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August 31, 2004

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
& Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 040604-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of Sprint-Florida, Incorporated are the original and 15 copies of Sprint's Petition protesting Proposed Agency Action Order Expanding Lifeline Eligibility.

Copies are being served on the interested persons in this docket pursuant to the attached certificate of service.

If you have any questions regarding this filing, please do not hesitate to call me at 850-599-1560.

Sincerely,

Susan S. Masterton

Enclosure

DOCUMENT NUMBER-DATE
09531 AUG 31 04
FPSC-COMMISSION CLERK

CERTIFICATE OF SERVICE
DOCKET NO. 040604-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic and U.S. mail on this 31st day of August, 2004 to the following:

Florida Cable Telecommunications
Association, Inc.
Michael A. Gross
246 E. 6th Avenue
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Tallahassee, FL 32303

Verizon Florida Inc.
Mr. Richard Chapkis
P.O. Box 110
Tampa, FL 33601

Florida Public Service Commission
Adam Teitzman
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

BellSouth Telecommunications, Inc.
Nancy White
150 South Monroe Street, Suite 400
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Office of Public Counsel
Charles J. Beck/Harold Mclean
111 West Madison Street, #812
Tallahassee, FL 32399-1400

Susan S. Masterton

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Adoption of the National School Lunch Program and an income-based Criterion at or below 135% of the Federal Poverty Guideline as eligibility Criteria for the Lifeline and Link-up Programs.	)	Docket No. 040604-TL Filed: August 31, 2004

SPRINT-FLORIDA, INCORPORATED'S PETITION PROTESTING PROPOSED AGENCY ACTION ORDER EXPANDING LIFELINE ELIGIBILITY

Sprint-Florida, Incorporated ("Sprint"), by and through its undersigned counsel, and pursuant to Section 25-22.029, Florida Administrative Code and Section 28-106.201, Florida Administrative Code, hereby files this Petition protesting Proposed Agency Action Order No. PSC-04-0781-PAA-TL ("PAA Order"), issued by the Florida Public Service Commission ("Commission") on August 10, 2004. The PAA Order proposes to impose on eligible telecommunications carriers ("ETCs") additional eligibility criteria for Lifeline and Link-up services and an additional mechanism for establishing eligibility for Lifeline and Link-up under certain criteria, as well as differential Lifeline support for customers based on the mechanism upon which they notify the ETC of their qualification for Lifeline services.

Sprint protests each of the additional eligibility criteria as well as the additional mechanism for qualification and the related annual report filing requirements as set forth below. Sprint files this protest reluctantly because Sprint supports the goals of the PAA Order to improve Lifeline subscribership levels and processes. However, Sprint does not believe that the mechanisms adopted in the PAA Order are necessarily the best

alternatives based on relevant facts and applicable law and policy, but looks forward to working with the Commission to explore appropriate mechanisms to achieve these goals.

1. Petitioner is an incumbent local exchange company and an ETC in Florida. Petitioner's name and address are as follows:

Sprint-Florida, Incorporated
6450 Sprint Parkway
Overland Park, KS 66251-6100

2. All notices, pleadings, staff recommendations, orders or other documents filed or served in this docket should be provided to the following representatives of Sprint:

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BACKGROUND

3. On April 29, 2004, the FCC released its Report and Order and Further Notice of Proposed Rulemaking adopting additional federal criteria relating to Lifeline and Linkup ("Lifeline Order").[1] The Lifeline Order adds an income-based criterion (135% of the federal poverty guideline) and a program-based criterion (the free

National School Lunch program) to the existing program-based criteria. (Lifeline Order at ¶¶10 and 13, respectively) These additional criteria apply to "federal default" Lifeline and Link-up states. States with their own Lifeline programs are not required to adopt the additional federal criteria.

4. On August 10, 2004, the Commission issued the PAA Order adopting the new federal criteria in Florida. The Commission issued this Order *sua sponte*, that is, without soliciting comments from or holding workshops involving ETCs or citizens who would be affected by the imposition of the new criteria. The Commission's stated reasons for the recommended actions contained in the PAA Order were to increase enrollment of eligible participants in the Florida Lifeline program (PAA Order at pp. 4 and 7) and to attempt to remedy Florida's status as a "net contributor" to the federal Universal Service Fund by increasing the number of Florida residents receiving federal support from Lifeline in comparison to other states. (PAA Order at pp. 5 and 9)

