State of Florida
Public Service Commission
INTERNAL AFFAIRS AGENDA
Wednesday, April 6, 2011
9:30 a.m.
Room 140 - Betty Easley Conference Center

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1. Approve March 8, 2011, Internal Affairs Meeting Minutes. (Attachment 1)

2. Draft Comments in Response to the Federal Communications Commission Notice of Proposed Rulemaking on Lifeline and Link-Up Reform and Modernization. Critical Dates: Comments are due April 21, 2011. (Attachment 2)

3. Draft Comments to the Federal Communications Commission Regarding High-Cost Universal Service Programs and Intercarrier Compensation. Critical Dates: Comments are due April 18, 2011. (Attachment 3)

4. Potential FPSC *Amicus* Filing in *National Association of Regulatory Utility Commissioners v. U.S. Department of Energy*, D.C. Circuit Court of Appeals (Case No. 11-1066). Commission guidance is sought. (Attachment 4)

5. Legislative Update. (No Attachment)

6. Other matters, if any.

TD/sa

OUTSIDE PERSONS WISHING TO ADDRESS THE COMMISSION ON ANY OF THE AGENDAED ITEMS SHOULD CONTACT THE OFFICE OF THE EXECUTIVE DIRECTOR AT (850) 413-6068.

Attachment 1

State of Florida
Public Service Commission
INTERNAL AFFAIRS MINUTES
Tuesday – March 8, 2011
10:05 am - 11:00 am
Room 140 - Betty Easley Conference Center

COMMISSIONERS PRESENT: Chairman Graham
Commissioner Edgar
Commissioner Brisé
Commissioner Balbis
Commissioner Brown

STAFF PARTICIPATING: Devlin, Hill, Helton, Ballinger, Harlow, Futrell, Miller, Mills, Moses, Hoppe, Shafer

OTHERS PARTICIPATING: Joe McGlothlin - Office of Public Counsel

1. Approve February 23, 2011, Internal Affairs Meeting Minutes.

   The minutes were approved.

   Commissioners participating: Graham, Edgar, Brisé, Balbis, Brown

2. Proposed Letter to Governor, President of the Senate, and Speaker of the House regarding FEECA Report.

   Mr. Ballinger discussed the proposed letter with the Commission. Staff is to edit the letter, as directed by the Commissioners, and circulate the final version.

   Commissioners participating: Graham, Edgar, Brisé, Balbis, Brown

3. Briefing on EPA Regulations.

   Ms. Harlow and Mr. Futrell briefed the Commissioners on EPA regulations. The Chairman is going to work with staff to get additional information from the utilities and DEP.

   Commissioners participating: Graham, Edgar, Brisé, Balbis, Brown

4. Briefing on Natural Gas Safety.

Mr. Mills briefed the Commissioners on the Pipeline Safety Program and some incidents that have occurred. Commission's procedures when evaluating pipeline systems for safety was reviewed. Possible Federal Legislation that could affect the Commission was discussed.

Mr. Hoppe advised the Commissioners that Mr. Mills would be leaving the Commission at the end of March, after 37 years of service. Commissioner Edgar commented on what an excellent job Mr. Mills and his staff have done.

Commissioners participating: Graham, Edgar, Brisé, Balbis, Brown

5. Legislative Update.

Mr. Futrell and Mr. Shafer briefed the Commissioners on proposed legislative bills and other matters of interest.

Commissioners participating: Graham, Edgar, Brisé, Balbis, Brown

6. Other matters, if any.

Commissioner Edgar requested that informal notification of any appointments of Commissioners to different groups be provided to the panel.

Commissioners participating: Graham, Edgar, Brisé, Balbis, Brown

State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: April 4, 2011

TO: Timothy J. Devlin, Executive Director

FROM: Robert J. Casey, Public Utilities Supervisor, Division of Regulatory Analysis
Beverlee S. DeMello, Asst Director of Public Information, Office of Public Information
Cindy B. Miller, Senior Attorney, Office of the General Counsel

RE: Draft Comments in Response to the Federal Communications Commission Notice of Proposed Rulemaking on Lifeline and Link-Up Reform and Modernization. **CRITICAL INFORMATION:** Please place on the April 6, 2011 Internal Affairs. Comments are due April 21, 2011. **COMMISSION APPROVAL OF COMMENTS IS SOUGHT.**

On March 4, 2011, the Federal Communications Commission (FCC) released a Notice of Proposed Rulemaking (NPRM) (FCC 11-32) on Lifeline and Link-Up Reform and Modernization. In this NPRM, the FCC seeks comment on its set of proposals to reform and modernize Lifeline and Link-Up, including recommendations of the Federal-State Joint Board on Universal Service, the Government Accountability Office, and the National Broadband Plan. Staff is seeking approval of the attached draft comments. (Attachment A)

The Draft Comments encourage the FCC to consider the following:

1. Eligible Telecommunications Carriers (ETCs) should provide such information as customer names, addresses, the last four digits of a Lifeline customer's social security number, birthdates, or other unique household-identifying information to the Universal Service Administrative Company (USAC) when filing for reimbursement using USAC's Form 497.

2. When duplicate USAC payments are identified, ETCs should notify the customer that they have 30 days to select a single ETC to provide Lifeline service going forward.

3. The FCC should restrict recovery for duplications only upon a showing of negligence by the ETC.

4. The FCC should codify as a rule the current practice of requiring unique residential addresses, in order to assist both ETCs and the Universal Service Administrative Company (USAC) in determining whether an applicant is already receiving Lifeline or Link-Up service.

5. The FCC should clarify that Line 9 of Form 497 must be used by carriers to adjust their support claim if they lose or gain subscribers during the month.

6. If toll limitation service is eliminated, the FCC should consider how much deposit a Lifeline customer would be required to provide and determine what amount of deposit would be considered excessive.

7. ETCs should not impose a customary charge only on low-income customers in order to inflate the amount of reimbursement received from the universal service fund (USF).

8. The FCC proposal should amend its rules to define "customary charge for commencing telecommunications service" as the ordinary initiation charge that an ETC routinely imposes on all customers within a state.

9. The FCC should require all ETCs seeking Link-Up reimbursement to submit cost support to USAC for the revenues they forgo in reducing their customary charges.

10. FCC rules should be clarified to prohibit ETCs from seeking more than one Link-Up subsidy for the same customer at the same location.

11. The FCC should adopt a rule that prohibits resellers from imposing a connection charge on consumers when the underlying wholesale provider has not assessed a similar connection charge on the reseller.

12. The FCC should amend its rules to prevent competitive ETCs which do not submit monthly bills to their Lifeline customers from obtaining Lifeline support for inactive consumers.

13. Charging a Lifeline customer a minimum monthly charge such as one dollar would not be cost-effective.

14. If the FCC proposes rules requiring ETCs to de-enroll their Lifeline customers from the program under specified circumstances, the FCC should take into consideration existing state laws regarding termination of Lifeline customers.

15. The FCC should require that all new ETCs be audited after the first year of providing Lifeline-supported service, and random audits should be continued for all ETCs to ensure ongoing compliance with low-income rules.

16. The FCC should create a process whereby states are allowed to request that ETC disbursements be suspended for ETCs that are being investigated for possible waste, fraud or abuse of the USF.

17. The FCC should adopt a one-per-residential address requirement for Lifeline service.

18. The FCC should require all ETCs to obtain a certification when initially enrolling a subscriber and again during the annual verification process that the subscriber is receiving Lifeline support for only one line per residence.

19. Providing Lifeline/Link-Up support for one wireless service per eligible adult, rather than one service per residential address goes well beyond the "sufficient" requirement in 47 U.S.C. § 254(b)(5).

20. The FCC should limit low-income USF support to a single subscription per U.S. Postal address, except in the case of group-living facilities such as homeless shelters.

21. Residents of commercially-zoned buildings such as homeless shelters, halfway houses, domestic-violence shelters, or other group living facilities should be allowed to participate in the Lifeline program if they are eligible.

22. The FCC should cap the size of the low-income program until the implementation of structural reforms proposed in this NPRM.

23. The FCC should continue to provide discretion to the states to administer key aspects of the low-income program, such as eligibility, enrollment, and ongoing verification of eligibility.

24. The FCC should initiate its sample-and-census proposal for Lifeline verification. If an ETC whose ineligibility rate exceeds the set threshold, it should be required to perform a census of all Lifeline customers each year until the ETC can establish that fewer than 5 percent of respondents are ineligible.

25. The Florida Public Service Commission (FPSC) supports the creation of a database to verify consumer eligibility, track verification and check for duplicates to ensure greater program accountability, as long as it is maintained by an independent administrator and operated under strict confidentiality provisions to protect the Lifeline subscribers/applicants personal identifying information.

26. The FPSC urges the FCC to continue to help increase awareness of the Lifeline and Link-Up programs.

27. The FPSC does not believe the FCC should impose particular marketing guidelines on ETCs, but the FCC needs to ensure that ETCs explain the Lifeline program to consumers so they fully understand the benefit being offered with the product to prevent the problem of duplicate support.

28. ETCs should not be required to submit a marketing plan to the state public service commissions but should work cooperatively with them to develop creative awareness campaigns.

29. The FCC should expand its existing *Lifeline Across America Working Group*--comprised of FCC, state public service commission, and NASUCA representatives--to include wireline and wireless ETC representatives.

30. The FCC should encourage state public service commissions to work with their designated social service agency(s) to develop and maintain Lifeline coordinated enrollment processes and distribute Link-Up and Lifeline educational materials.

31. ETCs marketing their Lifeline-supported products under a trade name should include language in the name of their service offering or in the description of the service to clarify that the offering is supported by Lifeline and explain the Lifeline program. The FCC could require ETCs to develop plain and simple language--which explains the specific Lifeline subsidy--for use in their product marketing.

32. The FPSC supports the FCC proposal to replace the term "basic local service" with "voice telephony service" for universal service purposes.

33. The FPSC opposes expanding the definition of supported services to include broadband unless the expansion was a part of an overall cap.

34. If Lifeline broadband is adopted by the FCC, it should only allow consumers a single discount off a single service and not multiple Lifeline discounts on multiple services.

Florida has been recognized by the FCC as being at the forefront of the battle against USF fraud, waste, and abuse and ensuring only eligible consumers receive Lifeline support.[1] The FCC seeks comment on its set of proposals to reform and modernize Lifeline and Link-Up. Staff is seeking Commission approval to submit the comments by April 21, 2011.

RJC
Attachment
cc: Charles Hill

[1] FCC 10J-3, Released November 4, 2010, at p.40

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Lifeline and Link-Up Reform and Modernization	)	WC Docket No. 11-42
	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109

COMMENTS OF THE FLORIDA PUBLIC SERVICE COMMISSION

FLORIDA PUBLIC SERVICE COMMISSION

CHAIRMAN ART GRAHAM
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER RONALD A. BRISÉ
COMMISSIONER EDUARDO E. BALBIS
COMMISSIONER JULIE I. BROWN

April 6, 2011

INTRODUCTION AND SUMMARY

The Florida Public Service Commission (FPSC) submits these comments in response to the Notice of Proposed Rulemaking (NPRM) released on March 4, 2011. In this NPRM (FCC 11-32), the Federal Communications Commission (FCC) seeks comment on its set of proposals to reform and modernize Lifeline and Link-Up, including recommendations of the Federal-State Joint Board on Universal Service, the Government Accountability Office, and the National Broadband Plan.

Paragraph 38 of the NPRM discusses the relative burden of the Universal Service Fund (USF) on consumers. Several states, including Florida, continue to shoulder a disproportionate burden of funding the program. There is a huge disparity between the amount of money collected from Florida customers for the USF and the amount of money coming back into Florida to eligible telecommunications carriers (ETCs) through the federal USF. For the year 2009, Floridians paid $496 million into this fund and received back $222 million for a net contribution from Florida into the fund of ($274 million). Florida has been the largest net contributor to the federal USF for at least 11 years (1999-2009). The FPSC is concerned about the inequity in the amount Florida customers are paying into the federal USF versus the amount the USF is disbursing to the State of Florida. The FPSC encourages the FCC to address this inequity during the proceedings to reform the USF.

The FPSC encourages the FCC to consider the following:

1. ETCs should provide such information as customer names, addresses, the last four digits of a Lifeline customer's social security number, birthdates, or other unique household-identifying information to the Universal Service Administrative Company (USAC) when filing for reimbursement using USAC's Form 497.

