BEFORE THE MISSOURI
PUBLIC SERVICE COMMISSION

In the Matter of an Investigation to Review the Lifeline Program Practices of American Broadband and Telecommunications Company d/b/a American Assistance	**)**	**Docket No. LO-2019-0154**

RESPONSE OF AMERICAN BROADBAND AND TELECOMMUNICATIONS COMPANY TO MISSOURI PUBLIC SERVICE COMMISSION STAFF DATA REQUEST 1-2 (RESPONSE OF AMERICAN BROADBAND AND TELECOMMUNICATIONS COMPANY TO FEDERAL COMMUNICATIONS COMMISSION'S NOTICE OF APPARENT LIABILITY AND FORFEITURE)

REDACTED PURSUANT TO 4 CSR 240-2.135(2)(A)(1) THROUGH 4 CSR 240-2.135(2)(A)(5) AND 4 CSR 240-2.135(2)(A)(8)

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February 8, 2019

BY HAND DELIVERY AND EMAIL

Ms. Marlene H. Dortch
Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room 4-A123
Washington, DC 20554
ATTN: Enforcement Bureau

Re: Response of American Broadband and Telecommunications Company to the Notice of Apparent Liability for Forfeiture and Order, File No.: EB-IHD-17-00023554, NAL/Acct. No.: 201932080001

Dear Ms. Dortch:

American Broadband and Telecommunications Company ("American Broadband"), by and through its undersigned counsel and in accordance with Section 1.80(f)(3) of the rules of the Federal Communications Commission ("Commission"),[1] hereby submits the attached response to the Notice of Apparent Liability for Forfeiture and Order released by the Commission on October 25, 2018, in the above-captioned proceeding ("*NAL*").[2] Also included in this

[1] 47 C.F.R. § 1.80(f)(3).

[2] *Am. Broadband & Telecomms. Co., Jeffrey S. Ansted*, File No. EB-IHD-17-00023554, Notice of Apparent Liability for Forfeiture and Order, FCC 18-144 (Oct. 25, 2018) ("*NAL*"). On November 1, 2018, the Commission's Enforcement Bureau granted an extension for the Company's *NAL* response to January 23, 2019. *See* e-mail from Rakesh Patel, Director, USF Strike Force, Enforcement Bureau, Federal Communications Commission, to John J. Heitmann, Counsel to American Broadband (Nov. 1, 2018). In accordance with the Commission's Public Notice further extending the deadlines for filings due during the recent partial shutdown of Commission operations, American Broadband is submitting this *NAL* response on February 8,

submission is a Request for Confidential Treatment of American Broadband's confidential, un-redacted *NAL* response.

In accordance with Section 1.51(c) of the Commission's rules,[3] American Broadband includes an original and one copy of the confidential, un-redacted version of American Broadband's *NAL* response as well as an original and one copy of the redacted version of American Broadband's *NAL* response. In addition, American Broadband provides one additional duplicate copy of both the confidential, un-redacted version of its *NAL* response and the redacted version of its *NAL* response. Please date stamp and return a duplicate copy of each version of the *NAL* response to the courier.

Please do not hesitate to contact me if you have any concerns or questions.

Respectfully submitted,

John J. Heitmann
Counsel to American Broadband and Telecommunications Company

cc (by email): Rakesh Patel (Rakesh.Patel@fcc.gov)

Enclosures

2019, making this submission timely. *See Revisions to Filing and Other Deadlines Following Resumption of Normal Commission Operations*, Public Notice, DA 19-26 (Jan. 29, 2019).

[3] 47 C.F.R. § 1.51(c).

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American Broadband & Telecommunications Company	)	File No.: EB-IHD-17-00023554
	)	NAL/Acct. No.: 201932080001
	)	
Jeffrey S. Ansted	)	

RESPONSE OF AMERICAN BROADBAND AND TELECOMMUNICATIONS COMPANY TO THE NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

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February 8, 2019

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EXECUTIVE SUMMARY

The Notice of Apparent Liability for Forfeiture and Order ("*NAL*") issued by the Federal Communications Commission ("FCC" or "Commission") to American Broadband and Telecommunications Company ("American Broadband" or "Company") and Mr. Jeffrey S. Ansted in this proceeding must be cancelled.

American Broadband takes its obligations as a Lifeline eligible telecommunications carrier ("ETC") seriously. As the Commission acknowledges in the *NAL*, American Broadband proactively investigated and voluntarily self-disclosed its unintentional receipt of Universal Service Fund ("USF") overpayments after conducting an internal compliance review in response to concerns raised by then-Commissioner Pai about the Lifeline program. As part of its self-disclosure, the Company proposed a plan that would allow it to restore all identified USF overpayments to the Universal Service Administrative Company ("USAC") while continuing to meet its obligation to serve low-income subscribers in need. As of this filing, the Company has repaid **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**. Since its self-disclosure, the Company has periodically reformed and supplemented its Lifeline policies and standard operating procedures, providing copies to the Commission, and it is confident that its current approach to Lifeline operations is sound, well-designed to ensure compliance, and represents improvements from the time period on which the *NAL* focused.

Despite the Company's cooperation, demonstrated commitment to compliance, and remedial efforts, the Commission issued the *NAL* on October 25, 2018, proposing an unprecedented $63,463,500 forfeiture against American Broadband and Mr. Ansted for alleged violations of the FCC's Lifeline rules. The Commission based its proposed forfeiture on 42,309

unidentified allegedly ineligible subscribers included in American Broadband's Form 497 filings for the August 2016 data month.

The *NAL* is so legally and factually deficient that it must be cancelled. First, the proposed forfeiture is barred by the Communications Act's one-year statute of limitations. The Company filed its original and revised Form 497s for the August 2016 data month more than a year prior to the release of the *NAL*. The submission of a Form 497 is a discrete act and the limitations period for such act begins to run on the date of filing. FCC precedent and the Commission's leadership do not support applying a "continuing violation" theory to a Form 497 submission that would suspend the limitations period. Thus, the proposed forfeiture in the *NAL* is time-barred. The Commission fails to provide any explanation for its failure to comply with the one-year statute of limitations in the *NAL*. Although the *NAL* references the most-recent tolling agreement entered into by the Company and the Commission's Enforcement Bureau, the limitations periods for the alleged violations that served as the basis of the proposed forfeiture expired prior to the tolling agreement. American Broadband repeatedly bargained for, and the Enforcement Bureau agreed to, the expiration of the limitations periods for older possible violations in each of the tolling agreements between the parties. Government agencies are held to the plain terms of their tolling agreements and the plain terms of the tolling agreements here show that that the proposed forfeiture in the *NAL* is time-barred.

Second, imposing the forfeiture against American Broadband or Mr. Ansted would violate due process protections. Due process requires that the Commission provide fair notice of prohibited conduct. But during the period covered by the *NAL*, the FCC did not have a requirement for ETCs to verify subscriber identity or a standard practice for detecting the enrollment of deceased subscribers. The FCC never provided notice that a valid identification

would be insufficient for Lifeline enrollment and the Company would be expected to independently check for possible identity issues, especially when this responsibility was assigned solely to USAC by the FCC. The Commission may not simultaneously announce a new standard of conduct and then use that standard to justify a proposed forfeiture in the *NAL*. Moreover, the FCC failed to provide sufficient notice of the facts underlying the *NAL*, as it never identified the actual allegedly ineligible subscribers that served as the basis for the proposed forfeiture. While American Broadband remains willing to work with the Commission and USAC to restore additional overpayments for ineligible accounts not already included in its USF repayment plan, it will not blindly accept the Commission's unsupported presumption that all of the 42,309 unidentified subscribers were ineligible for Lifeline support.

Third, the Commission's imposition of a strict liability standard for claims involving allegedly ineligible Lifeline subscribers in the *NAL* represents arbitrary and capricious agency action under the Administrative Procedure Act. The Commission's regulatory framework for Lifeline uses a process-based, not results-based, approach. FCC rulemakings recognize that consumer fraud has been, and continues to be, a problem related to the Lifeline program. The Commission therefore understands that it is impossible for any Lifeline provider to successfully eliminate all claims for allegedly ineligible subscribers. Nothing in the Commission's rules indicates that every error – regardless of fault – in determining accounts eligible for Lifeline reimbursement will constitute a violation warranting a monetary penalty. In fact, the Commission's rules allow ETCs to file revised Form 497s to correct reimbursement claims with the understanding that the Lifeline enrollment, de-enrollment, and reimbursement processes always will involve some errors. As a result, instead of applying a strict liability standard, the Commission should afford the Company the opportunity to address any remaining issues and

reimburse the USF for any identified ineligible accounts not already included in its repayment plan.

Fourth, the Commission repeatedly makes allegations in the *NAL* that do not represent violations of its Lifeline rules. For example, the Commission alleges that American Broadband's Lifeline compliance policies and procedures were lacking or non-existent. In reality, however, American Broadband had robust policies and procedures in place aimed at achieving compliance with the ever-evolving Lifeline rules. Specifically, American Broadband had Lifeline compliance policies and procedures in place during the covered period for subscriber enrollment and certification as well as subscriber de-enrollment. Contrary to the Commission's allegations, American Broadband did not engage in conduct designed to create improper Lifeline enrollments through manipulation of personal/address information, enrollment of deceased individuals, or re-use of program eligibility proof documents. American Broadband similarly did not engage in conduct designed to avoid the de-enrollment of subscribers ineligible for Lifeline due to non-usage or benefit transfers. American Broadband also took action to ensure that its employees and agents understood its Lifeline compliance obligations and terminated its relationship with those who violated its policies and procedures. Consequently, the Commission's attempt to use isolated facts in the *NAL* to frame a misleading narrative about the Company's compliance activities is unsupported and cannot serve as the basis for the proposed forfeiture.

Fifth, the Commission cannot impose personal liability on Mr. Ansted. The Commission may not impose liability on individuals personally for the violations of regulated entities because the Commission has no general or specific jurisdiction over individuals in their personal capacity. In concluding that the Commission should "pierce the corporate veil" of American Broadband, the Commission primarily relies on its analysis from its prior *Telseven* decisions.

But the conclusion that the FCC can pierce the corporate veil to reach an owner or officer of a regulated entity in *Telseven* is legally erroneous, and applying this analysis to Mr. Ansted would be an *ultra vires* action without any justification. But even if the Commission had jurisdiction over Mr. Ansted, none of the veil-piercing factors highlighted in *Telseven* are present here. No common identity of officers, directors, or shareholders exists between Mr. Ansted, personally, and American Broadband. In addition, no common control exists between Mr. Ansted, personally, and American Broadband. Holding Mr. Ansted personally liable for the proposed forfeiture will not prevent entities from defeating the purpose of the Lifeline rules, and the Commission's speculative efforts to connect salacious descriptions of Mr. Ansted's personal expenditures to the Company fail for a lack of causal connection, and are otherwise factually incomplete and inaccurate.

Finally, the Commission's proposed forfeiture in the *NAL* is unlawfully excessive. As discussed above, the Commission fails to identify and provide sufficient facts to demonstrate that each of the 42,309 subscribers ostensibly used as the basis for the proposed forfeiture was ineligible for Lifeline support. The Commission also fails to address the forfeiture adjustment criteria that it is obligated to consider, including the impact of the Company's voluntary self-disclosure of its unintentional receipt of USF overpayments and good faith efforts to comply with the Lifeline rules as well as its inability to pay the proposed fine. The Commission therefore must cancel the proposed forfeiture in the *NAL* against American Broadband and Mr. Ansted.

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WASHINGTON, DC 20554

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American Broadband & Telecommunications Company	)	File No.: EB-IHD-17-00023554
	)	NAL/Acct. No.: 201932080001
	)	
Jeffrey S. Ansted	)	

RESPONSE OF AMERICAN BROADBAND AND TELECOMMUNICATIONS COMPANY TO THE NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

American Broadband and Telecommunications Company ("American Broadband" or "Company"), by and through its attorneys, hereby responds to the Notice of Apparent Liability for Forfeiture and Order ("*NAL*") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding on October 25, 2018.[1]

[1] *Am. Broadband & Telecomms. Co., Jeffrey S. Ansted*, File No. EB-IHD-17-00023554, Notice of Apparent Liability for Forfeiture and Order, FCC 18-144 (Oct. 25, 2018) ("*NAL*"). On November 1, 2018, the Commission's Enforcement Bureau granted an extension for the Company's *NAL* response to January 23, 2019. *See* e-mail from Rakesh Patel, Director, USF Strike Force, Enforcement Bureau, Federal Communications Commission, to John J. Heitmann, Counsel to American Broadband (Nov. 1, 2018). In accordance with the Commission's Public Notice further extending the deadlines for filings due during the recent partial shutdown of Commission operations, American Broadband is submitting this *NAL* response on February 8, 2019, making this submission timely. *See Revisions to Filing and Other Deadlines Following Resumption of Normal Commission Operations*, Public Notice, DA 19-26 (Jan. 29, 2019). On November 14, 2018, the Company timely filed a Petition for Reconsideration of the Commission's decision in the *NAL* to deny most of the Company's confidentiality requests related to materials provided during the course of the investigation. *See* Petition for Reconsideration of American Broadband and Telecommunications Company, File No. EB-IHD-17-00023554 (Nov. 14, 2018); *see also NAL*, ¶¶ 180-185. On November 30, 2018, the Company timely submitted a report in accordance with the *NAL* explaining why the Commission should not initiate proceedings to revoke its FCC authorizations. *See* Report of American Broadband and Telecommunications Company, File No. EB-IHD-17-00023554 (Nov. 30, 2018) ("Revocation Report"); *see also NAL*, ¶¶ 179, 191.

As demonstrated below, the proposed forfeiture must be cancelled because it is based on alleged conduct that falls outside of the one-year statute of limitations in the Communications Act of 1934, as amended ("Communications Act"). Even if that were not the case, the Commission's failure to provide sufficient notice of prohibited and required conduct, and of the facts it used to assess the forfeiture, violates the protections guaranteed by the Due Process Clause of the Fifth Amendment and the Communications Act to American Broadband and Mr. Jeffrey S. Ansted. The Commission also applies a strict liability standard to the Company's alleged conduct, which falls outside the scope of the FCC's authority and is arbitrary and capricious. It does so while repeatedly making allegations that are either incorrect or misrepresentations of the facts, and therefore do not constitute violations of the rules. In any event, the Commission does not have the authority to impose personal liability on Mr. Ansted for the Company's alleged violations, and the Commission fails to establish that Mr. Ansted willfully violated the Commission's rules. Because the Commission relies on its faulty application of the law and misrepresented facts, it cannot maintain the proposed forfeiture, which is unlawfully excessive. The Commission therefore must cancel the proposed forfeiture against American Broadband and Mr. Ansted, and instead continue its efforts to develop reasonably effective controls for the Lifeline program through the National Lifeline Accountability Database ("NLAD"), National Verifier, and further rulemaking proceedings.

I. BACKGROUND

A. Description of American Broadband

American Broadband is a Delaware corporation, headquartered in Toledo, Ohio. The Company was formed in 2003 and began providing local and long-distance telephone service in 2004, primarily to customers in rural parts of the Midwest. American Broadband expanded its

services in 2006, by offering dial-up and broadband internet access service to residential and commercial customers. In 2010, the Company began providing wireline Lifeline service in Michigan. As the Lifeline program evolved, American Broadband entered the wireless Lifeline market. The Commission granted the Company's Compliance Plan to provide wireless Lifeline services on May 25, 2012,[2] and it began providing Lifeline-supported wireless services to consumers in Michigan and Ohio in August 2012.[3] Over the next four years, the Company expanded its Lifeline services into several other states, as it sought to serve greater numbers of eligible subscribers. In May 2014, it adopted the industry-standard model of utilizing master and local agents to collect Lifeline applications from consumers certifying their eligibility for the program. American Broadband is currently designated as an eligible telecommunications carrier ("ETC") for the purpose of providing federal and/or state Lifeline services in Arizona, Arkansas, Colorado, California, Georgia, Hawaii, Illinois, Indiana, Kentucky, Maryland, Michigan, Minnesota, Missouri, Nevada, Ohio, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Utah, West Virginia, and Wisconsin.

Jeffrey Ansted is the president and Chief Executive Officer ("CEO") of American Broadband.[4] Mr. Ansted exercises indirect control over American Broadband through **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**,

[2] *See Wireline Competition Bureau Approves the Compliance Plans of American Broadband & Telecommunications, Budget Prepay, Consumer Cellular, Global Connection, TerraCom and Total Call*, 27 FCC Rcd 5776 (2012). Since the Commission's approval of the Company's Compliance Plan, the obligations imposed on eligible telecommunications carriers by the FCC have changed and American Broadband's policies and procedures have been updated accordingly.

[3] *See* Letter from John J. Heitmann, Counsel for American Broadband, to Dangkhoa Nguyen, USF Strike Force, Enforcement Bureau, FCC, 6 (May 25, 2017) ("May 25 LOI Response").

[4] *Id.*, 2.

which owns all stock in the Company. Mr. Ansted and his management team have more than 50 years' combined experience in the telecommunications industry.[5] In consultation with his management team, Mr. Ansted worked to develop and periodically update the Company's internal procedures and policies to achieve compliance with the Commission's Lifeline rules. As the Commission noted in the *NAL*, Mr. Ansted relied on his subordinate directors and employees to provide day-to-day management and supervision of the Company's agents, enrollment, and de-enrollment practices.[6] Mr. Ansted similarly relied on his subordinate directors and employees to provide accurate information for use on the Company's Lifeline reimbursement claims. Until the issuance of the *NAL*, Mr. Ansted has never personally been the subject of a government enforcement action.

B. American Broadband's Internal Investigation, Self-Disclosure of Overpayments from the USF, and Repayments to the Fund

As the Commission acknowledges in the *NAL*, American Broadband proactively investigated and voluntarily disclosed its unintentional receipt of Universal Service Fund ("USF") overpayments.[7] In early June 2016, American Broadband began an internal review of its subscriber rolls after Mr. Ansted read letters sent from then-Commissioner Pai to the Universal Service Administrative Company ("USAC") detailing concerns about waste, fraud, and abuse in the Lifeline program.[8] After the internal inquiry indicated potential issues with the Company's list of active subscribers, American Broadband contracted with a third-party software company, **[BEGIN CONFIDENTIAL]** [redacted]

[5] Revocation Report, 26.

[6] *See NAL*, ¶ 16 (detailing the relative titles and responsibilities of the Company's directors).

[7] *Id.*, ¶¶ 23-28.

[8] May 25 LOI Response, 18.

[redacted] **[END CONFIDENTIAL]** to assist with conducting analyses of its subscriber records.[9] **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** conducted a comparative analysis of the phone numbers in the Company's Lifeline subscriber database against the phone numbers active under each Company Study Area Code ("SAC") in NLAD. From this analysis, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** determined the categories of subscribers that should not have been claimed on American Broadband's Lifeline Worksheets ("Form 497s"). Following **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** analysis, American Broadband proactively disclosed to the FCC's Wireline Competition Bureau ("WCB") on August 26, 2016, the Company's identification of certain issues with its Lifeline compliance procedures that unintentionally led to overpayments from the USF.[10] Described generally, these areas included (1) removal of subscribers who transferred benefits to other Lifeline service providers from the Company's subscriber lists; (2) removal of subscribers who were terminated for non-usage from the Company's subscriber lists; and (3) removal of subscribers subject to certain process and processing issues from the Company's subscriber lists.[11]

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[9] *Id.*

[10] *See* Letter from John J. Heitmann, Counsel to American Broadband, to Ryan Palmer, Chief, Telecommunications Access Policy Division, FCC (Sept. 16, 2016) ("Self-Disclosure Letter"). **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

[11] Self-Disclosure Letter, 1. *See also* Letter from John J. Heitmann, Counsel to American Broadband, to Ryan Palmer, Chief, Telecommunications Access Policy Division, FCC, 2 (Sept. 23, 2016) ("September 23 Letter") (providing additional details about the issues identified).

In August 2016, in conjunction with its internal review and self-disclosure, American Broadband began de-enrolling identified ineligible Lifeline subscribers and adopted reforms to its standard operating procedures to improve its Lifeline compliance mechanisms. **[BEGIN CONFIDENTIAL]** [redacted][12] [redacted][13] [redacted][14] **[END CONFIDENTIAL]**

In its self-disclosure letter, the Company disclosed an overpayment of approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** for the period of February 2014 to July 2016 and included a plan to repay the USF.[15] American Broadband proposed a plan that would allow it to repay the balance owed while continuing to meet its

[12] Letter from John J. Heitmann, Counsel for American Broadband, to Dangkhoa Nguyen, USF Strike Force, Enforcement Bureau, FCC, 12 (June 8, 2017) ("June 8 LOI Response").

[13] *Id.*, 11.

[14] *Id.*, 10.

[15] Self-Disclosure Letter, 1, Attachment – American Broadband Proposed Repayment Schedule.

obligations to serve existing subscribers and other qualifying customers in need.[16] In addition, the Company offered to provide a full subscriber list supporting each subsequent Form 497/Lifeline Claims System ("LCS")[17] filing submitted to USAC after the self-disclosure.[18]

Upon further review of the subscriber reimbursement claims included in the self-disclosure, American Broadband determined that its initial overpayment amount had been overstated for a variety of reasons, including the duplicate counting of subscribers that were considered invalid for more than one compliance/reporting issue category during a single month.[19] To ensure the accuracy of its self-disclosure, the Company subsequently retained the services of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** an independent third-party auditor, to review its assessment of the number of ineligible Lifeline subscriber accounts claimed on its Form 497 filings during the period covered in the self-disclosure.[20] The independent audit found that the Company had overstated the overpayment amount in its self-disclosure by approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** by including subscribers that fell into more than one compliance/reporting

[16] *Id.*, 1. **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** *Id.*, 2.

[17] The LCS online reimbursement process went into effect in January 2018, replacing the Form 497 Lifeline reimbursement claim process. *See* USAC, "Reimbursement FAQs," *available at* www.usac.org/li/about/faqs/faq-lifeline-reimbursement-claims.aspx# (last visited Jan. 20, 2019).

[18] Self-Disclosure Letter, 2.

[19] *See, e.g.*, Letter from John J. Heitmann, Counsel to American Broadband, to Michelle Garber, Vice President, USAC, 6-9 (Jan. 19, 2017) (discussing subscribers included in the initial self-disclosure overpayment amount for non-usage or recertification issues that the Company later determined were valid subscribers receiving Lifeline service during the disclosure period).

[20] *See* **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

issue category during a single month.[21] The third-party auditor concluded that the actual total amount of American Broadband's overpayment was **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**.[22] The auditor's report was provided to USAC, the FCC's Enforcement Bureau ("EB"), and WCB in September 2017.[23]

In late January 2017, American Broadband offered its **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**, as its initial good faith down payment in consideration of a repayment plan.[24] The Company then entered into a two-year promissory note and repayment plan with USAC on February 14, 2017, whereby it paid a **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**.[25] On July 15, 2017, the Company executed a revised repayment plan with USAC, in which the Company made a substantial down payment of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** resulting in a reduced monthly payment of **[BEGIN CONFIDENTIAL]** [redacted]

[21] *See id.*, 4.

[22] *See id.*

[23] *See* email from Marisa A. Lorenzo, Counsel to American Broadband, to Dangkhoa Nguyen, USF Strike Force, Enforcement Bureau, FCC (Sept. 12, 2017); email from John J. Heitmann, Counsel to American Broadband, to Michelle Garber and Dionne Dean, USAC (Sept. 12, 2017); John J. Heitmann, Counsel to American Broadband, to Ryan Palmer and Jodie Griffin, WCB, FCC (Sept. 12, 2017).

[24] *See* Letter from John J. Heitmann, Counsel to American Broadband, to Michael Pond, USAC (Jan. 26, 2017). American Broadband's initial down payment was almost **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** more than the required amount of 10% of the total overpayment.

[25] USAC Letter Agreement and Promissory Note for American Broadband and Telecommunications Company (effective Feb. 15, 2017).

[redacted] **[END CONFIDENTIAL]**.[26] Since August 2017, American Broadband has attempted to revise the repayment amount based on the results of the independent audit, but WCB staff has yet to approve an adjusted payment plan. As a result, the Company continues to make payments under the second revised payment plan, which would result in **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** in overpayments to the USF when complete. As of January 15, 2019, the Company has repaid **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to the USF.

American Broadband takes its compliance obligations as a Lifeline provider seriously. As acknowledged in the *NAL*, American Broadband repeatedly took action to address potential Lifeline compliance issues identified by its employees, vendors, or the FCC and ensure such issues did not recur.[27] In addition, the Company periodically reformed and supplemented its Lifeline policies and standard operating procedures.[28] It provided copies of these compliance materials to the Commission. For over two years following its self-disclosure, the Commission never suggested that the Company's revised procedures were in any way deficient to ensure compliance with its Lifeline rules, and USAC continued to pay American Broadband's claimed Lifeline reimbursement amounts every month based on the Company's filings. During this

[26] USAC Letter Agreement and Promissory Note for American Broadband and Telecommunications Company (effective July 15, 2017).

[27] *See, e.g.*, *NAL*, ¶ 23 (detailing proactive investigation by American Broadband leadership that led to its self-disclosure of the USF overpayment to the FCC), ¶ 34 (discussing the Company's engagement of a third-party auditor to review Lifeline subscriber claims), ¶ 79 (noting outreach by American Broadband to USAC staff regarding Lifeline program eligibility documentation), ¶¶ 88-89 (summarizing compliance obligations imposed by the Company on its agents), ¶ 95 (covering agent termination for failure to follow Company Lifeline compliance policies).

[28] *See, e.g.*, Self-Disclosure Letter, 2, Attachments.

period, the Company further reviewed and improved its Lifeline compliance mechanisms to help achieve compliance with evolving Lifeline rules and guidance issued by the FCC and USAC. For example, **[BEGIN CONFIDENTIAL]** [redacted][29] **[END CONFIDENTIAL]** The Company has also worked with its third-party vendor **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to implement a software update that will help identify when multiple enrollments are made at a single address.[30] Additional measures have already been implemented to prevent the enrollment of potentially deceased individuals and to verify potential customer Social Security number accuracy, and beginning in February 2019, American Broadband will utilize **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** and automatically reject individuals identified as deceased.[31] The Company also terminated its relationships with all agents that were identified in the *NAL* as being connected to alleged improper enrollments.[32] American Broadband no longer uses agents to gather necessary information to assist with its Lifeline enrollments in any state except California, where the California Administrator makes the final eligibility determination.[33]

[29] Revocation Report, 16-17.

[30] *Id.*, 15.

[31] *Id.*, 15-16.

[32] *Id.*, 9.

[33] *Id*. American Broadband's agents do not make any final determinations regarding an applicant's Lifeline eligibility. Instead, the decision about whether an applicant is eligible and appropriate for submission to the NLAD and/or the California Administrator is made by the Company's internal compliance team.

While the Company has acknowledged that its policies and procedures did not, in all instances, prevent overpayments from the USF, its commitment to compliance is evident.

EB issued a Letter of Inquiry ("LOI") to American Broadband on April 25, 2017, seeking detailed information related to the Company's self-disclosure and Lifeline practices.[34] The Company fully and timely responded to the LOI on a rolling basis, as agreed to by EB.[35] It has also responded to additional information and document requests from WCB, USAC, and the FCC's Office of the Inspector General ("OIG") during this multi-faceted, prolonged, and costly investigation. At all times, American Broadband has been forthcoming, responsive, and transparent. For each instance where American Broadband was asked to provide information and documentation about its practices, procedures, and subscribers, the Company has responded promptly and completely. On the six occasions where EB requested an agreement to toll the statute of limitations while the investigation was conducted, the Company obliged. American Broadband continues to work cooperatively with the Commission to resolve any remaining issues regarding identified USF overpayments and remains ready to work with the Commission to address any other perceived deficiencies with or suggested refinements to its Lifeline compliance procedures.

[34] Letter from Loyaan Egal, Director, USF Strike Force, Enforcement Bureau, FCC, to Jeffrey S. Ansted, President, American Broadband, and John J. Heitmann, Counsel to American Broadband (Apr. 25, 2017) ("LOI").

[35] *See* May 25 LOI Response; June 8 LOI Response; Letter from John J. Heitmann, Counsel to American Broadband, to Dangkhoa Nguyen, USF Strike Force, Enforcement Bureau, FCC (June 22, 2017).

C. The *NAL*

On October 25, 2018, the FCC issued the *NAL* against American Broadband and Mr. Ansted.[36] In the *NAL*, the Commission proposes a forfeiture penalty of $63,463,500 "for apparently willfully and repeatedly engaging in conduct that violated the Commission's rules governing the federal Lifeline program."[37] The *NAL* asserts that American Broadband violated sections 54.405, 54.404, 54.407, and 54.410 of the FCC's rules for the Lifeline program because it "(1) apparently created, then sought and obtained Lifeline support for ineligible or duplicate Lifeline accounts; (2) sought and obtained Lifeline support for deceased individuals; (3) repeatedly filed Forms 497 seeking Lifeline support, and obtained support for ineligible Lifeline accounts even after its own compliance staff had identified the enrollments as 'fraudulent' and after it had represented to the Commission that it had identified and remediated all improper Lifeline claims; and (4) failed to de-enroll ineligible subscribers that it knew or should have known were ineligible to receive Lifeline support."[38]

In the *NAL*, the Commission seeks to hold Mr. Ansted jointly and severally liable for the forfeiture penalty with the Company, claiming that he (1) shared a common identity with American Broadband; (2) maintained exclusive control over American Broadband's finances; and (3) made transfers or purchases that benefited himself or his family using Lifeline reimbursement funds.[39]

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[36] *See NAL*.

[37] *Id.*, ¶ 1.

[38] *Id.*, ¶ 2 (footnotes omitted).

[39] *Id.*, ¶¶ 168, 170-71. As explained further below, it is a fiction that USAC disbursements must be segregated from other revenues or that such funds exist in perpetuity as "Lifeline funds." Because USAC disbursements are paid *after* a Lifeline provider provides service, the provider *first* foregoes revenues associated with the Lifeline discount and incurs the operational expenses

The Commission based the proposed forfeiture on the allegedly ineligible subscribers claimed by the Company on its Form 497 submissions for the August 2016 calendar month.[40] The Commission alleges that the Company's Form 497 submission for the August 2016 data month sought reimbursement for ineligible subscribers "notwithstanding the Company's August 2016 indication to WCB that it had implemented new policies and procedures to prevent future submissions of inaccurate Forms 497."[41] According to the Commission's calculations, the Company's Form 497 submission for the August 2016 data month included 18,894 allegedly ineligible subscribers due to enrollment issues (*e.g.*, manipulation of personal/address information, enrollment of deceased individuals, re-use of program eligibility proof documents) and 32,032 allegedly ineligible subscribers due to de-enrollment issues (*e.g.*, non-usage, benefit transfers, missing from NLAD).[42] In total, the Commission alleges that the Company improperly claimed and received Lifeline reimbursement for 42,309 allegedly ineligible subscribers, which excludes 8,617 accounts subject to both enrollment and de-enrollment issues.[43]

II. THE COMMISSION'S PROPOSED FORFEITURE IS BARRED BY THE COMMUNICATION ACT'S ONE-YEAR STATUTE OF LIMITATIONS

The Commission's proposed forfeiture must be cancelled because it is based on conduct that falls outside of the Communications Act's one-year statute of limitations for forfeiture

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associated with a Lifeline customer. The Lifeline provider has no further obligations to do anything with the funds once they are reimbursed by USAC. Therefore, the *NAL*'s assertion that so-called "Lifeline funds" were used as dividend distributions to Mr. Ansted is legally and factually erroneous. *See infra* Section VI.

[40] *NAL*, ¶¶ 174-75.

[41] *Id.*

[42] *Id.*, ¶ 175, n. 424.

[43] *Id.*

actions against non-broadcast entities. The Commission based its proposed forfeiture on each "unique improper Lifeline account claimed on the Company's Form 497."[44] Specifically, the Commission found American Broadband and Mr. Ansted apparently liable for "each of the 42,309 improper claims/subscribers for which American Broadband sought support in August 2016."[45] The Company filed its original Form 497s for the August 2016 data month on September 6, 2016, and filed revised Form 497s for the August 2016 data month for certain states on November 16, 2016.[46] As explained below, the submission of a Form 497 is a discrete act and the limitations period "shot clock" for such act begins to run on the date of filing. As a result, the applicable limitations periods for a proposed forfeiture based on American Broadband's original and revised Form 497 submissions for the August 2016 data month expired on September 6, 2017, and November 16, 2017, respectively – long before the Commission released the *NAL* on October 25, 2018.

The Commission does not claim that American Broadband's violations were continuing in nature or provide any explanation for why its proposed forfeiture is not time-barred. The Commission briefly references a tolling agreement entered into by American Broadband and EB in the *NAL*, but that agreement did not cover potential claims based on conduct from previously-expired time periods, such as those based on American Broadband's Form 497 filings for the August 2016 data month.[47] American Broadband specifically bargained for, and EB repeatedly

[44] *Id.*, ¶ 175.

[45] *Id*. *See also id.*, n. 424 (summarizing the Commission's proposed forfeiture calculation methodology based on "improper accounts in data month August 2016").

[46] *See id.*, Appendix A, Original and Revised Form 497s (showing the Company filed revised Form 497s for the August 2016 data month for Illinois, Indiana, Kentucky, Michigan, Ohio, Puerto Rico, South Carolina, West Virginia, and Wisconsin).

[47] *Id.*, ¶ 173, n. 417.

agreed to, the expiration of the limitations periods for older potential violations during tolling agreement negotiations. EB is a sophisticated actor and courts will hold government agencies to the plain terms of their tolling agreements and dismiss time-barred claims. The *NAL* therefore fails to comply with the Communications Act's one-year statute of limitations and such failure is fatal to the Commission's ability to adopt the proposed forfeiture.

A. The One-Year Statute of Limitations Period Expired Prior to the Commission's Release of the *NAL*

The Communication's Act statute of limitations for a Commission forfeiture action based on the Company's Form 497 submissions for the August 2016 data month expired prior to the release of the *NAL*. The Communications Act bars the imposition of a monetary forfeiture for conduct occurring more than one year prior to the release of an NAL. The one-year limitations periods for the Company's original and revised Form 497 submissions for the August 2016 data month expired on September 6, 2017, and November 16, 2017, respectively, both of which were long before the Commission's release of the *NAL* on October 25, 2018. As a result, the proposed forfeiture must be cancelled because the Commission exceeded its authority under the Communications Act by proposing a fine for time-barred conduct.

Section 503(b)(6) of the Communications Act states that "[n]o forfeiture penalty shall be determined or imposed against any person under this subsection if . . . such person does not hold a broadcast station license . . . and if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability."[48] Statutes of limitations reflect the judgment of lawmakers "that there comes a time when the potential defendant ought

[48] 47 U.S.C. § 503(b)(6). *See also* 47 C.F.R. § 1.80(c)(4) (stating that "no penalty shall be imposed if the violation occurred more than 1 year prior to the date on which the appropriate notice is issued").

to be secure in his reasonable expectation that the slate has been wiped clean."[49] Such expectation applies equally to administrative actions involving federal agencies as to civil and criminal matters brought before courts.[50] Congress adopted the limitations period in Section 503(b)(6) specifically to address due process concerns raised with the Commission's authority to impose monetary forfeitures. In particular, Congress was "concerned with the gravity of the lack of due process" that would happen in the absence of an explicit limitations period.[51] The legislative history shows that Congress adopted the limitations period "to bar the imposition of a forfeiture on a 'stale' violation."[52] Congress intended the limitations period to establish a date certain "beyond which the Commission could not go in ordering a forfeiture."[53] Congressional leaders found the limitations period necessary, otherwise the Commission could "sit back for years" on a potential violation only to surprise a regulatee with a substantial proposed forfeiture.[54] By imposing a strict limitations period, Congress directed the Commission to act diligently and ensured consequences would result from the failure to bring an enforcement action in a timely manner. The Commission makes no attempt in the *NAL* to explain why the will of Congress can or should be disregarded here. Based on the statute of limitations set forth in the Communications Act, the proposed forfeiture must be cancelled.

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[49] *3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994) (internal quotations omitted).

[50] *Id.*

[51] 106 Cong. Rec. 17623 (Aug. 25, 1960).

[52] *Id.*

[53] *Id. See also Gabelli v. SEC*, 568 U.S. 442 (2013) (stating that a statute of limitations "sets a fixed date when exposure to the specified Government enforcement efforts ends").

[54] 106 Cong. Rec. 17642 (statement of Rep. Pastore).

i. The Submission of a Form 497 Is a Discrete Act and the Limitations Period Begins to Run at Filing

The "shot clock" on the statute of limitations period for a proposed forfeiture based on American Broadband's Form 497 Lifeline reimbursement claims for the August 2016 data month began to run on the dates the Company filed the Form 497s. Because the Company's Form 497 submissions occurred more than one-year prior to the release of the *NAL*, the proposed forfeiture must be cancelled.

Courts have long held that government agencies should apply a natural reading of the statutory text when interpreting limitations periods.[55] For example, in *Gabelli*, the Securities and Exchange Commission ("SEC") brought a civil enforcement action against a mutual fund investment advisor for certain violations of the Investment Advisers Act of 1940.[56] The defendants challenged the action on the grounds that it was time-barred by the relevant statute of limitations, which provided that an enforcement action "shall not be entertained unless commenced within five years from the date when the claim first accrued."[57] While the defendant argued that the claim accrued when the violation first occurred, the SEC countered that the claim accrued when it discovered the violation.[58] The Court agreed with the defendant's reading, finding that the SEC's interpretation would improperly extend the statute of limitations beyond the date that the violation first occurred.[59]

[55] *See, e.g.*, *Gabelli*, 568 U.S. at 448.

[56] *See id.*, 446-47.

[57] *Id.*, 447-48 (quoting 28 U.S.C. § 2462).

[58] *Id.*, 448-49.

[59] *See id.*, 453-54.

Similar to the statute in *Gabelli*, the limitations period contained in Section 503(b)(6) is triggered by when an alleged violation "occurred."[60] Thus, as the D.C. Circuit said in analogous circumstances, Congress did not endow the Commission "with the power to hold a discrete . . . violation over [a regulatee] for years" without taking action.[61] Instead, the Commission has repeatedly recognized that it "may impose a forfeiture penalty only for violations that occurred one year or less before the date of the issuance of a notice of apparent liability."[62] A violation

[60] 47 U.S.C. § 503(b)(6).

[61] *AKM LLC v. Sec'y of Labor*, 675 F.3d 752, 759 (D.C. Cir. 2012) (finding citations for failure to report workplace injuries time-barred when they were issued after the applicable six-month limitations period).

[62] *Telseven, LLC, Calling 10, LLC, Patrick Hines a/k/a P. Brian Hines*, File No. EB-TCD-12-00000416, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 15558, ¶ 23 (2012) (proposing forfeiture based on only 14 of 80 cramming complaints because the remaining complaints occurred more than one year prior to the NAL's release) ("*Telseven NAL*"). *See WDT World Discount Telecomms. Co., Inc.*, File No. EB-IHD-15-00020150, Notice of Apparent Liability for Forfeiture and Admonishment, 31 FCC Rcd 12571, ¶¶ 15, 18 (EB 2016) (finding that apparent violations for excessive USF surcharges "have lapsed under the applicable one-year statute of limitations"); *LawMateTech*, File No. EB-07-SE-206, Forfeiture Order, 27 FCC Rcd 15159, ¶ 2, n. 6 (EB 2012) (noting that Commission was barred under limitations period from proposing a forfeiture for apparent equipment marketing violations that occurred more than one year before the release of the NAL); *Locus Telecomms., Inc.*, File No. EB-11-SE-104, Notice of Apparent liability for Forfeiture and Admonishment, 26 FCC Rcd 17073, ¶ 14 (EB 2011) (concluding that, while a forfeiture normally would be warranted for apparent failures to comply with hearing aid-compatible handset deployment requirements, "the statute of limitations for proposing a forfeiture is one year from the date of violation" and the apparent violations were time-barred); *Airadigm Commc'ns, Inc.*, File No. EB-11-SE-045, Notice of Apparent Liability for Forfeiture and Admonishment, 26 FCC Rcd 16914, ¶ 13 (EB 2011) (same); *Centennial Commc'ns Corp.*, File No. EB-08-SE-117, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 9406, ¶ 12 (EB 2008) ("[W]e are barred from assessing a forfeiture for this violation because it is outside the one-year statute of limitations."); *Adrian Coll.*, File No. BRED-20050426AAP, Forfeiture Order, 26 FCC Rcd 7831, ¶ 6 (MB 2011) (cancelling proposed forfeiture based on apparent violation occurring more than one year prior to the NAL's release); *Richard F. Swift*, File No. BR-20040802AYO, Letter, 26 FCC Rcd 11085 (MB 2011) (same).

occurs when a "complete and present cause of action" exists against the violator.[63] The Supreme Court has noted that the cases where the normal running of a limitations period is suspended "are very limited in character, and are to be admitted with great caution; otherwise the court would make the law instead of administering it."[64]

One such potential exception is when a violation is "continuing" in nature. In a continuing violation, "there exists a continuing or persistent legal duty that the violator steadily fails to fulfill."[65] By contrast, a continuing violation cannot occur when "there was but a single, pointed duty, admitting of only a single dereliction" that results in the violation.[66] Even if an entity can ameliorate the effects of a violation after it happens, "the violation itself cannot be said to 'occur' each day thereafter," resulting in a continuing violation.[67] The mere failure "to right a wrong" does not constitute a continuing violation because such an exception would "obliterate" the purpose of statutory limitations periods in cutting off potential liability.[68] The "lingering

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[63] *Gabelli*, 568 U.S. at 448 (citing *Wallace v. Kato*, 549 U.S. 384, 388 (2007)). *See United States v. Luminant Generation Co., LLC*, 2015 U.S. Dist. LEXIS 111322, *9 (N.D. Tex. Aug. 21, 2015).

