SQUIRE PATTON BOGGS

Seeking to Narrow the Digital Divide: Lifeline Support for Broadband

Nearly a full month after a contentious March 31, 2016 open meeting, the Federal Communications Commission (FCC or Commission) released its much-anticipated Lifeline Modernization Order on April 27 (Order). Recognizing that "[a]ffordability remains the primary barrier to broadband adoption," particularly among low-income Americans, the FCC will now allow eligible Lifeline participants to use the US$9.25 per month Lifeline subsidy to lower the cost of broadband Internet access.

What is Lifeline?

Created in 1985 to subsidize telephone service for eligible low-income Americans, Lifeline is one of the Universal Service Fund (USF) programs administered by the Universal Service Administrative Company (USAC). The USF funds the monthly subsidy, which is paid to participating service providers (i.e., eligible telecommunications carriers [ETCs]). Qualifying participants may receive only one Lifeline subsidy per household; they must choose whether to apply the US$9.25 per month to their wireless service or their landline service.

Why the Call for Action?

Taking up Congress's mandate to ensure that all Americans have affordable access to communications services, the Order describes the Internet as "the most powerful and pervasive platform in our Nation's history," and notes that "accessing the Internet has become a prerequisite to full and meaningful participation in society." The Commission further asserts that its efforts to reform and modernize the Lifeline program will narrow the "homework gap" among schoolchildren, allow their parents access to jobs that require online applications and give low-income consumers the ability that others enjoy on a daily basis to bank, shop and communicate online.

What Does the Order Do?

The Order's actions can be organized into four categories: (1) provider requirements; (2) waste, fraud and abuse prevention; (3) efficient program administration; and (4) program monitoring.

Lifeline Broadband Provider Requirements

- First and foremost, the Order establishes a new category of provider: The "Lifeline Broadband Provider," or LBP. LBPs will be a subset of ETCs, but ETCs that are not LBPs will also be allowed to receive reimbursement for providing Lifeline-supported broadband Internet access. In addition, some of the FCC's rules will apply only to LBPs, while others will apply more broadly.
- The Order allows LBPs to be compensated for delivering standalone fixed or mobile broadband Internet access services, in addition to continuing to allow providers to receive support for bundled fixed or mobile voice and broadband services.
- The Order establishes minimum service standards for broadband and mobile voice services, and permits an exception in areas where fixed broadband providers do not meet the minimum standards.
- The Order requires that devices that are provided for use with Lifeline-supported services be Wi-Fi-enabled and phases in a hotspot-enabled requirement.
- The Order imposes a five-and-a-half-year transition period phasing out support for voice-only services (i.e., service not bundled with broadband access) to ultimately focus the program more on broadband. Further, minimum service levels (e.g., minutes of voice use and data speeds) are set to ensure that Lifeline participants are not receiving second-class quality service.

Waste, Fraud and Abuse Prevention

- In a "step . . . critical to preventing waste, fraud, and abuse," the Order creates the role of a third-party National Verifier, which will remove service providers from the eligibility verification process. The FCC believes that a National Verifier will reduce the cost of service by removing the verification administrative costs and reducing the possibility that providers will face enforcement action for failing to properly verify eligibility. Most importantly, however, service providers will no longer be able to register ineligible recipients – conduct that previously resulted in substantial fraud against the program.
- Moreover, the Order continues to permit low-income consumers to qualify by establishing that their income is less than 135% of the federal poverty guidelines. But the decision also refines the federal programs that can be used to demonstrate Lifeline eligibility to include SNAP, Medicaid, SSI, Federal Public Housing Assistance, the Veterans Pension benefit program and the current Tribal qualifying programs.
- In addition, the Order increases the program's transparency by making subscriber counts by provider, uniform disclosure of annual subscriber recertification data, and other information publicly available and understandable.
- Finally, the Order aligns Lifeline with the other three USF programs by establishing an annual budget – US$2.25 billion. The Commission's Wireline Competition Bureau (WCB) must alert the FCC when Lifeline spending approaches 90% of that amount and prepare an analysis explaining the reasons for the growth in spending, with the expectation that the Commission will then act on WCB's report within six months.

Efficient Program Administration

- The Order imposes a streamlined federal LBP designation process within the statutory construct of Sections 214 and 254 of the Communications Act. The new process is an alternative to, and does not replace, the existing ETC designation process.
- Further, the Order permits Lifeline providers currently obligated to provide voice services to obtain relief from even this streamlined process assuming certain benchmarks are met.
- Finally, the FCC "reform[s] non-usage rules, . . . make[s] recertification a rolling process, . . . establish[es] a 12-month benefit port freeze for broadband offerings, . . . take[s] steps to increase transparency in the program, and . . . modif[ies] program forms to reduce administrative burdens on providers."

Program Monitoring

- To facilitate the reforms described above, the Oder directs the Consumer and Government Affairs Bureau (CGB) to develop and execute a digital inclusion plan that will seek input from various stakeholders to determine how to best leverage Lifeline to enhance broadband adoption.

Why is This Controversial?

Both Republican Commissioners issued strong dissents and neither supported the Order. Commissioner Pai was most vocal, asserting that the Order is "not fiscally responsible," that it "consigns Lifeline consumers to second-class broadband for the foreseeable future," that it "does not comply with federal law," and that it does not "clean up the waste, fraud, and abuse." In fact, just a week after the Order was adopted at the March 31 open meeting, the Commission announced a US$51 million fine against Total Call Mobile for "apparently enrolling tens of thousands of duplicate and ineligible consumers into the Lifeline program." In that case – investigated by the Enforcement Bureau's Universal Service Fund Strike Force – the Commission alleges that "since 2014, Total Call has requested and received an estimated $9.7 million dollars in improper payments from the Universal Service Fund for duplicate or ineligible consumers despite repeated and explicit warnings from its own employees, in some cases compliance specialists, that company sales agents were engaged in widespread enrolment fraud." Notwithstanding the size of the fine, both Commissioners Clyburn and Pai argued for a more significant penalty in their separate statements.

Who is Affected?

The changes to the Lifeline program will start to take effect as early as December 1, 2016. The changes will impact all stakeholders, not just the service providers who will seek to participate. Community anchor institutions and service organizations that will want to help eligible individuals qualify and participate in the benefits of broadband access will be deeply interested in participating in the implementation process. Certainly, entities already qualified as ETCs and entities looking to become LPBs should engage and work with counsel familiar with the Lifeline program and the 2012 reforms. In particular, counsel can assist Internet service providers with the LBP designation process and other questions as they arise. Also, the new rules do not pre-empt participation in any state Lifeline programs, so providers interested in applying to participate in those programs should also seek the aid of experienced counsel. No doubt, there will also be potential enforcement/compliance issues as with any new set of rules. The Squire Patton Boggs (US) LLP Communications Group includes lawyers familiar with the ins and outs of the Universal Service Programs, with experience advocating for clients before USAC and the FCC, and they are available to help.

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