2. When duplicate USAC payments are identified, ETCs should notify the customer that they have 30 days to select a single ETC to provide Lifeline service going forward.
3. The FCC should restrict recovery for duplications only upon a showing of negligence by the ETC.
4. The FCC should codify as a rule the current practice of requiring unique residential addresses, in order to assist both ETCs and USAC in determining whether an applicant is already receiving Lifeline or Link-Up service.
5. The FCC should clarify that Line 9 of Form 497 must be used by carriers to adjust their support claim if they lose or gain subscribers during the month.
6. If toll limitation service is eliminated, the FCC should consider how much deposit a Lifeline customer would be required to provide, and determine what amount of deposit would be considered excessive.
7. ETCs should not impose a customary charge only on low-income customers in order to inflate the amount of reimbursement received from the USF.
8. The FCC proposal should amend its rules to define "customary charge for commencing telecommunications service" as the ordinary initiation charge that an ETC routinely imposes on all customers within a state.
9. The FCC should require all ETCs seeking Link-Up reimbursement to submit cost support to USAC for the revenues they forgo in reducing their customary charges.
10. FCC rules should be clarified to prohibit ETCs from seeking more than one Link-Up subsidy for the same customer at the same location.

11. The FCC should adopt a rule that prohibits resellers from imposing a connection charge on consumers when the underlying wholesale provider has not assessed a similar connection charge on the reseller.
12. The FCC should amend its rules to prevent competitive ETCs which do not submit monthly bills to their Lifeline customers from obtaining Lifeline support for inactive consumers.
13. Charging a Lifeline customer a minimum monthly charge such as one dollar would not be cost-effective.
14. If the FCC proposes rules requiring ETCs to de-enroll their Lifeline customers from the program under specified circumstances, it should take into consideration existing state laws regarding termination of Lifeline customers.
15. The FCC should require that all new ETCs be audited after the first year of providing Lifeline-supported service, and random audits should be continued for all ETCs to ensure ongoing compliance with low-income rules.
16. The FCC should create a process whereby states are allowed to request that ETC disbursements be suspended for ETCs that are being investigated for possible waste, fraud or abuse of the USF.
17. The FCC should adopt a one-per-residential address requirement for Lifeline service except for group-living facilities such as homeless shelters.
18. The FCC should require all ETCs to obtain a certification when initially enrolling a subscriber and again during the annual verification process that the subscriber is receiving Lifeline support for only one line per residence.

19. Providing Lifeline/Link-Up support for one wireless service per eligible adult, rather than one service per residential address goes well beyond the "sufficient" requirement in 47 U.S.C. § 254(b)(5).

20. The FCC should limit low-income USF support to a single subscription per U.S. Postal address, except in the case of group-living facilities such as homeless shelters.

21. Residents of commercially-zoned buildings such as homeless shelters, halfway houses, domestic-violence shelters, or other group living facilities should be allowed to participate in the Lifeline program if they are eligible.

22. The FCC should cap the size of the low-income program until the implementation of structural reforms proposed in this NPRM.

23. The FCC should continue to provide discretion to the states to administer key aspects of the low-income program, such as eligibility, enrollment, and ongoing verification of eligibility.

24. The FCC should initiate its sample-and-census proposal for Lifeline verification. If an ETC's ineligibility rate exceeds the set threshold, it should be required to perform a census of all Lifeline customers each year until the ETC can establish that fewer than 5 percent of respondents are ineligible.

25. The FPSC supports the creation of a database to verify consumer eligibility, track verification and check for duplicates to ensure greater program accountability, as long as it is maintained by an independent administrator and operated under strict confidentiality provisions to protect the Lifeline subscriber's/applicant's personal identifying information.

26. The FPSC urges the FCC to continue to help increase awareness of the Lifeline and Link-Up programs.

27. The FPSC does not believe the FCC should impose particular marketing guidelines on ETCs, but the FCC needs to ensure that ETCs explain the Lifeline program to consumers so they fully understand the benefit being offered with the product to prevent the problem of duplicate support.

28. ETCs should not be required to submit a marketing plan to the state public service commissions but should work cooperatively with them to develop creative awareness campaigns.

29. The FCC should expand its existing *Lifeline Across America Working Group*--comprised of FCC, state public service commission, and NASUCA representatives--to include wireline and wireless ETC representatives.

30. The FCC should encourage state public service commissions to work with their designated social service agency(s) to develop and maintain Lifeline coordinated enrollment processes and distribute Link-Up and Lifeline educational materials.

31. ETCs marketing their Lifeline-supported products under a trade name should include language in the name of their service offering or in the description of the service to clarify that the offering is supported by Lifeline and explain the Lifeline program. The FCC could require ETCs to develop plain and simple language--which explains the specific Lifeline subsidy--for use in their product marketing.

32. The FPSC supports the FCC proposal to replace the term "basic local service" with "voice telephony service" for universal service purposes.

33. The FPSC opposes expanding the definition of supported services to include broadband unless the expansion were a part of an overall cap.

34. If Lifeline broadband is adopted by the FCC, it should only allow consumers a single discount off a single service and not multiple Lifeline discounts on multiple services.

IMMEDIATE REFORMS TO ELIMINATE WASTE, FRAUD, AND ABUSE

DUPLICATE CLAIMS

The FCC historically has allowed only one Lifeline credit per household. The results of the Universal Service Administrative Company audit[2] discussed in paragraph 48 of the NPRM show that multiple ETCs (wireline/wireless) seeking reimbursement for Lifeline service provided to the same residence is a major problem. At this time, these ETCs have no way to determine if another ETC is providing Lifeline service to the same customer.

Measures to Assist in Detecting Duplicate Claims

In order for an ETC to receive reimbursement for providing Lifeline and Link-Up discounts to eligible consumers, it must submit a Form 497 to the USAC. Presently when filing Form 497 with USAC for reimbursement, an ETC must certify that the data contained in this form has been examined and reviewed and is true, accurate, and complete. The ETC is not required to submit any supporting documentation that the numbers it recorded on Form 497 are true and correct. The FPSC supports the FCC's proposal to require ETCs to provide such information as customer names, addresses, the last four digits of a Lifeline customer's social security number,[3] birthdates, or other unique household-identifying information to USAC on their Forms 497, as long as it is under strict confidentiality provisions to protect the Lifeline subscriber's/applicant's personal

[2] USAC Independent Auditor's Report, Audit No. LI2009BE006 (December 3, 2010) (TracFone Audit).

[3] Rule 25-4.0665(9), Florida Administrative Code, provides that eligible telecommunications carriers shall only require a customer to provide the last four digits of the customer's social security number for application for Lifeline and Link-Up service and to verify continued eligibility for the programs as part of the annual verification process.

identifying information. The FPSC believes that the benefits of requiring subscribers to provide such information to protect the USF from waste, fraud, and abuse, outweighs the burden.

Remedies to Address Duplicate Claims

In paragraph 58 of the NPRM, the FCC explains the process being used to address duplicate subsidies when more than one ETC seeks support for the same subscriber from USAC for the same address. Currently, when a duplicate subsidy is discovered, USAC is to notify the ETCs to discontinue including the duplicate subscriber in their list of subscribers for which the ETCs are claiming Lifeline support on the FCC Form 497. ETCs must notify the subscriber by phone, and in writing where possible, and explain that the subscriber has 30 days to select one Lifeline provider or face de-enrollment from the program. Once the subscriber selects a single Lifeline provider for the household by signing a new certification, the chosen ETC must notify USAC and the other ETC. The selected ETC may then seek reimbursement for the subscriber going forward, while the other ETC must de-enroll the household from its Lifeline service and may not seek reimbursement for that subscriber going forward. The FPSC believes this process may be burdensome and time-consuming to not only the ETC but also the Lifeline consumer.

The FPSC believes that when duplicate payments are identified, ETCs should notify their customers that they have 30 days to select a single ETC to provide Lifeline service going forward. If the customer makes a timely selection, the carrier not selected will no longer receive Lifeline support for that customer. If the customer fails to make a timely selection, the carrier that has provided continuous Lifeline service to the customer for the longest period of time would continue to receive Lifeline support and the other carrier would no longer receive support for that customer.

In paragraph 62 of the NPRM, the FCC proposes that "...USAC would be required to seek recovery for funds from all ETCs with duplicates for the applicable period—*i.e.*, if one or more individuals residing at the same address have been obtaining Lifeline support from two or more providers simultaneously, USAC would be required to seek recovery from all implicated providers for all support received during the period of duplicative service..." The FPSC believes that this approach would punish the ETCs for something that is not within their control at this time. In this scenario, an ETC would have no way to cross-check another provider's database to determine if the Lifeline applicant is already receiving Lifeline benefits from another provider. Punishing both ETCs for something they could not control may have a detrimental effect on the Lifeline program as ETCs may not want to sign up new Lifeline applicants. The FPSC believes the FCC should restrict recovery only upon a showing of negligence by the ETC. If duplicate support is recovered from an ETC, it should be up to the ETC whether to seek recovery from the customer.

Addresses

The FPSC believes that the FCC should codify as a rule the current practice of requiring unique residential addresses, in order to assist both ETCs and USAC in determining whether an applicant is already receiving Lifeline or Link-Up service. However, the FCC needs to evaluate situations for applicants who may be residing in facilities where residents don't have unique addresses such as homeless shelters, halfway houses, or domestic violence shelters. In these situations, often there is no specific apartment number, room number, or bed number. Homeless persons may also be living on the street or in their car and use a General Delivery address at the post office. These persons would have to be evaluated based upon unique personal information as proposed by the FCC - name, birth date, and social security. The only way to prevent one person

from receiving two wireless Lifeline credits from two different providers would be to have a state or national database that could cross-reference Lifeline customers of different companies.

PRO RATA REPORTING REQUIREMENTS

In prior comments before the FCC,[4] the FPSC has recommended that the FCC should clarify that Line 9 of Form 497 must be used by carriers to adjust their support claim if they lose or gain subscribers during the month. Line 9 of Form 497 states, "Check box to the right if partials or pro rata amounts are used." Having ETCs provide partial discounts on customer monthly bills for customers gained or lost during the month, and subsequently claiming a full month's support from USAC is unacceptable and contrary to 47 C.F.R. §54.407(a), which states that ETCs can receive support based on the number of qualifying low-income consumers **it serves**. (emphasis added) The FPSC continues to believe that this process is necessary to protect the USF from waste, fraud, and abuse.

ELIMINATING REIMBURSEMENT FOR TOLL LIMITATION SERVICE

The FCC is proposing amending its rules to eliminate Lifeline support for the costs of providing TLS to Lifeline customers. Florida statutes require ETCs to offer Lifeline customers toll limitation service.[5] FPSC rules state that eligible telecommunications carriers may not charge a service deposit in order to initiate Lifeline service if the subscriber voluntarily elects toll blocking or toll control. If the subscriber elects not to place toll blocking or toll control on the line, an eligible telecommunications carrier may charge a service deposit.[6] The FPSC has

[4] Reply Comments of the FPSC in WC Docket No. 05-195. Filed December 15, 2008, at pp.4-5.

[5] Section 364.10(20(b), Florida Statutes, provides that an eligible telecommunications carrier shall offer a consumer who applies for or receives Lifeline service the option of blocking all toll calls or, if technically capable, placing a limit on the number of toll calls a consumer can make. The eligible telecommunications carrier may not charge the consumer an administrative charge or other additional fee for blocking the service.

[6] Rule 25-4.0665(18), Florida Administrative Code.

concerns that if TLS is eliminated, ETCs will charge Lifeline applicants excessive deposits. The FPSC is aware of some ETCs in Florida that presently charge a deposit of $500 if a Lifeline customer declines TLS service. This amount of deposit is excessive and unaffordable for a typical Lifeline customer. The FPSC recommends that if TLS is eliminated, the FCC should consider how much deposit a Lifeline customer would be required to provide, and determine what amount of deposit would be considered excessive.

CUSTOMARY CHARGES FOR LINK-UP

Link-Up is defined as a reduction in the carrier's customary charge for commencing telecommunications service for a single telecommunications connection at a consumer's principle place of residence.[7] The FPSC believes that ETCs should not impose a customary charge only on low-income customers in order to inflate the amount of reimbursement received from the USF. The FPSC agrees with the FCC proposal to amend its rules to define "customary charge for commencing telecommunications service" as the ordinary initiation charge that an ETC routinely imposes on all customers within a state. The FCC should require all ETCs seeking Link-Up reimbursement to submit cost support to USAC for the revenues they forgo in reducing their customary charges. Costs associated with marketing and customer acquisition should not be considered part of Link-Up.

Activation charges that are waived, reduced, or eliminated when activation is accompanied by purchase of additional products, services, or minutes should not be considered customary charges eligible for universal service support. However, an exception should be made for situations where a state commission has ordered ETCs to waive the remainder of the connection charge not reimbursed by the USF.