[64] *Gabelli*, 568 U.S. at 454 (citing *Amy v. Watertown (No. 2)*, 130 U.S. 320, 324 (1889) (internal quotations omitted)).

[65] *United States v. WIYN Radio, Inc.*, 614 F.2d 495, 497 (5th Cir. 1980). For example, Congress highlighted the transfer of control of a license without Commission authorization as an example of a continuing violation, because the transferee will continue to operate unlawfully until it obtains the required authorization. *See* H.R. Rep. No. 101-386, 435 (1989) (Conf. Rep.).

[66] *WIYN Radio*, 614 F.2d at 497. Thus, Congress noted that a continuing violation does not occur when a licensee transmits on an unauthorized frequency for an hour, even if the licensee does so over multiple days, because the actual violations – the unauthorized transmissions – each took place over a discrete period. *See* H.R. Rep. No. 101-386, 435 (1989) (Conf. Rep.).

[67] *WIYN Radio*, 614 F.2d at 497.

[68] *Fitzgerald v. Seamans*, 553 F.2d 220, 230 (D.C. Cir. 1977). *See Reading Co. v. Koons*, 271 U.S. 58, 65 (1926) ("An interpretation of a statute purporting to set a definite limitation upon the time of bringing action . . ., which would, nevertheless, leave defendants subject indefinitely to actions for the wrong done, would, we think, defeat its obvious purpose.").

effect" of a violation therefore "is not itself an unlawful act" that can extend a limitations period indefinitely.[69] The fact that a violation may involve the improper receipt of funds or property, standing alone, does not alter this principle.[70] Consequently, courts have rejected the continuing violation theory in cases where the relevant violation involved a discrete act, such as the failure to file a form or the filing of an inaccurate form.[71]

The submission of a Form 497 is a discrete act and the limitations period on any forfeiture stemming from such a submission, such as the proposed forfeiture in the *NAL*, begins to run on the filing date. When an ETC timely submits a Form 497 with the required certifications, it satisfies a "single, pointed duty" under the Commission's rules.[72] Although ETCs may file revised Form 497s to correct subscriber claims, nothing in the Commission's Lifeline rules imposes a continuing duty on ETCs to periodically review and revise their Form 497 submissions in the absence of a known issue. The passage of time is not necessary for an

[69] *Felter v. Kempthorne*, 473 F.3d 1255, 1260 (D.C. Cir. 2007) (citations omitted). *See Weis-Buy Servs. v. Paglia*, 411 F.3d 415, 423 (3d Cir. 2005) (concluding that "a continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation"); *Ocean Acres Ltd. P'ship v. Dare Cty. Bd. of Health*, 707 F.2d 103, 106 (4th Cir. 1983) (same).

[70] *See AKM*, 675 F.3d at 757 (noting that an "ongoing failure to return . . . wrongfully seized property cannot toll the statute of limitations") (citations omitted); *see also infra* Section II.A.ii. (discussing then-Commissioner Pai's rejection of the argument that violations may be continuing simply because a company retains excessive reimbursements from the USF).

[71] *See, e.g.*, *United States v. Habig*, 390 U.S. 222, 225 (1968) (finding the limitations period for prosecuting false tax returns begins when a return is filed (or its due date if the due date is later)); *AKM*, 675 F.3d at 758-59 (determining that the failure to prepare an OSHA-mandated incident report and year-end summary were not continuing violations); *United States v. Del Percio*, 870 F.2d 1090, 1094-98 (6th Cir. 1989) (concluding that the failure to file plans and schedules for making nuclear power plant modifications is not a continuing violation); *Luminant Generation*, 2015 U.S. Dist. Lexis 11322 at *16 (rejecting continuing violation theory under Clean Air Act and finding that violation occurred when a plant was modified without obtaining the required permit).

[72] 47 C.F.R. § 54.407(d).

alleged violation based on a Form 497 filing to become "ripe." Following the submission, the Commission has a complete and present cause of action for any potential violations stemming from a Form 497 filing. The mere fact that the harm to the USF from an ETC's claims for ineligible subscribers may persist after the Form 497 submission does not mean that the potential violation continues indefinitely. Indeed, such boundless liability would undercut Congress's intent to bar proposed forfeitures for "stale" violations and allow the Commission to ignore basic due process protections for regulatees. Thus, the most natural reading of Section 503(b)(6) is that the statute of limitations for violations stemming from the submission of a Form 497 begin to run on the filing date.

The Company filed its original Form 497s for the August 2016 data month on September 6, 2016, and filed revised Form 497s for the August 2016 data month for certain states on November 16, 2016.[73] Each of these filings represented a discrete act that started the one-year statute of limitations "shot clock" for any proposed forfeiture based on the filings. The applicable limitations periods for a proposed forfeiture based on American Broadband's original and revised Form 497 submissions for the August 2016 data month expired on September 6, 2017, and November 16, 2017, respectively. As a result, the Commission's October 25, 2018 *NAL*, released nearly a year after the expiration of the limitations period for the Company's revised Form 497 submissions, is untimely and the proposed forfeiture must be cancelled.

ii. Commission Precedent and Leadership Do Not Support Applying a Continuing Violation Theory to Form 497 Submissions

The Commission makes no attempt in the *NAL* to explain why the proposed forfeiture based on the Company's Form 497 submissions for the August 2016 data month is not time-

[73] *NAL*, Appendix A, Original and Revised Form 497s.

barred under the one-year statute of limitations period. At no point in the *NAL* does the Commission demonstrate that any of the alleged violations occurred within a year of the release date of the *NAL* or that the violations were somehow "continuing" in nature, extending the limitations period indefinitely until the Company took corrective action. As explained further below, this is unsurprising considering the Commission's recent precedent in USF enforcement actions and the Chairman's own correct view that a continuing violation theory does not apply to Form 497 filings.

Prior Commission Lifeline enforcement actions recognize that the statute of limitations period for any violations stemming from a Form 497 submission begins to run on the filing date. As examples, the *TracFone* and *UTPhone* NALs, which the Commission issued on September 30, 2013, only proposed fines for alleged duplicate subscribers going as far back as the September 2012 data month.[74] Similarly, the *True Wireless* NAL, which the Commission issued on November 1, 2013, only proposed a fine for alleged duplicates going as far back as the October 2012 data month.[75] And the NAL issued to Budget on February 28, 2014, only proposed fines for alleged duplicates going as far back as the February 2013 data month.[76] Even in cases where the Commission seeks to apply a continuing violation theory in the context of a proposed forfeiture, it often exercises its prosecutorial discretion to limit the proposed forfeiture

[74] *See TracFone Wireless, Inc.*, File No. EB-IHD-13-00010668, Notice of Apparent Liability for Forfeiture and Order, 28 FCC Rcd 14478 (2013); *UTPhone, Inc.*, File No. EB-IHD-13-00010646, Notice of Apparent Liability for Forfeiture and Order, 28 FCC Rcd 14467 (2013).

[75] The relevant Form 497s would have been filed on or after November 8, 2012, making the NAL timely. *See True Wireless, LLC*, File No. EB-IHD-13-00011727, Notice of Apparent Liability for Forfeiture and Order, 28 FCC Rcd 15389 (2013).

[76] *See Budget Prepay, Inc.*, File No. EB-IHD-14-00013140, Notice of Apparent Liability for Forfeiture and Order, 29 FCC Rcd 2508 (2014).

to alleged violations occurring within one year of an NAL's release.[77] The Commission never addresses these precedents in the *NAL* or explains why American Broadband's alleged violations should be treated differently for the purpose of the one-year statute of limitations.

Chairman Pai also consistently has recognized the importance of the Communications Act's one-year statute of limitations and the inability of the Commission to propose a forfeiture for otherwise time-barred violations involving the submission of inaccurate forms seeking USF support. For example, in *Network Services Solutions*, the Commission proposed a penalty for competitive bidding violations in the Rural Health Care Program based on the number of allegedly inaccurate USF support request forms submitted.[78] But all of the relevant forms were submitted to USAC more than a year prior to the release of the NAL.[79] Then-Commissioner Pai asserted that reliance on the forms for the violations "fatally compromises our ability to impose a lawful forfeiture."[80] Critically, he found that the Commission lacked the authority to apply a

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[77] *See, e.g.*, *Bear Down Brands, LLC*, File No. EB-SED-17-00024115, Notice of Apparent Liability for Forfeiture, FCC 18-67, ¶¶ 22-28 (May 30, 2018) (proposing forfeiture based only on devices allegedly marketed in violation of the Commission's rules in the year preceding issuance of the NAL); *Am. Samoa Telecomms. Auth.*, File No. EB-08-SE-143, Forfeiture Order, 27 FCC Rcd 131, ¶ 13 (2012) (declining to pursue forfeitures for failures to file hearing aid compatibility status reports that occurred more than one year prior to the NAL); *Kajeet, Inc. & Kajeet/Airlink, LLC*, File No. EB-09-IH-1972, Notice of Apparent Liability for Forfeiture and Order, 26 FCC Rcd 16684, ¶ 25, n. 96 (2011) ("Consistent with precedent . . ., we exercise our prosecutorial discretion here and decline to propose forfeitures for Kajeet/Airlink's failures to file Worksheets, all of which occurred more than one year prior to the date of this NAL."); *Omniat Int'l Telecom*, File No. EB-08-IH-1150, Notice of Apparent Liability for Forfeiture and Order, 24 FCC Rcd 4254, ¶ 26 (2009) ("Consistent with precedent . . ., we exercise our prosecutorial discretion here and decline to propose forfeitures for Omniat's failures to file Worksheets more than one year prior to the date of the NAL.").

[78] *Network Servs. Solutions, LLC; Scott Madison*, File No. EB-IHD-15-0001913, Notice of Apparent Liability for Forfeiture and Order, 31 FCC Rcd 12238, ¶ 130 (2016) ("*Network Servs. Solutions NAL and Order*").

[79] *See id.*, ¶¶ 133-40.

[80] *Id.*, Statement of Commissioner Ajit Pai, Approving in Part and Dissenting in Part, 1.

continuing violation theory to the submission of inaccurate USF forms in order to avoid the application of the one-year statute of limitations.[81] He stated that such an approach "stretches the concept of a continuing violation past the breaking point" and warned that, "under this theory, the statute-of-limitations clock might never commence for an inaccurately filed form."[82] Then-Commissioner Pai concluded that he could not "discern any rule, any precedent, or any legal theory . . . that imposes the continuing obligation" supporting the proposed forfeiture.[83]

Then-Commissioner Pai reached a similar conclusion in *BellSouth Telecommunications*, which dealt with apparent violations of the E-Rate Program's lowest corresponding price rule.[84] As then-Commissioner Pai explained, the Commission improperly based its proposed forfeiture on allegedly excessive charges and inaccurate E-Rate funding request forms submitted more than a year prior to the NAL's release.[85] In doing so, then-Commissioner Pai explicitly rejected the argument that the violations were continuing simply because the company failed to file corrected forms and "retained the excessive reimbursements."[86] Then-Commissioner Pai stated that the Commission's misapplication of the continuing violation theory to USF forms "is not the law

[81] *Id.*

[82] *Id.*

[83] *Id.*, 2. Under now-Chairman Pai's leadership, the Commission subsequently took the unprecedented step of adopting an *amended* proposed forfeiture that revised the basis for the penalty to cover more recent violations, in part to address the statute of limitations issue. *Network Servs. Solutions, LLC; Scott Madison*, File No. EB-IHD-15-0001913, Amended Notice of Apparent Liability for Forfeiture and Order, 32 FCC Rcd 5169 (2017).

[84] *BellSouth Telecomms., LLC*, File No. EB-IHD-14-00017954, Notice of Apparent Liability for Forfeiture, 31 FCC Rcd 8501 (2016).

[85] *Id.*, Statement of Commissioner Ajit Pai, Dissenting, 1.

[86] *Id.*

and neither do I believe that a court would find our reasoning . . . to be persuasive."[87] American Broadband agrees that the continuing violation theory does not apply to Form 497 submissions and it is curious that Chairman Pai overlooked his previous concerns and did not apply a consistent approach in this *NAL*.[88]

The Chairman is not alone in his concerns. Commissioner O'Rielly also has questioned the Commission's authority to impose a forfeiture where it failed to provide sufficient evidence that the alleged violations were not time-barred, arguing that such an approach "does not appear to be aligned with the spirit and purpose of a statute of limitations."[89] As with Chairman Pai, Commissioner O'Rielly has expressed particular concern with the application of the continuing violation theory to alleged violations involving the submission of forms seeking USF reimbursement. For example, the Commissioner dissented in part from the proposed forfeiture

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[87] *Id.*, 1-2. The Chairman also has correctly questioned the application of the continuing violation theory to non-USF-related violations. *See, e.g.*, *STI Telecom Inc.*, File No. EB-TCD-12-00000435, Forfeiture Order, 30 FCC Rcd 11742 (2015) (Statement of Commissioner Ajit Pai, Dissenting) (contending the Commission had no authority to impose a penalty where it failed to provide any evidence that the allegedly deceptive prepaid calling cards were sold within one year of the NAL); *Intelsat License LLC*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 17183 (2013) (Statement of Commissioner Ajit Pai, Dissenting) (finding that the violation of the satellite queue-jumping rule took place at the time Intelsat modified its application, which occurred nearly three years before the release of the NAL).

[88] The fact that *Network Services Solutions* and *BellSouth Telecommunications* involved claims for support under USF programs other than Lifeline is irrelevant. The Commission fails to demonstrate any distinction between claims for USF support under the Rural Health Care Program and E-Rate on one hand and claims for USF reimbursement under the Lifeline program on the other hand, warranting different treatment of American Broadband in the *NAL*. Indeed, no such distinction exists and any attempt by the Commission to treat Lifeline violations differently than Rural Health Care Program or E-Rate violations for statute of limitations purposes with no explanation would represent arbitrary and capricious agency action in violation of the Administrative Procedures Act. *See* 5 U.S.C. § 706(2)(A).

[89] *AT&T Inc.*, File No. EB-SED-13-00008891, Notice of Apparent Liability for Forfeiture, 30 FCC Rcd 856 (2015) (Statement of Commissioner Michael O'Rielly Concurring in Part, Dissenting in Part).

in *Total Call Mobile* that, similar to the *NAL* against American Broadband and Mr. Ansted, involved allegations that a Lifeline provider submitted multiple Form 497s with ineligible subscribers.[90] Nearly all of the relevant Form 497s cited as the basis for the proposed forfeiture were filed more than a year prior to the release of that NAL.[91] The Commissioner stated that, "once again, the Commission goes down the path of proposing a very large fine that does not appear to be fully supported by the law and Commission precedent" and doubted "whether all of the conduct falls within the statute of limitations period."[92] In addition, industry stakeholders have challenged the Commission's authority to impose forfeitures for otherwise time-barred violations involving USF forms under a continuing violation theory, arguing that such actions effectively eliminate the Communications Act's one-year statute of limitations.[93]

By proposing a forfeiture for alleged violations that occurred well outside of the one-year limitations period, the Commission is again seeking large fines for alleged violations that are time-barred under the Communications Act. Because this approach is contrary to the

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[90] *Total Call Mobile, Inc.*, File No. EB-IHD-14-00017650, Notice of Apparent Liability for Forfeiture and Order, 31 FCC Rcd 4191, ¶¶ 74-83 (2016).

[91] *See id.*, Exhibit E (showing only two Form 497s filed within the one-year limitations period).

[92] *See id.*, Statement of Commissioner Michael O'Rielly, Approving in Part and Dissenting in Part, 1. The Commissioner recently highlighted the confusion surrounding the Commission's periodic misapplication of the continuing violation theory in a blog post. *See* Commissioner Michael O'Rielly, FCC Blog, "Further Improving the FCC's Procedures" (Dec. 20, 2018), *available at* https://www.fcc.gov/news-events/blog/2018/12/20/further-improving-fccs-procedures (last visited Jan. 20, 2019).

[93] Petition for Reconsideration of CTIA, NCTA, United States Telecom Association and COMPTEL, FCC 15-15, 12-15 (Mar. 6, 2015) (seeking review of Commission Policy Statement indicating that violations based on USF forms are continuing until cured). *See* Joan Marsh, Executive Vice President of Regulatory & State External Affairs, AT&T, "FCC Reform: Let's Start with the Enforcement Bureau" (Feb. 8, 2017) (arguing that the Commission has increasingly applied the continuing violation theory to "extend[] the agency's reach back to the first alleged violation date even if that original date far exceeded the one year statute of limitations – an approach that effectively neutered any limitation at all").

Communications Act, Commission precedents, and prior statements of Commissioners Pai and O'Rielly, the FCC must cancel the proposed forfeiture.

iii. The Proposed Forfeiture Is Based on Conduct Falling Outside of the One-Year Statute of Limitations

The proposed forfeiture in the *NAL* is based on conduct that falls outside of the Communications Act's one-year limitations period and must be cancelled. American Broadband agrees with Chairman Pai, Commissioner O'Rielly, and industry stakeholders that the relevant starting point for the limitations period for a forfeiture based on alleged violations stemming from a Form 497 submission is the filing date. As explained above, American Broadband filed its original Form 497s for the August 2016 data month on September 6, 2016, and filed revised Form 497s for this period for certain states on November 16, 2016. Consequently, the one-year limitations periods for any proposed forfeiture based on the Form 497 submissions expired well before the Commission released the *NAL* on October 25, 2018.

American Broadband's Form 497 filings represented discrete acts that started the "shot clock" on the one-year limitations period. Upon filing of the Form 497s, the Commission had a complete and present cause of action against the Company for any violations stemming from its Lifeline subscriber claims. Yet, the Commission waited nearly two years before issuing the *NAL*. Although American Broadband filed revised Form 497s for the August 2016 data month, such filings did not make the alleged violations continuing.[94] The revised Form 497 filings instead represented a new discrete act, subject to its own one-year limitations period. Consistent

[94] American Broadband notes that the revised Form 497s filed for the August 2016 data month **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** *See* Letter of John J. Heitmann, Counsel to American Broadband, to Dangkhoa Nguyen, USF Strike Force, Enforcement Bureau, FCC (Mar. 9, 2018) (providing a chart summarizing the Form 497 revisions).

with the Chairman's stated position, the mere fact that the Company may have retained reimbursements due to its allegedly inaccurate Form 497 submissions and did not file further revisions to return such reimbursements does not give rise to a continuing violation. Congress intended Section 503(b)(6) to establish a date certain after which proposed forfeitures by the Commission for even valid allegations would be time-barred. The Commission's proposed forfeiture here threatens to undermine the regulatory certainty and due process protections Congress sought to provide. After the passage of nearly two years, it was reasonable for American Broadband to presume that the time for any enforcement action based on its Form 497 filings for the August 2016 data month had passed. Applying a continuing violation theory to American Broadband's Form 497 filings in the *NAL* effectively would nullify the one-year limitations period and subject the Company (and all ETCs) to potential liability in perpetuity.[95] As the D.C. Circuit put it, there would be "truly no end to such madness."[96]

Notably, the Commission did not assert in the *NAL* that American Broadband's alleged violations were continuing in nature. In the *NAL*, the Commission actually disclaimed reliance on precedent discussing the application of the continuing violation theory to support a proposed forfeiture for Lifeline violations. Specifically, the Commission referenced its 2007 *VCI* decision, in which it proposed a forfeiture against an ETC for receiving duplicate Lifeline support and failing to comply with its recordkeeping obligations.[97] In *VCI*, the Commission suggested that

[95] *See AKM*, 675 F.3d at 758 (refusing to adopt agency's continuing violation theory as it would result in the "absurd consequence[]" that "the statute of limitations Congress included in the Act could be expanded *ad infinitum*").

[96] *Id.*, 757-58.

[97] *NAL*, ¶ 175, n. 425 (citing *VCI Co.*, File No. EB-07-IH-3985, Notice of Apparent Liability for Forfeiture and Order, 22 FCC Rcd 15933 (2007) ("*VCI NAL*")).

the submission of an inaccurate Form 497 or the failure to timely submit a Form 497 represented a continuing violation until "cured" through a corrective filing.[98] However, the Commission stated in the *NAL* that *VCI* was "not binding" on its analysis of the proposed forfeiture against American Broadband and Mr. Ansted.[99] The Commission instead cited to its 2017 decision in *Abramovich*, which dealt with allegedly unlawful spoofed robocalls, to support its proposed forfeiture analysis.[100] While the *Abramovich* decision utilizes the $1,000 per violation forfeiture methodology that the Commission applied to the Company's Form 497s in the *NAL*, it does not rely on or contain any discussion of a continuing violation theory. As a result, the Commission never explicitly nor implicitly claims that American Broadband's alleged violations were continuing in nature.

In the absence of a continuing violation, the proposed forfeiture is time-barred under the Communication Act's one-year statute of limitations set forth in Section 503(b)(6). As explained above, the limitations periods for any proposed forfeiture based on American Broadband's original or revised Form 497s expired prior to the issuance of the *NAL*. Indeed, *none* of the conduct highlighted by the Commission in its discussion of the Company's purported violations falls within the one-year limitations period. For example, the Commission asserts in the *NAL* that the Company filed Form 497s containing claims for allegedly ineligible subscribers "beginning in March 2014 and continu[ing] at least through December 2016."[101] But even using

[98] *VCI*, ¶ 20. In doing so, the Commission recognized that it was "changing course" in its approach to Lifeline violations and declined to propose a forfeiture for VCI's failures to file Form 497s more than a year prior to the date of the *VCI NAL*'s release. *Id.*

[99] *NAL*, ¶ 175, n. 425.

[100] *Id.* (citing *Adrian Abramovich*, File No. EB-TCD-15-00020488, Notice of Apparent Liability for Forfeiture, 32 FCC Rcd 5418 (2017) ("*Abramovich NAL*")).

[101] *Id.*, ¶ 174.

the Form 497 submissions for data months after August 2016 as the basis for the proposed forfeiture would not comport with the limitations period. American Broadband filed its Form 497s for the December 2016 data month on January 12, 2017.[102] Thus, the limitations period for any proposed forfeiture based on the Company's Form 497s for the December 2016 data month expired on January 12, 2018, over 10 months before the release of the *NAL*. The most recent Form 497 filing referenced in the *NAL* is a revised Form 497 submission for the November 2016 data month filed by the Company on June 19, 2017.[103] The limitations period for any proposed forfeiture based on this filing expired on June 19, 2018, over four months before the issuance of the *NAL*. Accordingly, the proposed forfeiture would be time-barred regardless of which Form 497 data month referenced in the *NAL* the Commission used as the basis for its forfeiture.

Furthermore, while the Commission's discussion of the alleged violations references numerous Company enrollment and de-enrollment practices that purportedly did not comply with the Lifeline rules, none of the conduct cited occurred within one year of the *NAL*'s release. As with its Form 497 examination, the Commission's analysis of the Company's conduct ends in December 2016.[104] American Broadband and Mr. Ansted cannot be held liable for a monetary forfeiture based on such "stale" alleged conduct.[105] Section 503(b)(6) requires the Commission

[102] *Id.*, Appendix A. The Company did not file revised Form 497s for this data month. *Id.*

[103] *Id.* The Company only filed this revision for Michigan and Ohio. *Id.*

[104] *See id.*, ¶¶ 141-72 (discussing conduct occurring between March 2014 and December 2016).

[105] At most, the Commission could issue a non-monetary admonishment for the alleged violations. *See Globcom, Inc.*, File No. EB-02-IH-0757, Notice of Apparent Liability for Forfeiture and Order, 18 FCC Rcd 19893, ¶ 22 (2003) (admonishing carrier for apparent failures to pay USF contributions and file accurate annual worksheets); *see also WDT World Discount Telecomms.*, ¶ 25; *Locus Telecomms.*, ¶ 17; *Airadigm*, ¶ 15.

to exercise diligence in bringing its enforcement actions. Because the Commission failed to exercise such diligence, it must cancel the forfeiture proposed in the *NAL*.[106]

B. The Proposed Forfeiture Is Based on Conduct Falling Outside of the Tolling Agreement

As demonstrated above, the proposed forfeiture in the *NAL* is based on conduct falling outside of the Communications Act's one-year statute of limitations. The Commission fails to provide any explanation for its failure to comply with Section 503(b)(6). The closest the Commission comes to such an explanation is a passing reference to a tolling agreement entered into by American Broadband and EB on May 22, 2018, which was the sixth tolling agreement the Company executed during the investigation ("Sixth Tolling Agreement").[107] But as explained below, the limitations periods for the potential violations that served as the basis of the proposed forfeiture all expired prior to the Sixth Tolling Agreement and the Sixth Tolling Agreement did not revive these violations for the purposes of the *NAL*. With each successive tolling agreement, American Broadband specifically negotiated for explicit provisions regarding the expiration of the limitations periods for older potential violations, rendering any proposed forfeiture based on such violations time-barred. While the Commission may now wish to rewrite

[106] Similarly, any upward adjustment to the proposed forfeiture must be cancelled. *See NAL*, ¶ 176. While the Commission's rules afford it considerable flexibility in the factors it can use to adjust proposed forfeiture amounts, *see* 47 C.F.R. § 1.80(b), nothing in the rules or Communications Act empowers the Commission to upwardly adjust a forfeiture when the proposed fine itself is time-barred. Here, cancellation of the proposed forfeiture as required reduces American Broadband and Mr. Ansted's apparent liability to $0. Thus, any upward adjustment factor applied by the Commission to this amount (*e.g.*, 50% of the forfeiture based on allegedly egregious conduct) still results in a proposed forfeiture of $0. *See NAL*, ¶ 176 (discussing application of upward adjustment to proposed forfeiture).

[107] *NAL*, ¶ 173, n. 417. *See* Sixth Tolling Agreement between American Broadband and Federal Communications Commission Enforcement Bureau (effective May 22, 2018), attached as Exhibit A ("Sixth Tolling Agreement").

the Sixth Tolling Agreement to make the *NAL* timely, it is bound by the plain terms of the agreement and, as a result, it must cancel the proposed forfeiture because it is time-barred.

Cancellation of the proposed forfeiture in the *NAL* is supported by longstanding precedent regarding contract interpretation. Courts apply general contract principles when interpreting agency tolling agreements.[108] Courts will read tolling agreement terms in accordance with their plain meaning and will not interpret such agreements to render any provision superfluous.[109] However, where an agreement's terms are ambiguous, the court will determine the meaning of an agreement using extrinsic evidence of the parties' intent.[110] Importantly, courts recognize that government agencies are sophisticated actors in negotiations and normally should bear responsibility for any lack of clarity in a tolling agreement.[111] A government agency must "check its work" when executing tolling agreements to ensure that it has preserved the relevant claims for prior violations.[112] As a result, courts will find claims time-

[108] *See, e.g., United States v. FedEx Corp.*, 2016 U.S. Dist. LEXIS 36383, *9 (N. D. Cal. Mar. 18, 2016) (stating courts will "look to general principles for interpreting contracts in reviewing tolling agreements") (internal quotations omitted); *SEC v. Cohen*, 2018 U.S. Dist. LEXIS 121164, *32 (E.D.N.Y. July 12, 2018) (interpreting tolling agreement "in light of general principles of contract law") (citations omitted); Williston on Contracts § 32:7, 434-35 (4th ed. 1999). In the District of Columbia, courts apply the so-called "objective" law of contracts, under which a court must rely upon the language of the contract unless the terms of the contract are ambiguous. *See, e.g., Dist. Of Columbia v. Dist. Of Columbia Pub. Serv. Comm'n*, 963 A.2d 1144, 1155 (D.C. Cir. 2009) ("*DC PUC*"). In analyzing a contract, District of Columbia courts will interpret the text of the contract "as a whole, giving a reasonable, lawful, and effective meaning to all terms" in light of the circumstances known to the parties at the time of contract formation. *See id.* (citing *1010 Potomac Assocs. v. Grocery Mfrs. of Am. Inc.*, 485 A.2d 199, 205 (D.C. Cir. 1984)).

[109] *Cohen*, 2018 U.S. Dist. LEXIS 121164 at *32; *United States v. Goyal*, 2007 U.S. Dist. LEXIS 29234, *8 (N.D. Cal. Apr. 2, 2007).

[110] *DC PUC*, 963 A.2d at 1155.

[111] *Goyal*, 2007 U.S. Dist. LEXIS 29234 at *8-9.

[112] *FedEx Corp.*, 2016 U.S. Dist. LEXIS 36383 at *2.

barred when an agency tolling agreement did not specifically preserve the limitations period for alleged violations.[113] As explained further below, the Commission failed to preserve the right to propose a forfeiture for any of the conduct cited in the *NAL* in its tolling agreements with the Company. The proposed forfeiture in the *NAL* therefore must be cancelled because it is based on conduct falling outside of American Broadband's tolling agreements with the Commission.

i. American Broadband Specifically Bargained for, and the Enforcement Bureau Agreed to, the Expiration of the Limitations Periods for Older Possible Violations in the Tolling Agreements

Here, the text of the tolling agreements and the intent of the parties support the conclusion that the proposed forfeiture in the *NAL* based on American Broadband's Form 497 submissions for the August 2016 data month is time-barred. EB issued the LOI in this proceeding on April 25, 2017, **[BEGIN CONFIDENTIAL]** [redacted][114] [redacted] **[END CONFIDENTIAL]** American Broadband and EB entered into a tolling agreement on May 16, 2017 ("First Tolling Agreement") in order to "have the opportunity for the production and review of materials regarding the facts surrounding the possible violations of the Lifeline rules . . . prior to the

[113] *See Cohen*, 2018 U.S. Dist. LEXIS 121164 at *33-34 (concluding that tolling agreement did not toll the limitations period for related investigation when the agreement referred only to another investigation); *Luminant Generation*, 2015 U.S. Dist. LEXIS 111322 at *16-17 (finding tolling agreement based on 2012 notice of violation no longer applied once agency issued superseding notice of violation a year later); *Goyal*, 2007 U.S. Dist. LEXIS 29234 at *8-9 (declining to extend tolling agreement to cover alleged violations of statutes not specifically enumerated in the agreement).

[114] LOI.

expiration of the limitations period set forth in 47 U.S.C. § 503(b)(6)."[115] The First Tolling Agreement stated that:

> For purposes of calculating the statute of limitations, pursuant to 47 U.S.C. § 503(b)(6), the parties agree that any limitations period for the possible violations as set forth in the preamble of this Agreement shall be tolled from May 5, 2017 until and including either: (a) the release date of a Commission Notice of Apparent Liability for Forfeiture (NAL), consent decree, or order regarding the disposition of any of the possible violations as set forth in the preamble of this Agreement; (b) the date the FCC informs [American Broadband] in writing that it has terminated the Investigation; or (c) August 3, 2017, whichever occurs first.[116]

The timeframe from May 5, 2017 to any of the specified terminating events was defined as the "Tolled Period."[117] The preamble to the First Tolling Agreement stated that the Commission's investigation covered "possible violations of the Commission's rules and orders governing the provision of Lifeline service," including 47 C.F.R. §§ 54.403-54.405, 54.407, 54.409-54.411, 54.413-54.414, 54.416-54.417, 54.419-54.420, 54.422, as well as the *2012*, *2015*, and *2016 Lifeline Reform Orders*.[118] The First Tolling Agreement specified that "[b]y signing this Agreement, [American Broadband] does not admit to any of the possible violations as set forth in

[115] Tolling Agreement between American Broadband and Federal Communications Commission Enforcement Bureau, Preamble (effective May 16, 2017), attached as Exhibit B ("First Tolling Agreement"). EB acknowledged in the First Tolling Agreement that "the statute of limitations for issuance of a Notice of Apparent Liability (NAL) for violations of the Act, Commission's rules, or both, by a non-broadcast licensee, is one year from the date on which the alleged violations occurred." *Id.*

[116] *Id.*, Section 1.

[117] *Id.*

[118] *Id.*, Preamble. *See Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656 (2012) ("*2012 Lifeline Reform Order*"); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, *et al.*, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818 (2015) ("*2015 Lifeline Reform Order*"); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, *et al.*, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962 (2016).

the preamble of this Agreement or to any violation of the Lifeline rules. Nothing in this Agreement shall be construed to limit [American Broadband's] ability or right to challenge any Commission action . . . finding [American Broadband] liable for the possible violations . . . other than the statute of limitations matters addressed in this Agreement" ("Challenge Provision").[119] Critically, the First Tolling Agreement further stated that "[n]othing in this Agreement has the effect of extending or reviving any limitations period that expired prior to the Tolled Period or that involves possible violations other than those set forth in the preamble of this Agreement" ("Expiration Provision").[120]

The Tolled Period of the First Tolling Agreement expired according to its terms on August 3, 2017. That same day, an EB representative emailed American Broadband's counsel proposing that "a second tolling agreement be executed for another 90 day period effective from today's date, the expiration of the existing tolling agreement."[121] American Broadband's counsel responded later that day that the Company would be amenable to a new tolling agreement with a new Tolled Period.[122] Despite the concurrence between the parties regarding a new tolling agreement with a new Tolled Period, the EB representative sent American Broadband's counsel a "draft tolling agreement extension" for review on August 10, 2017.[123] The draft stated that the parties "wish to extend their prior tolling agreement executed on May 16, 2017" and maintained

[119] First Tolling Agreement, Section 4.

[120] *Id.*, Section 5.

[121] *See* email from Dangkhoa Nguyen, USF Strike Force, Enforcement Bureau, FCC, to John J. Heitmann, Counsel to American Broadband (Aug. 3, 2017), attached as Exhibit C.

[122] *See* email from John J. Heitmann, Counsel to American Broadband, to Dangkhoa Nguyen, USF Strike Force, Enforcement Bureau, FCC (Aug. 3, 2017), attached as Exhibit D.

[123] *See* email from Dangkhoa Nguyen, USF Strike Force, Enforcement Bureau, FCC, to John J. Heitmann, Counsel to American Broadband, Attachment (Aug. 10, 2017), attached as Exhibit E.

the May 5, 2017 starting date for the Tolled Period.[124] On August 15, 2017, American Broadband's counsel emailed the EB representative and indicated that the draft tolling agreement extension was unacceptable.[125] In particular, American Broadband's counsel wrote that the parties "agreed to a new tolling agreement beginning on August 3rd, *not an extension of the initial tolling agreement*."[126] Accordingly, American Broadband's counsel sent the EB representative a new tolling agreement draft that removed the language extending the First Tolling Agreement, which already had expired, and inserted a new Tolled Period that began on August 3, 2017.[127] The new draft retained the Challenge Provision and Expiration Provision language.[128] To avoid any doubt regarding the effect of the new tolling agreement, American Broadband's counsel and EB representatives spoke by phone on August 16, 2017. During the call, American Broadband's counsel reiterated that the Company did not agree to a tolling agreement extension, but rather a new tolling agreement with a new Tolled Period. Following the call, the EB representative emailed American Broadband's counsel and agreed to the proposed revisions, which were incorporated into the Second Tolling Agreement executed by the parties on August 16, 2017.[129]

[124] *Id.*, Attachment, attached as Exhibit F.

[125] *See* email from John J. Heitmann, Counsel to American Broadband, to Dangkhoa Nguyen, USF Strike Force, Enforcement Bureau, FCC (Aug. 15, 2017), attached as Exhibit G.

[126] *Id.* (emphasis added).

[127] *Id.*, Attachment, attached as Exhibit H.

[128] *Id.*

[129] *See* email from Dangkhoa Nguyen, USF Strike Force, Enforcement Bureau, FCC, to John J. Heitmann, Counsel to American Broadband (Aug. 16, 2017), attached as Exhibit I; Second Tolling Agreement between American Broadband and Federal Communications Commission Enforcement Bureau (effective Aug. 16, 2017), attached as Exhibit J ("Second Tolling Agreement"). By signing the Second Tolling Agreement, Mr. Nguyen "represent[ed] and

As demonstrated above, American Broadband specifically bargained for, and EB agreed to, tolling agreement provisions that advanced the Tolled Period forward in time and resulted in the expiration of older potential violations. American Broadband never agreed to extend the First Tolling Agreement or to revive the limitations periods for possible violations that expired prior to the new Tolled Period. The parties subsequently agreed to follow this process for each consecutive tolling agreement, resulting in the expiration of the limitations periods for additional possible violations.[130] Accordingly, nothing in the tolling agreements between the Company and the Commission demonstrates that the proposed forfeiture in the *NAL* is timely.

ii. The Sixth Tolling Agreement Does Not Cover the Conduct that Served as the Basis for the Proposed Forfeiture

The Sixth Tolling Agreement between the Company and the Commission, which is the only tolling agreement cited to by the FCC in the *NAL*, does not cover the conduct that served as the basis for the proposed forfeiture. The parties executed the Sixth Tolling Agreement on May 22, 2018. The Commission suggests that the Sixth Tolling Agreement provides that, "for purposes of calculating the statute of limitations, pursuant to 47 U.S.C. § 503(b)(6), the parties agree that any limitations period for the possible violations . . . shall be tolled until October 28,

warrant[ed] that he [was] authorized to execute this agreement on behalf of the FCC." Second Tolling Agreement, Section 7.

[130] *See* Third Tolling Agreement between American Broadband and Federal Communications Commission Enforcement Bureau, Section 1 (effective Oct. 20, 2017) (moving the Tolled Period forward to cover November 1, 2017 to January 29, 2018 at the latest), attached as Exhibit K; Fourth Tolling Agreement between American Broadband and Federal Communications Commission Enforcement Bureau, Section 1 (effective Dec. 19, 2017) (moving the Tolled Period forward to cover January 30, 2018 to April 30, 2018 at the latest), attached as Exhibit L; Fifth Tolling Agreement between American Broadband and Federal Communications Commission Enforcement Bureau, Section 1 (effective Mar. 7, 2018) (moving the Tolled Period forward to cover April 30, 2018 to July 30, 2018 at the latest), attached as Exhibit M; Sixth Tolling Agreement, Section 1 (moving the Tolled Period forward to cover July 30, 2018 to October 28, 2018 at the latest).

2018," making the *NAL* timely.[131] The Commission's apparent attempt to selectively read the Sixth Tolling Agreement in a manner that ignores the July 30, 2018 beginning of the Tolled Period is unavailing. Like the Second, Third, Fourth, and Fifth Tolling Agreements that preceded it, the Sixth Tolling Agreement includes a new Tolling Period with a new beginning date, rendering all claims based on conduct occurring prior to July 30, 2017 time-barred, which in turn renders the proposed forfeiture time-barred.

Notably, the Commission does not quote the actual language of the Sixth Tolling Agreement in the *NAL*. Regarding the Tolled Period, the Sixth Tolling agreement actually reads as follows:

> For purposes of calculating the statute of limitations, pursuant to 47 U.S.C. § 503(b)(6), the parties agree that any limitations period for the possible violations as set forth in the preamble of this Agreement shall be tolled *from July 30, 2018*, until and including either: (a) the release date of a Commission Notice of Apparent Liability for Forfeiture (NAL), consent decree, or order regarding the disposition of any of the possible violations as set forth in the preamble of this Agreement; (b) the date the FCC informs [American Broadband] in writing that it has terminated the Investigation; or (c) October 28, 2018, whichever occurs first.[132]

The parties therefore agreed to toll the limitations period for any violations occurring on or after July 30, 2017 (*i.e.*, one year prior to the start date for the Tolled Period) to October 28, 2017 (*i.e.*, one year prior to the latest possible end date of the Tolled Period). As with each prior tolling agreement entered into by the parties, the Sixth Tolling Agreement contained the Challenge Provision and Expiration Provision language. Under the Challenge Provision, American Broadband did not admit to any violations of the Lifeline rules and retained its right to challenge

[131] *NAL*, ¶ 174, n. 417.

