whom even a routine charge is an excessive financial burden.”<sup>72</sup> The 2020 MSS Waiver Order adopting the 4.5 GB MSS failed to acknowledge that the Bureau was setting a standard that would impose substantial minimum consumer charges on

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<sup>67</sup> *Id.*, ¶ 17.

<sup>68</sup> It is also notable that those allegedly decreasing consumer prices are retail prices, which the Bureau refused to consider or analyze as relevant to the Lifeline retail service discount subsidy program. *See supra* 11-12.

<sup>69</sup> NaLA Nov. 18 *Ex Parte*, Exhibit.

<sup>70</sup> *See supra* 7-8.

<sup>71</sup> *See Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11, ¶¶ 179-299 (2012).

<sup>72</sup> *Id.*, ¶ 267.

a majority of Lifeline subscribers, and failed to provide good reasons for such a conflicting policy change. The Bureau similarly failed to study the Lifeline marketplace and determine that the program no longer serves the truly neediest or that a monthly charge would not impose an excessive financial burden. The Commission has never reversed its earlier decision rejecting Lifeline subscriber co-payments. Therefore, imposing a *de facto* co-pay through the MSS increase is a fundamental policy reversal in conflict with established Commission policy.

Finally, the 2020 MSS Waiver Order contradicts established Commission policy to waive Lifeline rules as needed to ensure that Lifeline services are available and affordable during the COVID-19 health and economic crisis. This year, the Bureau repeatedly waived other Lifeline requirements, including rules governing subscriber recertification, reverification, involuntary de-enrollment, usage, income documentation, and audits.<sup>73</sup> In doing so, the Bureau found that “[t]elemedicine, telework, and online learning continue to be necessary social distancing measures” and “emphasized the importance of access to affordable communications services” during the pandemic.<sup>74</sup> The Bureau granted the waivers to allow carriers to “prioritize helping their subscribers with getting connected and staying connected” and avoid involuntary de-

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<sup>73</sup> See, e.g., *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42 *et al.*, Order, DA 20-285 (WCB Mar. 17, 2020) (First Lifeline COVID Waiver Order) (temporarily waiving Lifeline recertification and reverification requirements); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42 *et al.*, Order, DA 20-354 (WCB Mar. 30, 2020) (temporarily waiving the Lifeline usage and general de-enrollment requirements and directing USAC to suspend periodic audit reviews); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42 *et al.*, Order, DA 20-462 (WCB Apr. 29, 2020) (temporarily waiving three-month documentation requirement for subscribers to demonstrate income eligibility); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42 *et al.*, Order, DA 20-577 (WCB June 1, 2020) (temporarily waiving documentation requirements for subscribers residing in rural areas on Tribal lands); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42 *et al.*, Order, DA 20-891 (WCB Aug. 17, 2020) (Aug. 17 Lifeline COVID Waiver Order) (extending the waivers through November 30, 2020); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42 *et al.*, Order, DA 20-1357 (WCB Nov. 16, 2020) (extending the waivers through Feb. 28, 2021).

<sup>74</sup> Aug. 17 Lifeline COVID Waiver Order, ¶ 1.

enrollments of low-income consumers who cannot comply with Lifeline requirements during the pandemic.<sup>75</sup>

In the 2020 MSS Waiver Order, the Bureau found that “the need for robust service is even greater today as the ongoing COVID-19 health and economic crisis impacts the needs of low-income Americans for quality communications services.”<sup>76</sup> However, requiring carriers to provide “robust” Lifeline service means little if low-income consumers cannot afford it.

Accordingly, the same justifications supporting the Bureau’s waivers of other Lifeline rules due to the pandemic support pausing the MSS at 3 GB. The pandemic continues unabated, with the United States facing recent spikes in both new cases, hospitalizations, and deaths. Pausing the MSS would allow low-income consumers to maintain or obtain access to affordable Lifeline services necessary for telemedicine, telework, online learning, and other critical communications. Pausing the MSS also would allow carriers to dedicate their limited resources to providing critical Lifeline services to existing and new subscribers. The record contains no support for increasing the MSS in the midst of a national health and economic crisis.<sup>77</sup> The

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<sup>75</sup> First Lifeline COVID Waiver Order, ¶¶ 7-8.