[7] 47 C.F.R. §54.411

The FPSC believes that the FCC rules should be clarified to prohibit ETCs from seeking more than one Link-Up subsidy for the same customer at the same location. The FCC should also adopt a rule that prohibits resellers from imposing a connection charge on consumers when the underlying wholesale provider has not assessed a similar connection charge on the reseller.

CUSTOMER USAGE OF LIFELINE-SUPPORTED SERVICE

The FPSC believes that the FCC should amend its rules to prevent competitive ETCs which do not submit monthly bills to their Lifeline customers from obtaining Lifeline support for inactive consumers. Some wireless competitive ETCs provide a free phone and free monthly minutes which are automatically issued to the phone each month. Their customers could stop using their wireless phone after 30 or 60 days without notifying the provider, and the competitive ETC could continue to automatically issue that customer additional minutes each month and count that person as a customer for USF reimbursement purposes for months or even years if only random sampling is used for annual verification.

The FCC should prohibit competitive ETCs from seeking reimbursement from the USF for any Lifeline customer who has failed to use his or her service for sixty consecutive days, and failed to respond to the ETC's notices. The FPSC recommends that competitive ETCs who do not bill their customers monthly should be required to contact any Lifeline customer with no phone activity after a sixty-day period to determine whether the consumer is still an active Lifeline customer. The provider could contact the Lifeline customer by letter, fax, e-mail, or text message. If no response is received, the phone should be deactivated and the company should cease including that customer when requesting reimbursement from the Universal Service Administrative Company. This process is currently being followed in Florida and has saved the federal USF millions of dollars. As an example, during a six-month period in 2009 for one

Florida provider, these procedures saved the universal service fund $8,582,760 which equates to an annual savings of over $17 million.

This process would not be necessary for ETCs that bill their customers on a monthly basis since the ETC would receive payment each month indicating the customer's desire to maintain the telephone service. Deactivation of the service would not hinder the ability of the Lifeline customer to use 911 service in an emergency since ETCs are still required to transmit a Lifeline customer's wireless 911 calls, even if the ETC is no longer providing service to that customer.

Minimum Consumer Charges

The Joint Board recommended that, to guard against waste, fraud, and abuse in the Lifeline program, the FCC should consider whether a minimum monthly rate should be paid by all Lifeline subscribers. The FPSC believes that charging a minimum monthly charge such as one dollar would not be cost-effective. Sending a bill to collect such a small amount would be burdensome not only on the ETC but also the Lifeline subscriber. On the other hand, charging a one-time upfront fee of $10 or $15 may be creating unnecessary obstacles for low-income households to obtaining vital communication services, and may create an unreasonable barrier to enrollment for households that need support but can't afford to pay the fee.

The FPSC believes that other appropriate safeguards recommended in this NPRM will protect the USF from waste, fraud, and abuse better than attempting to collect a minimum fee from a Lifeline customer. Competition in the marketplace may also help develop better safeguards and controls in the Lifeline program.

DE-ENROLLMENT PROCEDURES

If the FCC proposes rules requiring ETCs to de-enroll their Lifeline customers or households from the program under specified circumstances, it should take into consideration existing state laws regarding termination of Lifeline customers. In Florida, an eligible telecommunications carrier must notify a Lifeline subscriber of impending termination of Lifeline service if the company has a reasonable basis for believing that the subscriber no longer qualifies. The notification of pending termination must be in the form of a letter that is separate from the subscriber's bill.[8] Florida law also provides that an eligible telecommunications carrier shall allow a subscriber 60 days following the date of the pending termination letter to demonstrate continued eligibility. The subscriber must present proof of continued eligibility. An eligible telecommunications carrier may transfer a subscriber off of Lifeline service, pursuant to its tariff, if the subscriber fails to demonstrate continued eligibility.[9] Based on existing Florida law, the FPSC believes that the de-enrollment timeframe should be 60 days.

AUDITS

The FPSC supports the FCC's proposal that all new ETCs be audited after the first year of providing Lifeline-supported service. This would allow new ETCs to be aware of any violations of the low-income requirements and prevent them from occurring on an on-going basis. Random audits should be continued for all ETCs to ensure ongoing compliance with low-income rules.

In Section 101 of the NPRM, the FCC states that FCC rules already direct USAC to "suspend or delay discounts, offsets and support amounts provided to a carrier if the carrier fails

[8] Section 364.10(1)(e)1, Florida Statutes.
[9] Section 364.10(1)(e)2, Florida Statutes.

to provide adequate verification of discounts, offsets and support amounts provided upon reasonable request." The FCC should create a process whereby states are allowed to request that ETC disbursements be suspended for ETCs that are being investigated for possible waste, fraud, or abuse of the USF. In prior comments before the FCC, the FPSC recommended that the FCC confirm that states may request USAC to suspend support disbursements for failure of an ETC to comply with state and/or federal requirements of universal service.[10]

CLARIFYING CUSTOMER ELIGIBILITY RULES

One-Per-Residence

The FPSC supports the FCC proposal to adopt a one-per-residential address requirement for Lifeline service. We believe this will clarify the "single telephone line in their principle residence" language in previous FCC orders.[11] However, as stated in prior joint comments before the FCC, the FPSC believes the definition should be expanded to include group living facilities such as homeless shelters.[12]

The FPSC also supports the FCC proposal to require that all ETCs obtain a certification when initially enrolling a subscriber and again during the annual verification process that the subscriber is receiving Lifeline support for only one line per residence. The certification form should contain language stating that violation of this requirement would constitute a violation of the Commission's rules and may constitute the federal crime of fraud, which will be prosecuted to the fullest extent. The form should also indicate that the Lifeline customer may be de-enrolled, suspended, or banned from participation in Lifeline for violation of this requirement.

[10] Reply comments of the FPSC in WC Docket No. 05-195. Filed December 15, 2008, at p. 2.
[11] FCC 97-157, ¶ 341, FCC 04-87, ¶ 4, FCC 07-148, ¶ 3.
[12] Comments of the FPSC and Florida Office of Public Counsel in WC Docket No. 03-109. Filed November 13, 2009, at p. 2.

Several commenters in the Joint Board proceeding suggested that the Lifeline/Link-Up program should provide support for one wireless service per eligible adult, rather than one service per residential address. The FPSC believes that this would significantly increase the size of the USF, and should not be done. The original intent of Lifeline service remains the same - to allow low-income consumers to obtain and maintain basic telecommunications service. 47 U.S.C. § 254(b)(5) provides that there should be specific, predictable, and sufficient Federal and State mechanisms to preserve and advance universal service. Providing wireless Lifeline service per eligible adult is going well beyond "sufficient."

Defining Residence

The FPSC supports the FCC's proposal to limit low-income USF support to a single subscription per U.S. Postal address. This proposal would fulfill the goal of providing access to basic telephone service and prevent waste, fraud, and abuse in the USF. Requiring Lifeline applicants to initially certify when applying for service, and verify annually thereafter that they are receiving support for only one line per residential address, and that address is their principal residence, should help prevent providing more than one person with low-income support at the same residence. In situations where a Lifeline applicant does not have a unique U.S. Postal Service address, additional verifying information can be obtained such as the applicant's birth date and last four digits of their social security number. The FCC permitted additional verifying information when allowing companies to provide Lifeline service to victims of Hurricane Katrina who were living in shelters and no longer had a residential address. (FCC 05-178, pp. 11-12) Additional verifying information should be required of all Lifeline applicants to prevent duplicate credits at the same address. The proposed definition of residence should not be expanded to include unrelated adult roommates or multiple families sharing a residence.

Application of the One-Per-Residence Rule to Commercially Zoned Buildings

Residents of commercially-zoned buildings such as homeless shelters, halfway houses, domestic-violence shelters, or other group living facilities should be allowed to participate in the Lifeline program if they are eligible. Florida experienced one instance where a family who was evicted from their home was living in a commercial rental storage facility with their furnishings. For emergency circumstances, the family applied for wireless Lifeline service with an ETC and was subsequently turned down because the rental storage facility address they used on their application was a commercial address. The FPSC believes that the FCC should adopt special rules for residents of commercially-zoned buildings whereby Lifeline applicants would be required to provide additional verifying information such as a birth date and last four digits of their social security number. This would prevent a commercial entity from obtaining Lifeline service.

Ensuring Access for Residents of Group Living Quarters

In prior comments before the FCC, the FPSC expressed support for the FCC to create an exception to its proposed one-per-residence rule for eligible consumers in a group living facility to obtain Lifeline or Link-Up service.[13] Residents of group living quarters such as homeless persons in Florida need communication services in order to stay in touch with family, have access to emergency services, and have the ability to make living, housing, and work arrangements. In those comments, the FPSC expressed its belief that residents of homeless shelters should not have the burden of additional eligibility requirements placed on them.

[13] Comments of the FPSC and Florida Office of Public Counsel in WC Docket No. 03-109. Filed November 13, 2009, at p. 2.

Lifeline-eligible applicants should have the same requirements whether they live in a group-living facility or not.

The FPSC believes that requiring administrators of group living facilities to certify to ETCs and/or USAC the number of separate and unrelated individuals or families in the facility would create additional administrative and financial burdens on the USF. A group living facility should not be responsible for applying for Lifeline/Link-Up support on behalf of its residents, but they certainly can assist residents as many already do now.

The FPSC does not believe Lifeline funding should be made available to agencies or non-profit organizations to provide communications services to residents of group living facilities. Section 254(e) of the Act limits the recipients of universal service support to ETCs which have regulatory oversight by the FCC or state commissions. If funding were made available to agencies or non-profit organizations to provide communications services to residents of group living facilities, there may be a lack of regulatory oversight of the USF functions they do, which may lead to waste, fraud, and abuse of the USF.

CONSTRAINING THE SIZE OF THE LOW-INCOME FUND

The FPSC has stated repeatedly over the years that it opposes further growth in the size of the USF. The FPSC supports a proposed cap on the low-income program; we believe, however, that the FCC should look to reduce the size of the fund and possibly lower the cap in the future where efficiencies derived from universal service reform allow. The savings that are experienced from proposed reforms in this NPRM could allow a cap on the low-income fund to be reduced. Capping the size of the low-income program which is estimated to be $1.5 billion in 2011 until the implementation of structural reforms proposed in this NPRM would be consistent with our position and help curb growth of the USF. A low-income program cap could be

indexed to inflation, unemployment rates or the number of recipients of food stamps which is the primary program qualifier for Lifeline applicants in Florida. Many of the proposals contained in the FCC's NPRM such as elimination of duplicate payments, should remove much of the waste, fraud, and abuse which is currently taking place.

IMPROVING PROGRAM ADMINISTRATION

The FPSC believes that the FCC should continue to provide discretion to the states to administer key aspects of the low-income program, such as eligibility, enrollment, and ongoing verification of eligibility. The FCC proposal to eliminate the option of self-certifying eligibility and to require all consumers to present documentation of program eligibility when enrolling may discourage eligible consumers from applying for Lifeline assistance. The FCC could require documentation of eligibility only for consumers who have not applied using a coordinated enrollment process as described in paragraph 199 of this NPRM.

Coordinated enrollment, such as Florida presently has, allows consumers to enroll in the Lifeline and Link-Up programs at the same time they enroll in a qualifying public assistance program administered by the Florida Department of Children and Families (DCF). The drawback is that the DCF only administers three of the Florida Lifeline qualifying programs: Food Stamps, Medicaid, and Temporary Assistance to Needy Families. Applicants who use Supplemental Security Income, Section 8 Federal Public Housing, Low-Income Home Energy Assistance, National School Free Lunch, or Bureau of Indian Affairs Programs as qualifying programs could be required to present documentation of program eligibility when enrolling. States should be allowed to impose additional permissive eligibility criteria they deem appropriate, so long as these additional eligibility criteria are reasonably tied to income.

<u>Eligibility Criteria for Lifeline and Link-Up</u>

The FCC seeks comment on raising the program's income eligibility criteria of 135 percent or below of Federal Poverty Guidelines (FPGs) to 150 percent or below of the FPGs. Section 364.10(3)(a), Florida Statutes, provides that each local exchange telecommunications company that has more than 1 million access lines and that is designated as an eligible telecommunications carrier shall, and any commercial mobile radio service provider designated as an eligible telecommunications carrier may, upon filing a notice of election to do so with the commission, provide Lifeline service to any otherwise eligible customer or potential customer who meets an income eligibility test at 150 percent or less of the federal poverty income guidelines for Lifeline customers. In accordance with Rule 25-4.0665(3), Florida Administrative Code, eligible telecommunications carriers with less than one million access lines are not required to enroll Lifeline applicants through the income eligibility test of 150 percent or less of the federal poverty income guidelines, but may do so voluntarily.