[132] Sixth Tolling Agreement, Section 1 (emphasis added).

the *NAL*.[133] Pursuant to the Expiration Provision, nothing in the Sixth Tolling Agreement "ha[d] the effect of extending or reviving any limitations period *that expired prior to the Tolled Period*," which began on July 30, 2018.[134]

As discussed above, the proposed forfeiture is based on the Company's Form 497 filings for the August 2016 data month, which occurred prior to the Tolled Period established in the Sixth Tolling Agreement. Moreover, the applicable limitations periods for a proposed forfeiture based on American Broadband's original and revised Form 497 submissions expired on September 6, 2017, and November 16, 2017, respectively – long before the July 30, 2018, start date of the Tolled Period under the Sixth Tolling Agreement. Under the Expiration Provision, the limitations periods for a proposed forfeiture based on the Company's Form 497 submissions for the August 2016 data month were not extended or revived; they remained expired and beyond the reach of the Commission's proposed forfeiture. The Commission therefore must cancel the proposed forfeiture in the *NAL*.

The same result applies for all of the conduct highlighted by the Commission in its discussion of the Company's purported violations in the *NAL*. The Commission's analysis of the Company's alleged enrollment and de-enrollment practices ends in December 2016.[135] Any limitations periods based on such conduct would have expired by December 2017 at the latest, seven months before the start of the Tolled Period. As explained above, even if the Commission based its proposed forfeiture on the latest-filed Form 497 from the Company referenced in the *NAL*, the limitations period for that submission expired on June 19, 2018, over a month before

[133] *Id.*, Section 4.

[134] *Id.*, Section 5 (emphasis added).

[135] *See supra* Section II.A.iii.

the start of the Tolled Period.[136] Consequently, the Sixth Tolling Agreement does not cover any of the conduct cited in the *NAL*.

Finding the proposed forfeiture time-barred represents the only "objective" reading of the Sixth Tolling Agreement. By its plain terms, the Expiration Provision prohibited the Commission from proposing a forfeiture based on possible violations whose limitations periods had already lapsed before the start of the new Tolled Period. Nothing in the Sixth Tolling Agreement suggests that American Broadband agreed to waive its statute of limitations claims for all possible violations of the Lifeline rules for all time during the Tolled Period. In fact, such a reading would render the Expiration Provision wholly superfluous, contrary to precedent. There would be no reason to include the Expiration Provision if the Sixth Tolling Agreement already covered all possible prior violations of the Lifeline rules by American Broadband. As noted above, government agencies will be held to the plain terms of their tolling agreements and the plain terms of the Sixth Tolling Agreement show that that the proposed forfeiture in the *NAL* is time-barred. If EB wished to avoid the expiration of the limitations periods for older possible violations, such as those based on the Company's Form 497 filings for the August 2016 data month, it bore the responsibility to "check its work" and try to negotiate different terms. EB took no such action and instead agreed to the Expiration Provision five separate times. Even if the provisions of the Sixth Tolling Agreement somehow were ambiguous, the responsibility for such ambiguity would lie with EB as a sophisticated governmental actor.[137] Furthermore, any

[136] *See id.*

[137] *See Goyal*, 2007 U.S. Dist. LEXIS 29234 at *8-9 (finding that government agencies are sophisticated actors in negotiations and normally should bear responsibility for any lack of clarity in a tolling agreement); *FedEx Corp.*, 2016 U.S. Dist. LEXIS 36383 at *2 (stating federal agencies are responsible for ensuring that they have reserved relevant claims for prior violations in tolling agreements).

reliance on extrinsic evidence of the parties' intent here demonstrates that American Broadband specifically bargained for, and EB agreed to, the expiration of the limitations periods for older violations in the Sixth Tolling Agreement. The Commission cannot attempt to rewrite the Sixth Tolling Agreement now to save a proposed forfeiture that violates the Communications Act. Instead, the Commission must adhere to the will of Congress as expressed in the statute and cancel the forfeiture proposed in the *NAL* as time-barred.

III. IMPOSING THE PROPOSED FORFEITURE AGAINST AMERICAN BROADBAND OR MR. ANSTED WOULD VIOLATE DUE PROCESS

The Due Process Clause of the Fifth Amendment provides procedural protections against the imposition of penalties in enforcement proceedings without sufficient notice of the prohibited conduct.[138] Here, assessing the proposed forfeiture against American Broadband or Mr. Ansted would violate due process in three ways. First, because the Commission has never had any rules requiring ETCs to verify subscriber identity; it failed to provide notice of the standard it now claims American Broadband failed to adhere to. Indeed, USAC has the sole responsibility for verification of subscriber identity. Second, the Commission cannot impose a penalty on American Broadband related to alleged claims for deceased subscribers because, during the period covered by the *NAL*, the Commission had not established a standard of conduct to which it would hold Lifeline ETCs (or even itself) accountable for detecting possible use of a deceased individual's information. Finally, the FCC failed to provide American Broadband sufficient detail about the facts on which the forfeiture is based and apparently double-counted allegedly ineligible subscribers in its calculations. The Commission's failure to provide sufficient notice

[138] U.S. Const. amend. V.

of prohibited conduct and the facts on which the forfeiture is based is fatal to its ability to assess the proposed forfeiture against the Company or Mr. Ansted.

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."[139] The Supreme Court has explained that "[a] conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'"[140] If a regulation does not provide sufficient clarity about what is expected from a regulatee, an agency may not use it for imposition of civil or criminal fines or other liability.[141]

In *Fox Television*, the Supreme Court vacated the FCC's enforcement actions against two broadcast networks for airing fleeting expletives or nudity on television. The FCC had a longstanding prohibition on the airing of indecent material on broadcast television. However, prior to its 2002 issuance of NALs against the networks, the FCC's indecency policy did not necessarily prohibit the airing of all expletives or nudity. Instead, the FCC previously examined the full context of allegedly indecent broadcasts considering a range of factors, including whether the material was repeatedly and persistently shown and, if the material was fleeting, the

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[139] *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012); *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (explaining that "agencies should provide regulated parties fair warning of the conduct [a regulation] prohibits or requires").

[140] *Fox Television*, 567 U.S. at 253 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

[141] *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995).

agency typically found that the material did not rise to the level of indecency warranting enforcement action.[142] Despite the then-existing multi-factor policy, the FCC imposed significant forfeitures on Fox Broadcasting ("Fox") and ABC Television Network ("ABC") for three allegedly indecent broadcasts: two in which fleeting expletives aired on live awards shows and one in which brief partial nudity aired on a scripted show.[143] The Court emphasized that the FCC had failed to provide sufficient notice that its interpretation of the indecency law had changed such that the conduct at issue would be considered a violation of the FCC's rules.[144] Because Fox and ABC had no notice that fleeting indecent language and images could result in enforcement action, the Court found that the FCC could not sanction the broadcasters.[145]

Even if an administrative agency has discretion to interpret a statute or rule in a particular manner, it may not impose forfeitures where sufficient notice of the interpretation is not given in advance.[146] In *SNR Wireless*, two startup companies – SNR Wireless LicenseCo, LLC ("SNR") and NorthStar Wireless LLC ("NorthStar") – participated in a wireless spectrum auction, won hundreds of licenses, and sought bidding credits made available to small businesses. The FCC denied SNR and NorthStar's request for bidding credits, finding that they were under the de facto control of DISH Network (a larger company) and thus, were not eligible for small business

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[142] *See Fox Television*, 567 U.S. at 245.

[143] After these incidents, but before issuing the NALs, the FCC issued a decision sanctioning a fleeting expletive at an NBC award show and used this new policy as the basis for the Fox and ABC NALs at issue in *Fox Television*. *See id.*, 567 U.S. at 248-49.

[144] *See id.* 567 U.S. at 254 (explaining that a "regulatory change this abrupt on any subject" is a failure to provide fair notice about prohibited conduct).

[145] *Id.*, 258.

[146] *SNR Wireless LicenseCo, LLC v. FCC*, 868 F.3d 1021, 1045 (2016); *see also Gen. Elec.*, 53 F.3d at 1329.

credits.[147] The FCC gave SNR and NorthStar the opportunity to purchase the licenses at full auction value but did not allow them to cure the control issues. As a result, SNR and NorthStar purchased the licenses they could afford and returned the rest, resulting in the FCC assessing a forfeiture for failure to comply with the auction's terms – which included paying for any licenses they sought and won.[148] The parties challenged the FCC's decision as, among other things, inconsistent with how they had treated previous applicants that had de facto control findings but were allowed to make changes to their ownership and interests to resolve the issue.[149] The D.C. Circuit determined that, while it was reasonable for the FCC to interpret its standard to mean DISH had de facto control over the companies, the FCC did not provide fair advance notice to SNR and NorthStar that they would be penalized without the opportunity to cure a violation of the auction rules.[150] As a result, "due process requires that parties receive fair notice before being deprived of property"[151] and the FCC may not simultaneously announce a standard of conduct under its rules and then use that standard of conduct to justify a proposed forfeiture in an NAL.

[147] *See SNR Wireless*, 868 F.3d at 1028-29.

[148] *See id.*

[149] *Id.*, 1029.

[150] *Id.*, 1045 ("[T]he FCC reasonably concluded that DISH's conduct plainly evidenced a greater degree of control over petitioners than the conduct of entities previously found not to have exercised *de facto* control. But that alone is not sufficient to show that the petitioners had fair notice that they would be denied any opportunity to cure.").

[151] *Gen. Elec.*, 53 F.3d at 1328.

B. During the Period Covered by the *NAL*, the FCC Did Not Have a Requirement for ETCs to Verify Subscriber Identity or a Standard Practice for Detecting the Use of Deceased Individuals' Information

In the *NAL*, the Commission alleges that American Broadband failed to properly verify the identity of potential subscribers and sought Lifeline reimbursement for deceased individuals.[152] The Commission's enforcement against American Broadband on this matter fails to satisfy the requirements of due process because, at the time covered by the *NAL*, there was no requirement for ETCs to verify subscriber identity or industry standard to check for the presence of deceased subscribers on Lifeline customer rolls. Additionally, the FCC failed to adequately notify American Broadband that ETCs were expected to detect the possible use of a deceased person's information during the Lifeline enrollment process and failure to do so would result in penalties.

Since the establishment of the Lifeline program, the Commission has had detailed regulations outlining the expectations for ETCs regarding application and enrollment in the Lifeline program, including determining subscriber eligibility.[153] Yet, the Commission has never adopted rules requiring ETCs to verify subscriber identity. In fact, USAC (the FCC's chosen administrator for the Lifeline program) continues to bear sole responsibility for verifying a subscriber's identity, which would necessarily involve assessing whether the information being used for enrollment relates to a deceased person.[154] The obligation to verify applicant identity originated in the *2012 Lifeline Reform Order* and falls to USAC as part of its obligation to

[152] *NAL*, ¶¶ 39, 44-51, 78, 174.

[153] *See* 47 C.F.R. Part 54, Subpart E.

[154] *See NAL*, ¶ 8 (explaining that the rules require ETCs to maintain eligibility documentation for audits or for NLAD processes "that require verification of identity").

manage NLAD.[155] In that order, the Commission also confirmed that ETCs were not required to verify identity.[156] In fact, the FCC has only recently adopted requirements for USAC to include a process within its NLAD applicant identity verification process to check the Social Security Administration's Death Master File.[157] In November 2017, following a Government Accountability Office ("GAO") investigation into the Lifeline program that indicated that deceased individuals' information was being used to improperly enroll subscribers for Lifeline accounts, USAC revised its NLAD subscriber enrollment verification process, at the direction of FCC Chairman Pai, to include a check for deceased subscribers.[158] The responsibility to verify potential Lifeline subscriber identity and detect the enrollment of deceased individuals has been and continues to be with USAC.

Here, similar to *Fox Television*, the FCC aims to impose penalties related to alleged violations of rules for which Lifeline regulatees like American Broadband had no notice. The Commission seeks to enforce requirements that no person of common intelligence would expect was required of an ETC (*i.e.*, verifying customer identity, a responsibility specifically assigned to USAC). The *NAL* states that the basis for its proposed forfeiture is the Company's reimbursement claims for allegedly ineligible subscribers contained on its Form 497 submissions

[155] *See 2012 Lifeline Reform Order*, ¶ 201 ("[T]he database must have the capability of performing an identification verification check when an ETC or another party submits a query to the database about a potential consumer.").

[156] *See id.*, ¶ 200 (noting that "several ETCs have already been performing routine identification checks using subscribers' date of birth and social security number even though they are not explicitly required to do so by our rules").

[157] *See* High Cost and Low Income Committee Briefing Book, USAC, 148, 154 (Jan. 29, 2018) ("January 29 USAC Briefing Book") (discussing USAC's implementation of a deceased person check during enrollment).

[158] *See* Letter from Ajit Pai, Chairman, FCC, to Vickie Robinson, Acting Chief Executive Officer and General Counsel, USAC, 3 (July 11, 2017); *see also* January 29 USAC Briefing Book, 148.

for the August 2016 data month.[159] At that time, American Broadband was diligently checking and collecting proof of income and/or program eligibility from Lifeline applicants. Each enrollment of a purported "Dead" person also went through the NLAD, which verified the identity of each subscriber. However, American Broadband was not aware of the existence of deceased subscribers on its active subscriber list.

At the relevant time, there was no rule for ETCs to verify a potential subscriber's identity or check that the applicant information did not relate to a deceased person. American Broadband, like the Commission, previously understood that if an individual provided a valid proof of eligibility to receive support from the Lifeline program it had satisfied its regulatory obligations. Nothing in the FCC's prior rulemakings indicated that it would be unreasonable for the Company to assume that if the documentation provided was valid for eligibility that it related to a non-deceased individual. The FCC never provided the Company with any advance notice that valid identification was insufficient and that the Company would be expected to independently check for possible identity issues, a responsibility that the FCC assigned to USAC as part of the NLAD.

Indeed, not only was there no notice to American Broadband, there was no established industry standard by which the Company could follow to meet such a requirement. There was no suggestion from the FCC or USAC that ETCs were required to check potential Lifeline subscriber information against death databases. Indeed, USAC did not begin doing so until late 2017 – well after the time period at issue in the *NAL*. As a result, the absence of any standards to identify the presence of deceased individuals' information, either for ETCs or even for USAC,

[159] *NAL*, ¶¶ 174-75.

renders enforcement in this context arbitrary and capricious. Here, the Commission has decided that, after many years of not having a standard of conduct for identifying possibly deceased subscribers, and no assignment of such responsibility to ETCs, the failure to identify such potentially ineligible accounts is a violation that can warrant significant financial penalties. The Commission decision, however, clearly fails to satisfy due process and as such cannot be the basis for assessing penalties against American Broadband.

C. The FCC Has Not Provided Sufficient Notice of the Facts on Which the *NAL* Is Based

The *NAL* violates due process requirements because it fails to identify the specific accounts that the Commission included in its calculation of the proposed forfeiture amount. Due process mandates that the target of an FCC enforcement action receive sufficient notice about the basis for any penalties related to alleged violations.[160] In addition to the constitutional due process standards for entities subjected to penalties by a government agency discussed above, the Commission is subject to statutory due process requirements. The Communications Act outlines what the required elements are for sufficient notice related to the imposition of a forfeiture penalty.[161] Section 503 provides that:

> [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

[160] *See Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 599 (D.C. Cir. 1993) ("[W]hen a notice requires its target to guess among several possible bases for adverse government action, it has not served those fundamental purposes."); *Parker v. Dist. of Columbia*, 293 F. Supp. 3d 194, 207 (D.D.C. 2018) (stating that the "[n]otice must also provide interested parties with some sense of the factual basis for the action").

[161] 47 U.S.C. § 503.

> (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.[162]

Moreover, an NAL must specify the particular basis for the alleged violations and the facts supporting the allegations. According to the Act:

> 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.[163]

The *NAL* issued to American Broadband does not comply with the statutory due process obligations under the Act because the Commission failed to provide sufficient detail to allow American Broadband to effectively respond and defend against the proposed forfeiture. While EB subsequently provided to the Company data underlying a number of the allegations made in the *NAL*, it neglected to provide data that would facilitate the identification of the actual subscribers that were included in the *NAL* forfeiture calculation. This violates due process under the Act by failing to provide "the facts upon which such charge is based."[164]

In the *NAL*, the Commission found American Broadband and Mr. Ansted apparently liable for 42,309 allegedly ineligible subscribers claimed on its Form 497 submissions for the August 2016 data month.[165] The Commission asserted that these allegedly ineligible subscribers fell into two broad categories. First, the Commission alleged that the Company sought Lifeline reimbursement for 18,894 subscribers that were allegedly ineligible due to enrollment issues

[162] 47 U.S.C. § 503(b)(4).

[163] *Id.*

[164] 47 U.S.C. § 503(b)(4).

[165] *NAL*, ¶ 175.

(*e.g.*, manipulation of personal/address information, enrollment of deceased individuals, re-use of program eligibility proof documents).[166] Second, the Commission asserted that the Company sought Lifeline reimbursement for 32,032 subscribers that were allegedly ineligible due to de-enrollment issues (*e.g.*, non-usage, benefit transfers, missing from NLAD).[167] The Commission stated that 8,617 allegedly ineligible subscribers fell within both the enrollment and de-enrollment categories and were purportedly removed, resulting in the 42,309 final total of allegedly ineligible subscribers used as the basis for the proposed forfeiture.[168]

In the *NAL*, the Commission failed to include a list or other means of identifying the specific 42,309 allegedly ineligible subscribers that served as the basis for the Commission's proposed forfeiture. On October 31, 2018, several days after release of the *NAL*, EB sent a CD to American Broadband that contained numerous spreadsheets ostensibly containing the raw data used by the Commission to identify the number of allegedly ineligible subscribers for each specific enrollment or de-enrollment issue.[169] But EB never provided American Broadband with

[166] *Id.*, ¶ 151.

[167] *Id.*, ¶ 175, n. 424.

[168] *Id.*

[169] An NAL must be complete on its face and subsequently-provided spreadsheets cannot cure administrative due process notice violations. *See* 47 U.S.C. § 503(b)(4); *see also Nat'l Lifeline Ass'n v. FCC*, No 18-1026, slip op. at 23-24 (D.C. Cir. Feb. 1, 2019) (concluding the Commission did not provide sufficient notice under the Administrative Procedure Act when it failed to make available searchable maps or digital "shapefiles" necessary for affected stakeholders to determine the impact of a rulemaking until after the final rules were published). Here, EB did not provide any key or other explanation of the data contained on the spreadsheets. **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** The spreadsheets are replete with these types of inconsistencies.

a spreadsheet showing the actual allegedly ineligible subscribers that make up the final total used as the basis for the proposed forfeiture. Thus, American Broadband is unable to independently assess the validity of the Commission's calculations or that it properly removed allegedly ineligible subscribers that fell within both the enrollment and de-enrollment categories to avoid double-counting.

Moreover, the information that the Commission did provide to the Company suggests that it improperly double-counted allegedly ineligible subscribers *that fell within the same category*. After it received the spreadsheets from EB, American Broadband spent considerable time and effort analyzing a sample of the raw subscriber data provided. This analysis showed that the Commission apparently double-counted subscribers with multiple alleged enrollment or de-enrollment issues. As examples: **[BEGIN CONFIDENTIAL]**

[redacted]

[END CONFIDENTIAL]

The Commission does not indicate that it ever removed such intra-category duplicates from its allegedly ineligible subscriber calculations. Consequently, in addition to failing to provide sufficient information for American Broadband to assess the Commission's calculation of inter-category duplicates, it appears that the Commission overstated the amount of allegedly ineligible subscribers in the *NAL*. As the Commission recognizes in the *NAL*, an allegedly ineligible

subscriber should not be counted twice for the purpose of the proposed forfeiture. The Commission therefore at a minimum should have removed the intra-category duplicates prior to calculating a proposed forfeiture. However, such corrective action would not change the fact that the Commission failed to provide sufficient facts to allow the Company to assess the veracity of its proposed forfeiture, directly inhibiting American Broadband and Mr. Ansted's ability to effectively respond and defend against the *NAL*. The *NAL* provides insufficient notice of the prohibited conduct and facts supporting the proposed forfeiture and thus violates American Broadband and Mr. Ansted's due process rights under the Constitution and the Communications Act.

IV. IMPOSING THE PROPOSED FORFEITURE BASED ON A STRICT LIABILITY STANDARD WOULD BE BOTH OUTSIDE THE SCOPE OF THE FCC'S AUTHORITY AND ARBITRARY AND CAPRICIOUS

In the *NAL*, the FCC alleges American Broadband violated the Commission's rules by seeking support for Lifeline subscribers the FCC claims were ineligible due to certain enrollment and/or de-enrollment issues.[170] The FCC identifies claims for allegedly deceased subscribers as one of the bases for its determination that the Company sought Lifeline reimbursement for ineligible subscribers in its Form 497 submissions.[171] In doing so, the Commission employs a strict liability standard for imposing penalties related to claims for these allegedly ineligible subscribers. The strict liability approach employed by the Commission in the *NAL* is not only beyond the Commission's authority to impose, but it is also unlawful and arbitrary and capricious in violation of the Administrative Procedure Act ("APA").

[170] *NAL*, ¶ 174.

[171] *See id.*

The Commission's regulatory framework for Lifeline uses a process-based, not results-based, approach. The framework accounts for the fact that issues of waste, fraud, and abuse are challenges that government subsidy programs such as Lifeline undoubtedly experience. Lifeline ETCs are allowed to revise Form 497 filings when they identify invalid claims whether due to a mistake or improper conduct by third parties.[172] Thus, in the absence of explicit statutory or regulatory authorization, the FCC lacks authority to impose strict liability on an ETC regarding reimbursement claims for allegedly ineligible subscribers.[173] Moreover, even if the FCC has the authority to adopt a strict liability standard, the standard is impossible to meet under the circumstances described in the *NAL* and, consequently, imposition of a penalty using a strict liability standard would be arbitrary and capricious.[174]

Under the APA, Commission Orders like the *NAL* are subject to reversal if they are arbitrary and capricious.[175] To survive arbitrary and capricious review, an agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[176] Importantly, an agency must provide a more substantial

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[172] *See* Reimbursement FAQs: FCC Form 497, USAC, *available at* www.usac.org/li/about/faqs/faq-lifeline-reimbursement-claims.aspx (last visited Jan. 20, 2019) ("USAC Form 497 FAQ") ("Use FCC Form 497 to submit claims and revisions for data months prior to 2018. . . . Carriers can revise any form that was submitted offline as long as it falls within the current administrative window.").

[173] *See AT&T Corp. v. FCC*, 323 F.3d 1081, 1087 (D.C. Cir. 2003) (finding that the FCC's authorization was limited to certain procedures and that the FCC could not adopt additional steps without explicit authorization).

[174] *Cf. AT&T Corp.*, 323 F.3d at 1086-1087 (finding that the FCC's new actual-authorization rule was beyond what was authorized under statute and amounted to an impossible-to-meet, strict liability standard).

[175] *See* 5 U.S.C. § 706(2)(A).

[176] *NTCH, Inc. v. FCC*, 841 F.3d 497, 502 (D.C. Cir. 2012) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (internal quotes and citations omitted).

justification when its regulations have "endangered serious reliance interests that must be taken into account."[177] Here, the Commission does not even attempt to tie the facts underlying the purported violations to its decision to apply a strict liability standard to the Company's reimbursement claims for allegedly ineligible subscribers. Instead, the FCC proposes penalties against American Broadband and Mr. Ansted in the *NAL* without sufficient consideration of the reasons why such allegedly ineligible subscribers may have been enrolled or whether American Broadband could have reasonably prevented any improper claims that may have resulted.

The Commission's intention to adopt and apply a strict liability standard is made clear with its pronouncement that it "determined that the Company apparently filed Forms 497 seeking support for ineligible Lifeline accounts, in apparent violation of section 54.407 of the Commission's rules."[178] The *NAL* seeks to impose penalties strictly because there were some allegedly ineligible accounts claimed in the Company's Form 497 submissions for the August 2016 data month. But even if American Broadband did seek support for some ineligible accounts as alleged by the Commission, the decision to adopt a strict liability standard regarding such conduct is improper and contrary to the Communications Act as well as the FCC's rules.

Sections 214 or 254 of the Act provide no basis upon which the Commission is authorized to impose strict liability for claiming reimbursement for allegedly ineligible Lifeline subscribers on a Form 497. The language of those statutes instead outlines general principles and processes for setting up the universal service program and authorizing providers to offer federal subsidy-supported services to eligible consumers.[179] Similarly, the Lifeline rules are

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[177] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 151 (2009).

[178] *NAL*, ¶ 174.

[179] *See generally* 47 U.S.C. §§ 214, 254.

focused on outlining the processes for providing Lifeline service, with an emphasis on procedures to enroll customers and verify program eligibility.[180]

The Commission's Lifeline rules and rulemakings reflect awareness that consumer fraud has been, and continues to be, a problem related to the Lifeline program.[181] Because consumer self-certification is involved, it is impossible for any Lifeline provider to successfully eliminate all claims for allegedly ineligible subscribers on its rolls.[182] Throughout the history of the Lifeline program, the Commission has regularly reassessed and revised the rules and obligations related to consumer enrollment, particularly verification of applicant information, to address concerns around waste, fraud, and abuse. For instance, the *2012 Lifeline Reform Order* touted the NLAD as a key mechanism in the FCC's efforts to attempt to combat the enrollment of ineligible subscribers into the program.[183] In addition, USAC's processes as they relate to Lifeline enrollment, de-enrollment, and reimbursement claims recognize that it is not possible to eliminate all errors in administration of the program. When American Broadband made its Form 497 submissions, the enrollment process included a third-party identity verification ("TPIV") failure resolution to address situations wherein a subscriber's identity could not be verified and

[180] *See* 47 C.F.R. §§ 54.400 *et seq.*

[181] *See e.g.*, Chairman Pai Statement on Ensuring Security for the Lifeline National Verifier (Dec. 1, 2017) ("The Lifeline program is an important tool for closing the digital divide but for too long, it's plagued by waste, fraud, and abuse.").

[182] *See* 47 C.F.R. § 54.410(d), (f)(2)(iii). In fact, prior to implementation of the *2012 Lifeline Reform Order*, the Commission allowed customers to self-certify their program-based eligibility and show documentation indicating eligibility based on income. *See 2012 Lifeline Reform Order*, ¶ 94.

[183] *See 2012 Lifeline Reform Order*, ¶ 182.

allowed ETCs to correct errors and provide additional information, if needed, regarding their enrollment requests.[184]

A review of the FCC's Lifeline rules also reveals no authority for the imposition of a strict liability standard. As an example, Section 54.407 of the rules, specifically cited by the FCC in the *NAL*, simply outlines procedures for seeking reimbursement for providing Lifeline service.[185] It does not state that any error or inaccuracy in determining accounts eligible for reimbursement will constitute a violation warranting a monetary penalty. In fact, the Commission adopted rules that allowed an ETC to file a revised Form 497 within 12 months after its submission to correct its Lifeline subscriber reimbursement claims for any reason.[186] The existence of a revisions process for Form 497 filings supports the conclusion that the Lifeline rules are process-based and do not impose a strict liability standard regarding reimbursement claims for allegedly ineligible subscribers. The fact that the Commission included a revision process represents an acknowledgement that the Lifeline enrollment, de-enrollment, and reimbursement request processes will involve some level of errors or corrections. The revisions process provides an orderly way to rectify those problems, thereby avoiding exclusive reliance on any ETC's initial screening processes or consumer self-certifications.

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[184] *See* USAC, NLAD Third Party Identity Verification Failure Resolution, www.usac.org/li/tools/nlad/dispute-resolution/tpiv-failure-dr.aspx (last visited Jan. 20, 2019).

[185] *See* 47 C.F.R. § 54.407; *NAL*, ¶ 174.

[186] *See 2012 Lifeline Reform Order*, ¶ 305. American Broadband notes that the revised Form 497s filed for the August 2016 data month **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** *See* Letter of John J. Heitmann, Counsel to American Broadband, to Dangkhoa Nguyen, USF Strike Force, Enforcement Bureau, FCC (Mar. 9, 2018) (providing a chart summarizing the Form 497 revisions).

In this case, American Broadband took its Lifeline obligations seriously by proactively reviewing its prior subscriber reimbursement claims, and voluntarily self-disclosing its unintentional receipt of overpayments it had identified with a commitment to restore such funds and repay the full amount owed to the USF. As detailed in the *NAL*, American Broadband expended significant time and resources working with third-party vendors and its independent auditor to accurately determine its Lifeline overpayment amount.[187] The Company then worked with USAC to create a workable repayment plan while updating its internal Lifeline procedures and policies to avoid future overpayments. The *NAL* improperly disregards such good-faith compliance and remedial efforts simply based on the Company's failure to identify every possible reimbursement claim for allegedly ineligible subscribers.[188]

In addition to the general inappropriateness of applying a strict liability standard to every reimbursement claim for an allegedly ineligible Lifeline subscriber, there are specific issues with the application of such a standard with respect to the Commission's allegations of improper enrollments of deceased subscribers by the Company. The *NAL* imposes a forfeiture on American Broadband and Mr. Ansted in part for allegedly enrolling deceased individuals without consideration of the reasons why such accounts may be have been enrolled or if American Broadband could have reasonably prevented such enrollments.[189] Applying a strict liability standard to American Broadband's alleged submission of reimbursement claims for deceased persons would be arbitrary and capricious because it would have been near-impossible for the

[187] *See NAL*, ¶¶ 23-34.

[188] 47 C.F.R. § 1.80 (listing good faith efforts to comply with the law and "voluntary disclosure" as downward forfeiture adjustment criteria). *See infra* Section VII.

[189] *See NAL*, ¶ 148 ("American Broadband's agents apparently enrolled deceased individuals into the Lifeline program.").

Company and Mr. Ansted to be aware of the problem during the time period addressed by the *NAL*. As discussed above in Section III, the Commission had no rules in place during the period covered by the *NAL* and still does not have rules requiring ETC verification of subscriber identity. USAC continues to bear sole responsibility for verification of identity through its development of the NLAD. Furthermore, during the period covered by the *NAL*, the Commission had not established a standard of conduct to which it would hold Lifeline ETCs (or even itself) accountable for detecting possible use of a deceased individual's information. American Broadband relied in good faith on the proof of program eligibility documents provided by applicants. Moreover, 100% of the allegedly deceased persons identified on the Company's subscriber rolls were submitted to and approved by the NLAD for enrollment. And 100 percent of the allegedly deceased subscribers had their identity verified by USAC. The Company would have had no reason (or mechanism) to know that the eligibility information was related to persons that were already deceased and was not required to proactively check potential subscriber information against a death index or other database other than NLAD.

Imposition of a strict liability standard therefore would be arbitrary and capricious as the Commission failed to establish a "rational connection" in the *NAL* between the recognized imperfect processes underlying Lifeline enrollment, de-enrollment, and reimbursement claims and the enforcement action taken. No matter what verification procedures and other measures it took, American Broadband could not entirely eliminate the risk that it might mistakenly submit a claim based on a deceased subscriber's still-valid eligibility documents. American Broadband relied faithfully on the FCC's process-based approach to Lifeline compliance, which does not demand perfection from the Company regarding its claims for reimbursement. Thus, due to the

Company's reliance interests, the FCC would need substantial justification to support imposition of a standard, which it does not have in this case.

As discussed above, American Broadband, like the Commission, was not aware of the existence of deceased subscribers on the Lifeline program rolls prior to the release of the GAO's analysis and subsequent letters from the Chairman to USAC.[190] Since USAC's incorporation of a procedure to check whether a potential Lifeline subscriber is deceased, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Therefore, the FCC's attempt to penalize American Broadband for claims related to deceased persons would be arbitrary and capricious for the period covered by the *NAL*.

V. THE COMMISSION REPEATEDLY MAKES ALLEGATIONS THAT DO NOT REPRESENT VIOLATIONS OF THE RULES

Consistent with the *NAL*'s due process infirmities and the arbitrary and capricious application of a strict liability standard discussed above, the Commission repeatedly makes allegations that do not represent violations of the rules. The *NAL* alleges that American Broadband apparently violated sections 54.404, 54.405, 54.407, and 54.410 of the Commission's rules.[191] To support these claims, the *NAL* makes a number of statements about the scope and nature of American Broadband's operations and processes that are either simply incorrect or

[190] *See supra* Section III.B.

[191] *See NAL*, ¶¶ 2, 142. American Broadband notes that the Commission is not consistent in its discussion of which aspects of the rules it believes the Company violated, as it omits references to certain sections of the rules in different sections of the *NAL*. *See NAL*, ¶ 2 (summarizing the alleged violations at the outset of the *NAL*, which do not reference 54.404); *but see NAL*, ¶ 141 (citing to 54.404(b)(1)-(2) as rules that American Broadband apparently violated based on the results of the investigation).

significantly misrepresent the facts. These unsupported findings cannot be used to support the proposed forfeiture.

The Commission's Lifeline rules evolved over the course of the period covered by the *NAL*. Throughout the covered period, ETCs were required to review potential subscriber eligibility documentation,[192] have policies and procedures in place to prevent enrollment of ineligible individuals,[193] and de-enroll individuals it knew or reasonably believed had become ineligible.[194] ETCs also had to operate consistent with Lifeline compliance plans approved by the FCC that described how they would meet these program requirements.[195] In February 2012, the Commission adopted a rule directing USAC to create and manage NLAD.[196] USAC was to design the database to eliminate existing duplicate enrollments between ETCs and prevent future duplicate enrollments, in part by verifying the identities of subscribers.[197] Once operational, ETCs would be required to enroll and de-enroll subscribers in NLAD to facilitate the duplicate-checking process.[198] NLAD was operational in all states by March 27, 2014.[199] Leading up to the release of NLAD, USAC advised ETCs on how NLAD would function and how they should

[192] 47 C.F.R. § 54.410(b)-(c).

[193] 47 C.F.R. § 54.410(a).

[194] 47 C.F.R. § 54.405(e).

[195] *2012 Lifeline Reform Order*, ¶¶ 379-80. WCB has not approved a single compliance plan since 2012 and has articulated no policy on how such plans (approved or not) are to change in light of subsequent changes to the Commission's Lifeline rules.

[196] *Id.*, ¶ 179.

[197] *Id.*, ¶¶ 179, 201.

[198] *Id.*, ¶ 190.

[199] *See* NLAD Bulletin, *Group 6 Subscriber Data Is Now Live in the NLAD Production Environment*, USAC (Mar. 27, 2014) ("Beginning today, all ETCs are required to use the live production environment in NLAD to enroll, de-enroll, or transfer subscribers in the Lifeline Program.").

use the database.[200] USAC modified NLAD's functionality and the guidance to ETCs periodically over the covered period to address issues with enrollment and de-enrollment.[201] These were not the only Lifeline program and policy changes to occur during the covered period. For example, in February 2016, a Commission rule change went into effect that required ETCs to retain documentation used to verify a potential subscriber's eligibility for Lifeline service.[202]

American Broadband worked during the covered period with a third-party vendor, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to make numerous necessary technical adjustments to the Company's subscriber database to help achieve compliance. The Company used **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to store and manage its subscriber lists.[203] American Broadband relied on the **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to enroll its subscribers in NLAD, track subscriber usage, send recertification and non-usage notices to subscribers, and de-enroll subscribers no longer eligible for Lifeline benefits.[204]

[200] *See, e.g.*, NLAD Bulletin, *Webinar Invitation: NLAD Rollout by Migration Group*, USAC (Jan. 2, 2014).

[201] *See, e.g.*, NLAD Bulletin, Outage Today in NLAD Pre-Production Environment from 4:00 to 5:00 PM EDT, USAC (June 6, 2014); NLAD Bulletin, Guidance on Completing Non-Routine Benefit Transfers, USAC (Apr. 3, 2014).

[202] *2015 Lifeline Reform Order*, ¶ 11. *See also* 47 C.F.R. §§ 54.404(b)(11), 54.410(b)(1)(ii), 54.410(c)(1)(ii).

[203] May 25 LOI Response, 15.

[204] *Id.*, 15, 20.

A. During the Covered Period, American Broadband Had Policies and Procedures in Place to Ensure Compliance with the Lifeline Rules

In the *NAL*, the FCC asserts repeatedly that American Broadband's Lifeline compliance policies and procedures were lacking or non-existent.[205] Under Commission rules, an ETC "must implement policies and procedures for ensuring that their Lifeline subscribers are eligible to receive Lifeline services."[206] Throughout the Company's operation as a Lifeline provider, including during the period covered by the *NAL*, it had policies and procedures designed to achieve compliance with the evolving Lifeline rules. American Broadband also ensured that its employees and agents understood its Lifeline compliance obligations. In particular, the Company provided its employees and agents with materials explaining enrollment and de-enrollment policies and procedures, took action to enforce such policies and procedures, identified compliance issues, reeducated employees that did not follow the policies and procedures, and modified its policies and procedures to improve compliance. During the period covered by the *NAL*, American Broadband took its Lifeline obligations seriously and made a good faith effort and took reasonable steps to ensure its operations were in compliance consistent with the FCC's rules.[207]

The Commission's rules prescribe what ETCs must do to determine eligibility. Throughout the covered period, ETCs were required to obtain an eligibility certification form from potential subscribers.[208] ETCs were also required to confirm that potential subscribers were

[205] *See e.g.*, *NAL*, ¶ 85 ("American Broadband apparently lacked policies and procedures to comply with several provisions of the Commission's rules.").

[206] 47 C.F.R. § 54.410(a).

[207] *See* 47 C.F.R. § 1.80 (listing good faith efforts to comply with the law and "voluntary disclosure" as downward forfeiture adjustment criteria); *see also infra* Section VII.

[208] 47 C.F.R. § 54.410(d).

qualifying low-income individuals or received benefits from a qualifying federal assistance program, either by accessing state eligibility databases or by reviewing acceptable income and benefit program documents.[209] ETCs subsequently were required to retain copies of eligibility documentation.[210] When NLAD became operational, ETCs had to query the database when processing applications to confirm the identity of a potential subscriber and to ensure that the applicant was not receiving Lifeline service from another ETC and that no other person at the same address was receiving Lifeline service.[211] If ETCs complied with these requirements and determined that potential subscribers were eligible for Lifeline service, they enrolled the new subscribers in Lifeline via the NLAD.[212]

When American Broadband began providing wireless Lifeline service, it operated in a manner consistent with its compliance plan. As the Company's Lifeline operations expanded and the program's rules and requirements changed, the Company adjusted its policies and procedures accordingly. As explained further below, the core of the Company's operations has always been consistent with the spirit of its commitments and obligations under the Lifeline rules.

[209] 47 C.F.R. § 54.410(b)-(c).

[210] *2015 Lifeline Reform Order*, ¶ 6.

[211] *2012 Lifeline Reform Order*, ¶ 189; s*ee also* 47 C.F.R. § 54.404(b)(1)–(3). Even if NLAD shows another person at the same address is receiving Lifeline service, a potential subscriber can still receive Lifeline service if the potential subscriber certifies that no other person in the household is receiving Lifeline service. 47 C.F.R. § 54.404(b)(3).

[212] *2012 Lifeline Reform Order*, ¶ 190. *See* 47 C.F.R. § 54.404(b)(6) (describing how ETCs must transmit new subscriber information to NLAD).

i. Subscriber Enrollment and Certification

During the covered period, American Broadband had policies and procedures in place to help prevent the enrollment of ineligible Lifeline subscribers. **[BEGIN CONFIDENTIAL]**

[redacted][213][redacted]

[redacted][214][redacted]

[213] *See* ABT-OIG00000255–ABT-OIG00000271. **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL**].

[214] *See* ABT-OIG00000475–ABT-OIG00000481.

[redacted][215]

[redacted][216]

[redacted][217]

[redacted][218]

[redacted][219]

[215] *See* ABT-OIG02075182–ABT-OIG02075192.

[216] *See* ABT-OIG02064897–ABT-OIG02064903.

[217] *See* ABT-OIG02105244–ABT-OIG02105246.

[218] *See* ABT-OIG00000275.

[219] *See* ABT-OIG00000283–ABT-OIG00000285.

[redacted][220] [redacted]

[redacted][221] [redacted]

[redacted][222] [redacted]

[redacted][223] [redacted]

[220] *See id.*

[221] June 8, 2017 LOI Response, 7.

[222] *Id*.

[223] *See* 47 C.F.R. § 54.410(g).

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[redacted][224] [redacted][225] [redacted][226] [redacted][227] [redacted][228] [redacted][229] [redacted][230] [redacted]

[224] *See* ABT-OIG00000303–ABT-OIG00000310.

[225] *See* ABT-OIG00000459–ABT-OIG00000465.

[226] June 8 LOI Response, 6-7.

[227] *See* ABT-OIG00000311–ABT-OIG00000312.

[228] June 8 LOI Response, 7.

[229] *Id*.