GENERAL PROTEST OF PAA ORDER

5. Sprint protests on legal, policy and factual grounds the additional Lifeline and Link-up eligibility criteria of participation in the free National School Lunch Program and an income at or beneath 135% of the federal poverty level. Similarly, Sprint protests on legal, policy and factual grounds the additional mechanism (and associated administrative requirements) for qualifying for Lifeline by self-certification of participation in one of the eligible programs to

[1] Report and Order and Further Notice of Proposed Rulemaking, WC Docket 03-109, In the Matter of Lifeline and Link-up, Release No. FCC 04-87, released April 29, 2004.

receive the $8.25 federal contribution and also protests related customer contact protocols, verification, and annual reporting requirements. Generally, the PAA Order is predicated upon an erroneous, insufficient or, in some cases, nonexistent factual record to support the Commission's findings and conclusions. In addition, the Commission has misinterpreted the applicable law and its authority under the law to impose the additional eligibility and qualification criteria. Finally, the Commission has failed to demonstrate that the imposition of the challenged criteria will ultimately materially contribute to or enhance its stated goal of increasing participation in the Lifeline and Link-up programs in Florida.

6. Generally, Sprint asserts that the Commission does not have the authority under Florida law to impose the recommended Lifeline criteria. Section 364.10, Florida Statutes, recognizes the Lifeline program as an exception to the general statutory prohibitions on discrimination among similarly situated customers, but it does not convey authority to the Commission to adopt or unilaterally augment those criteria or create two tiers of Lifeline support.

7. Historically in Florida (and pursuant to s. 364.10(2), F.S.), criteria for the state Lifeline program have been set forth in tariffs filed by ETCs.[2] In 2003, the Legislature imposed certain income eligibility criteria (125% of the federal

[2] See, *In re: Request for approval of tariff filing to offer Lifeline Assistance Program, required by Chapter 364.10(2), F.S., by: GTE Florida Incorporated (T-95-395 filed 6/30/95) United Telephone Company of Florida (T-95-400 filed 6/30/95) Central Telephone Company of Florida (T-95-401 filed 6/30/95) Vista-United Telecommunications (T-95-415 filed 7/7/95) Gulf Telephone Company (T-95-432 filed 7/12/95) Quincy Telephone Company (T-95-436 filed 7/14/95) ALLTEL Florida, Inc. (T-95-430 filed 7/12/95) St. Joseph Telephone & Telegraph Company (T-95-433 filed 7/12/95) The Florala Telephone Company, Inc. (T-95-443 filed 7/18/95)*, Docket Nos. 950792-TL, 950793-TL, 950794-TL, 950839-TL, 950842-TL, 950844-TL, 950846-TL, 950847-TL, 950873-TL; Order No. PSC-95-1150-FOF-TL, issued September 15, 1995; *In re: request for approval of proposed tariff to introduce Lifeline Assistance Plan by BellSouth Telecommunications , Inc. d/b/a Southern Bell Telephone and Telegraph Company (T-93-390 filed 6/28/93)*, Docket No. 930693-TL, Order No. PSC-94-02420FOF-TL, issued March 4, 1994.

poverty guideline) on certain eligible telecommunications carriers, contingent on those carriers receiving authority from the Commission to reduce their intrastate switched access charges to interstate levels in a revenue neutral manner.[3] Not only does this provision of the statute not accord the Commission the authority to adopt additional eligibility criteria, but it restricts the Commission from imposing any eligibility criteria inconsistent with the criteria set forth in the statute.

8. Sprint also asserts that, to the extent the Commission may have authority to impose any forward looking, generally applicable criteria for Lifeline eligibility and qualification in Florida, then the appropriate regulatory process is a rulemaking proceeding under s. 120.54, F.S. Sprint is aware that the Commission previously has approved or adopted Lifeline criteria through an order, rather than rulemaking. However, generally these orders have taken the form of recognizing an agreement of interested parties regarding the criteria and qualification process that would be incorporated into ETC tariffs. To the extent that the Commission has or intends to impose the criteria unilaterally, then such an action meets the definition of a rule in s. 120.52(15), F.S., and the rulemaking procedures and requirements apply.

9. Specific factual, legal and policy bases for Sprint's protest of each of the additional criteria included in the PAA Order are set forth in the following paragraphs.

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[3] See, e.g., Docket No. 030868-TP, *In re: Petition by Sprint-Florida, Incorporated to reduce intrastate switched network access rates to interstate parity in revenue neutral manner pursuant to Section 364.164(1), Florida Statutes*, Order No. PSC-03-1469-FOF-TL, issued December 24, 2003. The Commission granted Sprint's Petition to reduce its intrastate access charges to the level of its interstate access charges in a revenue neutral manner. However, that decision is currently stayed pending appeal to the Florida Supreme Court.