Uniform methodology for conducting verification sampling

The FCC is proposing to establish a uniform methodology for conducting verification sampling that would apply to all ETCs in all states and provide additional protections against waste, fraud, and abuse. Currently, an ETC with 400,000 Lifeline subscribers (half of whom were estimated to be ineligible) would only need to survey 244 customers. If an ETC has 400,000 Lifeline subscribers and half (or 200,000) were estimated to be ineligible, the ETC would only need to survey 1,082 Lifeline customers the following year for the sample to be statistically valid (and assuming the same ineligibility rate, would then de-enroll no more than half, or 541, of the sampled customers for ineligibility).

The FPSC believes this process results in fraud, waste, and abuse in the USF program. The FPSC supports a sample-and-census proposal, which would allow an ETC to sample its

customers so long as the rate of ineligibility among responders to the survey is below a fixed threshold. If that ineligibility rate exceeds the threshold, however, the ETC should be required to take a census of all customers within a specified number of months. If an ETC whose ineligibility rate exceeds the threshold, it should be required to perform a census of all Lifeline customers each year until the ETC can establish that fewer than 5 percent of respondents are ineligible.

Lifeline customers who fail to respond to an ETC's attempts for verification, and Lifeline customers who are found to no longer qualify for Lifeline should be de-enrolled from the program. Section 364.10(2)(e)2, Florida Statutes, provides that an ETC may transfer a subscriber off of Lifeline service if the subscriber fails to demonstrate continued eligibility.

Certification and verification best practices

The FCC seeks data on whether states impose different verification responsibilities on different types of carriers. The FPSC requires Lifeline-only prepaid wireless carriers to provide additional verification requirements different from other ETCs. The additional requirements include:

- Annual certification verifying that the head of household is only receiving Lifeline discounts from the ETC;
- Tracking of Lifeline customer's primary residential address and certification to ensure that there is only one customer receiving Lifeline at each residential address; and
- Submission of a quarterly report showing the number of customers who have been deactivated for not having any activity on their phone in a 60-day period, not passing annual verification, and voluntarily being deactivated.

The 60-day verification for Lifeline-only prepaid wireless carriers was instituted by the FPSC to avoid providing USF support to ETCs in cases where their Lifeline customers may have lost their phone, or chose not to use it after issuance and activation. The Lifeline-only prepaid

wireless carriers would have no way to know if the customer does not want or desire to use the Lifeline service since there is no contact with the consumer once the prepaid phone is provided to that customer. Minutes are automatically issued to the customer on a monthly basis and no monthly bill is provided to the Lifeline customer. Under the Florida process, if there is no activity on the phone during a 60-day period, the company contacts the customer to verify he/she still is eligible and desires Lifeline service. If the customer fails to respond to the company, the customer is de-activated from Lifeline service and the ETC ceases to include that customer when requesting reimbursement from USAC.

In addition to the above certification and verification processes, the FPSC worked with the Florida DCF to institute an on-line verification process. ETCs can log-in to a computer portal, enter the name, birth date, and last four digits of a Lifeline customer's social security number, and receive a response as to whether that customer currently is participating in the Florida Food Stamp, Medicaid, or Temporary Assistance for Needy Family (TANF) program.

COORDINATED ENROLLMENT

The FPSC and the Florida DCF initiated a Lifeline coordinated enrollment process in 2007. The coordinated enrollment process entails the DCF client checking a "yes" or "no" box on the DCF web application for assistance stating an interest in receiving the Lifeline discounts on his or her telephone service if approved for Food Stamps, Medicaid, or TANF. The "no" box provides an option to the applicant not to subscribe to Lifeline discounts if he or she chooses. If the client answers in the affirmative, the applicant identifies a telephone service provider from a drop-down box on the application and answers several questions. The DCF forwards to the FPSC the names of the clients approved for benefits and therefore, eligible for Lifeline and who have chosen to receive the Lifeline discounts. In addition, the relevant information needed for

the client to be enrolled in Lifeline is also transferred. The FPSC electronically sorts the information by ETC, and automatically sends an e-mail message to the appropriate ETC advising them that there is a Lifeline application available for retrieval on the PSC's secure website. By Rule 25-4.0665(10)(b), Florida Administrative Code, the ETC is required to enroll the subscriber in the Lifeline service program as soon as practicable, but no later than 60 days from the receipt of the e-mail notification.

In prior comments before the FCC, the FPSC has recommended that the FCC should not impose a mandatory automatic enrollment requirement for Lifeline on states.[14] Each state should have the ability to make a determination as to whether automatic or coordinated enrollment would be the most effective means to increase its Lifeline participation rate.

DATABASE

The FPSC supports the creation of a database to verify consumer eligibility, track verification, and check for duplicates to ensure greater program accountability. Whether USAC or a third-party administrator is used, any national database of Lifeline subscribers/applicants would have to be maintained by an independent administrator under strict confidentiality provisions to protect the Lifeline subscriber's/applicant's personal identifying information. ETCs should not be able to access Lifeline customer information of another ETC. Section 364.107, Florida Statutes, requires that personal identifying information of a participant in a telecommunications carrier's Lifeline Assistance Plan be confidential. Using a national database may not only prevent fraud, waste, and abuse of the USF by consumers, but may detect any fraud, waste, or abuse by an ETC.

AT&T's PIN proposal, which would put the responsibility on states for a state database

[14] Comments of the FPSC in CC Docket No. 96-45 and WC Docket No. 03-109. Filed July 15, 2010, at p. 2.

for certification and verification of Lifeline applicants and customers may be theoretically viable. However, state budgetary constraints and available staff to maintain the database would not permit oversight of such a database in most states unless funds from the federal USF or some other source were available for such a purpose.

CONSUMER OUTREACH & MARKETING

The FCC should continue working with the state public service commissions to improve the success of the Link-Up and Lifeline programs. Keeping people connected is essential. Lifeline provides significant discounts that can make a difference in people's lives. State public service commissions should continue doing our part to help those who need service to know what their options are. Wireless carriers have broken through recognized barriers to the low-income consumer market and are reaching many who traditionally have been isolated from assistance. The FPSC urges the FCC to continue to help increase awareness of these programs, and also urges government agencies and non-profit organizations to continue disseminating information about Lifeline and Link-Up to their constituents.

The FPSC does not believe the FCC should impose particular marketing guidelines on ETCs, but the FCC and the public service commissions need to ensure that ETCs explain the Lifeline program to consumers so they fully understand the benefit being offered with the product to prevent the problem of duplicate support. Reaching the target audience is critical when advertising the Lifeline program. The FCC should review ETCs' best outreach practices, specifically their current community-based outreach. Some of the more meaningful success in outreach for Lifeline and Link-Up appears to be from stakeholder partnerships to reach, inform, and enroll eligible consumers. Partnering among state public service commissions, AARP, United Way and other social service agencies, and private organizations helps to ensure that

accurate information is provided to consumers, from a trusted source, with an opportunity for necessary interaction to field questions. One-on-one outreach is critical. As noted by state public service commissions in various NARUC forums, perhaps the most effective way to educate and enroll consumers is through direct, personal contact with consumers from a trusted source. In some communities the trusted source may be a social worker; in others it may be a community newspaper, a community-based organization (such as a senior center), or even another consumer in the community.

The FPSC does not encourage the FCC to require ETCs to submit a marketing plan to the state or commission. The long-term success of Lifeline and Link-Up depends on effective communications with and outreach to potential eligible consumers. There is no one best way to communicate the message. For example, reaching non-English speaking populations may require different tactics than reaching the homebound elderly or residents located in remote locations on tribal lands. The FPSC would recommend that the FCC expand its existing *Lifeline Across America Working Group*--comprised of FCC, state public service commission, and NASUCA representatives--to include wireline and wireless ETC representatives. Subsequently, an industry forum could be scheduled in Washington D.C. that would include representatives from the telecommunications industry, NARUC's Committees on Consumer Affairs and Telecommunications and their respective Staff Subcommittees, NASUCA, as well as representatives of the FCC's Consumer and Governmental, Wireless Telecommunications, Wireline Competition, and Enforcement Bureaus. During this forum, participants could openly discuss industry questions and compile "best practices" for community-based outreach and tools for a successful marketing plan. National Lifeline Awareness Week could also be discussed. This forum's format would be similar to the FCC's Common Carrier Bureau and NARUC

industry forum held on August 23, 2000 in Washington D.C. for the implementation of slamming liability procedures.

Outreach to Households Without Telephone Service.

State public service commissions can identify appropriate community institutions to participate in public-private partnerships and can assist ETC outreach efforts by helping to identify the target audience. The FPSC has worked with the *Connect Florida Campaign*, established by Linking Solutions, Inc., Florida's Office of Public Counsel (OPC), and AT&T in 2004, that remains a factor in increasing consumer awareness and participation in Link-Up and Lifeline. Through this effective collaboration, program participants have continued to develop new partnerships, participate in community events, offer training sessions, provide updates about program changes, and supply brochures and applications. Developing a collaborative partnership has helped the FPSC and its ETCs identify Florida consumers who may not have service and would benefit from Lifeline.

Outreach to Non-English Speaking Populations

To reach non-English speaking, low-income consumers without phone service, a *Train-the-trainer* program appears to work well, as it has in Florida through the *Connect Florida Campaign*. It can be designed to introduce potential new trainers to fresh methods for creating and managing effective training sessions about the Lifeline program that engage their eligible clients who might have been unreachable through other means of outreach.

Role of the States and Outreach with Government Assistance Programs

The FPSC agrees that social service agencies are in a good position to approach eligible consumers with information about Link-Up and Lifeline. The FCC should encourage state public service commissions to work with their designated social service agency(s) to develop and

maintain Lifeline automatic enrollment processes and distribute Link-Up and Lifeline educational materials. A primary reason for Florida's increase in Lifeline participation has been the coordinated enrollment process initiated by the FPSC and the Florida DCF. Lifeline Assistance participation continues to grow in Florida, and have a positive impact, due to the involvement of the FPSC, the DCF, the OPC, and other state agencies that determine if a person is eligible for Lifeline service.

The FPSC would agree that encouraging states to partner with government assistance programs is a preferred outreach method. ETCs should not face mandatory outreach requirements from the FCC but should explore best practices of proven outreach methods for low-income consumers.

Outreach by ETCs

ETCs should not be required to submit a marketing plan to the state public service commissions but should work cooperatively with them to develop creative awareness campaigns. Although the low-income population is the least likely to have direct internet access for the FCC's Lifeline Web site, an important target audience for this Lifeline/Link-Up consumer education program is public assistance, social service, and community-based organizations that work with low-income populations. The objective for the FCC's Web site should continue to be a primary easy-to-use reference for public assistance, social service, and community-based organizations, but also easy-to-use use for individual low income consumers as well.

Specific outreach requirements should not be imposed on ETCs. Instead, the FCC should work with the ETCs on evaluating their outreach methods through annual reporting.

Community-Based Outreach

The most meaningful outreach success for Lifeline and Link-Up seems to come from collaborative partnerships to reach, inform, and enroll eligible consumers. Coordination in Florida has included cooperative outreach efforts with our state commission, ETCs, social service agencies, community centers, public schools, and private organizations that may serve low-income individuals, such as AARP and the United Way.

Marketing and Uniform Language to Describe Lifeline

The FPSC would agree that, with some ETCs marketing their Lifeline-supported products under a trade name, eligible consumers might not realize that these products are Lifeline-supported offerings, and they are therefore violating the FCC's prohibition against having more than one Lifeline-supported service per household. The FPSC agrees that all ETCs should include language in the name of their service offering or in the description of the service to clarify that the offering is supported by Lifeline and also include an explanation of the Lifeline program.

The FPSC has no problem with the Lifeline service being marketed under a different name, such as TracFone's SafeLink Wireless, as long as consumers understand they are entitled to only one Lifeline subsidy per household. As of June 30, 2010, SafeLink had 396,114 Florida Lifeline customers. The FCC could require ETCs to develop plain and simple language--which explains the specific Lifeline subsidy--for use in their product marketing.

MODERNIZING THE LOW INCOME PROGRAM TO ALIGN WITH CHANGES IN TECHNOLOGY AND MARKET DYNAMICS

Voice Services Eligible for Discounts

The FPSC agrees that the definition of Lifeline should be updated to reflect the current marketplace. The "basic local service" definition has changed in most states, including Florida.