[230] *Id.*

[redacted][231] **[END CONFIDENTIAL]**

In accordance with guidance issued by the Commission and USAC, American Broadband's enrollment process relied on NLAD, which had the ultimate responsibility for verifying applicant information and identity. In its *2012 Lifeline Reform Order*, the Commission stated that it was establishing NLAD "to detect and prevent duplicative support in the Lifeline/Link Up program."[232] The Commission instructed USAC to ensure that the system had "the ability to receive and process subscriber information provided by ETCs to identify whether a subscriber is receiving a Lifeline benefit from another ETC, and the ability to allow ETCs to query the database to determine if a prospective consumer already is receiving Lifeline service.[233] Additionally, the FCC mandated that when ETCs query NLAD, the system would verify the identity of subscribers through a third-party identity verification service.[234] Specifically, the "identification verification process would utilize a subscriber's name, address, date of birth and the last four digits of the social security number, and compare that information to publicly available databases, to determine if all of the information provided by the subscriber is valid."[235]

NLAD was supposed to detect and prevent potential duplicate Lifeline subscribers by verifying subscriber identity. American Broadband reasonably relied on that NLAD

[231] *See* ABT-OIG01299066–ABT-OIG01299068.

[232] *2012 Lifeline Reform Order*, ¶ 179.

[233] *Id.*, ¶ 183.

[234] *Id.*, ¶¶ 200-01.

[235] *Id.*, ¶ 200.

functionality in accordance with the *2012 Lifeline Reform Order*, but NLAD did not deliver. In fact, NLAD repeatedly required substantial modifications in order to prevent the enrollment of ineligible Lifeline subscribers. American Broadband should not be held responsible for NLAD's shortcomings.[236]

ii. Subscriber De-enrollment

During the covered period, American Broadband had policies and procedures in place regarding the de-enrollment of customers who transferred their benefit to another Lifeline provider, exceeded the Commission's non-usage timeframe, failed to recertify their eligibility, or requested service cancellation.

Prior to August 2016, **[BEGIN CONFIDENTIAL]** [redacted][237] [redacted][238] [redacted]

[236] *See e.g.*, NLAD Bulletin, *Modification to NLAD Schedule*, USAC (Dec. 27, 2013) (noting the delayed implementation date to January 2014 for usage by carriers in first five states); NLAD Bulletin, *New Production Duplicate Subscriber Resolution Process*, USAC (Dec. 1, 2014) (establishing another duplicate resolution process because of unresolved issues during NLAD migration); NLAD Bulletin, *Postponed—Production Duplicate Subscriber Resolution Process*, USAC (Dec. 12, 2014).

[237] *See* September 23 Letter **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**.

[238] *See* ABT-OIG00000323–ABT-OIG00000324.

[redacted][239] [redacted][240] [redacted]

[239] *See* ABT-OIG00000322.

[240] *See* ABT-OIG00000331.

[redacted][241] [redacted]

[redacted][242] [redacted]

[redacted]

[redacted][243] [redacted]

[241] ABT-OIG00000321.

[242] *See 2012 Lifeline Reform Order*, ¶ 130 (requiring ETCs to submit the Form 555 beginning in 2013).

[243] *See* ABT-OIG00000322–ABT-OIG00000324, ABT-OIG00000328, ABT-OIG00000331–ABT-OIG00000333, ABT-OIG00000364–ABT-OIG00000366, ABT-OIG00000454, ABT-OIG00000471–ABT-OIG00000473.

[redacted][244]

[redacted] **[END CONFIDENTIAL]**

While the Commission alleges in the *NAL* that the Company's Lifeline processes may have failed to prevent the enrollment and de-enrollment of allegedly ineligible subscribers, it is undisputable that American Broadband developed and implemented policies and procedures "for ensuring that their Lifeline subscribers are eligible to receive Lifeline services" in accordance with the Commission's rules.[245] The Commission's rules do not require that such policies and procedures be perfect, only that the ETC has such policies and procedure in place. Thus, the

[244] *See* ABT-OIG00000321, ABT-OIG00000363.

[245] 47 C.F.R. § 54.410(a).

Commission is wrong, both as a factual and legal matter, to assert that American Broadband failed to implement Lifeline policies and procedures during the period covered by the *NAL*.

American Broadband continued to periodically evaluate, consolidate, and update its Lifeline policies and SOPs following its self-disclosure to improve compliance.[246] American Broadband is confident that its current approach to Lifeline operations is sound, well-designed to ensure compliance with the Commission's rules, and represents improvements from the time period on which the *NAL* was focused. This is supported by the fact that the Commission's proposed forfeiture is not based on any allegations regarding recent Company Lifeline subscriber claims.[247] The Company also repeatedly took action to address potential Lifeline compliance issues identified by its employees, vendors, or auditors and ensure such issues did not recur. The Commission should acknowledge the Company's past and continued commitment to identifying issues and revising its Lifeline policies and reforming methods as necessary to prevent potential waste, fraud, and abuse, which satisfied the Commission's rules.

B. American Broadband Did Not Engage in Conduct Designed to Create Improper Lifeline Enrollments

The *NAL* alleges that American Broadband apparently created ineligible and duplicate Lifeline accounts during the enrollment process.[248] American Broadband vigorously disputes these claims and the FCC's rationale for reaching such a conclusion. The Commission's allegations seem to be based solely on the claim that some third-party sales agents used by the

[246] *See supra* Section I.

[247] *See NAL*, ¶ 175, n. 424 (basing the forfeiture on the purportedly ineligible subscribers for which the Company sought reimbursement on its Form 497 submissions for the August 2016 data month).

[248] *Id.*, ¶¶ 36, 61.

Company apparently attempted to alter Lifeline applicant proof of eligibility documentation as well as applicant personal information to create duplicative accounts. Any conduct of this nature by these agents was wholly improper and in violation of not only the Lifeline rules but American Broadband's policies and procedures. These individuals were engaged in fraud against the Company as well as the USF. As explained above, the Company terminated its relationships with all agents that were identified in the *NAL* as being connected to alleged improper enrollments and no longer uses agents to gather information to assist with its Lifeline enrollments in any state except California, where the California Administrator makes the final eligibility determination.[249] The actions of the agents identified in the *NAL* do not represent behavior that American Broadband either condoned or encouraged. The presence of any accounts that resulted from agent manipulation of customer data on American Broadband's subscriber claims cannot fairly be characterized as an effort by the Company to intentionally create or maintain invalid enrollments.

As discussed in above, on August 26, 2016, American Broadband self-disclosed its identification of specific issues that had resulted in the Company receiving overpayments from the USF due to reimbursement claims for ineligible subscriber accounts.[250] **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** At the time, American Broadband believed it had identified the extent of issues related to its subscriber set. In the *NAL*, the Commission identifies

[249] *See supra* Section I.B.

[250] *See id.*

other ineligible accounts that it alleges were not included in the self-disclosure. However, even if any of the allegations of improper accounts identified in the *NAL* are correct, the Company vehemently disagrees with the FCC's contention that it intentionally tried to obfuscate the issue and omit other account errors.[251]

As an example of the Company's purported efforts to try to create and maintain ineligible accounts, the FCC states that "in as early as December 2015, the Company was apparently aware that its agents manipulated personal identifying information to create duplicate accounts – yet the Company failed to disclose these facts to either USAC or the Commission."[252] This statement and the inferences made by the FCC demonstrate a failure to properly consider the facts and misrepresent the Company's conduct. **[BEGIN CONFIDENTIAL]** [redacted][253] [redacted][254] [redacted]

[251] *See e.g.*, *NAL*, ¶ 176 (claiming that American Broadband "failed to disclose additional issues which allowed it to receive improper payments from the Fund").

[252] *Id.*

[253] *See* September 23 Letter, 1-5.

[254] *See id.*

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[redacted][255] **[END CONFIDENTIAL]** This evidence demonstrates that American Broadband was not trying to conceal the fact that it had experienced attempts by agents and/or potential subscribers to use invalid identification or proof of eligibility in support of Lifeline enrollments.

The FCC's claim that American Broadband was aware that some agents tried to manipulate documents and applications does not demonstrate that the Company condoned or facilitated allegedly ineligible enrollments. In fact, the history of American Broadband's compliance activities (including some of the examples cited in the *NAL*) demonstrate the exact opposite. The FCC highlights instances where American Broadband personnel identified issues with certain applications and agent conduct, but it fails to discuss how the Company responded. In most cases where the Company identified potential enrollment issues, it terminated, reprimanded, penalized, or provided additional guidance on rules and compliance to the responsible third-party agents. For example, the *NAL* cites to numerous examples wherein an American Broadband compliance manager flagged issues with certain accounts and documentation provided by agents that appeared to result from agent efforts to create accounts based on incorrect and/or manipulated information.[256] But even if these examples involved efforts by certain third-party agents to engage in fraud, they also clearly show that the Company

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[255] *See* June 8 LOI Response, 7; *see also* ABT-OIG00000311.

[256] *See e.g., NAL*, ¶¶ 40-41, 44 (referencing ABT-OIG00123323, ABT-OIG00123322, ABT-OIG01298871).

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acted diligently and rigorously to identify and weed out these problem accounts and agents. The Commission fails to reference these remedial efforts by the Company, both before and after the investigation began, to address improper agent conduct, educate agents on Company Lifeline policies and procedures, and take remedial action when necessary.[257] Moreover, the *NAL* does not acknowledge the fact that some of the examples it cites reference Lifeline accounts that passed through the NLAD enrollment process.[258] Once again, this demonstrates significant deficiencies in NLAD's ability to properly verify the identity of Lifeline subscribers, a responsibility placed solely on USAC by the FCC in the *2012 Lifeline Reform Order*.[259]

As explained above, American Broadband had policies and procedures in place to identify and prevent the kinds of improper enrollment issues alleged in the *NAL*. The Company had no desire to create accounts based on manipulated information and was not aware of instances where these accounts made it through the activation process and were not caught in its internal audit prior to its self-disclosure. Indeed, American Broadband, as part of its efforts to be forthcoming about potential enrollment issues, volunteered to provide subscriber lists with each Form 497/LCS to USAC in support of its Lifeline reimbursement claims following its self-

[257] *See e.g.*, ABT-OIG01300346 **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**.

[258] *See NAL*, ¶ 44 **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**.

[259] *See 2012 Lifeline Reform Order*, ¶ 201 ("Because of the benefits and limited costs of identification verification, we conclude that the database must have the capability of performing an identification verification check when an ETC or other party submits a query to the database about a potential consumer. In response to the query, the database must indicate whether the subscriber's identity can be verified, and if not, provide error codes to indicate why the identity could not be verified. . . . ETCs may not receive reimbursement for those subscribers whose identities could not be verified through the identification verification process.").

disclosure. It stands to reason that if American Broadband intended to continue to claim ineligible subscribers after making its self-disclosure, the Company would not offer to provide subscriber lists that could be verified by the FCC and USAC. Therefore, the mere fact that the accounts identified by the FCC may concern ineligible subscribers does not show that American Broadband specifically sought to engage in conduct designed to create improper Lifeline enrollments.

C. American Broadband Did Not Engage in Conduct Designed to Avoid De-Enrollment of Ineligible Lifeline Subscribers

The *NAL* charges that "the Company apparently, in violation of section 54.405(e)(1) of the Commission's rules, failed to de-enroll subscribers that it had a reasonable basis to believe were no longer qualifying low-income subscribers."[260] The factual assertions used to support this conclusion are misleading, as the facts do not support the nature and scope of the rule violations alleged. To the extent that American Broadband allegedly failed to subsequently identify and de-enroll remaining allegedly ineligible subscribers after its self-disclosure, such conduct was due to error and does not represent a willful violation of the Commission's rules.

i. Non-Usage

In the *NAL*, the FCC states that American Broadband sought Lifeline support for subscribers who had been identified as ineligible due to non-usage and continued to do so after it made its voluntary self-disclosure to the Commission about this issue.[261] The Commission frames the non-usage issue to give the perception that American Broadband was willfully acting in a manner intended to violate the rules. However, the evidence cited to support the two

[260] *NAL*, ¶ 100.

[261] *See id.*, ¶¶ 100, 155.

categories of non-usage claims referenced in the *NAL* do not provide the full context of each scenario and do not support the FCC's characterizations.

First, the *NAL* discusses **[BEGIN CONFIDENTIAL]** [redacted][262] [redacted][263] [redacted] **[END CONFIDENTIAL]** It is improper for the Commission to base its proposed forfeiture on statements in an email without attempting to ascertain the details surrounding it. Indeed, the FCC does not cite to **[BEGIN CONFIDENTIAL]** [redacted][264] [redacted]

[262] *See id.*, ¶¶ 102-04.

[263] *See id.*, ¶ 105, n. 260 ("We ran a query in American Broadband Subscriber Lists to match the account numbers listed in the Dec. 2014 Excel Worksheet to match the account numbers with the names of the actual subscribers.").

[264] *See* ABT-OIG00487774 **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**.

[redacted][265] **[END CONFIDENTIAL]** In any event, the FCC never sought data supporting the spreadsheet's accuracy, nor did it ask for an explanation of this non-usage issue from the Company. Instead, it made a number of misleading and incomplete findings in the *NAL* based on a single email. The FCC cannot base its findings of apparent violations on such incomplete information.

Second, the Commission focuses on the non-usage subscriber set that was part of the Company's self-disclosure. The FCC draws attention to the alleged presence of some subscribers that were identified as ineligible on the Company's Form 497 submissions for the August 2016 data month. In doing so, the FCC acknowledges in a footnote that a review of the Company's subscriber claims for September 2016 shows that "American Broadband did not continue to seek support for *any* of the identified ineligible non-usage subscribers."[266] August 2016 was the exact month American Broadband not only made its disclosure but also **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** It was a period of transition for the Company as it was actively identifying and de-enrolling identified subscribers for non-usage. The record clearly reflects the Company

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[265] *See* ABT-OIG00527131 **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**; *see also* Declaration of Jeffrey S. Ansted, attached hereto.

[266] *NAL*, ¶ 108, n. 265 (emphasis added).

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quickly identified the issues and de-enrolled such accounts without further prompting from the FCC. While the goal of the Lifeline rules undoubtedly is to help prevent the payment of subsidies for ineligible subscriber accounts, as discussed above, those rules do not require or expect perfect or error-free claims from ETCs. The very nature of a Form 497/LCS revision process serves as a recognition on the part of the FCC that the reimbursement process may involve some errors or mistakes.[267] The FCC's attempt to mischaracterize American Broadband's subscriber reimbursement claims on its Form 497 submissions for the August 2016 data month as willful misconduct by the Company is unsupported and should not serve as the basis for any proposed forfeiture.

ii. Benefit Transfers

The *NAL* claims that "between March 2014 through July 2016, American Broadband received thousands of benefit transfer notices from USAC" and never implemented policies and procedures to ensure proper resolution of the issues.[268] The *NAL* alleges that the Company received a number of emails from USAC/NLAD about customers who had transferred their benefit to another ETC but continued claim them.[269] The Commission's implication seems to be that the Company did not know or simply ignored its responsibility to resolve benefit transfers.[270] However, American Broadband has never asserted that it was unaware of the rules around benefit transfers. Rather, as referenced above, the Company has been forthcoming about

[267] *See* USAC Form 497 FAQ (noting that companies are allowed submit revisions).

[268] *NAL*, ¶ 158.

[269] *See id.*, ¶¶ 110-21.

[270] *See id.*, ¶ 122 ("[W]hether or not the Company had actual written procedures to handle benefit transfers, its management, including the Company's president, was aware, by at least April 2014, that it was responsible for resolving benefit transfers within its records.").

the fact that it inadvertently sought reimbursement for customers who transferred their benefit away from the Company. This is not a new revelation; one of the main issues self-disclosed by American Broadband concerns the fact that **[BEGIN CONFIDENTIAL]** [redacted][271] [redacted][272] [redacted][273] [redacted][274] [redacted]

[271] *See* ABT-OIG00000799.

[272] *See* ABT-OIG00000800.

[273] *See* ABT-OIG00000788.

[274] *See* ABT-OIG00000782–ABT-OIG00000787; ABT-OIG00000779–ABT-OIG00000781.

[redacted][275] **[END CONFIDENTIAL]** Once the company learned about its misunderstanding, it implemented new procedures to de-enroll benefit transfers. While American Broadband was mistaken about the effectiveness of its earlier policies and procedures, it is evident that it did not engage in willful conduct designed to avoid de-enrollment. In fact, the Company had already disclosed the benefit transfer issue, made significant restitution, and revised its benefit transfer processes before the *NAL* was even issued.

The evidence cited by the FCC in the *NAL* to support its apparent rule violation findings are unsupported. There is nothing to indicate that the Company willfully violated the rules of the Lifeline program. At every step, the facts demonstrate that American Broadband and its employees were sincere and diligent in their compliance efforts. American Broadband recognizes that, as a small company, there were some employees that had responsibilities for compliance issues that at times proved to be beyond their capacity and who failed to bring that to the attention of Company leadership. American Broadband has acknowledged deficiencies in some of its early Lifeline compliance policies and procedures, and has taken action to remedy its compliance approach and reimburse the USF for all overpayments. But the Commission's attempt to use isolated facts in the *NAL* to frame a misleading narrative about the Company's compliance activities is unsupported and cannot serve as the basis for the proposed forfeiture.

VI. PERSONAL LIABILITY AGAINST AMERICAN BROADBAND'S CHIEF EXECUTIVE OFFICER AND PRESIDENT IS INAPPROPRIATE

The Commission cannot impose personal liability on American Broadband's president and CEO, Mr. Ansted, as proposed in the *NAL*,[276] because the Commission does not have

[275] *See, e.g.*, ABT-OIG00486416; ABT-OIG00941907–ABT-OIG00941909.

[276] *NAL*, ¶¶ 168-172.

statutory authority to impose personal liability on an individual for the regulatory violations of a regulated entity; such action falls well-outside the scope of the Commission's jurisdiction and authority. Furthermore, Mr. Ansted did not willfully violate any regulation and the *NAL*'s speculative attempts to connect salacious descriptions of Mr. Ansted's personal expenditures to American Broadband are unavailing. In sum, there are at least two independent bases for rejecting the *NAL*'s findings relating to imposing personal liability on Mr. Ansted. The Commission, therefore, must decline to adopt the *NAL*'s recommendations with respect to imposing personal liability on Mr. Ansted.

A. The Commission Does Not Have Jurisdiction or Authority to Impose Personal Liability on Mr. Ansted, Individually, for American Broadband's Alleged Regulatory Violations

The Commission may not impose liability on individuals, personally, for the violations of regulated entities because the Commission has no general or specific jurisdiction over individuals in their personal capacity. While it cannot be disputed that the Commission has far-reaching powers, duties, and functions over regulated entities and their affiliates, such as "for the purpose of regulating interstate and foreign commerce in communication by wire and radio,"[277] the Commission's jurisdiction is not unlimited. The Commission "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress."[278] "The FCC, like other federal agencies, 'literally has no power to act . . . unless and until Congress confers power on it.'"[279] The Commission does not exercise general jurisdiction and

[277] 47 U.S.C. § 151.

[278] *Am. Library Ass'n v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)).

[279] *Id.* (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

does not have the authority to expand its own authority to permit it to pierce the corporate veil of regulated entities in order to impose forfeitures on owners, officers and employees of those regulated entities.

Federal courts repeatedly have affirmed that the outer boundary of any Commission action is necessarily set by statutory grants of authority from Congress. For example, in *Bais Yaakov*, the court stated that "[t]he FCC may only take action that Congress has *authorized*."[280] In *EchoStar Satellite*, the court admonished the Commission by stating that "we refuse to interpret ancillary authority as a proxy for omnibus powers limited only the FCC's creativity in linking its regulatory actions."[281] And in *Comcast*, the court cautioned the Commission by stating that "the allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer . . . Commission authority."[282] Further, specifically with respect to Lifeline regulatory authority, courts already have rejected unfettered Commission jurisdiction.[283]

The Commission can point to no Congressional authority that permits the Commission to exercise jurisdiction over Mr. Ansted, personally, under the circumstances of the *NAL*. Therefore, the Commission is without jurisdiction over Mr. Ansted, individually, and it may not

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[280] *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1082 (D.C. Cir. 2017) (emphasis in original).

[281] *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 999 (D.C. Cir. 2013).

[282] *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010) (quoting *National Ass'n of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 618 (D.C. Cir. 1976)).

[283] *See, e.g., Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 424 (5th Cir. 1999) ("[T]he FCC exceeded its jurisdiction when it imposed the 'no disconnect' rule. Because there is no express grant to statutory authority, a proper showing of 'impossibility,' or a persuasive explanation of how § 254 applies to intrastate service, we reverse, for want of agency jurisdiction.").

impose personal liability on Mr. Ansted for the alleged regulatory violations of American Broadband.

i. The *Telseven Forfeiture Order* Relied on Authority Relating Solely to Regulated and Affiliated Entities, Which Does Not Address the Commission's Jurisdiction Over Individuals, Personally

In concluding that that the Commission should "pierce the corporate veil" of American Broadband to impose liability on Mr. Ansted, personally, the *NAL* relies on the Commission's analysis from the *Telseven NAL* and *Telseven Forfeiture Order*.[284] But the *Telseven Forfeiture Order*'s conclusion that the Commission can pierce the corporate veil to reach an owner or officer of a regulated entity is legally erroneous, and applying the same analysis to Mr. Ansted in this *NAL* would be *ultra vires* and legally unjustified.

While it is undisputed that the Commission may pierce the corporate veil between regulatory and affiliated entities within a business enterprise to ensure that "the purpose of a statutory scheme or regulation" is not frustrated,[285] the *Telseven Forfeiture Order* steps beyond related entities to reach individuals, acting in their personal capacity, for the first time in the Commission's history. But none of the authority relied on by the Commission in *Telseven Forfeiture Order* justifies the Commission's actions. To the contrary, a review of the authority cited in the *Telseven Forfeiture Order* and the *Telseven NAL* demonstrates that the Commission's ability to disregard corporate formalities is limited to regulated and affiliated

[284] *NAL*, ¶ 169, n. 407 (citing *Telseven NAL*, adopted in *Telseven, LLC, Patrick B. Hines*, File No. EB-IHD-14-000149999, Forfeiture Order, 31 FCC Rcd 1629, ¶¶ 8-19 (2016) ("*Telseven Forfeiture Order*")).

[285] *See e.g., APCC Serv., Inc., Data Net Sys., LLC, Davel Commc'ns, Inc., Jaroth, Inc. D/B/A Pacific Telemanagement Servs., and Intera Commc'ns Corp. v. NetworkIP, LLC, and Network Enhanced Telecom, LLC*, File No. EB-003-MD-011, Memorandum and Order, 22 FCC Rcd 4286, ¶ 47 (2007) ("*APCC Order*") (compiling cases).

entities in a business enterprise – none of the authority in the Commission's *Telseven Forfeiture Order* and *Telseven NAL* supports the Commission's exercise of jurisdiction over individuals for the alleged violations of a regulated entity. In point of fact, there is no statutory grant for such authority and no case law to support the *NAL*'s recommendation against Mr. Ansted, personally. As demonstrated below, the law is clear: the Commission does not have jurisdiction to impose forfeiture liability on individual owners and officers for the regulatory violations of an entity. The Commission therefore must decline the *NAL*'s recommendation to impose individual, personal liability on Mr. Ansted for American Broadband's alleged regulatory violations.

a. The Case Law Cited in the *Telseven Forfeiture Order* Does Not Address Imposing Liability Over Individuals, Personally

The *Telseven Forfeiture Order* relies primarily on one case to justify imposing individual, personal liability: *Capital Telephone*,[286] a case which does not stand for the proposition that the Commission may impose personal liability for the actions of a regulated entity's conduct. In *Capital Telephone,* the court affirmed the Commission's disregard of the separate legal existence for two high-band radio license applicants where the two applications were submitted in overlapping markets. One applicant, Capital Telephone Co. ("Capital"), was a corporation that applied for a radio channel allocation, and the other applicant, Dr. Peter Bakal, was then-operating personally as a radio common carrier ("RCC") that had also applied for a radio channel allocation in the same metropolitan statistical area.[287] Dr. Bakal was also president

[286] *Telseven Forfeiture Order*, ¶ 8 (citing *Capital Tel. Co., Inc. v. FCC*, 498 F.2d 734 (D.C. Cir. 1974)); *see also Telseven NAL*, ¶ 29, n. 107, ¶ 31.

[287] *Applications of Pattersonville Tel. Co., Schenectady, N.Y., Dr. Peter A. Bakal, Schenectady, N.Y., Capital Tel. Co., Albany, N.Y., Boris and Anette F. Squire, dba Air Page, Troy, N.Y., For Construction Permits to Establish New And Modified Facilities in the Domestic Public Land Mobile Radio Serv.*, Memorandum Opinion and Order, 34 F.C.C. 2d 258, ¶ 2 (1972) ("*Capital Tel. Order*").

and owner of Capital,[288] and Capital operated through shared switchboards and operators with Dr. Bakal's RCC operations.[289] Even though the Commission recognized that Capital and Dr. Bakal "are legally different persons,"[290] in the course of the proceeding, "Capital [did] not challenge the fact that it and Bakal are essentially one applicant."[291] The Commission ultimately concluded that "[w]e are therefore piercing the corporate veil and considering the Bakal and Capital applications as a single application."[292]

The *Capital Telephone* case does not address imposing personal liability on owners and officers for alleged violations of a regulated entity, as the Commission concluded it did in the *Telseven Forfeiture Order*. To the contrary, in *Capital Telephone*, the Commission examined two entities that were each independently regulated by the Commission: an individual operating as an RCC and a separate corporate applicant. In other words, both were regulated by the Commission on their own. Furthermore, both entities voluntarily submitted to the jurisdiction of the Commission by applying for radio allocations, and the parties did not contest the Commission's treatment of the two entities as one for purposes of the applications. Thus, when the *Capital Telephone* court agreed that these two regulated legal persons may be disregarded

[288] *Id*., ¶¶ 3-4.

[289] *Applications of Pattersonville Tel. Co., Schenectady, N.Y., Dr. Peter A. Bakal, Schenectady, N.Y., Capital Tel. Co., Albany, N.Y., Boris and Anette F. Squire, dba Air Page, Troy, N.Y., For Constructions Permits to Establish New And Modified Facilities in the Domestic Public Land Mobile Radio Serv.*, Memorandum Opinion and Order, 35 F.C.C. 2d 745, ¶ 5 (1972) ("*Capital Tel. Order on Reconsideration*").

[290] *Capital Tel. Order*, ¶ 8.

[291] *Capital Tel. Order on Reconsideration*, ¶ 5.

[292] *Capital Tel. Order*, ¶ 8.

and treated as one regulated entity, the court's decision did not address imposing jurisdiction over an individual, personally, for the regulatory actions of another entity.

Remarkably, the Commission mostly ignores the circumstances of *Capital Telephone* in the *Telseven Forfeiture Order* and the *Telseven NAL*, and fails to identify the *Capital Telephone* court's limitation to regulated legal entities.[293] Instead, the Commission summarily concludes that "the United States Court of Appeals for the D.C. Circuit upheld the Commission's decision to pierce the corporate veil" – carefully omitting the regulatory circumstances under which the Circuit Court made its decision.[294] Further, the *Telseven Forfeiture Order* misconstrues the facts of *Capital Telephone* when it concludes that "the D.C. Circuit's decision in *Capital Telephone* upheld the Commission's decision to pierce the corporate veil between an individual and his wholly owned corporation."[295] That statement is misleading, at best, because the individual in *Capital Telephone* operated as an RCC separately from the entity involved, and both Capital and Dr. Bakal (through his RCC operations) voluntarily submitted to the Commission's jurisdiction by applying for licenses from the Commission.

In contrast, here, the only regulated entity involved in the allegations of the *NAL* is American Broadband. Mr. Ansted did not, and has not, operated as a regulated entity, personally, like Dr. Bakal did in *Capital Telephone*, and Mr. Ansted has not voluntarily submitted to the jurisdiction of the Commission through a license application like Dr. Bakal did in *Capital Telephone*. The *Capital Telephone* decision simply does not support the

[293] *Telseven Forfeiture Order*, ¶¶ 8-9, 14; *Telseven NAL*, ¶ 29.

[294] *Telseven NAL*, ¶ 29.

[295] *Telseven Forfeiture Order*, ¶ 8, n. 20, ¶ 14.

Commission's attempt to impose liability on owners and officers, personally, for the violations of regulated entities.

Attempting to bolster its flawed analysis about the Commission's jurisdiction, the *Telseven Forfeiture Order* and the *Telseven NAL* cite to a handful of cases that are all similarly inapposite to the Commission's attempt to exercise personal jurisdiction over individuals for the actions of a regulated entity.[296] For example, in the *Telseven Forfeiture Order*, the Commission cites to the *Improving Pub. Safety Order* to conclude that "[t]he Commission and the courts have long stated that, '[w]here the statutory purpose could . . . be easily frustrated through the use of separate . . . entities, the Commission is entitled to look through the corporate form and treat the separate entities as one and the same for purpose of regulation.'"[297] But that citation is incomplete and the *Improving Pub. Safety Order* does not address piercing corporate formalities to impose personal liabilities on individuals. Indeed, the very next sentence after the Commission's quote explains that the Commission's authority is limited to "affiliated entities": "We have treated affiliated entities collectively where necessary to ensure compliance with the Communications Act and the Commission policies and regulations."[298] And the Commission explained that limitation to affiliated entities later in the *Improving Pub. Safety Order*:

> In each of these situations the Commission examined facts unique to the particular relationships among the entities at issue to support a finding that they should be considered a single enterprise for a particular regulatory purpose. This inquiry is distinct from the standards for "piercing the corporate veil" or finding an "alter ego" under common law. . . . Although the presence of the factors supporting veil

[296] *Telseven Forfeiture Order*, ¶ 8, n. 20; *Telseven NAL*, ¶ 29, n. 106, ¶ 107.

[297] *Telseven Forfeiture Order*, ¶ 8, n. 20 (citing *Improving Pub. Safety Commc'ns in the 800 MHz Band, et al.*, Fifth Report and Order, Eleventh Report and Order, Sixth Report and Order, and Declaratory Ruling, 25 FCC Rcd 13874, ¶ 33 (2010) ("*Improving Pub. Safety Order*"); *General Tel. Co. of the S.W. v. United States*, 449 F.2d 846, 854 (5th Cir. 1971).

[298] *Improving Pub. Safety Order*, ¶ 33.

> piercing or an alter ego finding can also be relevant to determining enterprise liability, enterprise liability does not seek to make a parent corporation liable for the actions of its subsidiary, but rather recognizes in appropriate cases that the parent is liable for its *own* actions as part of the overall enterprise that it has created and operated.[299]

The *Improving Pub. Safety Order* plainly limits the Commission's "piercing" analysis to "affiliated entities" of regulated entities within an enterprise business structure;[300] the *Improving Pub. Safety Order* does not stand for a proposition that the Commission can impose personal liability on individual owners and officers of those entities.

The *Telseven Forfeiture Order* and the *Telseven NAL* also rely on the decision in the *Mansfield Journal Decision*,[301] which is similarly unavailing to the Commission's position in the *NAL*. In fact, the *Mansfield Journal Decision* expressly rebuts the Commission's conclusions about that decision by stating that, "[i]n the present situation the problem before the Commission is not whether the two newspaper companies constitute separate entities; it is rather a question of the probable conduct of the applicants as licensees."[302] In *Mansfield Journal*, The Lorain Journal Company, a local daily newspaper,[303] appealed a Commission decision's denial of an AM radio

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[299] *Id*., ¶ 34 (emphasis in original).

[300] The *Improving Pub. Safety Order*'s reference to *General Tel.* confirms that conclusion and confirms that the Commission's *Telseven Forfeiture Order* analysis was erroneous. In *General Tel.*, the court specifically limited the Commission's authority to pierce a corporate veil to common carrier affiliates: "the activities of the non-common carrier affiliates may be imputed to the common carrier parent." *General Tel.*, 449 F.2d at 855.

[301] *Telseven Forfeiture Order*, ¶ 8, n. 20 (citing *Mansfield Journal Co. (FM) v. FCC*, 180 F.2d 28, 37 (D.C. Cir. 1950) ("*Mansfield Journal Decision*")); *see also Telseven NAL*, ¶ 29, n. 107.

[302] *Mansfield Journal Decision*, 180 F.2d at 37.

[303] *Applications of Laurence W. Harry, trading as Fostoria Broadcasting Co., Fostoria, Oh., Mansfield Journal Co., Mansfield, Oh., The Lorain Journal Co., Lorain, Oh.*, Decision, 13 FCC 23, ¶ 22 (1948) ("*Mansfield Journal Order*").

station application.[304] Among other companies, Mr. Isadore Horvitz owned 99.6% of the shares of The Lorain Journal Company and also owned 99.6% of a daily newspaper in a neighboring town.[305] Mr. Horvitz was also president, treasurer, and director of both The Lorain Journal and Mansfield Journal.

Ultimately, the Commission denied The Lorain Journal's application based on allegations that the newspapers were engaged in antitrust and monopolist actions,[306] and because the Commission noted that The Lorain Journal and Mansfield Journal were "under common control and publish the only daily newspapers in Mansfield and Lorain, Ohio."[307] The common ownership consideration was important to the Commission because "[t]he Commission concluded . . . that diversification of control of the media of mass communication and the avoidance of monopoly of the avenues of communicating fact and opinion, were desirable."[308] The court in *Mansfield Journal Decision* subsequently affirmed the Commission's consideration of ownership in the context of determining whether "what had occurred in Mansfield was indicative of what might occur under similar circumstances in Lorain" in the context of The Lorain Journal's application.[309] Neither the court nor the Commission discussed "piercing the corporate veil" between the two entities or between the entities' 99.6% owner, personally, and the entities involved in the applications.

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[304] *Mansfield Journal Decision*, 180 F.2d at 31, 37.

[305] *Mansfield Journal Order*, ¶ 14.

[306] *Id*., ¶¶ 15-18.

[307] *Id*., ¶ 2 (Conclusions).

[308] *Id*.

[309] *Mansfield Journal Decision*, 180 F.2d at 37.

Again in contrast, and like the *Capital Telephone* case, the Commission in the *Mansfield Journal Decision* examined two entities that sought the regulatory approval of the Commission voluntarily through an application process; Mr. Ansted did not, and has not, operated as a regulated entity, personally. Further, there is no suggestion that the legal existence of The Lorain Journal and Mansfield Journal should be discarded, or that the Commission may "pierce the corporate veil" to exercise jurisdiction over Mr. Horowitz as 99.6% owner of both entities because of the alleged antitrust and monopolist actions of the two applicant entities. Indeed, the *Mansfield Journal Decision* court took pains to emphasize that it was not disregarding the corporate existence of those entities, stating that "[t]his is not to disregard the fact that the two newspaper companies conduct separate businesses."[310] The *Mansfield Journal Decision* plainly does not support any Commission authority to assert jurisdiction over, or impose personal liability on, individual owners and officers for the actions of a regulated entity.

The only other case law relied on by the Commission in the *Telseven Forfeiture Order* and the *Telseven NAL* similarly provides no respite for the Commission's attempt to impose jurisdiction over an individual, personally, for the actions of a regulated entity. In the *APCC Order*,[311] the Commission again only examined regulated and affiliated entities' liability—the Commission did not examine imposing liability on individuals, personally, for entities' regulatory violations. Furthermore, the *APCC Order,* in fact, expressly limits its piercing the corporate veil analysis to regulated and affiliated *entities* by stating that "the Commission may 'pierce the corporate veil' and hold one *entity* liable for the acts and omissions of a different

[310] *Id*.

[311] *Telseven Forfeiture Order*, ¶ 8, n. 20; *Telseven NAL*, ¶ 29, n. 106.

entity."[312] There is no discussion about imposing liability on individuals, personally, or on owners and officers of regulated entities. As a result, there is no authority in the *Telseven Forfeiture Order* for holding officers and owners liable for the actions of a regulated entity.[313] The Commission's expansion of its own jurisdiction to encompass individuals, personally, in the *Telseven Forfeiture Order* was *ultra vires* and legally unjustified. The Commission, therefore, cannot rely on the analysis and conclusions in its *Telseven Forfeiture Order* and *Telseven NAL* to support its recommendation in this *NAL*.

b. The Statutory References in the *Telseven Forfeiture Order* Do Not Address Imposing Liability Over Individuals, Personally

The *Telseven Forfeiture Order* and *Telseven NAL* also rely on a handful of statutory references to justify the Commission's imposition of forfeiture liability over individuals, personally. None support the Commission's *Telseven Forfeiture Order* conclusions about individual liability. For example, the *Telseven NAL* cites to Sections 251(e)(2) and 254(d) of the Communications Act,[314] and the *Telseven Forfeiture Order* also cites to Section 9(a)(1) of the Communications Act.[315] However, each of these references are expressly limited to "telecommunications carriers," and therefore do not encompass individual officers and owners personally. Section 251(e) and Section 254(d) are limited by their own terms to

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[312] *APCC Order*, ¶ 47 (citations omitted) (emphasis added).

[313] The *Telseven Forfeiture Order*, ¶ 8, n. 20, also cites to two additional cases, neither of which support the Commission's position. In *Transcontinental Gas Pipe Line Corp. v. FERC*, 998 F.2d 1313, 1321-22 (5th Cir. 1993), the court examined only regulated and affiliated entities, and in *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946), the Court examined a "parent" and "other corporations owned or controlled by the parent," *i.e.*, regulated and affiliated entities. Neither case addresses the Commission's jurisdiction over individuals employed by regulated entities.

[314] *Telseven NAL*, ¶ 31.

[315] *Telseven Forfeiture Order*, ¶ 11, n. 32.

"telecommunications carriers," which Congress statutorily defines as "a provider of telecommunications services."[316] And Section 9(a)(1) solely concerns "regulatory fees to recover the costs of . . . regulatory activities." It cannot seriously be asserted that Mr. Ansted, in his personal capacity as an officer and owner, provided "telecommunications services" as a "telecommunications carrier" and is required, personally, to assess and collect regulatory fees; plainly Sections 9(a)(1), 251(e) and 254(d) of the Telecommunications Act cannot be enforced against him in his personal capacity.

The *Telseven NAL* also selectively quotes Section 503(b)(1) of the Communications Act in support of its claimed statutory authority over individuals, stating that Section 503(b) provides that "'[a]ny person who is determined by the Commission . . . to have willfully or repeatedly failed to comply with any of the provisions of [the] Act or [Commission] rule . . . shall be liable . . . for a forfeiture penalty.'"[317] Pointedly omitted from the Commission's Section 503(b) reference is that statute's clear definition of "persons" as limited to a regulated entities or regulated individuals, not owners and officers of regulated entities. This is necessarily so because Section 503(b)(2) details the "persons" and activities subject to forfeiture Commission authority:

[316] 47 U.S.C. § 153(51). The entire statutory definition states that "[t]he term 'telecommunications carrier' means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage." *Id.*

[317] *Telseven NAL*, ¶ 31 (quoting 47 U.S.C. § 503(b)(1)).

- broadcast station licensees or permittees, cable television operators, or applicants of operator license, permit, certificate, or other instrument or authorization issued by the Commission;[318]

- common carriers or applicants for any common carrier license, permit, certificate, or other instrument of authorization issued by the Commission;[319] and

- manufacturers or service providers subject to the requirements of Section 255, 716, or 718.[320]

It cannot be disputed that Mr. Ansted, personally in his role as indirect beneficial owner and officer of American Broadband, does not fall into any of the categories contemplated by Section 503(b) of the Communications Act and, therefore, that Mr. Ansted, personally, does not fall within the definition of "persons" subject to the Commission's forfeiture authority.

In addition, the Commission itself has twice affirmed that "persons" in Section 503(b) concern regulated and affiliated entities, not individual officers or owners of those entities, personally. In the *Connellsville Broadcasters Order*, the Commission examined an Administrative Law Judge's decision to grant a radio license to Connellsville Broadcasters, Inc. ("Connellsville") while imposing a forfeiture and sanctions on Bernard Stern, an officer and stockholder of Connellsville.[321] In exceptions, Connellsville, Mr. Stern, and the Commission's Broadcast Bureau Chief argued that "such sanctions are clearly outside the statutory power of the

[318] 47 U.S.C. §§ 503(b)(2)(A), (b)(2)(C).

[319] 47 U.S.C. § 503(b)(2)(B).

[320] 47 U.S.C. § 503(b)(2)(F). The statutory references relate to, respectively, manufacturers of telecommunications equipment and providers of telecommunications services used by individuals with disabilities, manufacturers and providers of advanced communications services, and manufacturers and providers of equipment with Internet browsers. 47 U.S.C. §§ 255, 617, 619.

[321] *Application of Connellsville Broadcasters, Inc., Connellsville, Pa. For Renewal of License for Radio Station WCVI*, File No. BR-1550, Decision, 46 F.C.C. 2d 919, ¶ 1 (1974) ("*Connellsville Broadcasters Order*").