NATIONAL SCHOOL LUNCH PROGRAM

10. The Commission does not have the authority to adopt the National School Lunch program as an additional eligibility criterion and has not established a factual predicate for doing so. It is a well-settled principal of Florida law that an administrative agency has only the authority conferred upon it by the Legislature.[4] Nowhere in the Florida Statutes governing the Commission and its regulation of telecommunications companies does the Legislature grant the Commission any authority to adopt criteria for the Lifeline program other than its authority to approve the tariffs filed in 1995 when s. 364.10(2), F.S., was enacted.

11. In addition, the Commission lacks competent, substantial evidence to support its finding that adding the National School Lunch program as an additional program-based eligibility criterion will increase participation in the Lifeline program in Florida. Since the income eligibility requirements for the National School Lunch program are similar to many of the other low income assistance programs currently recognized for qualification for Lifeline in Florida, it is difficult to predict if the addition of this program will have any effect at all on subscribership levels in Florida. The Commission has provided no competent evidence to support its finding that it will.

12. The Commission also has failed to adequately address administrative issues associated with the addition of this program to the program-based eligibility criteria or the recovery of associated costs that would be imposed on eligible telecommunications carriers in implementing this additional criterion.

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[4] See, *United Telephone Company v. Public Service Commission*, 496 So. 2d 116 (Fla. 1986).

INCOME-BASED ELIGIBIITY OF 135% OF THE FEDERAL POVERY GUIDELINE

13. Not only does the Commission lack the statutory authority to adopt an income-based eligibility criterion for participation in the Lifeline program, the criterion adopted (i.e., 135% of the federal poverty guideline) directly conflicts with the criterion established by the Legislature in its 2003 amendments to s. 364.10(3), F.S. Basic principles of statutory construction provide that if the Legislature has stated one thing, then it intended to exclude others (in its Latin form: *expressio unius est exclusio alterius*).[5] By establishing an income-based criterion of 125% of the federal poverty guideline only for ETCs whose petitions for access charge reductions have been granted, the Legislature explicitly precluded the Commission from adopting a different criterion or applying it more broadly.

14. The Commission expressly relies on a sentence in s. 364.10(3), F.S., to provide statutory support for its adoption of the increased income based eligibility criterion. (PAA Order at p. 5) According to the PAA Order, the adoption of this criterion is "within its discretion" because the Legislature stated that the 125% income eligibility requirement was intended to "augment, rather than replace, the eligibility standards established by federal law and based on participation in certain low-income assistance programs." (Id.) The Commission's interpretation of this statute is erroneous, first because it misreads the "and" as "or," in an attempt to support its ability to augment both the income and the program-based

[5] See, *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996) ("Under the principle of statutory construction, espressio unius est exclusio alterius, the mention of one thing implies the exclusion of another," citing Bergh v. Stephens, 175 So. 2d 787 (1st DCA 1965)); *Alvarez v. Board of Trustees of the City Pension Fund for Firefighters and Police Officers in the City of Tampa*, 580 So. 2d 151, 154 (Fla. 1991) ("Applying the doctrine of expressio unius est exclusio alterius, we conclude that by expressly excluding two forms of payment to an individual, which appear to be otherwise exempt from legal process,

eligibility requirements established by the FCC. As stated above, s. 364.10, F.S., does not grant the Commission any authority to impose additional or conflicting Lifeline eligibility criteria. But even assuming, *arguendo*, that the Commission has such authority as it relates to program-based criteria, this sentence clearly prohibits the imposition of any income-based eligibility criterion other than 125% of the FPG established in the law.

15. Second, even if it is assumed, once again *arguendo*, that the Commission has the authority to augment federal eligibility requirements pursuant to s. 364.10, F.S., principles of statutory construction related to "incorporation by reference" mandate that the Commission interpret its authority in the light of the federal criteria that existed at the time the statute was enacted.[6] At the time the statute was enacted, the federal criteria included only program-based criteria -- the federal income-based criteria of 135% that serves as the basis for the Commission adoption of similar state criteria was not enacted until April 29, 2004. This federal criterion was adopted subsequent to the 2003 enactment of the amendments to s. 364.10, F.S. that the Commission relies on as the statutory authority for its PAA Order and, therefore, may not be considered as a basis for the Commission's action.

16. The Commission's stated reason for adopting the 135% income-based criterion, that is, to increase participation in Florida so that Florida's status as a "net

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the legislature intended to 'preempt the field' of exclusions and to subject the chapter 61 income deduction to all other forms not so mentioned.")