<sup>76</sup> 2020 MSS Waiver Order, ¶ 12.

<sup>77</sup> Multiple commenters supporting NaLA’s Waiver Petition stressed the negative impact the planned mobile broadband MSS increase would have on low-income consumers during the pandemic. For example, TracFone stated “it is imperative that the Commission preserves the status quo and prevent dramatic and untenable changes to the Lifeline program, especially in the midst of an ongoing health and economic crisis created by COVID-19.” TracFone Comments, 3-4. TruConnect also explained that “[a]ccess to Lifeline keeps many Americans self-sustaining and in much less need of further government assistance. This is even more important now during the COVID-19 pandemic.” TruConnect Comments, 4. Public interest, consumer, and civil rights organizations similarly argued that “MSS changes would be disruptive and especially harmful during the ongoing pandemic,” particularly with “many more people unable to afford broadband and voice services or pay their bills without additional support after losing their employment and access to usual services due to the pandemic. Joint Public Interest Comments, 4. In addition, NARUC asserted that affordable Lifeline services are particularly important now, as the pandemic “has wrought economic havoc at a global scale and the United States continues to have high levels of unemployment.” NARUC Comments, 6.

Bureau therefore should have paused the MSS increase for the same reasons detailed in its recent pandemic-related waivers to keep low-income consumers connected to affordable communications services.

**V. THE COMMISSION’S POLICY OF ANNUALLY INCREASING THE MOBILE BROADBAND MSS BY 50 PERCENT BY WAIVER WITH NO AFFORDABILITY ANALYSIS SHOULD BE OVERTURNED AND REVISED TO HOLD THE MSS STEADY UNLESS IT CONDUCTS A PROPER AFFORDABILITY ANALYSIS**

The mobile broadband MSS formula established in 2016 was first set to go into effect on December 1, 2019. However, for two years in a row now the Commission has determined that the formula is broken and would impose dramatic increases that would threaten the affordability of Lifeline services and disrupt service for existing Lifeline subscribers.<sup>78</sup> Also for two years in a row, the Commission has arbitrarily increased the MSS by 50 percent without conducting any analysis of whether first 3 GB, and now 4.5 GB, would be available to, and affordable for, Lifeline subscribers.

This year, in the face of overwhelming retail pricing and network cost evidence in the record indicating that 4.5 GB could not be provided for free to Lifeline subscribers, as well as unanimous opposition to increasing the mobile broadband MSS from Lifeline stakeholders, the Bureau relied solely on a last minute letter from the largest Lifeline provider, Assurance, which is owned by the network owner T-Mobile, offering to provide 4.5 GB for free.<sup>79</sup> The Bureau conducted no further affordability analysis other than to assert without any support that the Lifeline marketplace follows the broader telecommunications marketplace trend of decreasing consumer prices over time. The Bureau failed to actually analyze those alleged consumer price

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<sup>78</sup> 2020 MSS Waiver Order, ¶¶ 10-11.

<sup>79</sup> *Id.*, ¶ 16; *see supra* 12-13.



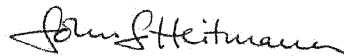
decreases and whether they would make 4.5 GB affordable with a reimbursement amount that has been stuck at \$9.25 since 2012.

This apparent new policy of blindly increasing the mobile broadband MSS by 50 percent each year must be overturned and revised to instead waive any increase in the MSS unless the Commission conducts a proper analysis that determines the increased MSS will be available to, and affordable for, Lifeline subscribers.<sup>80</sup>

## VI. CONCLUSION

For the foregoing reasons, the Commission should revise the 2020 MSS Waiver Order to retain the mobile broadband MSS at 3 GB pending completion of the Lifeline Marketplace Report and final resolution of the outstanding reconsideration petitions that have been pending for nearly four and a half years.

Respectfully submitted,



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<sup>80</sup> See 47 C.F.R. § 1.115(b)(2)(iii) (factors that warrant Commission consideration include “[t]he action involves application of a precedent or policy which should be overturned or reversed.”).

## Proof of Service

I hereby certify that on December 16, 2020, I caused the foregoing Application for Review to be served on the parties listed below via electronic mail (where an email address was provided) and U.S. first-class mail, postage prepaid.

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