Commission action . . . and that such sanctions should be deleted from the Ordering Clauses of the Initial Decision." The Commission agreed, stating:

> We agree that the Judge was without authority to impose the sanctions described above. *Certainly there is no authority to assess a $5,000 forfeiture against Bernard Stern individually, because subsections (b)(1), (2), and (3) of Section 503 of the Communications Act of 1934, as amended, make clear that the liability for monetary forfeiture attaches to the licensee or permittee, not to an individual stockholder of officer of the licensee or permittee*.[322]

And again, in 2018, the Commission reaffirmed the *Connellsville Broadcasters Order* conclusion that the Commission may not impose Section 503(b) sanctions on officers and owners of regulated entities. In its *KSQA Order*, the Commission stated that:

> In *Connellsville Broadcasters*, the Commission determined that the Act makes clear that 'the liability for [a] monetary forfeiture attaches to the licensee or permittee, not to an individual stockholder or officer of the licensee.' We do not believe *Connellsville Broadcasters* is applicable here because we are not attempting to impose forfeiture liability to KSQA's three members. As stated in the *Forfeiture Order*, we have imposed forfeiture liability on KSQA.[323]

As a result, neither the text of Section 503(b) nor the Commission's decisions interpreting Section 503(b) support the *NAL*'s determination that an owner or officer of a regulated entity can be subject to Commission forfeitures personally. Furthermore, neither the *Telseven NAL* nor the *Telseven Forfeiture Order* raise any other authority for the *NAL*'s exercise of jurisdiction over an officer or owner of a regulated entity.[324]

In light of the lack of any statutory authority and the Commission's own conclusions that Section 503(b) of the Communications Act may not be used to impose individual forfeiture

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[322] *Id*., ¶ 3 (emphasis added).

[323] *KSQA, LLC, Licensee of Station, KSQA(DT), Topeka, Kansas*, Memorandum Opinion and Order, 33 FCC Rcd 226, ¶ 7 (2018) ("*KSQA Order*").

[324] The present *NAL* raises the same invalid statutory provisions in support of its forfeiture findings against Mr. Ansted personally. *NAL*, ¶ 172, n. 414, ¶ 173, n. 416.

liability over officers and owners of regulated entities, the *NAL*'s attempt to do so against Mr. Ansted is legally erroneous and disconcerting. The Commission's reliance on the *Telseven Forfeiture Order* and *Telseven NAL* to assert jurisdiction over Mr. Ansted, personally, is misplaced; the Commission cannot point to any authority to assess a forfeiture order against Mr. Ansted, personally, for the alleged violations in the *NAL*.[325]

Even aside from its misplaced reliance on sections of the Communications Act and the Telecommunications Act in the *Telseven Forfeiture Order*, no statutory authority exists for the Commission to impose liability over individuals, personally. For example, under the Commission's ancillary authority (which the Commission has never asserted in this context),[326] the Commission's statutory grant is limited to jurisdiction over regulated and affiliated entities within a business enterprise. The Commission may only invoke its ancillary authority "when two conditions are satisfied: (1) the Commission's general jurisdictional grant under Title I covers the regulated subject; and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[327] Both considerations are limited to regulated and affiliated entities, which ensures that the Commission's authority is not "unbounded."[328] As the *EchoStar Satellite* court explained: "Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron*

[325] *See Am. Library Ass'n*, 406 F.3d at 697.

[326] Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this act, as may be necessary in the execution of its functions." This provision is commonly known as the Commission's ancillary authority.

[327] *Am. Library Ass'n*, 406 F.3d at 691-92, 700.

[328] *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979).

and quite likely with the Constitution as well."[329] As a result, courts have made clear that, for the Commission to invoke its ancillary jurisdiction authority, the Commission must demonstrate that its actions are incidental to specifically delegated powers or implicit in Congressional policy statements.[330]

With respect to imposing forfeiture liability on individuals who are not operating in a regulatory capacity, no express or implied delegated authority has been given to the Commission to impute regulatory violations onto individuals, personally. As demonstrated above, neither the statutory references nor case law authority cited by the Commission to exercise such forfeiture powers support that Commission action. As a result, the *NAL*'s findings against Mr. Ansted, personally, are not supported by any valid statutory basis or case law. The Commission therefore must decline to adopt the *NAL*'s recommendation to impose personal liability against Mr. Ansted as contrary to law and *ultra vires*.[331]

[329] *EchoStar Satellite*, 704 F.3d at 999 (quoting *Ry. Labor Execs. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994)) (emphasis is original).

[330] *Comcast Corp. v. FCC*, 600 F. 3d 642, 653, 660 (D.C. Cir. 2010) (citing *National Ass'n of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976)).

[331] This is also the correct conclusion from a policy perspective. If the Commission had unfettered authority to enforce its regulatory directions against anyone regardless of whether or not the entity or individual was a regulated or affiliated entity, the Commission then would have jurisdiction over, as examples, a landlord who rented an apartment to an individual who used the apartment without his or her knowledge to transmit a pirate radio signal, or over light poles in the United States to ensure against ballast interference with mobile communications. Plainly such unfettered jurisdiction is not contemplated in the Commission's authorization statutes. And the Commission and courts have rejected this approach previously. *See, e.g., Ill. Citizens Comm. v. FCC*, 467 F.2d 1397, 1399-1400 (7th Cir. 1972) (rejecting Commission jurisdiction to regulate the size of the Sears Tower in Chicago to ensure adequate television signals).

ii. The Commission's Decisions Following the *Telseven Forfeiture Order* and in the Present *NAL* Likewise Fail to Justify the Commission's Attempt to Exercise Jurisdiction Over Individuals in Their Personal Capacity

Following the *Telseven Forfeiture Order* and culminating in this *NAL*, the Commission has repeatedly invoked its supposed "*Telseven Forfeiture Order*" powers to impose personal liability on individual officers and owners for the actions of regulated entities, relying heavily on the Commission's faulty legal analysis from the *Telseven Forfeiture Order*. As demonstrated above, the *Telseven Forfeiture Order* relies on no valid statutory basis or case law authority to support a Commission forfeiture order against individual owners or officers of regulated entities. The present *NAL* and Commission's decisions following the *Telseven Forfeiture Order* likewise fail to reference any valid statutory basis or legal authority for the Commission to exercise jurisdiction over individuals, personally, for the regulatory violations of an entity.

Aside from its faulty *Telseven Forfeiture Order* analysis, the *NAL* points to only one additional authority to support its forfeiture jurisdiction over Mr. Ansted, personally: the *Ernesto Bustos Forfeiture Order*.[332] In the *Ernesto Bustos Forfeiture Order*, the Commission issued a forfeiture order against Ernesto Bustos who was, individually, the licensee of a broadcast station at the time of the forfeiture order.[333] Specifically, the Commission found that Mr. Bustos was liable for Commission rule violations when the license was held by himself, personally, after a *pro forma* assignment to him from Catawba Broadcast, LLC ("Catawba"), an entity in which Mr. Bustos was the sole shareholder, and earlier violations when the license was

[332] *NAL*, ¶ 172 (citing *Ernest Bustos, Licensee of Station WTBL-CD Lenoir, North Carolina*, Forfeiture Order, 29 FCC Rcd 1898 (2014) ("*Ernesto Bustos Forfeiture Order*")).

[333] *Ernesto Bustos Forfeiture Order*, ¶ 5.

held by Catawba.[334] However, aside from the supposed "*Telseven Forfeiture Order*" powers debunked above, the Commission's *Ernesto Bustos Forfeiture Order* relies solely on one additional authority, cursorily pointing to the Commission's *Forfeiture Policy Statement*.[335]

But the Commission's reliance on the *Forfeiture Policy Statement* in the *Ernesto Bustos Forfeiture Order* is misplaced. The *Forfeiture Policy Statement* does not bestow upon the Commission any powers it does not already possess. In the *Forfeiture Policy Statement*, the Commission expressly lists the Section 503(b) "persons" subject to the Commission's forfeiture powers and tellingly omits any mention of owners, officers or employees of regulated entities.[336] Instead, the Commission explained in the *Forfeiture Policy Statement* that its forfeiture powers may include "persons and entities that are not licensees . . . *if engaged in an action for which a Commission license or other authorization is required*."[337] It cannot be disputed that Mr. Ansted, personally, did not have a license and was not engaged or acting in a capacity for which a Commission license or other authorization was required. In short, the Commission's imposition of a forfeiture on Mr. Bustos, who personally operated a broadcast license, and its

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[334] *Id*., ¶¶ 3-5 (further stating that Catawba Broadcast, LLC was the licensee through February 23, 2010, and that the violations occurred in the last two quarters of 2009 and all quarters of 2010).

[335] *Id*., ¶ 12 (citing *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) ("*Forfeiture Policy Statement*")).

[336] *Forfeiture Policy Statement*, Appendix C, ¶¶ 8-109.

[337] *Id*., ¶ 109 (emphasis added). The *Forfeiture Policy Statement* also states that those individuals would receive their own citation about the alleged regulatory violation and an opportunity to discuss the purported regulatory violations. *Id*. It is undisputed that Mr. Ansted: (1) did not receive a citation from the Commission explaining his individual regulatory violations or providing an opportunity to discuss; and (2) is not engaged, personally, in an action for which a Commission license or other authorization is required. The Commission's rules, at 47 C.F.R. § 1.80(d), likewise requires issuance of a citation before issuing a forfeiture to "persons" under Section 503(b). No citation was or could be issued to Mr. Ansted.

reference in the *Ernesto Bustos Forfeiture Order* to the Commission's *Forfeiture Policy Statement*, provide no support for the *NAL*'s recommendation to impose forfeiture liability over an owner or officer of a regulated entity for the entity's alleged regulatory violations.

Other Commission forfeiture actions following the *Telseven Forfeiture Order* likewise provide no support for the Commission's exercise of jurisdiction over individual owners and officers of regulated entities. For example, in the *Network Servs. Solutions NAL and Order*, the Commission held Scott Madison personally liable for the forfeitures proposed against his company, Network Services Solutions, LLC ("NSS"), for apparent violations of the Commission's rules, wire fraud, and submission of forged documents to the Commission.[338] In doing so, the Commission pointed *solely* to its legally-erroneous, supposed "*Telseven Forfeiture Order*" powers to find Mr. Madison personally liable for the actions of NSS, the regulated entity.[339]

Similarly, in the *Sandwich Isles NAL and Order*,[340] the Commission found Albert Hee personally liable as a sole shareholder-owner for the forfeitures proposed against Sandwich Islands Communications, Inc. ("SIC") and Waimana Enterprises, Inc. ("Waimana"), for violations of the high-cost support rules as well the resulting reimbursements to the USF.[341] In the *Sandwich Isles NAL and Order*, the Commission points to a near-verbatim footnote recitation

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[338] *Network Servs. Solutions NAL and Order*, ¶¶ 117-26.

[339] *Id.*, ¶ 118, n. 296.

[340] *Sandwich Isles Commc'ns, Inc., Waimana Enters., Inc., Albert S.N. Hee*, File No. EB-IHD-15-00019603, Notice of Apparent Liability for Forfeiture and Order, 31 FCC Rcd 12947 (2016) ("*Sandwich Isles NAL and Order*").

[341] *Id.*, ¶¶ 69-77 (further stating that Mr. Hee was sole shareholder of Waimana and that Waimana wholly owned SIC, entities in which Mr. Hee "served in numerous simultaneous positions").

of case law and authority from the *Telseven Forfeiture Order* to justify its supposed "*Telseven Forfeiture Order*" powers (which, as demonstrated above, are illusory)[342] and also points to the above-refuted *Ernesto Bustos Forfeiture Order*.

In addition, the *Sandwich Isles NAL and Order* again relies on just one additional authority to support the Commission's claim of jurisdiction over an individual, pointing to the *Telecable Corp. Decision*.[343] But the *Telecable Corp. Decision* solely involved the Commission's examination of three affiliated entities (none as individual owners or officers) alleged to have undertaken cable television construction "without receiving a certificate of public convenience and necessity pursuant to section 214 of the Communications Act and that such certification . . . is required."[344] The *Telecable Corp. Decision* includes no discussion about "piercing a corporate veil" to reach stockholder owners of the entities; instead, much like the *Improving Pub. Safety Order*, the *Telecable Corp. Decision* limits the Commission's "piercing" analysis to affiliates of regulated entities within an enterprise business structure. The *Sandwich Isles NAL and Order*'s reference to the *Telecable Corp. Decision* as justification to find Mr. Hee personally liable for regulated entities' violations is unsupported. That faulty conclusion, like the faulty conclusions in the *Network Servs. Solutions NAL and Order* and the *Sandwich Isles NAL and Order*, do not provide a sound legal basis for the Commission's recommendation on personal liability proposed in this *NAL*.

[342] *Id*., ¶ 70, n. 200, ¶ 201, ¶ 75, n. 220.

[343] *Id*., ¶ 70. n. 199 (citing *Petition by Telecable Corp. to Stay Construction or Operation of a CATV System in Bloomington and Normal, Ill., By G.T.&E. Communications, Inc.*, Decision, 19 FCC 2d 574, 587 (1969) ("*Telecable Corp. Decision*").

[344] *Telecable Corp. Decision*, ¶ 1.

More recent decisions likewise demonstrate that the Commission is unable to point to any valid authority to support its *ultra vires* action over individuals, personally, for the actions of a regulated entity. For example, in the *Abramovich NAL*, and aside from the erroneous "*Telseven Forfeiture Order*" powers and reliance on the *General Tel.* decision both discussed above,[345] the Commission relies on two appellate decisions discussing the concept of "piercing the corporate veil" generally unrelated to the Commission; neither decision provides any statutory or legal authority for the Commission to impose forfeiture liability for regulatory violations on owners and officers of regulated entities.[346]

In sum, there is no authority or jurisdiction, and the Commission has cited to none in this *NAL* or in its forfeiture orders against individual owners and officers, for the Commission to hold owners and officers liable for the actions of a regulated entity through a "piercing the corporate veil" analysis. As demonstrated, prior to the *Telseven Forfeiture Order*, each Commission decision and case law relied on by the Commission limited its analysis to regulated and affiliated entities or individuals operating as regulated entities, and the Commission's own *Forfeiture Policy Statement* confirms that approach. Furthermore, the Commission has never presented any

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[345] *See supra* Section VI.A.ii.; *see also General Tel.*, 449 F.2d at 855 (stating that "the activities of the non-common carrier affiliates may be imputed to the common carrier parent" without a discussion about individual owner and officer liability).

[346] *Abramovich NAL*, ¶ 27, n. 62 (citing *NLRB v. W. Dixie Enters., Inc.*, 190 F.3d 1191, 1194 (11th Cir. 1999) (finding the National Labor Review Board's statutory grant of jurisdiction is granted to the fullest extent possible under 29 U.S.C. § 160(a) and that the National Labor Review Board's finding of jurisdiction will only be overturned in "extraordinary circumstances")), ¶ 27, n. 63 (citing *Labadie v. Black*, 672 F.2d 92, 95 (D.C. Cir. 1982) (reversing district court decision to admit late evidence to determine if corporate formalities should be respected in a breach of contract action). The Commission does not have the same jurisdictional grant of authority as the National Labor Review Board and neither of these cases support statutory authority for the Commission to impose individual liability on owners and officers of regulated entities.

valid statutory or legal authority for the Commission to exercise such authority or jurisdiction over individuals, personally, even after the *Telseven Forfeiture Order*. In point of fact, the Commission can point to *no* valid statutory grant of authority for the Commission to impose forfeiture liability on owners and officers of regulated entities – a position the Commission twice confirmed, the last time in 2018.[347] As a result, if the Commission were to adopt the *NAL*'s recommendations against Mr. Ansted, the result would amount to a textbook case of reversible *ultra vires* action by the Commission.

iii. The Commission Lacks Jurisdiction to Enter a Forfeiture Order Against Mr. Ansted, Personally

If the Commission does proceed to impose forfeiture liability over Mr. Ansted as an individual indirect beneficial owner and officer of a regulated entity, that decision would almost certainly be reversed on appeal for lack of jurisdiction.[348] As the Supreme Court explained in *American Library*, the Commission may only act "if the intent of Congress is clear" or, if pursuant to express or implied delegation of authority, the Commission's statutory interpretation is reasonable.[349] In either case, the Commission may only act "when the agency acts pursuant to 'delegated authority.'"[350] Here, however, the Commission's orders and the *NAL* demonstrate that there is, in fact, *no* express or implied delegation of authority to the Commission to enforce its regulations against individual owners and officers of regulated entities. Unlike state courts,

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[347] *See KSQA Order*; *Connellsville Broadcasters Order*.

[348] Pursuant to 5 U.S.C. § 706(2)(C), a Commission decision to impose forfeiture liability over an individual for the actions of a regulated entity would be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

[349] *Am. Library Ass'n*, 406 F.3d at 1551 (citing *Chevron v. Nat'l Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

[350] *Id*. (citing *United States v. Mead Corp.*, 533 U.S. 218, 226 (2001)).

which are courts of general jurisdiction over individuals and entities that satisfy the U.S. Constitution's "minimum contacts" threshold,[351] and unlike federal courts that are authorized by the U.S. Congress to exercise specific jurisdiction over individuals and entities by specific statutory authority,[352] the Commission has no general jurisdiction or specific jurisdiction granted to it to impose forfeiture liability on individuals acting in a non-regulated capacity.

Furthermore, given the sheer breadth of jurisdiction assumed by the Commission's *NAL* over individuals based on any alleged "egregious" actions which would "defeat" a general regulatory Commission purpose,[353] the Commission's conclusion would not be entitled to any deference at all because it would be an "extraordinary case . . . [where] there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[354] Individual owners and officers represent an "extraordinary case" permitting little or no deference to the Commission's statutory interpretation because individuals operating in their corporate capacity

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[351] *See, e.g., Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984).

[352] *See, e.g.*, 28 U.S.C. § 1331 (authorizing federal court jurisdiction over federal law civil actions); 28 U.S.C. § 1332 (authorizing federal court jurisdiction over "citizens" (individuals and entities) of different states, subject to a minimum amount in dispute); 28 U.S.C. § 1367 (authorizing federal court jurisdiction for state law claims "that are so related" to federal law claims that they should be decided together).

[353] *See Telseven Forfeiture Order*, ¶13, n. 37. The *Telseven Forfeiture Order*'s limitation on the Commission's authority to only those cases that are "egregious" also does not diminish the breadth of the Commission's action because that limitation is unconstitutionally vague for failing to provide to owners and officers of regulated entities notice of what conduct precisely would subject them to the Commission's jurisdiction and forfeiture liability. *Fox Television*, 567 U.S. at 235 (finding a Commission standard unconstitutionally vague based on the standard that a law or regulation is vague where it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement") (citing *United States v. Williams*, 553 U. S. 285, 304 (2008)).

[354] *King v. Burwell*, -- U.S. --, 135 S. Ct. 2480, 2488 (2015) (citing *FDA v. Brown Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

typically maintain a privileged position: "individuals ordinarily are shielded from personal liability when they do business in a corporation form and . . . it should not lightly be inferred that Congress intended to disregard this shield."[355] For example, under other circumstances, courts "have refused to impute to Congress an intent to disregard the shield from personal liability which is one of the major purposes of doing business in a corporate form."[356] A court is certain to refuse to impute a Congressional intent here because the Commission is unable to point to *any* statutory or other authority granting specific jurisdiction to exercise regulatory authority over individuals operating in a non-regulatory capacity.

As demonstrated above, the Commission has cited no statutory provision (and none can be cited) in this *NAL* or in other orders that expressly or impliedly delegates to the Commission jurisdiction to hold officers and owners liable for the actions of regulated entities. At most, the *NAL* can only point its faulty analysis of "persons" in Section 503(b) of the Communications Act to assert jurisdiction. But, as stated above, no court has found officers and owners liable under that statute for the alleged regulatory violations of regulated entities, and the Commission has expressly twice rejected that approach to interpreting Section 503(b).[357] Therefore, because the *NAL*'s recommendation to impose individual liability against Mr. Ansted for the regulatory violations of American Broadband is without statutory or legal authority, the Commission is without jurisdiction to impose personal forfeiture liability on Mr. Ansted. The Commission

[355] *City Select Auto Sales Inc. v. David Randall Assocs.*, 885 F.3d 154, 159 (3d Cir. 2018) (additional citations omitted).

[356] *Combs v. Sun-Up Coal Co.*, 634 F. Supp. 13, 15 (D.C. Cir. 1985).

[357] *See KSQA Order*; *Connellsville Broadcasters Order*.

therefore must decline to adopt the *NAL*'s proposed forfeiture liability against Mr. Ansted, personally.

B. Even if the Commission Had Jurisdiction and Authority Over Mr. Ansted, Personally, None of the *Telseven Forfeiture Order* Factors Are Present

Even if the Commission were to claim jurisdiction and authority to impose personal liability over individual owners and officers for the actions of regulated entities (which it cannot lawfully do), the Commission may not pierce the corporate veil as against Mr. Ansted, personally, in this proceeding. The *NAL* contends that Mr. Ansted may be held personally liable pursuant to the conclusion in the *Telseven Forfeiture Order*, because "[t]he Commission may 'pierce the corporate veil' and hold one entity or individual liable for the acts or omissions of a different, related entity when: (1) there is a common identity of officers, directors or shareholders; (2) there is common control between the entities; and (3) it is necessary to preserve the integrity of the Commissions Act and to prevent the entities from defeating the purpose of statutory provisions."[358] Even if that were legally correct (which it is not), none of the *Telseven Forfeiture Order* factors are present in the facts presented in the *NAL*. As a result, no factual basis exists for accepting the *NAL*'s recommendation as to Mr. Ansted, personally.

i. No "Common Identity of Officers, Directors, or Shareholders" Exists Between Mr. Ansted, Personally, and American Broadband

The Commission points to no facts sufficient to demonstrate that Mr. Ansted has a common identity with American Broadband. In its findings on this *Telseven Forfeiture Order* factor, the *NAL* attempts to demonstrate Mr. Ansted's supposed "exclusive control of American Broadband in its business matters" and Mr. Ansted's status as "exclusive shareholder,"[359] but

[358] *NAL*, ¶ 169 (citing *Telseven Forfeiture Order*; *Telseven* NAL).

[359] *Id.*, ¶ 170 (citing *NAL*, Section II.B.1 (in its entirety)).

relies mostly on descriptions of actions taken by other members of "American Broadband's management" team to make its case against the company.[360] In the *NAL*, Mr. Ansted is described as "serv[ing] as American Broadband's president and CEO" and states that Mr. Ansted oversaw and signed American Broadband's FCC Form 497.[361] Those facts, even if true, are insufficient to demonstrate a "common identity" between Mr. Ansted, personally, and American Broadband.

Mr. Ansted does not maintain a "common identity" with American Broadband. In *Sabine Towing*, a decision relied on by the Commission in *Improving Pub. Safety Order* where it pierced the corporate veil of corporate entities in a regulated business enterprise,[362] the *Sabine Towing* court pointed to several non-dispositive factors to evaluate whether an entity is an alter ego of another entity or individual,[363] stating that, "[t]o find an alter ego relationship, the evidence must disclose a pattern of control or domination of a corporation by an individual or corporation, and that this domination was used to support a corporate fiction."[364] The Commission in the

[360] *Id*., Sections II.B, III.A-B.

[361] *Id*.

[362] *Improving Pub. Safety Order*, ¶34, n. 83 (citing *Sabine Towing & Transp. Co., Inc. v. Merit Ventures, Inc.*, 575 F. Supp. 1442, 1446-48 (E.D. Tex. 1983)).

[363] The *Sabine Towing* court was not examining the Commission's piercing the corporate veil as to an individual. Instead, the court in *Sabine Towing* examined an admiralty action seeking to pierce the corporate veil between a parent corporation and subsidiary corporation. 575 F. Supp. at 1443. As a result, the court's reference to "individual" says nothing about the Commission's jurisdiction or authority over individuals acting in a non-regulatory capacity.

[364] *Id.*, 1446 (citing *Bordagain Shipping Co. v. Saudi-Arabian Lines S.A.*, 1979 AMC 1058, 1072 (E.D. La. 1978)).

Telseven Forfeiture Order described the "common identity" analysis as looking to, *inter alia*, whether the individual was the regulated entity's "only manager and employee."[365]

The *NAL*'s factual findings fall short of raising facts sufficient to show that Mr. Ansted maintained a "common identity" with American Broadband or that Mr. Ansted exercised "domination" over American Broadband or its provision of Lifeline services. On the contrary, the *NAL* itself recites a myriad of facts demonstrating other individuals directed, managed, and supervised American Broadband's Lifeline activities, refuting the Commission's conclusions in the *NAL* about "common identity." The *NAL* details six "directors" at American Broadband, including **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**, Director of Sales and Marketing and Vice President of Operations at American Broadband, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**, Operations Manager responsible for Lifeline at American Broadband, and **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**,[366] Director of Sales and Marketing and Director of Wireless Sales and Compliance.[367]

With respect to those individuals, the *NAL* makes clear that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** provided the day-to-day and supervisory roles for American Broadband's Lifeline program; as a result, Mr. Ansted cannot be found to have exercised "domination" over American Broadband or its provision of Lifeline

[365] *Telseven Forfeiture Order*, ¶ 10 (stating that Mr. Hines "was Telseven's only manager and employee" in its "common identity" and "common control" analysis).

[366] To distinguish **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

[367] *NAL*, ¶ 16. Nothing in this response suggests or should be construed to suggest that any of these individuals should be held responsible or liable for any alleged violations of the Commission's rules by American Broadband.

services.[368] For example, in the role of managing American Broadband's master field agent agreements, the *NAL* is devoid of facts demonstrating Mr. Ansted exercised "domination" over master field agents' agreements. Instead, the *NAL* lays out in detail how **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** were responsible for American Broadband's master field agent agreements.[369] The *NAL* is likewise devoid of facts demonstrating that Mr. Ansted exercised "domination" over American Broadband's supervision of master field agents. Instead, the *NAL* details how those roles were filled by **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**.[370] The *NAL* also details how **[BEGIN CONFIDENTIAL]** [redacted]

[368] In addition to Lifeline services, American Broadband provides non-Lifeline services, including local and long-distance telephone service, dial-up and broadband internet access to residential and commercial customers located primarily in rural areas, and other resold wireless services. *Id*., ¶ 12.

[369] *Id*., ¶¶ 18-19, ¶ 22, nn. 47-57, ¶ 61-71 (discussing American Broadband's master agent agreements and discussing only **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**); *Id*., ¶ 87, n. 213-213 (describing **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** discussions with a new master agent).

[370] *Id*., ¶ 18, n. 51 (detailing directives from **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to a master field agent about accounts); *Id*., ¶ 20, n. 59-63 (detailing supervision of a master field agent by **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**); *Id*., ¶¶ 40-42, nn. 117-25 (emails to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** about potential agent compliance issues); *Id*., ¶¶ 44-47, ¶¶ 50-51, nn. 126-36, ¶ 138, ¶ 148-152 (emails to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** about potential agent compliance issues); *Id*., ¶¶ 64-70, ¶ 73, nn. 159-77 (emails to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** about potential agent compliance issues); *Id*., ¶ 74, nn. 180-84 (emails to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** about potential agent compliance issues); *Id.*, ¶¶ 80-81, nn. 192-94 (emails to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** about potential agent compliance issues); *Id*., ¶ 90, n. 222 (emails from **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** about agent inventory); *Id*., ¶¶ 94-95, nn. 234-40 (emails from **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to master agent about compliance).

[END CONFIDENTIAL] managed American Broadband's third-party vendor relationships relating to Lifeline enrollments,[371] how **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** supervised American Broadband's Lifeline compliance and its Compliance Manager, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**,[372] and how **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** discussed and created that audit position at American Broadband to monitor enrollment orders, and generate audit and duplicate-flag reports to be sent to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**.[373]

In contrast, the *NAL*'s factual findings with respect to Mr. Ansted's role in American Broadband are mostly limited to exactly what one would expect from a chief executive officer:

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[371] *Id*., ¶ 23, n.75 (detailing extensive communications between Murphy Consulting and **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**); *Id*., ¶ 102, nn. 252-54 (detailing communications between **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**.

[372] *Id*., ¶ 39, nn. 112-15 (referencing an email from **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** providing for a new position that would be responsible for audits and compliance and related emails); *Id*., ¶¶ 40-42, nn. 117-25 (emails to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** about potential agent compliance issues); *Id*., ¶¶ 44-47, 50-51, nn. 126-36, 138, 148-52 (emails to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** about potential agent compliance issues); *Id*., ¶¶ 64-70, 73, nn. 159-77 (emails to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** about potential agent compliance issues); *Id*., ¶ 74, nn. 180-84 (emails to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** about potential agent compliance issues); *Id*., ¶¶ 80-81, nn. 192-94 (emails to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** about potential agent compliance issues); *Id*., ¶¶ 94-95, nn. 234-40 (emails from **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to master agent about compliance).

[373] *Id*., ¶ 39, nn. 112-15 (referencing an email from **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** providing for a new position that would be responsible for audits and compliance and related emails); *Id*., ¶ 46, nn. 135-36 (email providing **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**).

general overall business strategy decisions and making major corporate decisions.[374] For example, the *NAL* describes how Mr. Ansted performed a high-level audit of agent enrollments, but then the *NAL* specifically states that he alerted **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** about the potential errors.[375] Similarly, the *NAL* describes how **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** notified Mr. Ansted about on-going audit results.[376] These exchanges confirm **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** roles in managing master field agents – not Mr. Ansted's "domination" over American Broadband.[377] Further, the *NAL* describes how Mr. Ansted identified a third-party vendor to be used to improve American Broadband's Lifeline enrollment process, but then the *NAL* states that it was **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** who managed that vendor.[378] And while Mr. Ansted had numerous interactions with American Broadband's management team, the *NAL* falls far short of

[374] *See, e.g., Chief Executive Officer - CEO*, Investopedia, https://www.investopedia.com/terms/c/ceo.asp (last visited Jan. 20, 2019).

[375] *NAL*, ¶ 20, n. 58; *see also id.*, ¶ 21, n. 61-63 (where **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** forwarded an email to Mr. Ansted in which **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**); *Id.*, ¶ 21, n. 64 (referencing an email about a master agent between **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**).

[376] *Id.*, ¶¶ 48, 140-145.

[377] Other factual references which include Mr. Ansted likewise confirm that other individuals managed and supervised American Broadband and American Broadband's provision of Lifeline services. *See, e.g., id.*, ¶ 20 (where **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** emailed Mr. Ansted **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** and discussion about a master agent); *Id.*, ¶¶ 91-96 (where **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** provide audit results and compliance issues about master agents to Mr. Ansted).

[378] *Id.*, ¶ 23, nn. 74-75, ¶ 25, nn. 79-81.

demonstrating that Mr. Ansted "dominated" American Broadband or American Broadband's provision of Lifeline services.

Furthermore, the mere fact that Mr. Ansted is a controlling shareholder,[379] or that Mr. Ansted "served as American Broadband's president and CEO"[380] is insufficient to demonstrate "domination" of American Broadband by Mr. Ansted sufficient to establish a "common identity." For example, the *Black Knight Asset* court rejected veil piercing where there was a failure to allege that the president and CEO "did anything outside of his role as President and CEO of the Company that would permit him to be held personally liable under the veil piercing or alter-ego theories."[381] Here, at most, the *NAL* alleges that Mr. Ansted operated in his role as president and CEO of American Broadband and failed to detect alleged rule violations with respect to American Broadband's provisioning of Lifeline supported service to low-income consumers. However, the *NAL* does specifically detail how Mr. Ansted did, in fact discover and cause American Broadband to self-report errors while taking steps to address and correct them.[382]

In addition, the mere fact that Mr. Ansted exercised a supervisory role at American Broadband fails to demonstrate "domination" sufficient to establish a "common identity"

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[379] The *NAL* incorrectly states that Jeffrey Ansted is the exclusive shareholder. *Id*., ¶ 170. That is incorrect; **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** is the sole shareholder.

[380] *Id*., ¶ 170.

[381] *Oliver v. Black Knight Asset Mgmt., LLC*, 812 F. Supp. 2d 2, 16 (D.C. Cir. 2001).

[382] *NAL*, ¶ 23 (where Mr. Ansted reviewed letters describing certain fraudulent and abusive practices and then directed American Broadband to employ a third-party software vendor to detect duplicates that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** then managed); *Id*., ¶¶ 26-30 (describing American Broadband's September 2016 letters to WCB about its discoveries).

between Mr. Ansted and American Broadband. In *Wakilpoor*, the court found that "mere employment in a supervisory capacity . . . is insufficient to make an individual liable for the corporation's breach."[383] Mr. Ansted's role as American Broadband's president and CEO is therefore insufficient alone to demonstrate that Mr. Ansted "dominated" American Broadband or its provision of Lifeline services. And as described in more detail below, the salacious descriptions concerning Mr. Ansted's personal expenditures are inaccurate and are therefore also insufficient to find that Mr. Ansted and American Broadband shared a "common identity."

The *NAL* does not raise facts sufficient to demonstrate that Mr. Ansted maintained a "common identity" with American Broadband. Unlike in the *Sabine Towing* court's description of "common identity," the *NAL* does not show that Mr. Ansted "dominated" American Broadband and American Broadband's provision of Lifeline services; in fact, the opposite is shown through extensive facts showing that the day-to-day and supervisory roles for American Broadband's Lifeline program were performed by other individuals. And the *NAL* presents facts that distinguish Mr. Ansted from the Commission's *Telseven Forfeiture Order* because Mr. Ansted was not the "only manager and employee" at the company. As a result, the *NAL*'s factual findings fall short of raising facts sufficient to show that Mr. Ansted maintained a "common identity" with American Broadband.

[383] *Wakilpoor v. Faruque (In re Faruque)*, No. 07-13375-SSM, 2009 Bank. LEXIS 3717, *17 2009 WL 3854941 (Bankr. E. D. Va. Nov. 17, 2009). The *Wakilpoor* court further recognized that "[t]here can be little doubt that a free-wheeling application of veil piercing would have a chilling effect upon corporate investors, thereby frustrating the fundamental economic policies that undergird the corporate scheme." *Id.* The Commission's analysis appears to be precisely the type of free-wheeling application that the court cautioned against.

ii. No "Common Control" Exists Between Mr. Ansted, Personally, and American Broadband

As to the second factor in the *Telseven Forfeiture Order* analysis, the *NAL* presents no facts to demonstrate that Mr. Ansted and American Broadband had "common control between the entities."[384] Common control is usually demonstrated through "[c]ommon or overlapping stock ownership" between two entities and "[c]ommon or overlapping directors and officers" between two entities – concepts that are obviously not applicable to an individual in his capacity as a corporate officer.[385] Instead, the *NAL* argues that American Broadband was Mr. Ansted's alter ego either because "he held sole signatory authority" over an American Broadband bank account that, *inter alia*, held Lifeline disbursements, or because Mr. Ansted allegedly transferred money out of that account within the same general timeframe as expending personal funds for himself and his family.[386] The *NAL*'s suppositions concerning these allegations are factually faulty and fail to justify any conclusion that American Broadband is Mr. Ansted's alter ego.

As to the *NAL*'s allegations about American Broadband's bank account, the allegations are inaccurate and the facts in the *NAL* are incomplete. The *NAL*'s factual description omits American Broadband's second bank account, which is fatal to the Commission's "common control" argument that Mr. Ansted used American Broadband as an alter ego. This is necessarily so because, to demonstrate that the Company was Mr. Ansted's alter ego, an undercapitalization

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[384] *NAL*, ¶ 169.

[385] *Sabine Towing*, 575 F. Supp. at 1446. The *NAL* expressly lists "common control" as a requirement, but presents only allegations that Mr. Ansted disregarded corporate formalities by treating American Broadband as his alter ego. *See NAL*, ¶ 171.

[386] *NAL*, ¶ 171.

of American Broadband is generally required;[387] the mere allegation that Mr. Ansted had "sole signatory authority" is insufficient.[388]

American Broadband was not undercapitalized. To the contrary, American Broadband operated at a profit through its provision of both non-Lifeline and Lifeline services. These profits were held, in part, in the bank account referenced in the *NAL*; however, a second American Broadband bank account – which is not referenced in the *NAL* – contained the debits, credits, and certain profits relating to the operation of American Broadband's Lifeline and non-Lifeline services, such as the non-Lifeline services that the *NAL* recognizes: local and long-distance telephone service, dial-up and broadband internet access to residential and commercial customers located primarily in rural area, and other resold wireless services.[389] As a result, both bank accounts held profits which could permissibly be distributed to Mr. Ansted as the Company's indirect beneficial sole shareholder. Indeed, as a matter of law, "dividends may be paid from profits or from net assets in excess of capital, but whatever the source of payment it is a return to the shareholders upon their investment."[390]

American Broadband's bank statements also confirm that the bank account referenced in the *NAL* held funds that were available for dividend distributions and did not solely contain

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[387] *See, e.g.*, *Sabine Towing*, 575 F. Supp. at 1448 (explaining that a failure to observe corporate formalities is one factor in determining if an entity is an alter ego); *see also Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 379-80 (7th Cir. 2008) (finding in a piercing the corporate veil analysis that "a court will find a corporation to be undercapitalized only when it has so little money that it could not and did not actually operate its nominal business as its own") (internal and additional citations omitted).

[388] *Plastic Film Corp. of Am., Inc. v. Unipac, Inc.*, 128 F. Supp. 2d 1143, 1147 (N.D. Ill. 2001) ("[T]he fact that a corporation has only one single shareholder is not proof that the corporation is the 'alter ego' of that shareholder.");

[389] *NAL*, ¶ 12.

[390] *Fulweiler v. Spruance*, 222 A.2d 555, 558 (Del. 1966).

Lifeline reimbursements from USAC.[391] Nor would it matter, as USAC disbursements represent reimbursements to American Broadband for Lifeline revenues foregone by providing discounted service during the prior month.[392] American Broadband's bank account statements plainly show that American Broadband held funds from non-Lifeline and Lifeline operations, and that the funds held in its bank accounts were available for operating expenses and dividend distributions.[393] Consequently, there can be no finding that American Broadband was undercapitalized or that American Broadband operated as Mr. Ansted's alter ego.

Likewise, there are no facts in the *NAL* to demonstrate that Mr. Ansted used Lifeline disbursements for personal and family purposes despite the *NAL*'s attempt to raise salacious connections between Mr. Ansted's use of his properly distributed dividends and the Company's receipt of Lifeline support.[394] For example, the *NAL* surmises that "Jeffery Ansted used money from the [so-called] Lifeline Deposit Account toward the purchase of an $8 million Cessna 525C jet"[395] and used that jet for personal and family purposes.[396] But the Cessna 525C jet referenced in the *NAL* was "titled and registered" under Glenmore-Tuscarauras Partners, LLC

[391] Exhibit N and O (Bank Statements), attached.

[392] 54 C.F.R. § 54.407(b).

[393] It is a fiction that USAC disbursements must be segregated from other revenues or that such funds exist in perpetuity as "Lifeline funds." Since USAC disbursements are paid *after* a Lifeline provider provides service, the provider *first* foregoes revenues associated with the Lifeline discount and incurs the operational expenses associated with a Lifeline customer. As a result, the Lifeline provider has no further obligations to do anything with the funds once they are reimbursed by USAC. Therefore, the *NAL*'s assertion that so-called "Lifeline funds" were used as dividend distributions to Mr. Ansted is legally and factually erroneous.

[394] *See NAL*, Section III.C.1.

[395] *Id*., ¶ 136.

[396] *Id*., ¶¶ 137-140.

("Glenmore"),[397] purchased after a proper dividend distribution to Mr. Ansted who then invested money in Glenmore. Glenmore is not Mr. Ansted's holding company, as alleged in the *NAL*; rather it is a company that provides flight services to American Broadband and other corporate entities as demonstrated by Glenmore's contractual commitments to provide flight services to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**.[398] Other *NAL* allegations concerning Mr. Ansted's use of his dividend distributions are similarly unavailing to the *NAL*'s argument that American Broadband was Mr. Ansted's alter ego.[399]

In addition, the *NAL*'s alter ego analysis falls short by failing to raise sufficient facts to demonstrate that American Broadband failed to adhere to corporate formalities.[400] In point of fact, the *NAL* fails to cite any facts to demonstrate that Mr. Ansted disregarded corporate formalities and treated American Broadband in a manner sufficient to find that the company is Mr. Ansted's alter ego. To the contrary, and as examples, American Broadband maintained corporate formalities by maintaining bylaws and regularly filing its annual franchise tax reports and the Company's annual reports, as required by Delaware law.[401] As a result, the *NAL* raises

[397] *Id*., ¶ 136, n. 346.

[398] Exhibit P, Q, and R (Flight Agreements), attached.