[6] See, *Department of Legal Affairs v. Rogers*, 329 So. 2d 257, 267 (Fla. 1976) (relating to incorporation by reference of federal FTC rules and decisions into the Florida "Little FTC' the Court stated, "To preserve the constitutional validity of the act, we would have to say that the legislative enactment intended only decisions made prior to its enactment.")

contributor" into the federal universal service fund is ameliorated (PAA Order at p. 5), also is not supported by the statutes setting forth the Commission's mission or purpose. (See, s. 364.01, F.S.)

17. Not only does the Commission lack the authority to adopt 135% income-based criteria, but the factual predicate for its findings and conclusions is entirely inadequate. In the PAA Order, the Commission relies on certain statistical evidence provided in a staff analysis that supported the FCC's Lifeline Order. (Lifeline Order at ¶ 10 and Appendix K) These statistics are estimates derived from broad-based national data and, by the FCC's own admission, are "likely to represent the upper limit of potential new Lifeline and telephone subscribers and estimated impact on the fund." (Lifeline Order at FN 32) Clearly, individuals who meet the 135% income eligibility likely also qualify to participate in one of the several programs that are recognized under the program-based criteria, so that any actual increase in potential subscribership is difficult to accurately estimate. Nevertheless, in the PAA Order, the Commission estimates that by imposing the 135% criterion eligibility in Florida would increase by an additional 938,473 households (almost twice the number of eligible households under the current Florida Lifeline criteria, including the 125% currently imposed voluntarily by BellSouth, Verizon and Sprint). This estimate is flawed and should not serve as a basis for the Commission's PAA Order.

SELF-CERTIFICATION

18. The Commission's adoption of a two-tiered Lifeline benefit based on the method a customer uses to qualify for the benefit is not authorized by Florida Statutes

and, in fact, violates the provisions prohibiting discrimination against similarly situated customers contained in the very statute that the Commission relies on for its authority.

19. In addition, the Commission's factual basis for adopting the self-certification criteria is unproven and incorrect. The Commission states that "it appears that one of the major reasons more eligible consumers have not signed up for Lifeline and Link-Up assistance programs is the time-consuming certification process." (PAA Order at p. 5) However, the Commission has conducted no fact-finding process upon which to base that assumption and provides no competent, substantial evidence to support it. As recognized by the FCC in the Lifeline Order, lack of participation is based often on lack of awareness of the existence of the program – more effectively addressed by additional outreach efforts – than on the administrative difficulties in enrollment. (Lifeline Order at ¶ 42)

20. Sprint agrees that Florida enrollment levels in Lifeline are below the national average and that work can be done to improve Florida participation rates. In fact, Sprint has committed to and is engaged in substantial outreach efforts to increase awareness of the availability of the Lifeline program. These outreach efforts have resulted in an increase in enrollment in Lifeline for Sprint of almost 40% since outreach efforts have begun. Sprint suggests that the better course of action for the Commission at this time is to give these outreach efforts an opportunity to succeed based on the existing eligibility criteria and qualification methodology before seeking to impose additional criteria that have not been proven will affect Lifeline subscribership levels to a significant degree, if at all.

21. In the haste to impose unproven additional requirements to address the perceived problem of insufficient Lifeline enrollment, the Commission has failed to adequately consider or address the administrative implications (including impacts on carriers' processes and costs) of adopting self-certification as a qualification mechanism, and related customer contact protocols and annual reporting requirements. In the Lifeline Order, the FCC has made it clear that any self-certification mechanism must have a corollary verification mechanism, in order to ensure that customers who are not eligible do not receive or continue to receive benefits that they are not entitled to. (Lifeline Order at ¶ 33) The Commission addressed this issue by requiring that "ETCs annually calculate a statistically valid sample of their Lifeline customers to ensure eligibility standards are being met." (PAA Order at p. 9) The Commission's imposition of these protocols, reports and verification procedures may impose significant administrative costs on ETCs (with no corresponding benefits), which the Commission has failed to acknowledge, much less address.

WHEREFORE, Sprint protests the PAA Order and requests that, in lieu of an order, the Commission initiate a rulemaking proceeding pursuant to s. 120.54, F.S., to consider its authority to adopt and the appropriateness of adopting any generally applicable eligibility criteria or qualification mechanisms applicable to Lifeline. In the alternative, Sprint requests a hearing to resolve the disputed issues of material fact, law and policy as set forth herein pursuant sections 120.569 and 120.57, Florida Statutes.

Respectfully submitted this 31st day of August 2004.

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