Section 364.02(1), Florida statutes defines basic service as voice-grade, single-line, flat-rate residential local exchange service that provides dial tone, local usage necessary to place unlimited calls within a local exchange area, dual tone multifrequency dialing, and access to the following: emergency services such as "911," all locally available interexchange companies, directory assistance, operator services, relay services, and an alphabetical directory listing. Section 364.02(10), Florida Statutes, provides that any combination of basic service along with a nonbasic service or an unregulated service is nonbasic service. In other words, if a consumer has any vertical feature such as voicemail or call waiting, it is no longer considered basic service. The FPSC supports the FCC proposal to replace the term "basic local service" with "voice telephony service" for universal service purposes.

Support for Broadband

Lifeline/Link-Up does not currently support broadband. The FCC seeks comment on whether it should amend the definition of Lifeline to explicitly allow support for broadband. In prior comments before the FCC, the FPSC has opposed expanding the definition of supported services to include broadband unless the expansion was a part of an overall cap. Consistent with those comments, the FPSC can support Lifeline Broadband if the funding for such a service comes from existing support through savings incurred by eliminating duplicate payments, and capping the low-income program. If Lifeline broadband is adopted by the FCC, it should only allow consumers a single discount off a single service and not multiple Lifeline discounts on multiple services.

CONCLUSION

The FPSC continues to be proactive regarding the Lifeline and Link-Up programs to ensure that low-income Florida consumers have the ability to obtain and retain affordable

telephone service. The FPSC continues to strive for accountability in the universal service program and safeguard the USF from fraud, waste, and abuse. The FPSC believes that the FCC should look to reduce the size of the fund where efficiencies derived from universal service reform allow. The FPSC encourages the FCC to consider the proposed changes to the program administration noted in these comments.

Respectfully submitted,
/ s /
Cindy B. Miller, Senior Attorney
Office of the General Counsel

FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
(850) 413-6082

DATED: April 6. 2011

State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: March 30, 2011

TO: Timothy J. Devlin, Executive Director

FROM: Division of Regulatory Analysis (Fogleman, J. Miller, Shafer)
Office of the General Counsel (C. Miller)

RE: Draft Comments to the Federal Communications Commission Regarding High-Cost Universal Service Programs and Intercarrier Compensation

CRITICAL INFORMATION: Please place on the April 6, 2011 Internal Affairs. Approval of comments is sought. Comments are due April 18, 2011.

On February 9, 2011, the Federal Communications Commission (FCC) released a 289-page Notice of Proposed Rulemaking (NPRM) on High-Cost Universal Service Programs and Intercarrier Compensation. A summary of the NPRM was provided on March 28, 2011. Attached are draft comments for consideration. Initial comments are due April 18, 2011 and reply comments are due May 23, 2011. The draft comments are aimed at limiting or reducing the size of the universal service program. The FCC concedes in its NPRM that current rules may provide carriers more support than is necessary. The FCC discusses various concerns about the size of the program, and that the federal funding commitment should be sufficient, but not excessive. Staff is requesting approval of the attached draft comments (Attachment A). The comments:

- Agree that the FCC has statutory authority to extend universal service support to broadband services that providers offer as telecommunications services. However, pursuant to the Telecommunications Act, the FCC must first formally define broadband as a supported service.
- Oppose restricting availability of Connect America Fund (CAF) support to states that have either engaged in access charge reform, established a high-cost universal services fund or established a broadband support mechanism.
- Endorse slightly lower targets for the required download and upload speeds for broadband.
- Agree with the FCC that local switching support (LSS) has become outdated and should be eliminated.

- Support the elimination of corporate operations expense recovery through high-cost support mechanisms.
- Agree with limiting total high-cost support per line to $250 per month, absent a demonstrated need.
- Endorse using the funds made available by the elimination of Interstate Access Support (IAS) to reduce the overall size of the universal service fund.
- Support the elimination of the identical support rule.
- Support the consideration of non-regulated revenues when evaluating the interstate rate of return revenue requirement of a high-cost carrier.
- Endorse caps on the funds, but also urge a reduction in the size of the program.

Cc: Charles H. Hill
S. Curtis Kiser

Attachment A

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109

COMMENTS OF THE
FLORIDA PUBLIC SERVICE COMMISSION

CHAIRMAN ART GRAHAM

COMMISSIONER LISA POLAK EDGAR

COMMISSIONER RONALD A. BRISÉ

COMMISSIONER EDUARDO E. BALBIS

COMMISSIONER JULIE I. BROWN

April 6, 2011

INTRODUCTION

The Florida Public Service Commission (FPSC) submits these comments in response to the Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (NPRM) released by the Federal Communications Commission (FCC) on February 9, 2011.[1] The FCC seeks comment on reforms to both the high-cost universal service programs (USF) and intercarrier compensation (ICC) regimes. The proposed Connect America Fund (CAF) would ultimately replace the current high-cost funds. The FCC proposes transition paths that it believes will facilitate adoption of reforms. The FPSC commends the FCC for embarking on this comprehensive list of reforms.

As stated in prior comments, the FPSC supports reallocation of reclaimed high-cost support to expand the availability of broadband services in areas where there are none or where such services are deemed to be inadequate. The FPSC is supportive of many of the proposed near-term reforms to the existing high-cost support mechanisms. Our support of the CAF is conditioned on retargeting reclaimed support from other programs and not increasing the overall size of the fund. The FPSC supports the proposed cap on the total size of the CAF; we believe, however, that the FCC should look to reduce the size of the fund where efficiencies derived from universal service reform allow. We believe that prior to distributing universal service support through the CAF, the FCC must first make a determination of the extent to which the four statutory criteria established in the Telecommunications Act (Act) are satisfied by broadband services.[2] The FPSC does not support the FCC's proposal to base CAF support on intrastate USF and ICC reform.

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[1] FCC, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, released: February 9, 2011.
[2] 47 U.S.C. § 254(c)(1).

FCC AUTHORITY TO SUPPORT BROADBAND

We agree that the FCC has statutory authority to expand the scope of services supported by federal universal service funds. Section 254 of the Act defines universal service as "an evolving level of telecommunications services."[3] The Act specifies four criteria that the Universal Service Joint Board and the FCC should consider when determining whether a service should be included within the definition of supported services. The criteria that the FCC must consider include that the services:

> (A) are essential to education, public health, or public safety;
>
> (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;
>
> (C) are being deployed in public telecommunications networks by telecommunications carriers; and
>
> (D) are consistent with the public interest, convenience, and necessity.[4]

The FPSC believes that prior to distributing support for broadband networks, the FCC should formally define broadband as a supported service. We recognize that some universal service support has been provided under the FCC's "no barriers to advanced services" policy, which permits rate-of-return carriers to upgrade their facilities to modern networks. However, simply expanding this policy to all carriers would not necessarily provide the FCC with the ability to establish minimum broadband characteristics such as speeds or latency. In order to establish such minimum standards, we believe that the FCC will have to explicitly consider each of the criteria in section 254(c)(1).

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[3] Ibid.

[4] Because Section 254(c)(1) uses the verb "consider," the FPSC continues to believe that the Act affords the FCC and the Joint Board flexibility in expanding the definition of supported services to include services that do not meet all four criteria. Comments of the FPSC to the FCC in CC Docket 96-45, filed on April 11, 1996, October 22, 2001, and April 14, 2003.

The FCC also invites comment on whether it should consider classifying interconnected voice over Internet protocol (VoIP) as a telecommunication services or an information service. We agree with the FCC that classifying interconnected VoIP as a telecommunications service would enable it to explicitly support networks that provide interconnected VoIP, including broadband networks. Yet we do not believe such a move, absent an explicit expansion in the list of supported services, would allow the FCC to establish minimum broadband requirements such as speed and deployment.

ENCOURAGING STATE ACTION

In general, the FCC seeks comment on how it can most effectively encourage additional commitments from states to support universal service in partnership with the federal government. The FCC notes that some states have established intrastate universal service support mechanisms that fund voice services, established broadband grant programs, or reformed intrastate access charges and rebalanced local rates. In the first phase of the CAF, the FCC seeks comment on if CAF support should be based on states' progress on access charge reform, establishment of an intrastate high-cost universal service fund, or implementation of a broadband support mechanism. The FPSC opposes conditioning CAF support as proposed. The FCC's stated goal during this first phase is to make available non-recurring support for broadband in unserved areas and to test the use of reverse auctions more generally as a longer-term means of disbursing ongoing CAF support. Specifically, the FCC's stated goal is to "expand broadband to as many unserved housing units . . . as soon as possible."[5] We support the FCC in this effort but believe that limiting eligibility for CAF funding as proposed is not appropriate. Limiting or prioritizing funding based on whether individual states have addressed the identified issues fails to recognize the unique circumstances of individual states. For example, the FPSC does not have explicit legislative authority to address intrastate access charge reform.

[5] FCC 11-13, ¶267.

Moreover, such conditions may undermine realization of the FCC's broadband deployment goals by making funds unavailable to some areas of need.

BROADBAND SPEED

In November 2007, the Universal Service Joint Board recommended expanding the definition of supported services to include broadband services.[6] It did not, however, specify what speed constitutes broadband.[7] By comparison, the National Broadband Plan recommended that the FCC set an initial target of 4 Mbps (Megabits per second) actual download speed and 1 Mbps actual upload for broadband universal service.[8] The FCC seeks comment on this recommendation, as it could affect either the size of the fund or the extent to which universal broadband can be made available.

The FPSC believes that there are several reasons that the FCC should consider a slightly lower threshold at this time. First, several incumbent carriers have indicated that current technologies could deliver broadband services with significantly lower deployment costs if a 768 kbps upload speed threshold is used instead of the proposed 1 Mbps upload speed threshold.[9] Second, the FCC already requires broadband providers to report the number of their subscribers at several speed levels, including at the 3 Mbps/768 kbps level.[10] Using the same broadband upload threshold should make the process of tracking deployment easier for all parties. Finally, the FCC itself noted in the NPRM that "the basic (media) user requires actual download speeds of approximately 500 kbps, while emerging multimedia and full media users require actual download speeds of 1–4 Mbps . . .." Given this, it seems that a 3 Mbps download threshold is more than sufficient to provide "basic" broadband

[6] FCC-07J-4, ¶¶ 55-62.
[7] Ibid. ¶ 72.
[8] National Broadband Plan at 135.
[9] CenturyLink July 12, 2010 Comments at 19, n.54; Qwest Comments at 11; Windstream July 12, 2010 Comments at 10; AT&T Dec. 6, 2010 Ex Parte Letter at 1.
[10] The FCC currently categorizes connections reported through its FCC Form 477 at 72 speed tiers defined by eight ranges of downstream speed and nine ranges of upstream speed.

service and ample service for many multimedia applications. The FCC stated that one of its goals is to maximize the number of unserved households passed with broadband services within the current size of the fund. The FPSC believes that a 3 Mbps/768 kbps is the more reasonable speed at this time. We also believe the FCC should regularly reevaluate this benchmark speed going forward.

NEAR-TERM REFORMS

Beginning in 2012, the FCC proposes to transition funds from less efficient support programs to more efficient uses, including the creation of the CAF. The FCC seeks comment on several measures to reduce inefficiencies, expand availability of broadband, and increase the accountability of companies receiving support during the transition. In 2010, the high-cost fund disbursed $4.3 billion through five separate mechanisms designed to support different kinds of costs and different types of carriers.

High-Cost Loop Support

The FCC proposes to reduce the reimbursement percentages for high-cost loop support (HCLS) to promote a more equitable distribution of limited funds. HCLS provides local loop support in rural areas that exceed 115 percent of the national average loop cost. The FCC expresses concern that the current structure of HCLS may provide inadequate incentive for recipients to operate as efficiently as possible, based on data from National Exchange Carrier Association. The data suggest that companies continue to invest and upgrade their networks more than would otherwise be considered reasonable where reductions in customers served is occurring. The FCC proposes to decrease the current 65 percent and 75 percent support percentages, for incumbent LECs serving 200,000 or fewer loops, to 55 percent and 65 percent, respectively. This action results in a reduction in the amount of support these carriers would be eligible to receive. The FPSC supports this recommendation to increase incentives for carriers to operate efficiently.

The FCC also proposes that rules for providing HCLS to carriers with more than 200,000 working loops be eliminated, making those carriers ineligible to receive HCLS. Currently, there are only five rural incumbent LECs with more than 200,000 working loops. All five incumbent LECs have costs per loop that are well below the national average cost per loop. The FPSC is not opposed to this change.

Finally, the FCC proposes to eliminate the safety net additive component of high-cost loop support. The safety net additive was designed to provide additional loop support to an incumbent LEC, above its capped support amount, where significant additional loop investment had been made. Once an incumbent LEC qualifies, it receives support for the qualifying year plus the four subsequent years. The safety net additive has increased significantly from $9.1 million to $78.9 million from 2003 to 2010. The FCC projects it to be $90.1 million for 2011. The FPSC supports the immediate elimination of the safety net additive component.