[399] After proper dividend distributions to Mr. Ansted, Mr. Ansted purchased a convertible Ferrari 458 Spider which was "titled and registered" under Mr. Ansted's name, not American Broadband's name. *NAL*, ¶ 135, n. 342. The Florida condominium is held in the name of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** and the golf and yacht club memberships, which are actually social memberships, were held in Mr. Ansted's name, and not in the name of American Broadband.

[400] *Sabine Towing*, 575 F. Supp. at 1448 (explaining that a failure to observe corporate formalities is one factor in determining if an entity is an alter ego).

[401] Exhibits S and T, attached.

no facts to show that Mr. Ansted did not respect the corporate formalities of American Broadband or that Mr. Ansted treated American Broadband as his alter ego. The Commission, therefore, cannot establish "common control" as the second factor in the *Telseven Forfeiture Order* analysis.

iii. Enforcing the *NAL* Against Mr. Ansted, Personally, Does Not "Prevent the Entities from Defeating the Purpose of the Statutory Provisions"

Lastly, under the Commission's *Telseven Forfeiture Order* analysis, the Commission states that it can impose personal liability on individuals if "it is necessary to preserve the integrity of the Communications Act and to prevent the entities from defeating the purposes of the statutory provisions."[402] In the *Telseven Forfeiture Order*, the Commission explains that this "test captures individuals similarly situated to Hines because that is who the test is designed to capture – egregious violators of the Act who create sham corporate forms to evade liability."[403] The Commission further explains that this factor examines when "a legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime."[404]

The Commission's *Telseven Forfeiture Order* analysis for this factor demonstrates that imposing personal liability against Mr. Ansted is inappropriate. First, Mr. Ansted is not similarly situated to Mr. Hines. The *Telseven Forfeiture Order* describes Mr. Hines as: "sharing common identity with and total control over Telseven," the sole owner of Telseven, "the sole director and

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[402] *NAL*, ¶ 169 (citing *Telseven NAL*; *Telseven Forfeiture Order*).

[403] *Telseven Forfeiture Order*, ¶ 13, n. 37 (citing applicant licensee character qualification decisions to state that there could be circumstances wherein an owner or officer will not be liable for the regulated entities regulatory violations, such as minor rule violations but stating "egregious violations such as those committed by Hines undoubtedly qualify").

[404] *Telseven Forfeiture Order*, ¶ 8 (citing *Capital Telephone*, 498 F.2d at 738).

officer of Telseven, "Telseven's only manager and employee," and the only person that "executed and signed all transactional documents on behalf of Telseven."[405] In contrast, Mr. Ansted does not share common identity and total control over American Broadband; rather, the *NAL* describes six "directors" at American Broadband that supervised, managed and directed American Broadband and its provision of Lifeline services,[406] and those directors executed transactional documents on behalf of American Broadband and actively managed the circumstances described in the *NAL*, as described above.

Second, the *NAL* does not allege facts sufficient to demonstrate that Mr. Ansted created American Broadband as a sham corporate form to evade liability. Instead, the *NAL* demonstrates that American Broadband was created to provide telecommunications services, including non-Lifeline local and long-distance telephone service, dial-up and broadband internet access to residential and commercial customers located primarily in rural areas, and resold wireless services.[407] American Broadband receives revenues from those non-Lifeline services and deposited those sums into a bank account that the *NAL* completely ignores in its analysis. Further, as demonstrated above, the facts presented in the *NAL* fail to demonstrate that Mr. Ansted did not respect corporate formalities with respect to American Broadband.[408]

Third, the *NAL* does not demonstrate that Mr. Ansted "egregiously" or willfully violated any of the Commission's rules or directed American Broadband to "egregiously" or willfully violate any of the Commission's rules. Tellingly, the regulatory rule violations described in the

[405] *Id.*, ¶ 10.

[406] *See supra* Section VI.B.i.

[407] *NAL*, ¶ 12.

[408] *See supra* Section VI.B.ii.

personal liability section of the *NAL* relate to American Broadband's alleged violations – not to regulatory violations of Mr. Ansted in his personal capacity. The *NAL* states that "we find that American Broadband apparently violated several sections of the Commission's rules."[409] But omitted from that statement is: (1) a finding that there is any specific rule that applies to Mr. Ansted separately or (2) a finding that Mr. Ansted violated any specific rule by his actions.[410]

Instead, the *NAL*'s personal liability findings against Mr. Ansted rest on its erroneous conclusion that Mr. Ansted misused so-called "Lifeline funds," which is impossible because USAC disbursements represent *reimbursements* for Lifeline revenues which American Broadband had forgone in the prior month.[411] The *NAL* concludes that liability should be imposed against Mr. Ansted by the Commission because "Jeffrey Ansted apparently used [American Broadband's Lifeline funds] not to provision Lifeline service but for his personal use."[412] But, nowhere in the *NAL* does the Commission describe how or to whom American Broadband failed to provide Lifeline supported services. Instead, the record demonstrates that American Broadband was fully capitalized and provided discounted Lifeline services before it received any USAC Lifeline disbursements reimbursing the Company for revenue foregone in the prior month. Hence, the Lifeline disbursements were used exactly as intended: to reimburse American Broadband for revenues foregone due to Lifeline discounts provided to subscribers in the prior month. American Broadband maintained excess funds available for profit dividend

[409] *NAL*, ¶ 172.

[410] The Commission's inability to point to a specific Commission rule as a source for liability against Mr. Ansted, personally, underscores the *ultra vires* nature of the action recommended in the *NAL*. *See supra* Section VI.A.

[411] 54 C.F.R. § 54.407(b).

[412] *NAL*, ¶ 172.

distributions based on Lifeline and non-Lifeline services that it operated profitably. The mere fact that Mr. Ansted received remuneration from funds held in American Broadband's bank accounts which included non-Lifeline and Lifeline-related revenues provides no basis whatsoever for the Commission to conclude that the circumstances of the *NAL* are "egregious."

In addition, Mr. Ansted's actions cannot be construed as "willful" violations of the Commission's rules sufficient to impose forfeiture liability. Section 503 of the Communications Act addresses forfeitures for violations, requiring that the Commission determine a person has "willfully or repeatedly failed to comply with any of the provisions of this chapter."[413] Courts have disagreed on what the willfully standard requires. Using the traditional definitions, courts have held that the willfully standard requires a "voluntary, intentional violation of a known legal duty."[414] Other courts have held that it is not necessary for a violator to know that he or she has violated a law, so long as the violator intentionally performed the act that constitutes a violation.[415]

Under either standard, the facts demonstrate that Mr. Ansted did not willfully violate the Commission's rules or direct American Broadband to willfully violate the Commission's rules. For example, the Commission alleges that Mr. Ansted filed a Form 497 that contained duplicates. But Mr. Ansted did not willfully commit the act of submitting duplicates on its Form 497, and Mr. Ansted's conduct makes that clear. The same applies to the allegations relating to Mr. Ansted's conduct both with respect to the extensive steps he has directed American

[413] 47 U.S.C. § 503(b)(1)(B).

[414] *U.S. v. Simpson*, 561 F.2d 53, 67 (7th Cir. 1977).

[415] *See U.S. v. Baxter*, 841 F. Supp. 2d 378, 393 (D. Me. 2012); *see also Amendment of Section 97.114 of the Amateur Radio Service Rules*, 59 Rad. Reg. 2d (P & F) 436, n. 1 (1985).

Broadband to take to prevent duplicates and his response when duplicates were discovered – including voluntarily deciding to disclose American Broadband's issues with the Commission – unambiguously show not only that Mr. Ansted did not intentionally file a Form 497 with duplicate accounts, but that he directed American Broadband to take reasonable steps to prevent filing for reimbursement for any duplicates in the first place.[416] The *NAL* therefore demonstrates that Mr. Ansted proactively took steps to protect the Lifeline program from fraud and abuse.

As a result, under the Commission's *Telseven Forfeiture Order* analysis, the circumstances of Mr. Ansted in this *NAL* do not rise to the "egregious" and willful level of involvement necessary under the Commission's flawed *Telseven Forfeiture Order* analysis to impose liability on Mr. Ansted, personally, for the regulatory violations of American Broadband.

Under these circumstances, the Commission should reject the flawed analysis of the *NAL* and decline to impose personal liability on Mr. Ansted for American Broadband's alleged regulatory violations. The Commission does not have statutory authority to impose personal liability on an individual for the regulatory violations of a regulated entity, Mr. Ansted did not willfully violate any regulation, and the *NAL*'s speculative attempts to connect salacious descriptions of Mr. Ansted's personal expenditures to American Broadband fail on factual and legal grounds. The Commission, therefore, must decline to adopt the *NAL*'s recommendations with respect to imposing personal liability on Mr. Ansted.

[416] *NAL*, ¶ 23 (where Mr. Ansted reviewed letters describing certain fraudulent and abusive practices and then directed American Broadband to employ a third-party software vendor to detect duplicates that **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** then managed); *Id.*, ¶¶ 26-30 (describing American Broadband's Sept. 2016 letters to WCB about its discoveries).

VII. THE COMMISSION'S PROPOSED FORFEITURE IS UNLAWFULLY EXCESSIVE

The unprecedented forfeiture proposed by the Commission in the *NAL* against American Broadband and Mr. Ansted is unlawfully excessive.[417] The Eighth Amendment to the Constitution contains a ban on "excessive fines," which applies to both civil and criminal penalties.[418] The Supreme Court has held that a punitive forfeiture violates a party's constitutional rights when "it is grossly disproportional to the gravity of a defendant's offense."[419] The disproportionality of the Commission's proposed forfeiture in the *NAL* is clear. The $63,463,500 proposed penalty is approximately *162 times larger* than the purported harm to the USF from the Company's claims for allegedly ineligible subscribers for the August 2016 data month, and is grossly disproportionate to both the gravity of the apparent violations and the Company's culpability.[420]

While the proposed forfeiture must be cancelled for these fundamental reasons, it also fails for the various ways in which it conflicts with the Communications Act and the Commission's related precedents. First, the Commission fails to identify and provide sufficient

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[417] *See FCC Proposes $63 Million Fine for Lifeline Violations*, FCC Press Release (Oct. 23, 2018) (stating the "proposed fine is the largest ever proposed for violations of rules governing carriers seeking to receive support from the federal Universal Service Fund").

[418] U.S. Const. amend. VIII; *Hudson v. United States*, 522 U.S. 93, 103 (1997). *See Duckworth v. United States*, 418 Fed. App'x 2, 4 (D.C. Cir. 2011) (applying Eighth Amendment protections to civil penalties); *Wright v. Riveland*, 219 F.3d 905, 914 (9th Cir. 2000) (stating that, if penalties authorized by statute "serve the purpose of retribution or deterrence, they are subject to Eighth Amendment scrutiny").

[419] *United States v. Bajakajian*, 524 U.S. 321, 334 (1998), *overturned on other grounds as stated in United States v. Jose*, 499 F.3d 105, 108-09 (1st Cir. 2007).

[420] Applying the $9.25 non-Tribal Lifeline discount to the 42,309 allegedly ineligible subscribers claimed by the Company on its Form 497 submissions for the August 2016 data month results in $391,358.25 in potential Lifeline reimbursements.

facts to demonstrate that each of the 42,309 subscribers ostensibly used as the basis for the proposed forfeiture was ineligible for Lifeline support. Second, the Commission fails to address the forfeiture adjustment criteria that it is obligated to consider, including the impact of the Company's voluntary self-disclosure of its unintentional receipt of USF overpayments and good faith efforts to comply with the Lifeline rules as well as its inability to pay the proposed fine. Finally, excessive penalties of the magnitude proposed in the *NAL* threaten the future viability of the Lifeline program by driving rational ETCs and investors from the marketplace. As a result, the Commission's excessive proposed forfeiture in the *NAL* should not be imposed on American Broadband or Mr. Ansted and should instead be cancelled.

A. The Commission Fails to Provide Sufficient Facts to Demonstrate that Each of the Subscribers Used as the Basis for the Proposed Forfeiture Was Ineligible for Lifeline Support

The Commission violated the Communications Act by failing to provide sufficient facts to support the proposed forfeiture in the *NAL*. Section 503(b)(4) of the Communications Act requires that the Commission "set forth the nature of the act or omission charged against such person and the facts upon which such charge is based" in an NAL.[421] The Commission based the proposed forfeiture in this *NAL* on "42,309 improper claims/subscribers for which American Broadband sought support in August 2016."[422] However, the *NAL* did not contain and the Commission never provided a list or other documentation identifying the specific allegedly ineligible subscribers that served as the basis for its proposed forfeiture in the *NAL*. In the *NAL*, the Commission stated that EB would "provide to American Broadband information on the

[421] 47 U.S.C. § 503(b)(4).

[422] *NAL*, ¶ 175.

charged subscribers/accounts."[423] But EB provided no such information to American Broadband when the *NAL* was released on October 25, 2018. The Commission therefore failed to provide American Broadband with the facts upon which it based the proposed forfeiture when issuing the *NAL*, in violation of the Communications Act.

The fact that, on October 31, 2018, EB sent American Broadband a CD containing certain subscriber information *nearly a week after* the *NAL*'s release on October 25, 2018, does not somehow cure the factual deficiencies in the *NAL*.[424] The Communications Act requires an NAL to contain sufficient information regarding the facts upon which the proposed forfeiture is based when it is adopted.[425] Nothing in Section 503(b)(4) suggests that the Commission can meet its evidentiary burden under the Communications Act through post-hoc disclosures.[426] Indeed, as Chairman Pai explained soon after assuming office, any "editorial privileges" granted to supplement or amend an NAL after it is approved by Commission vote "extend only to

[423] *Id.*, ¶ 61, n. 156.

[424] Although the Sixth Tolling Agreement does nothing to save the claims the Commission makes in the *NAL*, it appears that the *NAL* was rushed so that it could be released before the October 28, 2018 expiration of claims tolled in that agreement and that the work that needed to be done to compile the information on the CD could not be completed by the end of the Sixth Tolling Agreement's termination date. Obviously, if such conduct sufficed, there would be no reason ever to agree to a tolling agreement with the Commission, as its power to meet a deadline with a subsequent disclosure would be unlimited.

[425] 47 U.S.C. § 503(b)(4).

[426] The absence of the CD or the spreadsheets contained therein at the time the Commission adopted the *NAL* renders the proposed forfeiture arbitrary and capricious. The Commission adopted the *NAL* and proposed a spectacular and unprecedented forfeiture without identifying the specific subscribers who were alleged to have received Lifeline service for which they were ineligible – or who allegedly did not receive Lifeline service because the funds were – according to the Commission – diverted to Mr. Ansted for his personal use on items such as landscaping.

technical and conforming edits to items."[427] All substantive changes to an NAL post-adoption must be proposed by a Commissioner and "should only be made in cases in which they are required, pursuant to the Administrative Procedure Act, as a response to new arguments made in a Commissioner's dissenting statement."[428] Providing a CD with previously undisclosed subscriber data nearly a week after the *NAL*'s release does not represent a "technical and conforming" edit to the *NAL* – it is an ill-conceived and improper attempt to substantively supplement the Commission's enforcement action. Moreover, neither the *NAL* nor the CD from EB indicated that the subscriber data was provided at a Commissioner's direction or as part of a required response to a dissenting statement. The Commission therefore cannot rely on EB's overdue provision of the CD to ameliorate the *NAL*'s failure to provide sufficient facts supporting the basis for the proposed forfeiture. To allow otherwise would be to grant the Commission blanket authority to send "corrective" filings to enforcement targets long after the vote on an NAL to try and address any subsequently-discovered issues. The Communications Act and Commission policy prohibit such after-the-fact action to save an otherwise deficient NAL.

Even if EB's overdue provision of the CD to American Broadband could be considered part of the release of the *NAL*, the subscriber information provided still failed to satisfy the Communications Act's obligation to set forth sufficient facts to support the proposed forfeiture. As explained above in Section III, the CD sent by EB did not provide any key or other explanation of the data contained on the spreadsheets. The Company therefore expended

[427] *See* Statement of FCC Chairman Ajit Pai Announcing Process Reform Measure on "Editorial Privileges," FCC Statement (Feb. 9, 2017).

[428] *Id.*

significant time and resources analyzing the spreadsheets to determine their purpose. From the analysis, the spreadsheets appeared to contain the raw data for subscribers allegedly ineligible due to specific enrollment or de-enrollment issues highlighted in the *NAL*. The number of subscribers listed in the CD's spreadsheets exceeded the 42,309 allegedly ineligible subscribers that served as the basis for the proposed forfeiture in the *NAL*. Critically, the CD did not explain which of these subscribers were counted by the Commission as part of the proposed forfeiture calculation. Thus, EB failed to provide any list or other documentation showing the specific allegedly ineligible subscribers that served as the basis for the proposed forfeiture in the *NAL*. American Broadband therefore is unable to independently assess the validity of the Commission's alleged violations or its proposed forfeiture calculation methodology.

Through its deficient *NAL*, the Commission appears to be trying to inappropriately flip the burden of proof for FCC forfeiture actions. The Communications Act requires *the Commission* to provide sufficient facts to support its finding that 42,309 subscribers claimed for reimbursement by the Company on its August 2016 Form 497 submissions were ineligible for Lifeline support.[429] It is not American Broadband's responsibility to do the Commission's work for it and identify the relevant subscribers (whoever they may be) and prove that each qualified for Lifeline support. American Broadband remains willing to work with the Commission and USAC to restore overpayments to the USF for additional ineligible accounts not already included in its repayment plan.[430] However, the Company need not and will not blindly accept the

[429] 47 U.S.C. § 503(b)(4).

[430] As discussed above, American Broadband has attempted to revise the self-disclosure repayment amount based on the results of the independent audit, but WCB staff has yet to approve an adjusted payment plan. As a result, the Company continues to make payments under its current payment plan, which would result in **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** in overpayments to the USF when complete.

Commission's unsupported presumption that all of the 42,309 unidentified subscribers were ineligible for Lifeline support.

Finally, American Broadband again notes that the information that EB did provide to the Company suggests that the *NAL* improperly double-counted certain allegedly ineligible subscribers.[431] In particular, American Broadband's analysis of a sample of the raw subscriber data indicated that the Commission counted subscribers allegedly ineligible for both enrollment and de-enrollment issues more than once, artificially inflating the number of allegedly ineligible subscribers used as the basis for the proposed forfeiture in the *NAL*. As the Commission properly acknowledged in the *NAL*, an allegedly ineligible subscriber should not be counted twice for the purpose of a proposed forfeiture.[432] The Commission therefore must, at a minimum, reassess its proposed forfeiture calculation methodology to remove double-counted allegedly ineligible subscribers and accordingly reduce the proposed fine against American Broadband and Mr. Ansted.[433]

B. The Commission Failed to Consider the Required Forfeiture Adjustment Criteria

The Commission failed to address the forfeiture adjustment criteria that it is required to consider under the Communications Act, resulting in an excessive proposed forfeiture against

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[431] *See supra* Section III.C.

[432] *See NAL*, ¶ 175, n. 424 (purportedly removing subscribers that fell into both the enrollment and de-enrollment categories from its allegedly ineligible subscriber total).

[433] Because the Commission failed to identify a single ineligible subscriber upon which its forfeiture calculation is based, the multiplier used in the formula should be zero. To the extent the Commission believes that it has the ability to modify the *NAL* through EB's post hoc disclosure or considers any additional EB post-hoc disclosures, any reduction in the Commission's proposed forfeiture amount would result in a corresponding reduction in any upward forfeiture adjustment. *See NAL*, ¶ 176 (applying a 50% upward forfeiture adjustment); *supra* Section II.

American Broadband and Mr. Ansted. Before assessing a forfeiture, Section 503(b)(2) requires the Commission to "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."[434] To meet this statutory obligation, the Commission must consider specific forfeiture adjustment criteria before proposing a fine.[435] As examples, the Commission may make upward adjustments to proposed forfeitures based on: (1) egregious misconduct; (2) ability to pay; (3) intentional violations; (4) substantial harm; (5) prior violations of any FCC requirements; (6) substantial economic gain; and (7) repeated or continuous violations.[436] In contrast, the Commission may make downward adjustments to proposed forfeitures based on: (1) minor violations; (2) good faith compliance efforts or voluntary disclosures; (3) history of overall compliance; and (4) inability to pay.[437] The Commission explained that the goal of the forfeiture adjustment criteria is to promote uniformity and predictability in the imposition of penalties under the Communications Act.[438]

Here, the FCC recognized that it was required to consider the statutory factors and forfeiture adjustment criteria before proposing a penalty against American Broadband and Mr. Ansted in the *NAL*, but then failed to do so.[439] In past Lifeline actions, the Commission has

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[434] 47 U.S.C. § 503(b)(2).

[435] *See* 47 C.F.R. § 1.80, Section II, Adjustment Criteria for Section 503 Forfeitures; *Forfeiture Policy Statement*. *See, e.g., Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 233 (D.C. Cir. 2008) (holding that the Commission must consider all relevant factors).

[436] 47 C.F.R. § 1.80, Section II, Adjustment Criteria for Section 503 Forfeitures.

[437] *Id.*

[438] *Forfeiture Policy Statement*, ¶ 8.

[439] *NAL*, ¶ 173 (citing 47 U.S.C. § 503(b)(2); 47 C.F.R. § 1.80, Section II, Adjustment Criteria for Section 503 Forfeitures).

engaged in a detailed assessment of the relevant factors and criteria when crafting a proposed forfeiture.[440] Yet, in the *NAL*, the Commission only mentions one of the eleven forfeiture adjustment criteria – egregiousness – to support a 50% upward forfeiture adjustment in the *NAL*.[441] The FCC cites to no Commission precedent or other supporting case law for its egregious and unlawfully punitive application of the egregiousness upward forfeiture adjustment.[442] This is not surprising because the upward forfeiture adjustment for egregiousness normally is reserved for parties that show a complete disregard for public safety, Commission rules, or Commission authority.[443] American Broadband has not engaged in such misconduct. American Broadband's alleged violations did not undermine the safety of its Lifeline subscribers. In fact, as explained further below, excessive penalties of the magnitude proposed in the *NAL* threaten to harm low-income consumers by undercutting access to Lifeline providers. Moreover, as demonstrated above in Section V, American Broadband had policies and procedures in place to comply with the Commission's Lifeline rules – it did not completely disregard its compliance obligations, but instead took them seriously and took reasonable

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[440] *See, e.g.*, *VCI NAL* (assessing the company's culpability for the apparent violations and proposing a penalty based on the "delinquent carrier's culpability and the consequential damage it causes to the goal of universal service").

[441] *Id.*, ¶ 175.

[442] *See, e.g.*, *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 434 (2001) (stating that a punishment is unlawfully punitive when it is "grossly disproportional" to the gravity of the violation); *Collins v. SEC*, 736 F.3d 521, 526 (2013) (observing that a civil penalty is unlawfully punitive "if it is grossly disproportional to the gravity of the offense"); *United States v. Droganes*, 728 F.3d 580, 591 (6th Cir. 2013) (noting that a federal government "forfeiture order is considered unconstitutional if it is grossly disproportional to the gravity of a defendant's offense") (internal quotations omitted).

[443] *See Aura Holdings of Wis., Inc.*, File No. EB-SED-17-00024701, Notice of Apparent Liability for Forfeiture, 33 FCC Rcd 3688, ¶ 25 (2016); *Network Servs. Solutions NAL and Order*, ¶ 139; *Frabrice Polynice*, File No. EB-FIELDSCR-12-00004798, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 15079, ¶ 7 (2012).

measures to achieve compliance.[444] The Company also has been respectful of the Commission's authority by being forthcoming, responsive, and transparent at all times in addressing the repeated document and information requests from WCB, USAC, EB, and OIG during this investigation. Consequently, the Commission's proposed upward forfeiture adjustment for egregiousness in the *NAL* is unjustified.

The Commission also fails to explain why it did not address any of the other forfeiture adjustment criteria in the *NAL*. In particular, the Commission did not consider American Broadband's voluntary disclosure of its unintentional receipt of USF overpayments and its good faith efforts to comply with the Lifeline rules. The Commission has repeatedly reduced proposed forfeitures when a party proactively disclosed potential violations or when alleged violations occurred despite the party's robust compliance efforts.[445] The Commission recognized in the *NAL* that American Broadband proactively investigated and voluntarily self-disclosed its unintentional receipt of USF overpayments to WCB in August 2016.[446] The self-disclosure followed a number of remedial actions taken by the Company. In early June 2016, American Broadband began an internal review of its subscriber rolls after Mr. Ansted read letters sent from then-Commissioner Pai to USAC regarding potential waste, fraud, and abuse in the Lifeline program.[447] After the internal inquiry indicated potential issues with the Company's list of

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[444] *See supra* Section V.

[445] *See, e.g.*, *Wagenvoord Adver. Grp., Inc.*, File No. EB-FIELDSCR-12-00000481, Memorandum Opinion and Order, 29 FCC Rcd 12578, ¶ 8 (2014) (reducing proposed forfeiture by 20%); *Infinity Radio Operations, Inc.*, File No. EB-02-IH-0624-GC, Order on Review, 22 FCC Rcd 9824, ¶ 16 (2007) (reducing proposed forfeiture by 25%); *Capstar Radio Operating Co.*, File No. EB-02-LA-225, Forfeiture Order, 19 FCC Rcd 15374, ¶ 10 (2004) (reducing proposed forfeiture by 20%).

[446] *NAL*, ¶¶ 23-28. *See supra* Section I.B.

[447] May 25 LOI Response, 18.

active subscribers, American Broadband contracted with **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to assist with conducting analyses of its subscriber records.[448] Following **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** analysis, American Broadband disclosed to WCB the Company's identification of certain issues with its Lifeline compliance procedures that unintentionally led to overpayments from the USF.[449] While the Company's self-disclosure **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** it is clear from the record that American Broadband initiated its review and took corrective actions prior to **[BEGIN CONFIDENTIAL]** [redacted][450] **[END CONFIDENTIAL]** In addition, the Company had policies and procedures in place to comply with the Commission's Lifeline rules. Specifically, American Broadband adopted and continually revised its internal policies and procedures regarding Lifeline enrollment, de-enrollment, and reimbursement claims to improve compliance.[451] The misconduct by third-party sales agents used by the Company alleged in the *NAL* was wholly improper conduct that violated not only the Lifeline rules but also American Broadband's policies and procedures. As a result, to the extent that any apparent violations occurred related to American Broadband's Lifeline practices, such apparent violations occurred despite of, and not because of, the Company's good faith efforts to comply with the Lifeline rules. The Commission failed to properly assess American Broadband's culpability for the alleged violations in the *NAL*, which would have

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[448] *Id.*

[449] *See* Self-Disclosure Letter.

[450] *See NAL*, ¶ 23 (discussing American Broadband's internal investigatory efforts in June-August 2016).

[451] *See supra* Section I.B.

necessarily included consideration of the Company's voluntary self-disclosure and good faith efforts to the comply with the Lifeline rules.

The Commission also failed to consider American Broadband's inability to pay the proposed forfeiture in the *NAL*. Consistent with longstanding precedent, the Commission will significantly reduce a proposed forfeiture when it is clear from the record that a party cannot pay it.[452] Using an ill-conceived analysis that typically has little to no bearing on a party's actual ability to pay, the Commission generally will reduce an excessive proposed forfeiture to between 2-8% of an alleged violator's average annual gross revenues in response to an inability to pay claim.[453] The Commission is required to consider a party's financial condition before imposing a forfeiture. As Commissioner O'Rielly correctly noted, "summarily dismissing concerns about how a fine is calculated could give the appearance that preserving the proposed fine is worth more than setting it at a level that is fully justified and designed to achieve compliance with the rules."[454] Here, however, the proposed penalty appears to be more focused on grabbing headlines and putting a company out of business (notwithstanding that it has continued to provide Lifeline service and meet its compliance obligations throughout the course of the

[452] *See, e.g., Discussion Radio, Inc.*, File No. BR-19990603AAA, Memorandum Opinion and Order and Forfeiture Order, 24 FCC Rcd 2206, ¶ 4 (2009) (reducing proposed forfeiture by 92%); *C.W.H. Broad., Inc.*, File No. EB-01-OR-133, Forfeiture Order, 17 FCC Rcd 4548, ¶ 7 (2002) (reducing proposed forfeiture by 82%).

[453] *Lancaster Educ. Broad. Found.*, File No. EB-06-IH-5642, Forfeiture Order, 24 FCC Rcd 9013, ¶ 8 (2009). *See Hoosier Broad. Corp.*, File No. 98CG277, Memorandum Opinion and Order, 15 FCC Rcd 8640, ¶ 8 (2000); *PJB Commc'ns of Va., Inc.*, File No. 63500-89-10-JSG, Memorandum Opinion and Order, 7 FCC Rcd 2088, ¶ 7 (1992).

[454] *PTT Phone Cards, Inc.*, File No. EB-IHD-13-00011669, Forfeiture Order, 30 FCC Rcd 14701 (2015) (Statement of Commissioner Michael O'Rielly).

investigation) than improving Lifeline compliance.[455] During the course of this investigation, the Commission has received documentation and other information regarding the financial condition of American Broadband and Mr. Ansted. As the Commission is well aware, the $63,463,500 proposed penalty, which is approximately *162 times larger* than the purported harm to the USF from the Company's reimbursement claims for the August 2016 data month, far exceeds the inability to pay range established by FCC precedent for both American Broadband and Mr. Ansted.[456]

C. The Proposed Forfeiture Threatens the Future Viability of the Lifeline Program

The excessive forfeiture proposed by the Commission in the *NAL* threatens the future viability of the Lifeline program. Grossly excessive penalties of the magnitude proposed in the *NAL* will make it more difficult for American Broadband and other ETCs to attract the funding and investment necessary to provide Lifeline service. Moreover, the perpetuation of an

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[455] *See* "FCC Enforcement: Questionable Priorities & Wrong Directions," Remarks of Commissioner Michael O'Rielly Before the Federal Communications Bar Association (June 11, 2015) ("[T]he Commission seems more intent on obtaining newspaper headlines trumpeting accusations and eye-popping fines. In other words, self-aggrandizing fanfare is a major objective and often appears to be more important than case foundation, correcting the violation or establishing a reasonable deterrent."); *see also* Alex Byers, *FCC proposes millions in fines, collects $0*, Politico (Nov. 23, 3015) (noting that the Commission's repeated assessment of excessive fines drew Congressional scrutiny).

[456] As a result of the Commission's access to the financial information of the Company and Mr. Ansted, this *NAL* response does not include any additional financial documentation (*i.e.*, corporate or personal tax returns). *See Forfeiture Policy Statement*, ¶ 44 (acknowledging the burden and expense of documenting the inability to pay a forfeiture and noting the Commission's "flexibility to consider any documentation . . . that it considers probative, objective evidence of the violator's ability to pay a forfeiture"). American Broadband and Mr. Ansted reserve all rights to provide such additional financial documentation in support of the inability to pay claims, including in the event that the Department of Justice pursues a collection action under Section 504(a) of the Communications Act, which will result in a trial *de novo*. *See* 47 U.S.C. § 504(a).

irrational, inconsistent, and non-transparent selective approach to enforcement related to the Lifeline program serves as a strong deterrent to entry and program participation by new providers. The fact is that, while ETCs like American Broadband work strenuously to prevent compliance issues involving Lifeline enrollment, de-enrollment, and reimbursement claims, even the best compliance systems retain some risk of an unwitting violation given the ever-present risk of consumer fraud recognized by the Commission. Nevertheless, the Commission proposed a penalty in the *NAL* that is approximately *162 times larger* than the purported harm to the USF from the Company's subscriber reimbursement claims for the August 2016 data month. The harm represented by the Commission's proposed forfeiture vastly exceeds that of even an extraordinary deterrent. At virtually any volume of customers, the Commission's proposed forfeiture approach would result in a fine exceeding the total reimbursement from the Lifeline fund for an ETC's entire subscriber base. For example, an ETC with 25,000 non-Tribal subscribers would generate up to $231,250 in Lifeline reimbursements. If this ETC had an error rate of only 1% a month (*i.e.*, 99% are valid Lifeline enrollments), it would result in 250 ineligible subscribers and $2,312.50 in potential USF overpayments. But under the Commission's proposed forfeiture methodology in the *NAL*, the ETC would face a fine of $250,000, more than the total reimbursement it receives from USF for *all of its Lifeline subscribers*.

The extreme level of financial risk posed by the Commission's proposed forfeiture methodology in the *NAL*, if allowed to stand, would drive rational participants from the market – from carriers seeking to provide Lifeline service to low-income individuals to investors seeking to support those who provide such service. Under the Commission's proposed forfeiture methodology, every Lifeline service provider – especially smaller ones which continue to be the

focus of the Commission's Lifeline enforcement efforts – faces a significant and unmanageable risk of excessive fines based on their participation in the program. And while the Commission's proposed forfeiture methodology is clearly designed to penalize violators, the ultimate victims of excessive forfeitures against Lifeline providers 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 investment and financing freezes and providers exit the program in the face of unmanageable financial risks, Lifeline services will become less available, resulting in fewer choices for low-income consumers. Ultimately, as enough Lifeline ETCs 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, the Commission should not assess its excessive proposed forfeiture on American Broadband or Mr. Ansted and should instead shift toward a more constructive engagement with American Broadband designed to maintain a high level of compliance and the enrollment of more – not fewer – subscribers eligible for Lifeline service.

VIII. CONCLUSION

As demonstrated above, the Commission must cancel its proposed forfeiture against American Broadband and Mr. Ansted. The Commission based the proposed forfeiture on alleged conduct that occurred well outside of the one-year statute of limitations established in the Communications Act. The Commission also failed to provide American Broadband with sufficient notice of prohibited and required conduct and of the facts it used to assess the forfeiture, which is a violation of American Broadband and Mr. Ansted's due process rights. In addition, the Commission acted both outside of its authority and arbitrarily and capriciously by applying a strict liability standard to the Company's alleged conduct. And by repeatedly making

allegations that are either incorrect or misrepresentations of the facts, the Commission failed to establish that the Company's alleged conduct constitutes violations of the rules. Even if the Commission had properly applied the law and facts, it does not have the authority to impose personal liability on Mr. Ansted for the Company's alleged violations, and it did not establish that Mr. Ansted willfully violated the Commission's rules. In any event, the Commission's proposed forfeiture is unlawfully excessive and therefore cannot be maintained. Accordingly, the Commission should cancel the proposed forfeiture against American Broadband and Mr. Ansted and continue its efforts to develop reasonably effective controls for the Lifeline program through NLAD, the National Verifier, or further rulemaking proceedings.

Respectfully submitted,

AMERICAN BROADBAND &
TELECOMMUNICATIONS COMPANY

By: 

John J. Heitmann
Michael R. Dover
J. Bradford Currier
Avonne S. Bell
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Counsel to American Broadband & Telecommunications Company

February 8, 2019

REDACTED COPY

Exhibit A

Sixth Tolling Agreement

SIXTH TOLLING AGREEMENT

The Enforcement Bureau (Bureau) of the Federal Communications Commission (FCC or Commission) is investigating possible violations of the Commission's rules and orders governing the provision of Lifeline service, 47 CFR §§ 54.403, 54.404, 54.405, 54.407, 54.409, 54.410, 54.411, 54.413, 54.414, 54.416, 54.417, 54.419, 54.420, 54.422; *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656 (2012); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818 (2015); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962 (2016), in investigation EB-IHD-17-00023554 (Investigation), and receipt of support for low-income subscribers by American Broadband and Telecommunications Company (ABTC or the Company) as an Eligible Telecommunications Carrier (ETC) participating in the Low-Income Program of the Universal Service Fund (USF). Under federal law, as set forth in 47 U.S.C. § 503(b)(6), the statute of limitations for issuance of a Notice of Apparent Liability (NAL) for violations of the Act, Commission's rules, or both, by a non-broadcast licensee, is one year from the date on which the alleged violations occurred.

ABTC and the FCC wish to continue the production and review of materials regarding the facts surrounding the possible violations of the Lifeline rules listed above prior to the expiration of the limitations period set forth in 47 U.S.C. § 503(b)(6). ABTC has consulted with its attorney and understands its rights. Therefore, the FCC and ABTC agree as follows:

1. For purposes of calculating the statute of limitations, pursuant to 47 U.S.C. § 503(b)(6), the parties agree that any limitations period for the possible violations as set forth in the preamble of this Agreement shall be tolled from July 30, 2018, until and including either: (a) the release date of a Commission Notice of Apparent Liability for Forfeiture (NAL), consent decree, or order regarding the disposition of any of the possible violations as set forth in the preamble of this Agreement; (b) the date the FCC informs ABTC in writing that it has terminated the Investigation; or (c) October 28, 2018, whichever occurs first (Tolled Period). In the event that the FCC is officially closed on any day that is not a Saturday, Sunday, or an officially recognized Federal legal holiday (as described in the note to Section 1.4 of the Commission's rules)[1] during the Tolled Period, then the Tolled Period shall be extended by the same number of business days as the FCC is officially closed.

2. By agreeing to toll the statute of limitations, as described in Paragraph 1, ABTC understands that it is waiving, and hereby does waive, any right that it might otherwise have to rely on the Tolled Period in connection with the computation of the one-year period under 47 U.S.C. § 503(b)(6) as it applies to the Investigation of the possible violations as set forth in the preamble of this Agreement. ABTC agrees and acknowledges that, upon execution of this Agreement, this document shall have the same force and effect as any other Commission order, and any violation of the terms of this Agreement shall constitute a violation of a

[1] 47 CFR § 1.4.

Commission order, entitling the Commission to exercise any and all rights and to seek any and all remedies authorized by law for the enforcement of a Commission order.

3. No promises, representations, or inducements of any kind have been made to ABTC in connection with this Agreement.

4. By signing this Agreement, ABTC does not admit to any of the possible violations as set forth in the preamble of this Agreement or to any violation of the Lifeline rules. Nothing in this Agreement shall be construed to limit ABTC's ability or right to challenge any Commission action, including without limitation, an order or other document finding ABTC liable for the possible violations as set forth in the preamble of this Agreement or otherwise relating to ABTC's compliance with the Lifeline rules, other than the statute of limitations matters addressed in this Agreement.

5. Nothing in this Agreement has the effect of extending or reviving any limitations period that expired prior to the Tolled Period or that involves possible violations other than those set forth in the preamble of this Agreement.

6. By his signature below, John J. Heitmann represents and warrants that he is authorized to execute this Agreement on behalf of ABTC. No change in the ownership, corporate organization, partnership status, or control of ABTC shall alter the effect of this Agreement.

7. By his signature below, Rakesh Patel, FCC Enforcement Bureau, represents and warrants that he is authorized to execute this Agreement on behalf of the FCC.

8. This Agreement shall become effective and binding on the parties when it is signed and dated by both parties (the Effective Date).

9. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument. Scanned and/or electronic signatures shall be deemed to be original signatures and legally binding on the applicable party.

By: _____
Rakesh Patel
Director, USF Strike Force
Enforcement Bureau
Federal Communications Commission

Dated: 5/22/18

By: _____
John J. Heitmann
Legal Counsel to
American Broadband and
Telecommunications Company

Dated: 5/21/18

Exhibit B

First Tolling Agreement

TOLLING AGREEMENT

The Enforcement Bureau (Bureau) of the Federal Communications Commission (FCC or Commission) is investigating possible violations of the Commission's rules and orders governing the provision of Lifeline service, 47 CFR §§ 54.403, 54.404, 54.405, 54.407, 54.409, 54.410, 54.411, 54.413, 54.414, 54.416, 54.417, 54.419, 54.420, 54.422; *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656 (2012); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818 (2015); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962 (2016), in investigation EB-IHD-17-00023554 (Investigation), and receipt of support for low-income subscribers by American Broadband and Telecommunications Company (ABTC or the Company) as an Eligible Telecommunications Carrier (ETC) participating in the Low-Income Program of the Universal Service Fund (USF). Under federal law, as set forth in 47 U.S.C. § 503(b)(6), the statute of limitations for issuance of a Notice of Apparent Liability (NAL) for violations of the Act, Commission's rules, or both, by a non-broadcast licensee, is one year from the date on which the alleged violations occurred.

ABTC and the FCC would like to have the opportunity for the production and review of materials regarding the facts surrounding the possible violations of the Lifeline rules listed above prior to the expiration of the limitations period set forth in 47 U.S.C. § 503(b)(6). ABTC has consulted with its attorney and understands its rights. Therefore, the FCC and ABTC agree as follows:

1. For purposes of calculating the statute of limitations, pursuant to 47 U.S.C. § 503(b)(6), the parties agree that any limitations period for the possible violations as set forth in the preamble of this Agreement shall be tolled from May 5, 2017 until and including either: (a) the release date of a Commission Notice of Apparent Liability for Forfeiture (NAL), consent decree, or order regarding the disposition of any of the possible violations as set forth in the preamble of this Agreement; (b) the date the FCC informs ABTC in writing that it has terminated the Investigation; or (c) August 3, 2017, whichever occurs first (Tolled Period). In the event that the FCC is officially closed on any day that is not a Saturday, Sunday, or an officially recognized Federal legal holiday (as described in the note to Section 1.4 of the Commission's rules)[1] during the Tolled Period, then the Tolled Period shall be extended by the same number of business days as the FCC is officially closed.

2. By agreeing to toll the statute of limitations, as described in Paragraph 1, ABTC understands that it is waiving, and hereby does waive, any right that it might otherwise have to rely on the Tolled Period in connection with the computation of the one-year period under 47 U.S.C. § 503(b)(6) as it applies to the Investigation of the possible violations as set forth in the preamble of this Agreement. ABTC agrees and acknowledges that, upon execution of this Agreement, this document shall have the same force and effect as any other Commission order, and any violation of the terms of this Agreement shall constitute a violation of a

[1] 47 CFR § 1.4.

Commission order, entitling the Commission to exercise any and all rights and to seek any and all remedies authorized by law for the enforcement of a Commission order.

3. No promises, representations, or inducements of any kind have been made to ABTC in connection with this Agreement.

4. By signing this Agreement, ABTC does not admit to any of the possible violations as set forth in the preamble of this Agreement or to any violation of the Lifeline rules. Nothing in this Agreement shall be construed to limit ABTC's ability or right to challenge any Commission action, including without limitation, an order or other document finding ABTC liable for the possible violations as set forth in the preamble of this Agreement or otherwise relating to ABTC's compliance with the Lifeline rules, other than the statute of limitations matters addressed in this Agreement.

5. Nothing in this Agreement has the effect of extending or reviving any limitations period that expired prior to the Tolled Period or that involves possible violations other than those set forth in the preamble of this Agreement.

6. By his signature below, John J. Heitmann represents and warrants that he is authorized to execute this Agreement on behalf of ABTC. No change in the ownership, corporate organization, partnership status, or control of ABTC shall alter the effect of this Agreement.

7. By his signature below, Dangkhoa Nguyen, FCC Enforcement Bureau, represents and warrants that he is authorized to execute this Agreement on behalf of the FCC.

8. This Agreement shall become effective and binding on the parties when it is signed and dated by both parties (the Effective Date).

9. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument. Scanned and/or electronic signatures shall be deemed to be original signatures and legally binding on the applicable party.

By: _____
Dangkhoa Nguyen
Investigative Counsel
Enforcement Bureau
Federal Communications Commission

Dated: 5/16/17

By: _____
John J. Heitmann
Legal Counsel to
American Broadband and
Telecommunications Company

Dated: 5/16/17

Exhibit C

Email from Dangkhoa Nguyen to John Heitmann (Aug. 3, 2017)

Grad, Harrison C.

From: Dangkhoa Nguyen <Dangkhoa.Nguyen@fcc.gov>
Sent: Thursday, August 03, 2017 1:44 PM
To: Heitmann, John
Cc: Currier, J. Bradford; Lorenzo, Marisa A.; Bell, Avonne; David Sobotkin; Rakesh Patel; Loyaan Egal; Pensyl, Meghan
Subject: RE: American Broadband Letter of Inquiry

John,

I wanted to follow up with you regarding the LOI productions in this matter. First, regarding the independent audit, has the audit been completed? If not, please provide us with an update of when you now expect it to be completed and produced to the Commission.

Second, I would like to clarify whether ABTC is categorically relying upon its responses and productions to the OIG and to USAC to satisfy its responses to the LOI. Based upon our telephone call on May 5, 2017, it was my understanding, and I had proceeded on the belief, that the OIG and USAC productions were to categorically satisfy the LOI's requests in order to save resources by avoiding to have your client provide a second, complete production of documents to the Bureau. However, you stated, for example, in ABTC's first production, dated May 25, 2017, that, "[w]here ABTC previously produced documents to OIG and USAC responsive to the LOI, it provided associated Bates number." This limitation also appears in subsequent LOI production letters dated June 8 and June 22. This sentence suggests that ABTC's productions in response to the LOI are limited to only those OIG and USAC documents specifically referenced by Bates number in ABTC's LOI responses. To avoid any confusion, I want to make it clear that the OIG and USAC productions categorically cover ABTC's LOI response, and its LOI production is not limited to only the Bates numbered documents cited in the company's LOI responses dated May 25, June 8, June 22, and the email below dated July 21, 2017.

However, if ABTC intended that its productions to the OIG and USAC are only responsive to the LOI through specifically cited Bates number documents, then the Bureau views ABTC's production to be incomplete. For instance, the LOI requested the production of all communications regarding ABTC's erroneous claims of USF funds but to date no documents have been produced to the Bureau or specifically referenced by Bates number in the LOI responses. If the OIG and USAC productions are limited to only specifically referenced documents, the Bureau will require ABTC to make full, separate productions to the Bureau to satisfy the LOI.

I believe that today is the expiration of the tolling agreement executed on May 16, 2017, in this matter. Because of the apparent delay of the ABTC's audit and LOI productions, and to clarify and resolve any possible issues with the OIG and USAC productions provided in response to the LOI, I would propose that a second tolling agreement be executed for another 90 day period effective from today's date, the expiration of the existing tolling agreement. Please let me know if this is agreeable to you and ABTC.

Best,
Khoa

From: Bell, Avonne [mailto:ABell@KelleyDrye.com]
Sent: Friday, July 21, 2017 10:35 AM
To: Dangkhoa Nguyen ; David Sobotkin ; Rakesh Patel ; Loyaan Egal
Cc: Heitmann, John ; Currier, J. Bradford ; Lorenzo, Marisa A. ; Pensyl, Meghan
Subject: American Broadband Letter of Inquiry

Khoa,

On June 22, 2017, American Broadband and Telecommunications Company ("ABTC") submitted its third set of objections and responses to the Enforcement Bureau's ("EB") April 25, 2017 Letter of Inquiry ("LOI") which included a response to LOI Request 46. ABTC's response to LOI Request 46 referred EB to the original Form 497 subscriber lists provided in response to the OIG Subpoena Duces Tecum on June 21, 2017 labeled ABT-OIG00152112 – ABT-OIG00152213. On July 17, 2017, ABTC made a supplemental production to OIG that contains customer lists from the Company's Form 497 filings from August 2016 through December 2016. The production includes customer lists corresponding to the original 497 filings labeled ABT-OIG00529405 – ABT-OIG00529409 as well as customer lists corresponding to some revised Form 497 filings labeled ABT-OIG00529410 – ABT-OIG00529412. Please note that ABT-OIG00529409 only contains the original filing lists for those states with downward revisions, the original lists for those states without downward revisions for November 2016 can be found at ABT-OIG00529412.

This is a courtesy notice of the availability of these additional documents which are also responsive to the LOI.

Please let us know if you have any questions.

Best,
Avonne

AVONNE BELL*
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(202) 342-8503
abell@kelleydrye.com

WWW.KELLEYDRYE.COM

*Admitted only in MD. Supervised by principals of the firm who are members of the DC bar.

Exhibit D

Email from John Heitmann to Dangkhoa Nguyen (Aug. 3, 2017)

Grad, Harrison C.

From: Heitmann, John
Sent: Thursday, August 03, 2017 6:37 PM
To: 'Dangkhoa Nguyen'
Cc: Currier, J. Bradford; Lorenzo, Marisa A.; Bell, Avonne; David Sobotkin; Rakesh Patel; Loyaan Egal; Pensyl, Meghan
Subject: RE: American Broadband Letter of Inquiry

Hi Khoa,

Why don't we set up a call to discuss early next week? I am available Monday or Tuesday afternoon.

Subject to check with our client, we are amenable to your proposal for a second tolling agreement that would begin effective today's date, August 3, 2017 and run for a 90 day period.

Best,
John

JOHN HEITMANN
Chair, Communications Law Group
Kelley Drye & Warren LLP
Office: (202) 342-8544
Mobile: (703) 887-9920
jheitmann@kelleydrye.com

From: Dangkhoa Nguyen [mailto:Dangkhoa.Nguyen@fcc.gov]
Sent: Thursday, August 03, 2017 1:44 PM
To: Heitmann, John
Cc: Currier, J. Bradford ; Lorenzo, Marisa A. ; Bell, Avonne ; David Sobotkin ; Rakesh Patel ; Loyaan Egal ; Pensyl, Meghan
Subject: RE: American Broadband Letter of Inquiry

John,

I wanted to follow up with you regarding the LOI productions in this matter. First, regarding the independent audit, has the audit been completed? If not, please provide us with an update of when you now expect it to be completed and produced to the Commission.

Second, I would like to clarify whether ABTC is categorically relying upon its responses and productions to the OIG and to USAC to satisfy its responses to the LOI. Based upon our telephone call on May 5, 2017, it was my understanding, and I had proceeded on the belief, that the OIG and USAC productions were to categorically satisfy the LOI's requests in order to save resources by avoiding to have your client provide a second, complete production of documents to the Bureau. However, you stated, for example, in ABTC's first production, dated May 25, 2017, that, "[w]here ABTC previously produced documents to OIG and USAC responsive to the LOI, it provided associated Bates number." This limitation also appears in subsequent LOI production letters dated June 8 and June 22. This sentence suggests that ABTC's productions in response to the LOI are limited to only those OIG and USAC documents specifically referenced by Bates number in ABTC's LOI responses. To avoid any confusion, I want to make it clear that the OIG and USAC productions categorically cover ABTC's LOI response, and its LOI production is not limited to only the Bates numbered documents cited in the company's LOI responses dated May 25, June 8, June 22, and the email below dated July 21, 2017.

However, if ABTC intended that its productions to the OIG and USAC are only responsive to the LOI through specifically cited Bates number documents, then the Bureau views ABTC's production to be incomplete. For instance, the LOI requested the production of all communications regarding ABTC's erroneous claims of USF funds but to date no documents have been produced to the Bureau or specifically referenced by Bates number in the LOI responses. If the OIG and USAC productions are limited to only specifically referenced documents, the Bureau will require ABTC to make full, separate productions to the Bureau to satisfy the LOI.

I believe that today is the expiration of the tolling agreement executed on May 16, 2017, in this matter. Because of the apparent delay of the ABTC's audit and LOI productions, and to clarify and resolve any possible issues with the OIG and USAC productions provided in response to the LOI, I would propose that a second tolling agreement be executed for another 90 day period effective from today's date, the expiration of the existing tolling agreement. Please let me know if this is agreeable to you and ABTC.

Best,
Khoa

From: Bell, Avonne [mailto:ABell@KelleyDrye.com]
Sent: Friday, July 21, 2017 10:35 AM
To: Dangkhoa Nguyen <Dangkhoa.Nguyen@fcc.gov>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>
Cc: Heitmann, John <JHeitmann@KelleyDrye.com>; Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Pensyl, Meghan <MPensyl@KelleyDrye.com>
Subject: American Broadband Letter of Inquiry

Khoa,

On June 22, 2017, American Broadband and Telecommunications Company ("ABTC") submitted its third set of objections and responses to the Enforcement Bureau's ("EB") April 25, 2017 Letter of Inquiry ("LOI") which included a response to LOI Request 46. ABTC's response to LOI Request 46 referred EB to the original Form 497 subscriber lists provided in response to the OIG Subpoena Duces Tecum on June 21, 2017 labeled ABT-OIG00152112 – ABT-OIG00152213. On July 17, 2017, ABTC made a supplemental production to OIG that contains customer lists from the Company's Form 497 filings from August 2016 through December 2016. The production includes customer lists corresponding to the original 497 filings labeled ABT-OIG00529405 – ABT-OIG00529409 as well as customer lists corresponding to some revised Form 497 filings labeled ABT-OIG00529410 – ABT-OIG00529412. Please note that ABT-OIG00529409 only contains the original filing lists for those states with downward revisions, the original lists for those states without downward revisions for November 2016 can be found at ABT-OIG00529412.

This is a courtesy notice of the availability of these additional documents which are also responsive to the LOI.

Please let us know if you have any questions.

Best,
Avonne

AVONNE BELL*

Associate
Kelley Drye & Warren LLP
3050 K Street NW, Suite 400
Washington, DC 20007
(202) 342-8503
abell@kelleydrye.com

WWW.KELLEYDRYE.COM

*Admitted only in MD. Supervised by principals of the firm who are members of the DC bar.

Exhibit E

Email from Dangkhoa Nguyen to John Heitmann (Aug. 10, 2017)

Grad, Harrison C.

From: Dangkhoa Nguyen <Dangkhoa.Nguyen@fcc.gov>
Sent: Thursday, August 10, 2017 1:28 PM
To: Heitmann, John
Cc: Currier, J. Bradford; Lorenzo, Marisa A.; Bell, Avonne; David Sobotkin; Rakesh Patel; Loyaan Egal; Pensyl, Meghan; MaryBeth DeLuca
Subject: RE: American Broadband Letter of Inquiry
Attachments: AB Draft 2nd TA 8.10.2017.docx

John,

As we discussed on Monday, please find attached a draft tolling agreement extension for your review. The attached draft is nearly identical to the original tolling agreement executed on May 16, 2017, except for the following revisions.

The first sentence of the second paragraph was revised to reflect the extension of the first tolling agreement.

Also, in the third paragraph (paragraph #1), the tolled period was revised to reflect an expiration on or before October 22, 2017, which I calculate to be 90 days from August 3.

If the proposed tolling agreement is acceptable to you, please execute and return a scanned copy of the tolling agreement to me for counter signing. Otherwise, please contact me should you wish to discuss the proposed tolling agreement.

Thanks,
Khoa

From: Heitmann, John [mailto:JHeitmann@KelleyDrye.com]
Sent: Monday, August 7, 2017 6:26 PM
To: Dangkhoa Nguyen
Cc: Currier, J. Bradford ; Lorenzo, Marisa A. ; Bell, Avonne ; David Sobotkin ; Rakesh Patel ; Loyaan Egal ; Pensyl, Meghan ; MaryBeth DeLuca
Subject: RE: American Broadband Letter of Inquiry

Khoa,

You generally covered our understanding from the call today. On point #2 below, we note that our responses to the LOI included documents not produced in response to the OIG subpoena. As a result, ABTC intends its document productions to OIG to satisfy its responses to EB's LOI where OIG and EB asked for similar documents. As you stated below, ABTC agrees that the Bates number references in its LOI responses were not intended to limit EB's access to the OIG document productions, but rather were provided as a courtesy to aid in EB's review.

Please let us know if you have any questions. We will keep an eye out for the draft tolling agreement.

Best,
John

JOHN HEITMANN
Chair, Communications Law Group
Kelley Drye & Warren LLP
Office: (202) 342-8544
Mobile: (703) 887-9920
jheitmann@kelleydrye.com

From: Dangkhoa Nguyen [mailto:Dangkhoa.Nguyen@fcc.gov]
Sent: Monday, August 07, 2017 4:18 PM
To: Heitmann, John <JHeitmann@KelleyDrye.com>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>; MaryBeth DeLuca <MaryBeth.DeLuca@fcc.gov>
Subject: RE: American Broadband Letter of Inquiry

John:

Thank you for taking the time today to discuss the topics I raised in my email dated August 3, 2017, regarding the ABTC matter. As I indicated at the end of our call, this email is to memorialize our discussion of my email topics.

1. Regarding ABTC's audit of the USF overpayment, you anticipated that the audit would be concluded and finalized in approximately two weeks. Following the audit, ABTC, and you, will work with USAC regarding the audit's findings/conclusions and prepare Form 497 revisions based upon your discussions with USAC.
2. With regard to the document productions to the OIG, you confirmed that ABTC agreed that the document productions to the OIG are intended to categorically cover the company's responses to EB's LOI. As you explained, the references to Bates numbered documents in ABTC's LOI responses were not intended to limit EB's access to the OIG document productions, but rather were provided as a courtesy to aid in our review of your client's LOI responses.
3. Lastly, you stated that ABTC has agreed to the execution of a second tolling agreement to be effective from August 3, 2017. I informed you that I would provide a draft tolling agreement to you for your review and approval.

Please let me know if your understanding of our discussion differs from the summary provided above.

Best,
Khoa

From: Heitmann, John [mailto:JHeitmann@KelleyDrye.com]
Sent: Monday, August 7, 2017 12:45 PM
To: Dangkhoa Nguyen <Dangkhoa.Nguyen@fcc.gov>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>; MaryBeth DeLuca <MaryBeth.DeLuca@fcc.gov>
Subject: RE: American Broadband Letter of Inquiry

Hi Khoa,

Please go ahead and call me at my office. Thank you.

Best,
John

JOHN HEITMANN
Chair, Communications Law Group
Kelley Drye & Warren LLP
Office: (202) 342-8544
Mobile: (703) 887-9920
jheitmann@kelleydrye.com

From: Dangkhoa Nguyen [mailto:Dangkhoa.Nguyen@fcc.gov]
Sent: Monday, August 07, 2017 12:42 PM
To: Heitmann, John <JHeitmann@KelleyDrye.com>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>; MaryBeth DeLuca <MaryBeth.DeLuca@fcc.gov>
Subject: RE: American Broadband Letter of Inquiry

Hi Tara,

I am following up on whether you had sent a bridge number earlier. I'm happy to call John's office directly if that is easier for you. My colleague, Mary Beth DeLuca, who I added to the email chain, and I will be able to call John from the same office. Please let us know whether John has a preference for us to call his office or a bridge.

Thanks,
Khoa

From: Dangkhoa Nguyen
Sent: Friday, August 4, 2017 12:24 PM
To: 'Heitmann, John' <JHeitmann@KelleyDrye.com>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>
Subject: RE: American Broadband Letter of Inquiry

Tara,

Please send a bridge in the event others will be joining us.

Thanks,
Khoa

From: Mahoney, Tara K. [mailto:TMahoney@KelleyDrye.com] **On Behalf Of** Heitmann, John
Sent: Friday, August 4, 2017 12:21 PM
To: Dangkhoa Nguyen <Dangkhoa.Nguyen@fcc.gov>; Heitmann, John <JHeitmann@KelleyDrye.com>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>
Subject: RE: American Broadband Letter of Inquiry

Hello Khoa, let's do 1 pm. Should I send a conference bridge, or should John just call you or you call John?

Best,
Tara

TARA MAHONEY
Legal Assistant to John Heitmann, Robert Aamoth, Denise Smith and Winafred Brantl
Kelley Drye & Warren LLP
Office: (202) 945-6616
tmahoney@kelleydrye.com

From: Dangkhoa Nguyen [mailto:Dangkhoa.Nguyen@fcc.gov]
Sent: Friday, August 04, 2017 9:53 AM
To: Heitmann, John <JHeitmann@KelleyDrye.com>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>
Subject: RE: American Broadband Letter of Inquiry

John,

I'm available on Monday, as well. Would 11 am or 1 pm work for you?

Best,
Khoa

From: Heitmann, John [mailto:JHeitmann@KelleyDrye.com]
Sent: Thursday, August 3, 2017 6:37 PM
To: Dangkhoa Nguyen <Dangkhoa.Nguyen@fcc.gov>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>
Subject: RE: American Broadband Letter of Inquiry

Hi Khoa,

Why don't we set up a call to discuss early next week? I am available Monday or Tuesday afternoon.

Subject to check with our client, we are amenable to your proposal for a second tolling agreement that would begin effective today's date, August 3, 2017 and run for a 90 day period.

Best,
John

JOHN HEITMANN
Chair, Communications Law Group
Kelley Drye & Warren LLP

Office: (202) 342-8544
Mobile: (703) 887-9920
jheitmann@kelleydrye.com

From: Dangkhoa Nguyen [mailto:Dangkhoa.Nguyen@fcc.gov]
Sent: Thursday, August 03, 2017 1:44 PM
To: Heitmann, John <JHeitmann@KelleyDrye.com>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>
Subject: RE: American Broadband Letter of Inquiry

John,

I wanted to follow up with you regarding the LOI productions in this matter. First, regarding the independent audit, has the audit been completed? If not, please provide us with an update of when you now expect it to be completed and produced to the Commission.

Second, I would like to clarify whether ABTC is categorically relying upon its responses and productions to the OIG and to USAC to satisfy its responses to the LOI. Based upon our telephone call on May 5, 2017, it was my understanding, and I had proceeded on the belief, that the OIG and USAC productions were to categorically satisfy the LOI's requests in order to save resources by avoiding to have your client provide a second, complete production of documents to the Bureau. However, you stated, for example, in ABTC's first production, dated May 25, 2017, that, "[w]here ABTC previously produced documents to OIG and USAC responsive to the LOI, it provided associated Bates number." This limitation also appears in subsequent LOI production letters dated June 8 and June 22. This sentence suggests that ABTC's productions in response to the LOI are limited to only those OIG and USAC documents specifically referenced by Bates number in ABTC's LOI responses. To avoid any confusion, I want to make it clear that the OIG and USAC productions categorically cover ABTC's LOI response, and its LOI production is not limited to only the Bates numbered documents cited in the company's LOI responses dated May 25, June 8, June 22, and the email below dated July 21, 2017.

However, if ABTC intended that its productions to the OIG and USAC are only responsive to the LOI through specifically cited Bates number documents, then the Bureau views ABTC's production to be incomplete. For instance, the LOI requested the production of all communications regarding ABTC's erroneous claims of USF funds but to date no documents have been produced to the Bureau or specifically referenced by Bates number in the LOI responses. If the OIG and USAC productions are limited to only specifically referenced documents, the Bureau will require ABTC to make full, separate productions to the Bureau to satisfy the LOI.

I believe that today is the expiration of the tolling agreement executed on May 16, 2017, in this matter. Because of the apparent delay of the ABTC's audit and LOI productions, and to clarify and resolve any possible issues with the OIG and USAC productions provided in response to the LOI, I would propose that a second tolling agreement be executed for another 90 day period effective from today's date, the expiration of the existing tolling agreement. Please let me know if this is agreeable to you and ABTC.

Best,
Khoa

From: Bell, Avonne [mailto:ABell@KelleyDrye.com]
Sent: Friday, July 21, 2017 10:35 AM
To: Dangkhoa Nguyen <Dangkhoa.Nguyen@fcc.gov>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>
Cc: Heitmann, John <JHeitmann@KelleyDrye.com>; Currier, J. Bradford <bcurrier@kelleydrye.com>;

Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Pensyl, Meghan <MPensyl@KelleyDrye.com>
Subject: American Broadband Letter of Inquiry

Khoa,

On June 22, 2017, American Broadband and Telecommunications Company ("ABTC") submitted its third set of objections and responses to the Enforcement Bureau's ("EB") April 25, 2017 Letter of Inquiry ("LOI") which included a response to LOI Request 46. ABTC's response to LOI Request 46 referred EB to the original Form 497 subscriber lists provided in response to the OIG Subpoena Duces Tecum on June 21, 2017 labeled ABT-OIG00152112 – ABT-OIG00152213. On July 17, 2017, ABTC made a supplemental production to OIG that contains customer lists from the Company's Form 497 filings from August 2016 through December 2016. The production includes customer lists corresponding to the original 497 filings labeled ABT-OIG00529405 – ABT-OIG00529409 as well as customer lists corresponding to some revised Form 497 filings labeled ABT-OIG00529410 – ABT-OIG00529412. Please note that ABT-OIG00529409 only contains the original filing lists for those states with downward revisions, the original lists for those states without downward revisions for November 2016 can be found at ABT-OIG00529412.

This is a courtesy notice of the availability of these additional documents which are also responsive to the LOI.

Please let us know if you have any questions.

Best,
Avonne

AVONNE BELL*
Associate
Kelley Drye & Warren LLP
3050 K Street NW, Suite 400
Washington, DC 20007
(202) 342-8503
abell@kelleydrye.com

WWW.KELLEYDRYE.COM

*Admitted only in MD. Supervised by principals of the firm who are members of the DC bar.

The information contained in this E-mail message is privileged, confidential, and may be protected from disclosure; please be aware that any other use, printing, copying, disclosure or dissemination of this communication may be subject to legal restriction or sanction. If you think that you have received this E-mail message in error, please reply to the sender.

This E-mail message and any attachments have been scanned for viruses and are believed to be free of any virus or other defect that might affect any computer system into which it is received and opened. However, it is the responsibility of the recipient to ensure that it is virus free and no responsibility is accepted by Kelley Drye & Warren LLP for any loss or damage arising in any way from its use.

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Exhibit F

Attachment to Email from Dangkhoa Nguyen to John Heitmann (Aug. 10, 2017)

SECOND TOLLING AGREEMENT

The Enforcement Bureau (Bureau) of the Federal Communications Commission (FCC or Commission) is investigating possible violations of the Commission's rules and orders governing the provision of Lifeline service, 47 CFR §§ 54.403, 54.404, 54.405, 54.407, 54.409, 54.410, 54.411, 54.413, 54.414, 54.416, 54.417, 54.419, 54.420, 54.422; *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656 (2012); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818 (2015); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962 (2016), in investigation EB-IHD-17-00023554 (Investigation), and receipt of support for low-income subscribers by American Broadband and Telecommunications Company (ABTC or the Company) as an Eligible Telecommunications Carrier (ETC) participating in the Low-Income Program of the Universal Service Fund (USF). Under federal law, as set forth in 47 U.S.C. § 503(b)(6), the statute of limitations for issuance of a Notice of Apparent Liability (NAL) for violations of the Act, Commission's rules, or both, by a non-broadcast licensee, is one year from the date on which the alleged violations occurred.

ABTC and the FCC wish to extend their prior tolling agreement executed on May 16, 2017, to continue the production and review of materials regarding the facts surrounding the possible violations of the Lifeline rules listed above prior to the expiration of the limitations period set forth in 47 U.S.C. § 503(b)(6). ABTC has consulted with its attorney and understands its rights. Therefore, the FCC and ABTC agree as follows:

1. For purposes of calculating the statute of limitations, pursuant to 47 U.S.C. § 503(b)(6), the parties agree that any limitations period for the possible violations as set forth in the preamble of this Agreement shall be tolled from May 5, 2017 until and including either: (a) the release date of a Commission Notice of Apparent Liability for Forfeiture (NAL), consent decree, or order regarding the disposition of any of the possible violations as set forth in the preamble of this Agreement; (b) the date the FCC informs ABTC in writing that it has terminated the Investigation; or (c) October 22, 2017, whichever occurs first (Tolled Period). In the event that the FCC is officially closed on any day that is not a Saturday, Sunday, or an officially recognized Federal legal holiday (as described in the note to Section 1.4 of the Commission's rules)[1] during the Tolled Period, then the Tolled Period shall be extended by the same number of business days as the FCC is officially closed.

2. By agreeing to toll the statute of limitations, as described in Paragraph 1, ABTC understands that it is waiving, and hereby does waive, any right that it might otherwise have to rely on the Tolled Period in connection with the computation of the one-year period under 47 U.S.C. § 503(b)(6) as it applies to the Investigation of the possible violations as set forth in the preamble of this Agreement. ABTC agrees and acknowledges that, upon execution of this Agreement, this document shall have the same force and effect as any other Commission order, and any violation of the terms of this Agreement shall constitute a violation of a

[1] 47 CFR § 1.4.

Commission order, entitling the Commission to exercise any and all rights and to seek any and all remedies authorized by law for the enforcement of a Commission order.

3. No promises, representations, or inducements of any kind have been made to ABTC in connection with this Agreement.

4. By signing this Agreement, ABTC does not admit to any of the possible violations as set forth in the preamble of this Agreement or to any violation of the Lifeline rules. Nothing in this Agreement shall be construed to limit ABTC's ability or right to challenge any Commission action, including without limitation, an order or other document finding ABTC liable for the possible violations as set forth in the preamble of this Agreement or otherwise relating to ABTC's compliance with the Lifeline rules, other than the statute of limitations matters addressed in this Agreement.

5. Nothing in this Agreement has the effect of extending or reviving any limitations period that expired prior to the Tolled Period or that involves possible violations other than those set forth in the preamble of this Agreement.

6. By his signature below, John J. Heitmann represents and warrants that he is authorized to execute this Agreement on behalf of ABTC. No change in the ownership, corporate organization, partnership status, or control of ABTC shall alter the effect of this Agreement.

7. By his signature below, Dangkhoa Nguyen, FCC Enforcement Bureau, represents and warrants that he is authorized to execute this Agreement on behalf of the FCC.

8. This Agreement shall become effective and binding on the parties when it is signed and dated by both parties (the Effective Date).

9. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument. Scanned and/or electronic signatures shall be deemed to be original signatures and legally binding on the applicable party.

By:_____	By:_____
Dangkhoa Nguyen Investigative Counsel Enforcement Bureau Federal Communications Commission	John J. Heitmann Legal Counsel to American Broadband and Telecommunications Company
Dated:_____	Dated:_____

Exhibit G

Email from John Heitmann to Dangkhoa Nguyen (Aug. 15, 2017)

Grad, Harrison C.

From: Heitmann, John
Sent: Tuesday, August 15, 2017 4:26 PM
To: 'Dangkhoa Nguyen'
Cc: Currier, J. Bradford; Lorenzo, Marisa A.; Bell, Avonne; David Sobotkin; Rakesh Patel; Loyaan Egal; Pensyl, Meghan; MaryBeth DeLuca
Subject: RE: American Broadband Letter of Inquiry
Attachments: AB Draft 2nd TA 8.10.2017 (KDW Edits) v1.docx

Hi Khoa,

We reviewed the draft tolling agreement and have two changes. First, your email on August 7th stated that the new tolling agreement would be "effective from August 3, 2017," but the draft has the tolled period beginning on May 5th. Together, we agreed to a new tolling agreement beginning on August 3rd, not an extension of the initial tolling agreement. As a result, we revised the second and third paragraphs on the first page of the draft to reflect that this is a new tolling agreement and the tolled period begins on August 3rd. Second, the draft has the tolled period ending on October 22nd. But 90 days from August 3rd is November 1st. We updated the third paragraph on the first page of the draft accordingly.

You will find our edits to the tolling agreement attached in redline. Please let us know if you have any questions.

Will you be in tomorrow? Perhaps we can chat re the VM I left for you last week. Thanks.

Best,
John

JOHN HEITMANN
Chair, Communications Law Group
Kelley Drye & Warren LLP
Office: (202) 342-8544
Mobile: (703) 887-9920
jheitmann@kelleydrye.com

From: Dangkhoa Nguyen [mailto:Dangkhoa.Nguyen@fcc.gov]
Sent: Tuesday, August 15, 2017 12:55 PM
To: Heitmann, John
Cc: Currier, J. Bradford ; Lorenzo, Marisa A. ; Bell, Avonne ; David Sobotkin ; Rakesh Patel ; Loyaan Egal ; Pensyl, Meghan ; MaryBeth DeLuca
Subject: Re: American Broadband Letter of Inquiry

Hi John,

I am writing to follow up on the tolling agreement. Please let me know if you have any suggested revisions for us or if we can anticipate receiving an executed copy.

Thanks,
Khoa

From: Dangkhoa Nguyen
Sent: Thursday, August 10, 2017 1:27 PM
To: Heitmann, John
Cc: Currier, J. Bradford; Lorenzo, Marisa A.; Bell, Avonne; David Sobotkin; Rakesh Patel; Loyaan Egal; Pensyl, Meghan; MaryBeth DeLuca
Subject: RE: American Broadband Letter of Inquiry

John,

As we discussed on Monday, please find attached a draft tolling agreement extension for your review. The attached draft is nearly identical to the original tolling agreement executed on May 16, 2017, except for the following revisions.

The first sentence of the second paragraph was revised to reflect the extension of the first tolling agreement.

Also, in the third paragraph (paragraph #1), the tolled period was revised to reflect an expiration on or before October 22, 2017, which I calculate to be 90 days from August 3.

If the proposed tolling agreement is acceptable to you, please execute and return a scanned copy of the tolling agreement to me for counter signing. Otherwise, please contact me should you wish to discuss the proposed tolling agreement.

Thanks,
Khoa

From: Heitmann, John [mailto:JHeitmann@KelleyDrye.com]
Sent: Monday, August 7, 2017 6:26 PM
To: Dangkhoa Nguyen <Dangkhoa.Nguyen@fcc.gov>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>; MaryBeth DeLuca <MaryBeth.DeLuca@fcc.gov>
Subject: RE: American Broadband Letter of Inquiry

Khoa,

You generally covered our understanding from the call today. On point #2 below, we note that our responses to the LOI included documents not produced in response to the OIG subpoena. As a result, ABTC intends its document productions to OIG to satisfy its responses to EB's LOI where OIG and EB asked for similar documents. As you stated below, ABTC agrees that the Bates number references in its LOI responses were not intended to limit EB's access to the OIG document productions, but rather were provided as a courtesy to aid in EB's review.

Please let us know if you have any questions. We will keep an eye out for the draft tolling agreement.

Best,
John

JOHN HEITMANN
Chair, Communications Law Group
Kelley Drye & Warren LLP

Office: (202) 342-8544
Mobile: (703) 887-9920
jheitmann@kelleydrye.com

From: Dangkhoa Nguyen [mailto:Dangkhoa.Nguyen@fcc.gov]
Sent: Monday, August 07, 2017 4:18 PM
To: Heitmann, John <JHeitmann@KelleyDrye.com>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>; MaryBeth DeLuca <MaryBeth.DeLuca@fcc.gov>
Subject: RE: American Broadband Letter of Inquiry

John:

Thank you for taking the time today to discuss the topics I raised in my email dated August 3, 2017, regarding the ABTC matter. As I indicated at the end of our call, this email is to memorialize our discussion of my email topics.

1. Regarding ABTC's audit of the USF overpayment, you anticipated that the audit would be concluded and finalized in approximately two weeks. Following the audit, ABTC, and you, will work with USAC regarding the audit's findings/conclusions and prepare Form 497 revisions based upon your discussions with USAC.
2. With regard to the document productions to the OIG, you confirmed that ABTC agreed that the document productions to the OIG are intended to categorically cover the company's responses to EB's LOI. As you explained, the references to Bates numbered documents in ABTC's LOI responses were not intended to limit EB's access to the OIG document productions, but rather were provided as a courtesy to aid in our review of your client's LOI responses.
3. Lastly, you stated that ABTC has agreed to the execution of a second tolling agreement to be effective from August 3, 2017. I informed you that I would provide a draft tolling agreement to you for your review and approval.

Please let me know if your understanding of our discussion differs from the summary provided above.

Best,
Khoa

From: Heitmann, John [mailto:JHeitmann@KelleyDrye.com]
Sent: Monday, August 7, 2017 12:45 PM
To: Dangkhoa Nguyen <Dangkhoa.Nguyen@fcc.gov>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>; MaryBeth DeLuca <MaryBeth.DeLuca@fcc.gov>
Subject: RE: American Broadband Letter of Inquiry

Hi Khoa,

Please go ahead and call me at my office. Thank you.

Best,
John

JOHN HEITMANN
Chair, Communications Law Group
Kelley Drye & Warren LLP
Office: (202) 342-8544
Mobile: (703) 887-9920
jheitmann@kelleydrye.com

From: Dangkhoa Nguyen [mailto:Dangkhoa.Nguyen@fcc.gov]
Sent: Monday, August 07, 2017 12:42 PM
To: Heitmann, John <JHeitmann@KelleyDrye.com>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>; MaryBeth DeLuca <MaryBeth.DeLuca@fcc.gov>
Subject: RE: American Broadband Letter of Inquiry

Hi Tara,

I am following up on whether you had sent a bridge number earlier. I'm happy to call John's office directly if that is easier for you. My colleague, Mary Beth DeLuca, who I added to the email chain, and I will be able to call John from the same office. Please let us know whether John has a preference for us to call his office or a bridge.

Thanks,
Khoa

From: Dangkhoa Nguyen
Sent: Friday, August 4, 2017 12:24 PM
To: 'Heitmann, John' <JHeitmann@KelleyDrye.com>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>
Subject: RE: American Broadband Letter of Inquiry

Tara,

Please send a bridge in the event others will be joining us.

Thanks,
Khoa

From: Mahoney, Tara K. [mailto:TMahoney@KelleyDrye.com] **On Behalf Of** Heitmann, John
Sent: Friday, August 4, 2017 12:21 PM
To: Dangkhoa Nguyen <Dangkhoa.Nguyen@fcc.gov>; Heitmann, John <JHeitmann@KelleyDrye.com>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>
Subject: RE: American Broadband Letter of Inquiry

Hello Khoa, let's do 1 pm. Should I send a conference bridge, or should John just call you or you call John?

Best,
Tara

TARA MAHONEY
Legal Assistant to John Heitmann, Robert Aamoth, Denise Smith and Winafred Brantl
Kelley Drye & Warren LLP
Office: (202) 945-6616
tmahoney@kelleydrye.com

From: Dangkhoa Nguyen [mailto:Dangkhoa.Nguyen@fcc.gov]
Sent: Friday, August 04, 2017 9:53 AM
To: Heitmann, John <JHeitmann@KelleyDrye.com>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>
Subject: RE: American Broadband Letter of Inquiry

John,

I'm available on Monday, as well. Would 11 am or 1 pm work for you?

Best,
Khoa

From: Heitmann, John [mailto:JHeitmann@KelleyDrye.com]
Sent: Thursday, August 3, 2017 6:37 PM
To: Dangkhoa Nguyen <Dangkhoa.Nguyen@fcc.gov>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>
Subject: RE: American Broadband Letter of Inquiry

Hi Khoa,

Why don't we set up a call to discuss early next week? I am available Monday or Tuesday afternoon.

Subject to check with our client, we are amenable to your proposal for a second tolling agreement that would begin effective today's date, August 3, 2017 and run for a 90 day period.

Best,
John

JOHN HEITMANN
Chair, Communications Law Group
Kelley Drye & Warren LLP
Office: (202) 342-8544
Mobile: (703) 887-9920
jheitmann@kelleydrye.com

From: Dangkhoa Nguyen [mailto:Dangkhoa.Nguyen@fcc.gov]
Sent: Thursday, August 03, 2017 1:44 PM

To: Heitmann, John <JHeitmann@KelleyDrye.com>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>
Subject: RE: American Broadband Letter of Inquiry

John,

I wanted to follow up with you regarding the LOI productions in this matter. First, regarding the independent audit, has the audit been completed? If not, please provide us with an update of when you now expect it to be completed and produced to the Commission.

Second, I would like to clarify whether ABTC is categorically relying upon its responses and productions to the OIG and to USAC to satisfy its responses to the LOI. Based upon our telephone call on May 5, 2017, it was my understanding, and I had proceeded on the belief, that the OIG and USAC productions were to categorically satisfy the LOI's requests in order to save resources by avoiding to have your client provide a second, complete production of documents to the Bureau. However, you stated, for example, in ABTC's first production, dated May 25, 2017, that, "[w]here ABTC previously produced documents to OIG and USAC responsive to the LOI, it provided associated Bates number." This limitation also appears in subsequent LOI production letters dated June 8 and June 22. This sentence suggests that ABTC's productions in response to the LOI are limited to only those OIG and USAC documents specifically referenced by Bates number in ABTC's LOI responses. To avoid any confusion, I want to make it clear that the OIG and USAC productions categorically cover ABTC's LOI response, and its LOI production is not limited to only the Bates numbered documents cited in the company's LOI responses dated May 25, June 8, June 22, and the email below dated July 21, 2017.

However, if ABTC intended that its productions to the OIG and USAC are only responsive to the LOI through specifically cited Bates number documents, then the Bureau views ABTC's production to be incomplete. For instance, the LOI requested the production of all communications regarding ABTC's erroneous claims of USF funds but to date no documents have been produced to the Bureau or specifically referenced by Bates number in the LOI responses. If the OIG and USAC productions are limited to only specifically referenced documents, the Bureau will require ABTC to make full, separate productions to the Bureau to satisfy the LOI.

I believe that today is the expiration of the tolling agreement executed on May 16, 2017, in this matter. Because of the apparent delay of the ABTC's audit and LOI productions, and to clarify and resolve any possible issues with the OIG and USAC productions provided in response to the LOI, I would propose that a second tolling agreement be executed for another 90 day period effective from today's date, the expiration of the existing tolling agreement. Please let me know if this is agreeable to you and ABTC.

Best,
Khoa

From: Bell, Avonne [mailto:ABell@KelleyDrye.com]
Sent: Friday, July 21, 2017 10:35 AM
To: Dangkhoa Nguyen <Dangkhoa.Nguyen@fcc.gov>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>
Cc: Heitmann, John <JHeitmann@KelleyDrye.com>; Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Pensyl, Meghan <MPensyl@KelleyDrye.com>
Subject: American Broadband Letter of Inquiry

Khoa,

On June 22, 2017, American Broadband and Telecommunications Company ("ABTC") submitted its third set of objections and responses to the Enforcement Bureau's ("EB") April 25, 2017 Letter of Inquiry ("LOI") which included a response to LOI Request 46. ABTC's response to LOI Request 46 referred EB to the original Form 497 subscriber lists provided in response to the OIG Subpoena Duces Tecum on June 21, 2017 labeled ABT-OIG00152112 – ABT-OIG00152213. On July 17, 2017, ABTC made a supplemental production to OIG that contains customer lists from the Company's Form 497 filings from August 2016 through December 2016. The production includes customer lists corresponding to the original 497 filings labeled ABT-OIG00529405 – ABT-OIG00529409 as well as customer lists corresponding to some revised Form 497 filings labeled ABT-OIG00529410 – ABT-OIG00529412. Please note that ABT-OIG00529409 only contains the original filing lists for those states with downward revisions, the original lists for those states without downward revisions for November 2016 can be found at ABT-OIG00529412.