Local Switching Support

The FCC proposes to eliminate local switching support (LSS) or, alternatively, to combine this program with high-cost loop support. Historically, LSS was appropriate because the cost of circuit switches were relatively more expensive for small carriers. However, technology has been evolving from circuit-switched to an IP-based environment and, as the FCC has noted, many smaller rate-of-return carriers now are purchasing soft switches. These soft switches and routers tend to be less expensive and more efficiently scaled to smaller operating sizes than circuit switches. The FCC asserts that LSS in its current form may not appropriately target funding to high-cost areas. For these reasons, the FCC proposes to eliminate LSS and utilize those savings to direct support through the CAF to areas that are unserved. The FPSC agrees with the FCC that LSS has become outdated and should be eliminated.

Corporate Operations Expenses

The FCC proposes to reduce or eliminate universal service support for corporate overhead expenses. Corporate operations expenses are general expenses that include expenses for overall management, accounting, legal services, and public relations. These expenses are currently eligible for recovery through the several high-cost support mechanisms.[11] The FCC estimates that approximately 13 percent of HCLS support (or $117 million) is related to corporate operations expenses. To focus finite universal service funds more directly on investments in network build-out, maintenance, and upgrades, the FCC proposes to eliminate the recovery of corporate operations expenses through HCLS, LSS, and ICLS. The FPSC supports this proposal.

Limits on Total per Line High-Cost Support

The FCC proposes to adopt a cap on total support per line for all companies operating in the continental United States. The FCC notes that some companies with fewer than 500 lines have received high-cost support ranging from roughly $700 to nearly $2,000 per line per month. The FCC seeks comment on capping high-cost support at $250 per month per line. The FCC asks whether an incumbent LEC whose current per-line support is above this cap should be able to make a showing that additional support is in the public interest. For 2010, such a cap would affect fewer than 20 incumbent local exchange companies.[12] The FPSC supports a cap of $250 per month per line support, absent a compelling demonstration that additional support is in the public interest. The FPSC endorses establishment of a default per line cap. We recognize, however, that some situations may warrant higher per line support and carriers should have an opportunity to demonstrate that need.

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[11] Those high-cost support programs are high-cost loop support (HCLS), local switching support (LSS), and interstate common line support (ICLS). The FCC has limited the amount of recovery for these expenses through HCLS (but not through LSS and ICLS).

[12] NPRM, ¶ 209.

Transitioning Interstate Access Support to the Connect America Fund

The FCC seeks comment on whether it would be appropriate to transition amounts from Interstate Access Support (IAS) for price cap carriers to the CAF beginning in 2012. The FCC created IAS as part of the CALLS Order in May 2000. It was intended to be a five-year transitional interstate access and universal service reform plan for price cap carriers. The FCC did not take further action to re-examine whether this was an appropriate level of support after five years. According to the FCC, IAS no longer appears necessary to provide voice service at affordable and reasonably comparable rates. The FCC proposes to transition IAS monies to Connect America Fund support. Alternatively, the FCC asks for comment regarding whether such funding should be used to reduce the size of the fund.

The FPSC believes that the elimination of the IAS program should be used to reduce the overall size of the fund. Consumers, who fund the universal service program, should see some relief. As the Tenth Circuit recognized, "excessive subsidization may affect the affordability of the telecommunications services, thus violating the principle in §254(b)(1)."[13] If, however, the FCC is unwilling to reduce the fund size, transitioning support to the CAF is the next best solution.

Elimination of the Identical Support Rule

The FCC seeks comment on approaches to rationalize funding for competitive ETCs, which are mainly mobile providers. Both approaches being considered involve eliminating the existing identical support rule, which fails to efficiently promote deployment of mobile voice services, fixed broadband, or mobile broadband. The FCC seeks comment on redirecting all available competitive ETC funding, over five years, to the CAF for redistribution through reverse auctions in order to provide support for mobile and fixed broadband. The initial 20 percent reduction under this plan

[13] Qwest Communications International v. FCC, 398 F.3d 1222, 1234 (2005).

would begin in 2012. Alternatively, the FCC could allow individual mobile providers to demonstrate that some level of continuing support is necessary, on a transitional basis.

The FPSC supports the elimination of the identical support rule. This position has been urged by the FPSC in prior comments, as well as by the Joint Board. The FCC determined, in the First Report and Order,[14] that it was appropriate to provide per-line portable universal service support for competitive ETCs based on the support that the ILEC would receive for the same line (the identical support rule). The rule arose from the competitive neutrality criterion that the Joint Board recommended the FCC adopt as an additional principle relating to universal service.[15] However, it was not envisioned that multiple carriers could receive support for the same customer.

We believe that the identical support rule is not competitively neutral. To the extent that the incumbent carrier's costs are significantly greater than a CETC's costs, basing the available support to the CETC on the incumbent's higher cost network would result in a revenue windfall for the competitive ETC. Furthermore, competitive neutrality should be looked at in conjunction with the other principles found in Section 254(b) of the Communications Act of 1934 as amended by the Telecommunications Act of 1996 (the Act), especially the principle of "specific, predictable, and sufficient" support.[16] The Joint Board has repeatedly found that "sufficient" also means "no more than sufficient."[17] Competitive neutrality should not be interpreted as requiring that all carriers receive the same amount of support, but only that all eligible carriers have an equal opportunity to compete for support. The proposed CAF allows for carriers to compete for support.

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[14] Report and Order, FCC 97-157, Released May 8, 1997, Appendix I - Final rules, § 54.307(a).
[15] Id., ¶¶ 46-51.
[16] 47 U.S.C. § 254(b).
[17] Recommended Decision, FCC 98J-7, Released November 25, 1998. ¶ 3; Recommended Decision, FCC 02J-2, Released October 16, 2002. ¶¶ 14, 16.

Non-Regulated Revenues

Several parties, including the FPSC, have suggested that when calculating universal service support levels, the FCC should take into account unregulated as well as regulated revenues.[18] The National Association of State Utility Consumer Advocates (NASUCA), the National Cable & Telecommunications Association (NCTA), and Sprint also urged the FCC to recognize that USF recipients derive revenues from other services such as broadband and video services over the same network. The FCC seeks comment on how to ensure that universal service funding is not subsidizing non-regulated services or excessively subsidizing carriers that have the ability to generate non-regulated revenues as a result of their deployment of subsidized local loops. The FPSC supports including all revenues (including broadband revenues) when evaluating the interstate rate of return revenue requirement of a high-cost carrier. If the FCC moves forward with the CAF as proposed, carriers bidding on the minimum amount of support they would accept to provide service would likely factor into their bids non-regulated revenues anticipated to be received.

SIZING THE FEDERAL COMMITMENT TO HIGH-COST SUPPORT

The FCC seeks comment on setting an overall budget for the CAF. For phase one, when CAF support is non-recurring and availability is concurrent with other high-cost support reforms, the FCC proposes that the size of the fund would be no greater than projected for the current high-cost program. In phase two, the CAF would provide all high-cost funding and would be recurring in nature. The FCC also proposes to set an overall budget equal to the size of the current high-cost program in 2010 (or roughly $4.3 billion). The FCC recognizes that it can impose cost controls to avoid excessive expenditures that detract from the goals of universal service. While the FPSC is supportive of these proposed caps, we believe that the FCC should look to reduce the size of the fund

[18] Ex Parte Comments of the FPSC – NBP Public Notice #19 – CC Docket No. 96-45; WC Docket No. 05-337; WC Docket No 03-109; GN Docket Nos 09-47, 09-51, and 09-137, p. 3, filed on December 15, 2009.

where efficiencies derived from universal service reform allow. Several states, including Florida, continue to shoulder a disproportionate burden of funding the program.

CONCLUSION

The FPSC is encouraged by many of the proposed reforms suggested within this Notice. We believe that the FCC must expand the definition of supported service under universal service if it wishes to specify the broadband characteristics (such as speed) that it will fund through universal service. The elimination of the identical support rule is long overdue and we believe this action is still consistent with the FCC's competitive neutrality principle. We support the establishment of funding caps, both on the aggregate size of the CAF and on the amount of per line support any carrier may receive. We do not support the FCC proposal to condition support of CAF on intrastate USF and ICC reform; however, we do support eliminating various legacy support mechanisms such as the interstate access support and local switching support. Finally, we believe that the FCC should look to reduce the size of the fund where efficiencies derived from universal service reform allow.

State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: March 25, 2011

TO: Timothy J. Devlin, Executive Director

FROM: Cindy B. Miller, Senior Attorney, Office of the General Counsel
Samantha M. Cibula, Attorney Supervisor, Office of the General Counsel
Judy G. Harlow, Senior Analyst, Division of Regulatory Analysis
Walter Clemence, Government Analyst I, Division of Regulatory Analysis

RE: Potential FPSC *Amicus* Filing in *National Association of Regulatory Utility Commissioners v. U. S. Department of Energy*, D. C. Circuit Court of Appeals (Case No. 11-1066)

CRITICAL INFORMATION: Please place on April 6, 2011 Internal Affairs. Guidance is sought.

On March 7, 2011, the National Association of Regulatory Utility Commissioners (NARUC) filed a petition in the D.C. Circuit Court, *National Association of Regulatory Utility Commissioners v. U.S. Department of Energy* (Case No. 11-1066). The petition addresses the Department of Energy (DOE) assessment of nuclear waste fees. We now seek Commission guidance regarding filing as *amicus* in support of the NARUC petition.

Background

In April 2010, the Commission requested staff to participate as *amicus curiae* in the case *National Association of Regulatory Utility Commissioner v. U. S. Department of Energy*, Case NO. 10-1074 in the D. C. Circuit Court of Appeals. The *amicus curiae* brief was filed May 14, 2010, in that case, in support of NARUC's petition.

On December 13, 2010, the D. C. Circuit Court of Appeals dismissed the NARUC petition for review. NARUC had asked the Court to order the Department of Energy to conduct an annual assessment of the nuclear waste fees, as required by the Nuclear Waste Policy Act (NWPA) and to suspend the fee pending completion of the assessment. Yet the DOE did release that fee assessment on October 18, 2010. The Court held, "Because the Secretary has since conducted the annual assessment, these two claims are moot and we lack jurisdiction to address them." Petitioners also asked that the Court order the DOE to suspend the nuclear waste fee in light of the status of the DOE's waste disposal program. The Court said the request was unripe. However, the Court stated that petitioners may be able to bring a challenge to the DOE's assessment.

The DOE's fee assessment is an annual determination required under the NWPA. The law establishes a fee per kilowatt hour of electricity generated by nuclear capacity and sold that must be paid by nuclear utilities and deposited in the Nuclear Waste Fund for the disposition of commercial spent nuclear fuel and high-level radioactive waste. The DOE Secretary must determine annually whether either insufficient or excess funds are being collected, and to propose an adjustment to the fee to Congress. In the October 18, 2010, fee assessment, as in all determinations since the NWPA was passed in 1983, the Secretary stated "that there is no reasonable basis at this time to conclude that either excess or insufficient funds are being collected." The previous determination had concluded the fee was adequate based on the life cycle cost of Yucca Mountain repository of $97 billion. However, the DOE has now withdrawn its application for Yucca Mountain to be considered the repository. The Secretary states the Department still has an obligation to manage and dispose of the waste and thus still needs the fees to be collected, and that this commitment is independent of Yucca Mountain. A Blue Ribbon Commission has been established to consider alternatives, with a draft report due by mid-2011 and a final report by early 2012. If the fee was suspended, according to the DOE Secretary, this would be inequitable to future ratepayers. The costs would be shifted onto future ratepayers after a disposal solution is identified and the fee is adjusted back to a positive amount.

In response, NARUC filed the attached petition in the D.C. Circuit Court of Appeals, which states:

> DOE's series of inactions and failures with respect to the program and, specifically, in the November 2010, "Determination," its effort to support the continued collection of unjustifiable fees – particularly during this severe economic downturn – is flatly inconsistent with Congress's instructions in the NWPA.

On March 8, 2011, the Nuclear Energy Institute, Inc., Florida Power & Light Company, and 15 other utilities (Joint Petitioners) filed a petition. They requested the Court grant relief, including:

> 1. Declare that DOE's Nuclear Waste Fund (NWF) fee review was arbitrary and capricious and contrary to law;
>
> 2. Declare that the DOE's determination statement that there is no reasonable basis to conclude that either excess or insufficient funds are being collected by the NWF fee, is arbitrary and capricious and contrary to law.
>
> 3. Direct DOE to propose that the fee collection be suspended pending DOE's completion of a fee review that complies with the Nuclear Waste Policy Act; and
>
> 4. Direct DOE to immediately transmit a proposal to Congress for suspension of the NWF fee..