This is a courtesy notice of the availability of these additional documents which are also responsive to the LOI.

Please let us know if you have any questions.

Best,
Avonne

AVONNE BELL*
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3050 K Street NW, Suite 400
Washington, DC 20007
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*Admitted only in MD. Supervised by principals of the firm who are members of the DC bar.

The information contained in this E-mail message is privileged, confidential, and may be protected from disclosure; please be aware that any other use, printing, copying, disclosure or dissemination of this communication may be subject to legal restriction or sanction. If you think that you have received this E-mail message in error, please reply to the sender.

This E-mail message and any attachments have been scanned for viruses and are believed to be free of any virus or other defect that might affect any computer system into which it is received and opened. However, it is the responsibility of the recipient to ensure that it is virus free and no responsibility is accepted by Kelley Drye & Warren LLP for any loss or damage arising in any way from its use.

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Exhibit H

Attachment to Email from John Heitmann to Dangkhoa Nguyen (Aug. 15, 2017)

SECOND TOLLING AGREEMENT

The Enforcement Bureau (Bureau) of the Federal Communications Commission (FCC or Commission) is investigating possible violations of the Commission's rules and orders governing the provision of Lifeline service, 47 CFR §§ 54.403, 54.404, 54.405, 54.407, 54.409, 54.410, 54.411, 54.413, 54.414, 54.416, 54.417, 54.419, 54.420, 54.422; *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656 (2012); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818 (2015); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962 (2016), in investigation EB-IHD-17-00023554 (Investigation), and receipt of support for low-income subscribers by American Broadband and Telecommunications Company (ABTC or the Company) as an Eligible Telecommunications Carrier (ETC) participating in the Low-Income Program of the Universal Service Fund (USF). Under federal law, as set forth in 47 U.S.C. § 503(b)(6), the statute of limitations for issuance of a Notice of Apparent Liability (NAL) for violations of the Act, Commission's rules, or both, by a non-broadcast licensee, is one year from the date on which the alleged violations occurred.

ABTC and the FCC wish to ~~extend their prior tolling agreement executed on May 16, 2017, to~~ continue the production and review of materials regarding the facts surrounding the possible violations of the Lifeline rules listed above prior to the expiration of the limitations period set forth in 47 U.S.C. § 503(b)(6). ABTC has consulted with its attorney and understands its rights. Therefore, the FCC and ABTC agree as follows:

1. For purposes of calculating the statute of limitations, pursuant to 47 U.S.C. § 503(b)(6), the parties agree that any limitations period for the possible violations as set forth in the preamble of this Agreement shall be tolled from August 3~~May 5~~, 2017 until and including either: (a) the release date of a Commission Notice of Apparent Liability for Forfeiture (NAL), consent decree, or order regarding the disposition of any of the possible violations as set forth in the preamble of this Agreement; (b) the date the FCC informs ABTC in writing that it has terminated the Investigation; or (c) November 1~~October 22~~, 2017, whichever occurs first (Tolled Period). In the event that the FCC is officially closed on any day that is not a Saturday, Sunday, or an officially recognized Federal legal holiday (as described in the note to Section 1.4 of the Commission's rules)[1] during the Tolled Period, then the Tolled Period shall be extended by the same number of business days as the FCC is officially closed.

2. By agreeing to toll the statute of limitations, as described in Paragraph 1, ABTC understands that it is waiving, and hereby does waive, any right that it might otherwise have to rely on the Tolled Period in connection with the computation of the one-year period under 47 U.S.C. § 503(b)(6) as it applies to the Investigation of the possible violations as set forth in the preamble of this Agreement. ABTC agrees and acknowledges that, upon execution of this Agreement, this document shall have the same force and effect as any other Commission order, and any violation of the terms of this Agreement shall constitute a violation of a

[1] 47 CFR § 1.4.

Commission order, entitling the Commission to exercise any and all rights and to seek any and all remedies authorized by law for the enforcement of a Commission order.

3. No promises, representations, or inducements of any kind have been made to ABTC in connection with this Agreement.

4. By signing this Agreement, ABTC does not admit to any of the possible violations as set forth in the preamble of this Agreement or to any violation of the Lifeline rules. Nothing in this Agreement shall be construed to limit ABTC's ability or right to challenge any Commission action, including without limitation, an order or other document finding ABTC liable for the possible violations as set forth in the preamble of this Agreement or otherwise relating to ABTC's compliance with the Lifeline rules, other than the statute of limitations matters addressed in this Agreement.

5. Nothing in this Agreement has the effect of extending or reviving any limitations period that expired prior to the Tolled Period or that involves possible violations other than those set forth in the preamble of this Agreement.

6. By his signature below, John J. Heitmann represents and warrants that he is authorized to execute this Agreement on behalf of ABTC. No change in the ownership, corporate organization, partnership status, or control of ABTC shall alter the effect of this Agreement.

7. By his signature below, Dangkhoa Nguyen, FCC Enforcement Bureau, represents and warrants that he is authorized to execute this Agreement on behalf of the FCC.

8. This Agreement shall become effective and binding on the parties when it is signed and dated by both parties (the Effective Date).

9. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument. Scanned and/or electronic signatures shall be deemed to be original signatures and legally binding on the applicable party.

By:_____	By:_____
Dangkhoa Nguyen Investigative Counsel Enforcement Bureau Federal Communications Commission	John J. Heitmann Legal Counsel to American Broadband and Telecommunications Company
Dated:_____	Dated:_____

Exhibit I

Email from Dangkhoa Nguyen to John Heitmann (Aug. 16, 2017)

Grad, Harrison C.

From: Dangkhoa Nguyen <Dangkhoa.Nguyen@fcc.gov>
Sent: Wednesday, August 16, 2017 11:38 AM
To: Heitmann, John
Cc: Currier, J. Bradford; Lorenzo, Marisa A.; Bell, Avonne; David Sobotkin; Rakesh Patel; Loyaan Egal; Pensyl, Meghan; MaryBeth DeLuca
Subject: RE: American Broadband Letter of Inquiry

Hi John,

We agree to your proposed revisions to the tolling agreement described below. If agreeable to you, please have the appropriate person execute a final agreement on ABTC's behalf and forward to me an executed copy to counter sign.

Thanks,
Khoa

From: Heitmann, John [mailto:JHeitmann@KelleyDrye.com]
Sent: Tuesday, August 15, 2017 4:26 PM
To: Dangkhoa Nguyen
Cc: Currier, J. Bradford ; Lorenzo, Marisa A. ; Bell, Avonne ; David Sobotkin ; Rakesh Patel ; Loyaan Egal ; Pensyl, Meghan ; MaryBeth DeLuca
Subject: RE: American Broadband Letter of Inquiry

Hi Khoa,

We reviewed the draft tolling agreement and have two changes. First, your email on August 7th stated that the new tolling agreement would be "effective from August 3, 2017," but the draft has the tolled period beginning on May 5th. Together, we agreed to a new tolling agreement beginning on August 3rd, not an extension of the initial tolling agreement. As a result, we revised the second and third paragraphs on the first page of the draft to reflect that this is a new tolling agreement and the tolled period begins on August 3rd. Second, the draft has the tolled period ending on October 22nd. But 90 days from August 3rd is November 1st. We updated the third paragraph on the first page of the draft accordingly.

You will find our edits to the tolling agreement attached in redline. Please let us know if you have any questions.

Will you be in tomorrow? Perhaps we can chat re the VM I left for you last week. Thanks.

Best,
John

JOHN HEITMANN
Chair, Communications Law Group
Kelley Drye & Warren LLP
Office: (202) 342-8544
Mobile: (703) 887-9920
jheitmann@kelleydrye.com

From: Dangkhoa Nguyen [mailto:Dangkhoa.Nguyen@fcc.gov]
Sent: Tuesday, August 15, 2017 12:55 PM
To: Heitmann, John <JHeitmann@KelleyDrye.com>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>; MaryBeth DeLuca <MaryBeth.DeLuca@fcc.gov>
Subject: Re: American Broadband Letter of Inquiry

Hi John,

I am writing to follow up on the tolling agreement. Please let me know if you have any suggested revisions for us or if we can anticipate receiving an executed copy.

Thanks,
Khoa

From: Dangkhoa Nguyen
Sent: Thursday, August 10, 2017 1:27 PM
To: Heitmann, John
Cc: Currier, J. Bradford; Lorenzo, Marisa A.; Bell, Avonne; David Sobotkin; Rakesh Patel; Loyaan Egal; Pensyl, Meghan; MaryBeth DeLuca
Subject: RE: American Broadband Letter of Inquiry

John,

As we discussed on Monday, please find attached a draft tolling agreement extension for your review. The attached draft is nearly identical to the original tolling agreement executed on May 16, 2017, except for the following revisions.

The first sentence of the second paragraph was revised to reflect the extension of the first tolling agreement.

Also, in the third paragraph (paragraph #1), the tolled period was revised to reflect an expiration on or before October 22, 2017, which I calculate to be 90 days from August 3.

If the proposed tolling agreement is acceptable to you, please execute and return a scanned copy of the tolling agreement to me for counter signing. Otherwise, please contact me should you wish to discuss the proposed tolling agreement.

Thanks,
Khoa

From: Heitmann, John [mailto:JHeitmann@KelleyDrye.com]
Sent: Monday, August 7, 2017 6:26 PM
To: Dangkhoa Nguyen <Dangkhoa.Nguyen@fcc.gov>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>; MaryBeth DeLuca <MaryBeth.DeLuca@fcc.gov>
Subject: RE: American Broadband Letter of Inquiry

Khoa,

You generally covered our understanding from the call today. On point #2 below, we note that our responses to the LOI included documents not produced in response to the OIG subpoena. As a result, ABTC intends its document productions to OIG to satisfy its responses to EB's LOI where OIG and EB asked for similar documents. As you stated below, ABTC agrees that the Bates number references in its LOI responses were not intended to limit EB's access to the OIG document productions, but rather were provided as a courtesy to aid in EB's review.

Please let us know if you have any questions. We will keep an eye out for the draft tolling agreement.

Best,
John

JOHN HEITMANN
Chair, Communications Law Group
Kelley Drye & Warren LLP
Office: (202) 342-8544
Mobile: (703) 887-9920
jheitmann@kelleydrye.com

From: Dangkhoa Nguyen [mailto:Dangkhoa.Nguyen@fcc.gov]
Sent: Monday, August 07, 2017 4:18 PM
To: Heitmann, John <JHeitmann@KelleyDrye.com>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>; MaryBeth DeLuca <MaryBeth.DeLuca@fcc.gov>
Subject: RE: American Broadband Letter of Inquiry

John:

Thank you for taking the time today to discuss the topics I raised in my email dated August 3, 2017, regarding the ABTC matter. As I indicated at the end of our call, this email is to memorialize our discussion of my email topics.

1. Regarding ABTC's audit of the USF overpayment, you anticipated that the audit would be concluded and finalized in approximately two weeks. Following the audit, ABTC, and you, will work with USAC regarding the audit's findings/conclusions and prepare Form 497 revisions based upon your discussions with USAC.
2. With regard to the document productions to the OIG, you confirmed that ABTC agreed that the document productions to the OIG are intended to categorically cover the company's responses to EB's LOI. As you explained, the references to Bates numbered documents in ABTC's LOI responses were not intended to limit EB's access to the OIG document productions, but rather were provided as a courtesy to aid in our review of your client's LOI responses.
3. Lastly, you stated that ABTC has agreed to the execution of a second tolling agreement to be effective from August 3, 2017. I informed you that I would provide a draft tolling agreement to you for your review and approval.

Please let me know if your understanding of our discussion differs from the summary provided above.

Best,
Khoa

From: Heitmann, John [mailto:JHeitmann@KelleyDrye.com]
Sent: Monday, August 7, 2017 12:45 PM
To: Dangkhoa Nguyen <Dangkhoa.Nguyen@fcc.gov>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>; MaryBeth DeLuca <MaryBeth.DeLuca@fcc.gov>
Subject: RE: American Broadband Letter of Inquiry

Hi Khoa,

Please go ahead and call me at my office. Thank you.

Best,
John

JOHN HEITMANN
Chair, Communications Law Group
Kelley Drye & Warren LLP
Office: (202) 342-8544
Mobile: (703) 887-9920
jheitmann@kelleydrye.com

From: Dangkhoa Nguyen [mailto:Dangkhoa.Nguyen@fcc.gov]
Sent: Monday, August 07, 2017 12:42 PM
To: Heitmann, John <JHeitmann@KelleyDrye.com>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>; MaryBeth DeLuca <MaryBeth.DeLuca@fcc.gov>
Subject: RE: American Broadband Letter of Inquiry

Hi Tara,

I am following up on whether you had sent a bridge number earlier. I'm happy to call John's office directly if that is easier for you. My colleague, Mary Beth DeLuca, who I added to the email chain, and I will be able to call John from the same office. Please let us know whether John has a preference for us to call his office or a bridge.

Thanks,
Khoa

From: Dangkhoa Nguyen
Sent: Friday, August 4, 2017 12:24 PM
To: 'Heitmann, John' <JHeitmann@KelleyDrye.com>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>
Subject: RE: American Broadband Letter of Inquiry

Tara,

Please send a bridge in the event others will be joining us.

Thanks,
Khoa

From: Mahoney, Tara K. [mailto:TMahoney@KelleyDrye.com] **On Behalf Of** Heitmann, John
Sent: Friday, August 4, 2017 12:21 PM
To: Dangkhoa Nguyen <Dangkhoa.Nguyen@fcc.gov>; Heitmann, John <JHeitmann@KelleyDrye.com>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>
Subject: RE: American Broadband Letter of Inquiry

Hello Khoa, let's do 1 pm. Should I send a conference bridge, or should John just call you or you call John?

Best,
Tara

TARA MAHONEY
Legal Assistant to John Heitmann, Robert Aamoth, Denise Smith and Winafred Brantl
Kelley Drye & Warren LLP
Office: (202) 945-6616
tmahoney@kelleydrye.com

From: Dangkhoa Nguyen [mailto:Dangkhoa.Nguyen@fcc.gov]
Sent: Friday, August 04, 2017 9:53 AM
To: Heitmann, John <JHeitmann@KelleyDrye.com>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>
Subject: RE: American Broadband Letter of Inquiry

John,

I'm available on Monday, as well. Would 11 am or 1 pm work for you?

Best,
Khoa

From: Heitmann, John [mailto:JHeitmann@KelleyDrye.com]
Sent: Thursday, August 3, 2017 6:37 PM
To: Dangkhoa Nguyen <Dangkhoa.Nguyen@fcc.gov>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>
Subject: RE: American Broadband Letter of Inquiry

Hi Khoa,

Why don't we set up a call to discuss early next week? I am available Monday or Tuesday afternoon.

Subject to check with our client, we are amenable to your proposal for a second tolling agreement that would begin effective today's date, August 3, 2017 and run for a 90 day period.

Best,
John

JOHN HEITMANN
Chair, Communications Law Group
Kelley Drye & Warren LLP
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Mobile: (703) 887-9920
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From: Dangkhoa Nguyen [mailto:Dangkhoa.Nguyen@fcc.gov]
Sent: Thursday, August 03, 2017 1:44 PM
To: Heitmann, John <JHeitmann@KelleyDrye.com>
Cc: Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Bell, Avonne <ABell@KelleyDrye.com>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>; Pensyl, Meghan <MPensyl@KelleyDrye.com>
Subject: RE: American Broadband Letter of Inquiry

John,

I wanted to follow up with you regarding the LOI productions in this matter. First, regarding the independent audit, has the audit been completed? If not, please provide us with an update of when you now expect it to be completed and produced to the Commission.

Second, I would like to clarify whether ABTC is categorically relying upon its responses and productions to the OIG and to USAC to satisfy its responses to the LOI. Based upon our telephone call on May 5, 2017, it was my understanding, and I had proceeded on the belief, that the OIG and USAC productions were to categorically satisfy the LOI's requests in order to save resources by avoiding to have your client provide a second, complete production of documents to the Bureau. However, you stated, for example, in ABTC's first production, dated May 25, 2017, that, "[w]here ABTC previously produced documents to OIG and USAC responsive to the LOI, it provided associated Bates number." This limitation also appears in subsequent LOI production letters dated June 8 and June 22. This sentence suggests that ABTC's productions in response to the LOI are limited to only those OIG and USAC documents specifically referenced by Bates number in ABTC's LOI responses. To avoid any confusion, I want to make it clear that the OIG and USAC productions categorically cover ABTC's LOI response, and its LOI production is not limited to only the Bates numbered documents cited in the company's LOI responses dated May 25, June 8, June 22, and the email below dated July 21, 2017.

However, if ABTC intended that its productions to the OIG and USAC are only responsive to the LOI through specifically cited Bates number documents, then the Bureau views ABTC's production to be incomplete. For instance, the LOI requested the production of all communications regarding ABTC's erroneous claims of USF funds but to date no documents have been produced to the Bureau or specifically referenced by Bates number in the LOI responses. If the OIG and USAC productions are limited to only specifically referenced documents, the Bureau will require ABTC to make full, separate productions to the Bureau to satisfy the LOI.

I believe that today is the expiration of the tolling agreement executed on May 16, 2017, in this matter. Because of the apparent delay of the ABTC's audit and LOI productions, and to clarify and resolve any possible issues with the OIG and USAC productions provided in response to the LOI, I would propose that a

second tolling agreement be executed for another 90 day period effective from today's date, the expiration of the existing tolling agreement. Please let me know if this is agreeable to you and ABTC.

Best,
Khoa

From: Bell, Avonne [mailto:ABell@KelleyDrye.com]
Sent: Friday, July 21, 2017 10:35 AM
To: Dangkhoa Nguyen <Dangkhoa.Nguyen@fcc.gov>; David Sobotkin <David.Sobotkin@fcc.gov>; Rakesh Patel <Rakesh.Patel@fcc.gov>; Loyaan Egal <Loyaan.Egal@fcc.gov>
Cc: Heitmann, John <JHeitmann@KelleyDrye.com>; Currier, J. Bradford <bcurrier@kelleydrye.com>; Lorenzo, Marisa A. <MLorenzo@KelleyDrye.com>; Pensyl, Meghan <MPensyl@KelleyDrye.com>
Subject: American Broadband Letter of Inquiry

Khoa,

On June 22, 2017, American Broadband and Telecommunications Company ("ABTC") submitted its third set of objections and responses to the Enforcement Bureau's ("EB") April 25, 2017 Letter of Inquiry ("LOI") which included a response to LOI Request 46. ABTC's response to LOI Request 46 referred EB to the original Form 497 subscriber lists provided in response to the OIG Subpoena Duces Tecum on June 21, 2017 labeled ABT-OIG00152112 – ABT-OIG00152213. On July 17, 2017, ABTC made a supplemental production to OIG that contains customer lists from the Company's Form 497 filings from August 2016 through December 2016. The production includes customer lists corresponding to the original 497 filings labeled ABT-OIG00529405 – ABT-OIG00529409 as well as customer lists corresponding to some revised Form 497 filings labeled ABT-OIG00529410 – ABT-OIG00529412. Please note that ABT-OIG00529409 only contains the original filing lists for those states with downward revisions, the original lists for those states without downward revisions for November 2016 can be found at ABT-OIG00529412.

This is a courtesy notice of the availability of these additional documents which are also responsive to the LOI.

Please let us know if you have any questions.

Best,
Avonne

AVONNE BELL*
Associate
Kelley Drye & Warren LLP
3050 K Street NW, Suite 400
Washington, DC 20007
(202) 342-8503
abell@kelleydrye.com

WWW.KELLEYDRYE.COM

*Admitted only in MD. Supervised by principals of the firm who are members of the DC bar.

TOP WORK PLACES 2016 The Washington Post

The information contained in this E-mail message is privileged, confidential, and may be protected from disclosure; please be aware that any other use, printing, copying, disclosure or dissemination of this communication may be subject to legal restriction or sanction. If you think that you have received this E-mail message in error, please reply to the sender.

This E-mail message and any attachments have been scanned for viruses and are believed to be free of any virus or other defect that might affect any computer system into which it is received and opened. However, it is the responsibility of the recipient to ensure that it is virus free and no responsibility is accepted by Kelley Drye & Warren LLP for any loss or damage arising in any way from its use.

The information contained in this E-mail message is privileged, confidential, and may be protected from disclosure; please be aware that any other use, printing, copying, disclosure or dissemination of this communication may be subject to legal restriction or sanction. If you think that you have received this E-mail message in error, please reply to the sender.

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This E-mail message and any attachments have been scanned for viruses and are believed to be free of any virus or other defect that might affect any computer system into which it is received and opened. However, it is the responsibility of the recipient to ensure that it is virus free and no responsibility is accepted by Kelley Drye & Warren LLP for any loss or damage arising in any way from its use.

Exhibit J

Second Tolling Agreement

SECOND TOLLING AGREEMENT

The Enforcement Bureau (Bureau) of the Federal Communications Commission (FCC or Commission) is investigating possible violations of the Commission's rules and orders governing the provision of Lifeline service, 47 CFR §§ 54.403, 54.404, 54.405, 54.407, 54.409, 54.410, 54.411, 54.413, 54.414, 54.416, 54.417, 54.419, 54.420, 54.422; *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656 (2012); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818 (2015); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962 (2016), in investigation EB-IHD-17-00023554 (Investigation), and receipt of support for low-income subscribers by American Broadband and Telecommunications Company (ABTC or the Company) as an Eligible Telecommunications Carrier (ETC) participating in the Low-Income Program of the Universal Service Fund (USF). Under federal law, as set forth in 47 U.S.C. § 503(b)(6), the statute of limitations for issuance of a Notice of Apparent Liability (NAL) for violations of the Act, Commission's rules, or both, by a non-broadcast licensee, is one year from the date on which the alleged violations occurred.

ABTC and the FCC wish to continue the production and review of materials regarding the facts surrounding the possible violations of the Lifeline rules listed above prior to the expiration of the limitations period set forth in 47 U.S.C. § 503(b)(6). ABTC has consulted with its attorney and understands its rights. Therefore, the FCC and ABTC agree as follows:

1. For purposes of calculating the statute of limitations, pursuant to 47 U.S.C. § 503(b)(6), the parties agree that any limitations period for the possible violations as set forth in the preamble of this Agreement shall be tolled from August 3, 2017 until and including either: (a) the release date of a Commission Notice of Apparent Liability for Forfeiture (NAL), consent decree, or order regarding the disposition of any of the possible violations as set forth in the preamble of this Agreement; (b) the date the FCC informs ABTC in writing that it has terminated the Investigation; or (c) November 1, 2017, whichever occurs first (Tolled Period). In the event that the FCC is officially closed on any day that is not a Saturday, Sunday, or an officially recognized Federal legal holiday (as described in the note to Section 1.4 of the Commission's rules)[1] during the Tolled Period, then the Tolled Period shall be extended by the same number of business days as the FCC is officially closed.

2. By agreeing to toll the statute of limitations, as described in Paragraph 1, ABTC understands that it is waiving, and hereby does waive, any right that it might otherwise have to rely on the Tolled Period in connection with the computation of the one-year period under 47 U.S.C. § 503(b)(6) as it applies to the Investigation of the possible violations as set forth in the preamble of this Agreement. ABTC agrees and acknowledges that, upon execution of this Agreement, this document shall have the same force and effect as any other Commission order, and any violation of the terms of this Agreement shall constitute a violation of a

[1] 47 CFR § 1.4.

Commission order, entitling the Commission to exercise any and all rights and to seek any and all remedies authorized by law for the enforcement of a Commission order.

3. No promises, representations, or inducements of any kind have been made to ABTC in connection with this Agreement.

4. By signing this Agreement, ABTC does not admit to any of the possible violations as set forth in the preamble of this Agreement or to any violation of the Lifeline rules. Nothing in this Agreement shall be construed to limit ABTC's ability or right to challenge any Commission action, including without limitation, an order or other document finding ABTC liable for the possible violations as set forth in the preamble of this Agreement or otherwise relating to ABTC's compliance with the Lifeline rules, other than the statute of limitations matters addressed in this Agreement.

5. Nothing in this Agreement has the effect of extending or reviving any limitations period that expired prior to the Tolled Period or that involves possible violations other than those set forth in the preamble of this Agreement.

6. By his signature below, John J. Heitmann represents and warrants that he is authorized to execute this Agreement on behalf of ABTC. No change in the ownership, corporate organization, partnership status, or control of ABTC shall alter the effect of this Agreement.

7. By his signature below, Dangkhoa Nguyen, FCC Enforcement Bureau, represents and warrants that he is authorized to execute this Agreement on behalf of the FCC.

8. This Agreement shall become effective and binding on the parties when it is signed and dated by both parties (the Effective Date).

9. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument. Scanned and/or electronic signatures shall be deemed to be original signatures and legally binding on the applicable party.

By: _____
Dangkhoa Nguyen
Investigative Counsel
Enforcement Bureau
Federal Communications Commission

Dated: 8/16/2017

By: _____
John J. Heitmann
Legal Counsel to
American Broadband and
Telecommunications Company

Dated: 8/16/17

Exhibit K

Third Tolling Agreement

THIRD TOLLING AGREEMENT

The Enforcement Bureau (Bureau) of the Federal Communications Commission (FCC or Commission) is investigating possible violations of the Commission's rules and orders governing the provision of Lifeline service, 47 CFR §§ 54.403, 54.404, 54.405, 54.407, 54.409, 54.410, 54.411, 54.413, 54.414, 54.416, 54.417, 54.419, 54.420, 54.422; *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656 (2012); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818 (2015); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962 (2016), in investigation EB-IHD-17-00023554 (Investigation), and receipt of support for low-income subscribers by American Broadband and Telecommunications Company (ABTC or the Company) as an Eligible Telecommunications Carrier (ETC) participating in the Low-Income Program of the Universal Service Fund (USF). Under federal law, as set forth in 47 U.S.C. § 503(b)(6), the statute of limitations for issuance of a Notice of Apparent Liability (NAL) for violations of the Act, Commission's rules, or both, by a non-broadcast licensee, is one year from the date on which the alleged violations occurred.

ABTC and the FCC wish to continue the production and review of materials regarding the facts surrounding the possible violations of the Lifeline rules listed above prior to the expiration of the limitations period set forth in 47 U.S.C. § 503(b)(6). ABTC has consulted with its attorney and understands its rights. Therefore, the FCC and ABTC agree as follows:

1. For purposes of calculating the statute of limitations, pursuant to 47 U.S.C. § 503(b)(6), the parties agree that any limitations period for the possible violations as set forth in the preamble of this Agreement shall be tolled from November 1, 2017 until and including either: (a) the release date of a Commission Notice of Apparent Liability for Forfeiture (NAL), consent decree, or order regarding the disposition of any of the possible violations as set forth in the preamble of this Agreement; (b) the date the FCC informs ABTC in writing that it has terminated the Investigation; or (c) January 29, 2018, whichever occurs first (Tolled Period). In the event that the FCC is officially closed on any day that is not a Saturday, Sunday, or an officially recognized Federal legal holiday (as described in the note to Section 1.4 of the Commission's rules)[1] during the Tolled Period, then the Tolled Period shall be extended by the same number of business days as the FCC is officially closed.

2. By agreeing to toll the statute of limitations, as described in Paragraph 1, ABTC understands that it is waiving, and hereby does waive, any right that it might otherwise have to rely on the Tolled Period in connection with the computation of the one-year period under 47 U.S.C. § 503(b)(6) as it applies to the Investigation of the possible violations as set forth in the preamble of this Agreement. ABTC agrees and acknowledges that, upon execution of this Agreement, this document shall have the same force and effect as any other Commission order, and any violation of the terms of this Agreement shall constitute a violation of a

[1] 47 CFR § 1.4.

Commission order, entitling the Commission to exercise any and all rights and to seek any and all remedies authorized by law for the enforcement of a Commission order.

3. No promises, representations, or inducements of any kind have been made to ABTC in connection with this Agreement.

4. By signing this Agreement, ABTC does not admit to any of the possible violations as set forth in the preamble of this Agreement or to any violation of the Lifeline rules. Nothing in this Agreement shall be construed to limit ABTC's ability or right to challenge any Commission action, including without limitation, an order or other document finding ABTC liable for the possible violations as set forth in the preamble of this Agreement or otherwise relating to ABTC's compliance with the Lifeline rules, other than the statute of limitations matters addressed in this Agreement.

5. Nothing in this Agreement has the effect of extending or reviving any limitations period that expired prior to the Tolled Period or that involves possible violations other than those set forth in the preamble of this Agreement.

6. By his signature below, John J. Heitmann represents and warrants that he is authorized to execute this Agreement on behalf of ABTC. No change in the ownership, corporate organization, partnership status, or control of ABTC shall alter the effect of this Agreement.

7. By his signature below, Dangkhoa Nguyen, FCC Enforcement Bureau, represents and warrants that he is authorized to execute this Agreement on behalf of the FCC.

8. This Agreement shall become effective and binding on the parties when it is signed and dated by both parties (the Effective Date).

9. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument. Scanned and/or electronic signatures shall be deemed to be original signatures and legally binding on the applicable party.

By: _____
Dangkhoa Nguyen
Investigative Counsel
Enforcement Bureau
Federal Communications Commission

Dated: 10/20/2017

By: _____
John J. Heitmann
Legal Counsel to
American Broadband and
Telecommunications Company

Dated: 10.19.17

Exhibit L

Fourth Tolling Agreement

FOURTH TOLLING AGREEMENT

The Enforcement Bureau (Bureau) of the Federal Communications Commission (FCC or Commission) is investigating possible violations of the Commission's rules and orders governing the provision of Lifeline service, 47 CFR §§ 54.403, 54.404, 54.405, 54.407, 54.409, 54.410, 54.411, 54.413, 54.414, 54.416, 54.417, 54.419, 54.420, 54.422; *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656 (2012); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818 (2015); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962 (2016), in investigation EB-IHD-17-00023554 (Investigation), and receipt of support for low-income subscribers by American Broadband and Telecommunications Company (ABTC or the Company) as an Eligible Telecommunications Carrier (ETC) participating in the Low-Income Program of the Universal Service Fund (USF). Under federal law, as set forth in 47 U.S.C. § 503(b)(6), the statute of limitations for issuance of a Notice of Apparent Liability (NAL) for violations of the Act, Commission's rules, or both, by a non-broadcast licensee, is one year from the date on which the alleged violations occurred.

ABTC and the FCC wish to continue the production and review of materials regarding the facts surrounding the possible violations of the Lifeline rules listed above prior to the expiration of the limitations period set forth in 47 U.S.C. § 503(b)(6). ABTC has consulted with its attorney and understands its rights. Therefore, the FCC and ABTC agree as follows:

1. For purposes of calculating the statute of limitations, pursuant to 47 U.S.C. § 503(b)(6), the parties agree that any limitations period for the possible violations as set forth in the preamble of this Agreement shall be tolled from January 30, 2018 until and including either: (a) the release date of a Commission Notice of Apparent Liability for Forfeiture (NAL), consent decree, or order regarding the disposition of any of the possible violations as set forth in the preamble of this Agreement; (b) the date the FCC informs ABTC in writing that it has terminated the Investigation; or (c) April 30, 2018, whichever occurs first (Tolled Period). In the event that the FCC is officially closed on any day that is not a Saturday, Sunday, or an officially recognized Federal legal holiday (as described in the note to Section 1.4 of the Commission's rules)[1] during the Tolled Period, then the Tolled Period shall be extended by the same number of business days as the FCC is officially closed.

2. By agreeing to toll the statute of limitations, as described in Paragraph 1, ABTC understands that it is waiving, and hereby does waive, any right that it might otherwise have to rely on the Tolled Period in connection with the computation of the one-year period under 47 U.S.C. § 503(b)(6) as it applies to the Investigation of the possible violations as set forth in the preamble of this Agreement. ABTC agrees and acknowledges that, upon execution of this Agreement, this document shall have the same force and effect as any other Commission order, and any violation of the terms of this Agreement shall constitute a violation of a

[1] 47 CFR § 1.4.

Commission order, entitling the Commission to exercise any and all rights and to seek any and all remedies authorized by law for the enforcement of a Commission order.

3. No promises, representations, or inducements of any kind have been made to ABTC in connection with this Agreement.

4. By signing this Agreement, ABTC does not admit to any of the possible violations as set forth in the preamble of this Agreement or to any violation of the Lifeline rules. Nothing in this Agreement shall be construed to limit ABTC's ability or right to challenge any Commission action, including without limitation, an order or other document finding ABTC liable for the possible violations as set forth in the preamble of this Agreement or otherwise relating to ABTC's compliance with the Lifeline rules, other than the statute of limitations matters addressed in this Agreement.

5. Nothing in this Agreement has the effect of extending or reviving any limitations period that expired prior to the Tolled Period or that involves possible violations other than those set forth in the preamble of this Agreement.

6. By his signature below, John J. Heitmann represents and warrants that he is authorized to execute this Agreement on behalf of ABTC. No change in the ownership, corporate organization, partnership status, or control of ABTC shall alter the effect of this Agreement.

7. By his signature below, Dangkhoa Nguyen, FCC Enforcement Bureau, represents and warrants that he is authorized to execute this Agreement on behalf of the FCC.

8. This Agreement shall become effective and binding on the parties when it is signed and dated by both parties (the Effective Date).

9. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument. Scanned and/or electronic signatures shall be deemed to be original signatures and legally binding on the applicable party.

By:_____
Dangkhoa Nguyen
Investigative Counsel
Enforcement Bureau
Federal Communications Commission

Dated: 12/19/2017

By:_____
John J. Heitmann
Legal Counsel to
American Broadband and
Telecommunications Company

Dated: 12/18/2017

Exhibit M

Fifth Tolling Agreement

FIFTH TOLLING AGREEMENT

The Enforcement Bureau (Bureau) of the Federal Communications Commission (FCC or Commission) is investigating possible violations of the Commission's rules and orders governing the provision of Lifeline service, 47 CFR §§ 54.403, 54.404, 54.405, 54.407, 54.409, 54.410, 54.411, 54.413, 54.414, 54.416, 54.417, 54.419, 54.420, 54.422; *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656 (2012); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818 (2015); *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, et al., Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962 (2016), in investigation EB-IHD-17-00023554 (Investigation), and receipt of support for low-income subscribers by American Broadband and Telecommunications Company (ABTC or the Company) as an Eligible Telecommunications Carrier (ETC) participating in the Low-Income Program of the Universal Service Fund (USF). Under federal law, as set forth in 47 U.S.C. § 503(b)(6), the statute of limitations for issuance of a Notice of Apparent Liability (NAL) for violations of the Act, Commission's rules, or both, by a non-broadcast licensee, is one year from the date on which the alleged violations occurred.

ABTC and the FCC wish to continue the production and review of materials regarding the facts surrounding the possible violations of the Lifeline rules listed above prior to the expiration of the limitations period set forth in 47 U.S.C. § 503(b)(6). ABTC has consulted with its attorney and understands its rights. Therefore, the FCC and ABTC agree as follows:

1. For purposes of calculating the statute of limitations, pursuant to 47 U.S.C. § 503(b)(6), the parties agree that any limitations period for the possible violations as set forth in the preamble of this Agreement shall be tolled from April 30, 2018 until and including either: (a) the release date of a Commission Notice of Apparent Liability for Forfeiture (NAL), consent decree, or order regarding the disposition of any of the possible violations as set forth in the preamble of this Agreement; (b) the date the FCC informs ABTC in writing that it has terminated the Investigation; or (c) July 30, 2018, whichever occurs first (Tolled Period). In the event that the FCC is officially closed on any day that is not a Saturday, Sunday, or an officially recognized Federal legal holiday (as described in the note to Section 1.4 of the Commission's rules)[1] during the Tolled Period, then the Tolled Period shall be extended by the same number of business days as the FCC is officially closed.

2. By agreeing to toll the statute of limitations, as described in Paragraph 1, ABTC understands that it is waiving, and hereby does waive, any right that it might otherwise have to rely on the Tolled Period in connection with the computation of the one-year period under 47 U.S.C. § 503(b)(6) as it applies to the Investigation of the possible violations as set forth in the preamble of this Agreement. ABTC agrees and acknowledges that, upon execution of this Agreement, this document shall have the same force and effect as any other Commission order, and any violation of the terms of this Agreement shall constitute a violation of a

[1] 47 CFR § 1.4.

Commission order, entitling the Commission to exercise any and all rights and to seek any and all remedies authorized by law for the enforcement of a Commission order.

3. No promises, representations, or inducements of any kind have been made to ABTC in connection with this Agreement.

4. By signing this Agreement, ABTC does not admit to any of the possible violations as set forth in the preamble of this Agreement or to any violation of the Lifeline rules. Nothing in this Agreement shall be construed to limit ABTC's ability or right to challenge any Commission action, including without limitation, an order or other document finding ABTC liable for the possible violations as set forth in the preamble of this Agreement or otherwise relating to ABTC's compliance with the Lifeline rules, other than the statute of limitations matters addressed in this Agreement.

5. Nothing in this Agreement has the effect of extending or reviving any limitations period that expired prior to the Tolled Period or that involves possible violations other than those set forth in the preamble of this Agreement.

6. By his signature below, John J. Heitmann represents and warrants that he is authorized to execute this Agreement on behalf of ABTC. No change in the ownership, corporate organization, partnership status, or control of ABTC shall alter the effect of this Agreement.

7. By his signature below, Dangkhoa Nguyen, FCC Enforcement Bureau, represents and warrants that he is authorized to execute this Agreement on behalf of the FCC.

8. This Agreement shall become effective and binding on the parties when it is signed and dated by both parties (the Effective Date).

9. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument. Scanned and/or electronic signatures shall be deemed to be original signatures and legally binding on the applicable party.

By: _____
Dangkhoa Nguyen
Investigative Counsel
Enforcement Bureau
Federal Communications Commission

Dated: 3/7/2018

By: _____
John J. Heitmann
Legal Counsel to
American Broadband and
Telecommunications Company

Dated: 3.8.18

Exhibit N

[REDACTED]

[REDACTED COPY]

Exhibit O

[REDACTED]

[REDACTED COPY]

Exhibit P

[REDACTED]

[REDACTED COPY]

Exhibit Q

[REDACTED]

[REDACTED COPY]

Exhibit R

[REDACTED]

[REDACTED COPY]

Exhibit S

[REDACTED]

[REDACTED COPY]

Exhibit T

[REDACTED]

[REDACTED COPY]

DECLARATION OF JEFFREY S. ANSTED

In accordance with 47 C.F.R. § 1.16, I, Jeffrey S. Ansted, hereby declare the following:

1. I make this declaration in response to the Notice of Apparent Liability for Forfeiture and Order issued by the Federal Communications Commission to American Broadband and Telecommunications Company ("American Broadband") and myself on October 25, 2018 ("*NAL*").

2. I am the Chief Executive Officer and President of American Broadband.

3. I am over the age of eighteen and I am competent and authorized to make this declaration on behalf of American Broadband.

4. I have reviewed the attached Exhibit N, which is designated as CONFIDENTIAL, and that document is a true and accurate copy [redacted]

5. I have reviewed the attached Exhibit O, which is designated as CONFIDENTIAL, and that document is a true and accurate copy [redacted]

6. I have reviewed the attached Exhibit P, which is designated as CONFIDENTIAL, and that document is a true and accurate copy [redacted]

7. I have reviewed the attached Exhibit Q, which is designated as CONFIDENTIAL, and that document is a true and accurate copy [redacted]

8. I have reviewed the attached Exhibit R, which is designated as CONFIDENTIAL, and that document is a true and accurate copy [redacted]

9. I have reviewed the attached Exhibit S, which is designated as CONFIDENTIAL, and that document is a true and accurate copy [redacted]

10. I have reviewed the attached Exhibit T, which is designated as CONFIDENTIAL, and that document is a true and accurate copy [redacted]

11. [redacted]

[redacted]

12. I make this declaration based on my personal knowledge and review of the foregoing response to the *NAL*.

13. I declare under penalty of perjury that the information contained in the foregoing response to the *NAL* is true and correct.

Executed on January 29, 2019

Jeffrey S. Ansted
Chief Executive Officer and President
American Broadband and Telecommunications Company
One Seagate, Suite 600
Toledo, OH 46399