The D.C. Circuit Court has consolidated NARUC's and NEI's petitions on appeal.

History of NWPA Issues

- Pursuant to the Nuclear Waste Policy Act of 1982 (NWPA), the federal government made commitments to centralize the long-term management of high-level nuclear waste, including the establishment of a permanent waste repository.

- The 1987 amendments to the NWPA designated Yucca Mountain, Nevada, as the sole option for a long-term storage site. The Yucca Mountain site was reaffirmed by Congress in 2002. In June 2008, the DOE filed an application before the Nuclear Regulatory Commission (NRC) for authorization to construct a national high-level nuclear waste repository at Yucca.

- The NWPA also established a statutory deadline for the U. S. Department of Energy (DOE) to dispose of nuclear waste, including spent nuclear fuel, by January 31, 1998.

- The NWPA established the Nuclear Waste Fund to finance a national repository and required fees to be assessed to the bills of consumers of energy produced by nuclear generating plants.

- Beginning in 1983, Nuclear Waste Fees were assessed to consumer electric bills of approximately $1 for every megawatt-hour of energy produced by nuclear generation.

- Since 1983, the nation's electric ratepayers have paid over $33 billion into the Nuclear Waste Fund for the development of a national waste repository.

- Florida's ratepayers have paid a total of $810.1 million into the Nuclear Waste Fund. When interest is taken into account, the federal government's liability to Florida's ratepayers totals approximately $1.5 billion. In 2010 alone, Florida's ratepayers paid over $21.3 million into the Nuclear Waste Fund.

- In June 2008, the DOE filed with the NRC an application for authorization to construct a national high-level nuclear waste repository at Yucca Mountain, Nevada.

- On March 3, 2010, DOE filed a motion with the NRC to withdraw the application for the repository with prejudice. This case is still pending at the NRC.

Possible Amicus Filing

An amicus filing is referred to as a "friend of the court" filing. An organization that is not a party to a given litigation is allowed to advise a Court on a matter of law in the case. An

amicus filing would enable the Commission to state its concern. The filing of an amicus brief is an option before the D. C. Circuit Court. Pursuant to Circuit Court Rule 29, we must seek leave of the Court or consent of the parties to the proceeding to file an *amicus* brief.

The Commission could share NARUC's and NEI's position that the NWF fee should be suspended. As NARUC's petition states, "ratepayers continue to pay for the Congressionally-mandated federal repository program that was supposed to start accepting waste in 1998 – a program which – in just the last two years – has been first evaluated and then eliminated by DOE."

Thus, staff seeks guidance as to whether the Commission wishes to file an *amicus* brief in Case No. 11-1066. This is another avenue to express concern that DOE continues to make ratepayers pay the fees, but the DOE has not met its obligations under the NWPA.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *Petitioner*, v. THE UNITED STATES DEPARTMENT OF ENERGY AND THE UNITED STATES OF AMERICA, *Respondents*,	Case No. _____

PETITION FOR REVIEW

The National Association of Regulatory Utility Commissioners (NARUC) respectfully petitions this Court pursuant to Section 119 of the Nuclear Waste Policy Act (NWPA), 42 U.S.C. § 10139, as amended, Section 702 of the Administrative Procedure Act (APA), 5 U.S.C. § 702, and Rule 15(a) of the Federal Rules of Appellate Procedure, for review of the action of, and/or failure to act by the United States Department of Energy (DOE) by its belated release of the somewhat inaccurately captioned "*Secretarial Determination of the Adequacy of the Nuclear Waste Fund Fee*" (Determination), attached as Exhibit 1.

The NWPA requires DOE to perform an assessment of funds needed to support the waste disposal program.[1] The determination must demonstrate whether "excess or insufficient revenues" are being collected. Id.

The not-quite-eight page "Determination", which shares little of the approach, intellectual rigor, content or empirical support that characterizes all previous fee assessments,[2] was *apparently* compiled, drafted and filed in a pending appeal within two months.

DOE filed the "Determination" to moot an earlier NARUC petition for review on *procedural grounds*.

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[1] The NWF fee was established to recoup government's costs for radioactive waste disposal. NWPA § 302(d); 42 U.S.C. § 10222(d). The NWPA set the fee for nuclear electricity generators at 1.0 mil per kilowatt-hour. NWPA § 302(a)(2), 42 U.S.C. § 10222(a)(2). The NWPA directs the Secretary of Energy to annually review whether the collection of the fee will provide sufficient revenues to offset the programs costs and to propose a fee adjustment if excess or insufficient revenues are being collected. NWPA § 302(a)(4); 42 U.S.C. § 10222(a)(4).

[2] For example, unlike previous fee assessments, this "Determination" does not contain any analysis of the programs needs, does not reflect the impact of either DOE's termination of the Yucca Mountain program or the $24 billion current value (and interest payments generated by) the current NWF. Instead, DOE posits a novel and self serving series of legal arguments for its failure/inability to provide empirical support for its position.

In 2010, NARUC challenged DOE's failure to conduct a statutorily mandated and long overdue annual assessment of the fee's adequacy as well as its rejection of NARUC's requests to do so.

Although the challenge was dismissed on procedural grounds, the Court noted "petitioners may now be able to properly raise this claim through a challenge to" the "Determination." See, the December 13, 2010 Judgment in *National Association of Regulatory Utility Commissioners et al. v. DOE*, D.C. Circuit Case Nos. 10-1074 and 10-1076.

DOE's elimination of the Yucca Mountain Repository program Congress specified those fees are collected to support – simultaneously eradicated any empirical support for continued collection of any fee. Under these circumstances, any rational assessment should have resulted in a recommendation to suspend the fee.

Instead, DOE released the "Determination."

The "Determination" fails to meet and/or is inconsistent with the NWF fee review requirements of section 302(a)(4) of the NWPA, 42 U.S.C. § 10222(a)(4).

NARUC represents the interests of State utility commissions that oversee nuclear utility rates including the pass-through cost of the nuclear waste fee. The association has been recognized both by Congress in several statutes[3] and consistently by Article III courts[4] as the proper entity to represent the collective interests of the State utility commissions.

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[3] See 47 U.S.C. § 410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Board to consider issues of concern to both the Federal Communications Commission and State regulators with respect to universal service, separations, and related concerns; Cf. 47 U.S.C. § 254 (1996) (describing functions of the Joint Federal-State Board on Universal Service). Cf. NARUC, et al. v. ICC, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains "...Carriers, to get the cards, applied to...(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system.).

[4] See, e.g., United States v. Southern Motor Carrier Rate Conference, Inc., 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985) (The Supreme Court noted: "[t]he District Court permitted . . . (NARUC), an organization composed of State agencies, to intervene as a defendant. Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions of those States in which the defendant rate bureaus operate." 471 U.S. 52, n. 10. See also NARUC v. DOE, 851 F.2d 1424 (D.C. Cir. 1988), where, although standing was not specifically addressed, NARUC was the lead petitioner in a successful appeal involving DOE and the nuclear waste program; Indianapolis Power and Light Co. v. ICC, 587 F.2d 1098 (7th Cir. 1982); Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir. 1976); Compare, NARUC v. Federal Energy Regulatory Commission, 475 F.3d 1277 (D.C. Cir. 2007); NARUC v. Federal Communications Commission, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985).

This Court has jurisdiction pursuant to NWPA Sec. 119(a)(1), 42 U.S.C. § 10139(a)(1).[5] Venue is proper in the court pursuant to 42 U.S.C. § 10139(a)(2). Id. NARUC has its principal office of business in this circuit, and in any case, the statute allows a petition to be lodged before this Court. The petition is timely filed within the 180 days specified in NWPA Sec. 119(c), 42 U.S.C. § 10139(c), based upon the November 1, 2010 date of the "Determination." Id. Moreover, DOE is a proper respondent under Rule 15(a) of the Federal Rules of Appellate Procedure.

NARUC seeks an order and judgment that DOE's actions or failure to act in releasing the "Determination" fail to meet the requisites of Section 302(a)(4) of the NWPA, 42 U.S.C. 10222(a)(4), are arbitrary and capricious, 5 U.S.C. §706(2)(A), beyond DOE's jurisdiction, authority or power, 5 U.S.C. §706(2)(C), and/or otherwise not in accordance with law, 5 U.S.C. §706(2)(A).

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[5] 49 U.S.C. § 10139. "Judicial review of agency actions: (a) Jurisdiction of United States courts of appeals . . . shall have original and exclusive jurisdiction over any civil action-- (A) for review of any final decision or action of the Secretary, the President, or the Commission under this part; (B) alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part; (C) challenging the constitutionality of any decision made, or action taken . . . (2) The venue of any proceeding . . . shall be in the judicial circuit in which the petitioner . . . has its principal office, or in the United States Court of Appeals for the District of Columbia. (c) Deadline for commencing action: A civil action for judicial review described under subsection (a)(1) of this section may be brought not later than the 180th day after the date of the decision or action or failure to act involved . ." Downloaded from the Government Printing Office: http://frwebgate1.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=058563466570+0+1+0&WAISaction=retrieve.

NARUC contends, *inter alia*, the purported fee assessment is facially deficient and lacks either intrinsic or record support. At a minimum, DOE should be directed to immediately (i) propose suspension of the collection of the fee to the NWF pending DOE's release of a fee review that complies with NWPA Section 302(a)(4), 42 U.S.C. § 10222(a)(4), and (ii) transmit such proposal for NWF fee suspension to Congress.

Ratepayers continue to pay for the Congressionally-mandated federal repository program that was supposed to start accepting waste in 1998 – a program which – in just the last two years – has been first eviscerated and then eliminated by DOE. Ratepayers also are bearing the current costs of onsite storage caused by DOE's failure to comply with this Congressional mandate. Ratepayers are also funding necessarily wasteful duplicative non-revenue producing waste sites pending consolidation at some central federal disposal facility – again caused by DOE's failure to comply with that mandate. At the same time, it *appears* that someone at DOE has determined, while electric ratepayers must be compelled continue to pay even more for a non-existent disposal program, the Department of Defense does not need to contribute anything this fiscal year to the NWF to cover its future "waste disposal" needs.

DOE's series of inactions and failures with respect to the program and, specifically, in the November 2010 "Determination," its effort to support the continued collection of unjustifiable fees – particularly during this severe economic downturn – is flatly inconsistent with Congress's instructions in the NWPA. Accordingly, we also respectfully request such other relief as this Court deems just and proper.

Respectfully submitted,

James Bradford Ramsay
GENERAL COUNSEL
(JRAMSAY@NARUC.ORG) PHONE: 202.898.2207

Robin Lunt
ASSISTANT GENERAL COUNSEL
(RLUNT@NARUC.ORG) PHONE: 202-898-1350

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS
1101 VERMONT AVE., N.W., SUITE 200
WASHINGTON, D.C. 20005
(FAX) 202-384-1554

Dated: March 7, 2011

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, the National Association of Regulatory Utility Commissioners (NARUC) respectfully submits this disclosure statement. NARUC is a quasi-governmental nonprofit organization founded in 1889 and incorporated in the District of Columbia. NARUC is a "trade association" as that term is defined in Rule 26.1(b). NARUC has no parent company. No publicly held company has any ownership interest in NARUC. NARUC represents those government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, *inter alia*, the regulated electric utilities within their respective borders.

Respectfully submitted,

James Bradford Ramsay
GENERAL COUNSEL
Robin Lunt
ASSISTANT GENERAL COUNSEL
NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS
1101 VERMONT AVE., N.W., SUITE 200
WASHINGTON, D.C. 20005

Dated: March 7, 2011

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, *Petitioner*,	)	
v.	)	Case No. _____
THE UNITED STATES DEPARTMENT OF ENERGY AND THE UNITED STATES OF AMERICA, *Respondents*,	)	

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of March 2011, a copy of the foregoing Petition for Review was served by U.S. mail upon the following persons:

_____
James Bradford Ramsay

Scott Blake Harris
General Counsel
Office of the General Counsel
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, D.C. 20585

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Exhibit A

DOE
"Determination"
November 1, 2010

The Secretary of Energy
Washington, D.C. 20585

Secretarial Determination of the
Adequacy of the Nuclear Waste Fund Fee

The Nuclear Waste Policy Act (NWPA) establishes a Nuclear Waste Fund to be used to pay for the disposition of commercial spent nuclear fuel and high-level radioactive waste. Section 302(a)(2) of the NWPA establishes a fee of 1 mill (1/10-cent) per kilowatt-hour of electricity generated and sold that must be paid by nuclear utilities and deposited in the Fund. The NWPA also requires the Secretary to review the adequacy of this fee annually and, upon a determination that either insufficient or excess funds are being collected, to propose an adjustment to the fee to ensure that the full costs of the Federal Government's disposal program will be fully recovered from generators and owners of high-level radioactive waste or spent nuclear fuel. The Secretary must transmit any proposed fee adjustment to Congress for a review period of 90 days of continuous session, after which time the adjustment becomes effective unless contrary legislation is enacted into law.

I adopt and approve the attached annual determination of the Director, Office of Standard Contract Management, that there is no reasonable basis at this time to conclude that either excess or insufficient funds are being collected and thus will not propose an adjustment to the fee to Congress; the fee will, therefore, remain at the amount specified in the Nuclear Waste Policy Act pending the next annual review.

Steven Chu

Steven Chu

- 1 2010

Date

Attachment

Department of Energy
Washington, DC 20585

October 18, 2010

MEMORANDUM FOR SCOTT BLAKE HARRIS
GENERAL COUNSEL

FROM: DAVID K. ZABRANSKY, ~~DIRECTOR~~
OFFICE OF STANDARD CONTRACT MANAGEMENT

SUBJECT: Annual Determination of the Adequacy of the Nuclear Waste Fund Fee

The Nuclear Waste Policy Act (NWPA) establishes a Nuclear Waste Fund to be used to pay for the disposition of commercial spent nuclear fuel (SNF) and high-level radioactive waste (HLW). Section 302(a)(2) of the NWPA establishes a fee of 1 mill (1/10-cent) per kilowatt-hour of electricity generated and sold. That fee must be paid by nuclear utilities and deposited in the Fund. The NWPA also requires the Secretary to review the adequacy of this fee annually and, upon a determination that either insufficient or excess funds are being collected, to propose an adjustment to the fee to ensure that the full costs of the Federal Government's disposal program will be fully recovered from generators and owners of HLW or SNF. The Secretary must transmit any proposed fee adjustment to Congress for a review period of 90 days of continuous session, after which time the adjustment becomes effective unless contrary legislation is enacted into law. Since the enactment of the NWPA in January 1983, the Secretary has never proposed a fee adjustment. The most recent assessment of the adequacy of the fee, completed in 2009, concluded that the fee was adequate based on the most recent life cycle cost estimate of the Yucca Mountain repository of $97 billion in constant 2007 dollars.

The Office of Standard Contract Management has conducted an annual review of the adequacy of the Nuclear Waste Fund fee. A copy of this "Annual Review of the Adequacy of the Nuclear Waste Fund Fee" is attached. This annual review concludes that there is no reasonable evidentiary basis to conclude that the current fee is generating either insufficient or excess funds to cover the costs of DOE's obligation to manage and dispose of SNF and HLW. Accordingly, I have determined that there is no basis to propose an adjustment to the fee to Congress and, therefore, the fee should remain at the amount specified in the NWPA.

Attachment

Annual Review of the Adequacy of the Nuclear Waste Fund Fee

INTRODUCTION: The Nuclear Waste Policy Act (NWPA) establishes a Nuclear Waste Fund to be used to pay for the disposition of commercial spent nuclear fuel (SNF) and high-level radioactive waste (HLW). Section 302(a)(2) of the NWPA establishes a fee of 1 mill (1/10-cent) per kilowatt-hour of electricity generated and sold that must be paid by nuclear utilities and deposited in the Fund. The NWPA also requires the Secretary to review the adequacy of this fee annually and, upon a determination that either insufficient or excess funds are being collected, to propose an adjustment to the fee to ensure that the full costs of the Federal Government's disposal program will be fully recovered from generators and owners of HLW or SNF. The Secretary must transmit any proposed fee adjustment to Congress for a review period of 90 days of continuous session, after which time the adjustment becomes effective unless contrary legislation is enacted into law. Since the enactment of the NWPA in January 1983, the Secretary has never proposed a fee adjustment. The most recent assessment of the adequacy of the fee, completed in 2009, concluded that the fee was adequate based on the most recent life cycle cost estimate of the Yucca Mountain repository of $97 billion in constant 2007 dollars.

This review concludes that there is no reasonable evidentiary basis to conclude that the current fee is generating either insufficient or excess funds. In such circumstances, the statutory framework and legislative intent support maintenance of the fee at the amount specified in the NWPA.

BACKGROUND: Section 111(b)(4) of the NWPA states that one of the purposes of the NWPA is "to establish a Nuclear Waste Fund, composed of payments made by the generators and owners of [high-level radioactive] waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel." The legislative history of the NWPA confirms that Congress intended those who benefit from electricity supplied through nuclear power to pay for the disposal of nuclear waste and spent fuel created during the generation of that electricity.[1]

Section 302(a)(1) of the NWPA authorizes the Secretary of Energy to enter into contracts with generators or owners of HLW or SNF. Section 302(a)(5) requires that these contracts contain a provision under which the Secretary agrees to dispose of SNF and HLW in return for payment of the fees established by section 302. Thus, payment of the fee is the consideration for the Secretary's contractual obligations related to the disposal of HLW and SNF. Section 302(a)(2) sets the fee at 1.0 mill per kilowatt-hour of electricity generated by a civilian nuclear power

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[1] *Commonwealth Edison Co. v. U.S. Dept. of Energy*, 877 F.2d 1042, 1047 (D.C. Cir. 1989) ("Congress, in passing the Nuclear Waste Policy Act, expressed its intention that 'the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel.'") (citing NWPA, sec. 111(a)(4)); Congressional Record – Senate at S 15655 (December 20, 1982) ("The bill includes several new or modified concepts from the bill passed by the Senate in the last Congress. One of the most noteworthy of those is the proposal for an assured full-cost recovery by the Federal Government from nuclear power-supplied ratepayers for the nuclear waste programs included in the bill. By establishing a 1 mill-per-kilowatt-hour users fee on nuclear generated electricity, this bill for the first time would provide a direct financial linkage between the beneficiaries of nuclear power and the cost for interim management and ultimate disposal for nuclear wastes.").

reactor and sold on or after the date 90 days after January 7, 1983. This fee results in the deposit of approximately $750 million of receipts annually into the Waste Fund. The Waste Fund's balance accrues annual interest of approximately $1 billion, producing total annual income into the Waste Fund of approximately $1.750 billion. The current value of the Waste Fund is approximately $24 billion.

Section 302(a)(4) of the NWPA provides for the Secretary annually to review the amount of the fee to "evaluate whether collection of the fee will provide sufficient revenues to offset the costs as defined in subsection (d)" of Section 302. Subsection (d) defines such costs in terms of expenditures from the Waste Fund "for purposes of radioactive waste disposal activities under Titles I and II" of the NWPA. Section 302(a)(4) further provides that, if the Secretary "determines that either insufficient or excess revenues are being collected," the Secretary "shall propose an adjustment to the fee to insure full cost recovery." The NWPA provides Congress with 90 days in which to act before the adjustment can take effect.[2]

The Secretary of Energy has determined that a Yucca Mountain Repository is not a workable option for permanent disposal of SNF and HLW. Consistent with that determination, on March 11, 2009, Secretary Chu announced that "the [Fiscal Year (FY) 2010] Budget begins to eliminate funding for Yucca Mountain as a repository for our nation's nuclear waste."[3] The Secretary stated that DOE "will begin a thoughtful dialogue on a better solution for our nuclear waste storage needs."[4] In its May 2009 budget request for FY 2010, DOE requested no funding for development of a Yucca Mountain repository.[5] Congress approved DOE's budget request in October 2009.[6]

In its February 2010 budget request for FY 2011, DOE stated that it "has been evaluating a range of options for bringing the [Yucca Mountain] project to an orderly close. In FY 2010, the Department of Energy will withdraw from consideration by the Nuclear Regulatory Commission the license application for construction of a geologic repository at Yucca Mountain, Nevada, in accordance with applicable regulatory requirements."[7] The Administration's FY 2011 Budget similarly stated that "[i]n 2010 the Department [of Energy] will discontinue its application to the

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[2] The Eleventh Circuit in *Alabama Power* struck the "unless" clause from the fee adjustment statutory provision as violative of the Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983). *Alabama Power Co. v. U.S. Dept. of Energy*, 307 F.3d 1300, 1308 (2002). As a result, the statute that remains reads "[t]he adjusted fee proposed by the Secretary shall be effective after a period of 90 days of continuous session have elapsed following the receipt of such transmittal [to Congress]," while the clause "unless during such 90-day period either House of Congress adopts a resolution disapproving the Secretary's proposed adjustment . . ." was invalidated.

[3] Statement of Steven Chu, Secretary of Energy, Before the Comm. on the Budget, United States Senate. at 3, *available at* http://congressional.energy.gov/documents/3-11-09_Final_Testimony_(Chu).pdf.

[4] *Id.*

[5] DOE, FY 2010 Cong. Budget Request, Budget Highlights. at 9, *available at* http://www.cfo.doe.gov/budget/10budget/Content/Highlights/FY2010Highlights.pdf. In addition, the request included minimal funding to continue participation in the NRC license application process for Yucca Mountain. *Id.*

[6] Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-85, 123 Stat. 2845, 2864-65 (2009); Energy and Water Development and Related Agencies Appropriations Act, 2010, Conference Report, H.R. Rep. No. 111-278 at 20-21 (2009), reprinted in 2009 U.S.C.C.A.N. 1003.

[7] DOE, FY 2011 Cong. Budget Request, Budget Highlights. at 44, *available at* http://www.mbe.doe.gov/budget/11budget/Content/FY2011Highlights.pdf.

Nuclear Regulatory Commission (NRC) for a license to construct a high-level waste geologic repository at Yucca Mountain, Nevada."[8] It further stated that "all funding for development of the [Yucca Mountain] facility will be eliminated" for FY 2011.[9] Consistent with those determinations, on March 3, 2010, the Department filed a motion with the NRC to withdraw the license application for Yucca Mountain.[10] An NRC Board denied that motion on June 29, 2010, but the next day the NRC itself invited briefing as to whether it should review and reverse or affirm that determination.[11] As of this writing, the matter remains pending before the NRC.[12]

Although, as noted above, the Secretary has determined that a geologic repository at Yucca Mountain is not a workable option, the Secretary has repeatedly affirmed the Department's commitment to meeting its obligation to manage and dispose of the nation's SNF and HLW.[13] To explore options to meet this commitment, the Secretary, acting at the direction of the President, has established the Blue Ribbon Commission on America's Nuclear Future (BRC).[14] The BRC is directed by its charter to consider, among other things, (1) "[o]ptions for safe storage of used nuclear fuel while final disposition pathways are selected and deployed," (2) "fuel cycle technologies and R&D programs," and (3) "[o]ptions for permanent disposal of used fuel and/or high-level nuclear waste, including deep geological disposal."[15] Congress has provided $5 million to fund the BRC so that it may consider "alternatives" for disposal of SNF and HLW.[16] The BRC is required to issue a draft report by mid-2011 and a final report by early 2012.[17] The BRC's forthcoming recommendations will inform the Department's policies toward management and disposal of SNF and HLW.

DISCUSSION:

The Framework Established by the NWPA and the Standard Contracts

As explained above, Section 302(a)(1) of the NWPA provides that DOE's disposal contracts with generators or owners of HLW or SNF must contain a provision that requires the payment of a fee. Section 302(a)(5) provides that payment of the fee is the consideration for the Secretary's

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8 Office of Management and Budget, Terminations, Reductions, and Savings, Budget of the U.S. Government, FY 2011, at 62, *available at* http://www.whitehouse.gov/sites/default/files/omb/budget/fy2011/assets/trs.pdf.

9 *Id.*

10 DOE's Motion to Withdraw, In the Matter of U.S. Dep't of Energy, Docket No. 63-001-HLW, ASLBP No. 09-892-HLW-CAB04.

11 In the Matter of U.S. Dep't of Energy, Docket No. 63-001-HLW, ASLBP No. 09-892-HLW.

12 *Id.*

13 See, e.g., DOE, Secretary Chu Announces Blue Ribbon Commission on America's Nuclear Future (Jan. 29, 2010), *available at* http://www.energy.gov/news/8584.htm ("The Administration is committed to promoting nuclear power in the United States and developing a safe, long-term solution for the management of used nuclear fuel and nuclear waste."); DOE's Motion to Withdraw at 1, In the Matter of U.S. Dep't of Energy, Docket No. 63-001-HLW, ASLBP No. 09-892-HLW-CAB04 ("DOE reaffirms its obligation to take possession and dispose of the nation's spent nuclear fuel and high-level nuclear waste ... .").

14 DOE, Secretary Chu Announces Blue Ribbon Commission on America's Nuclear Future (Jan. 29, 2010), *available at* http://www.energy.gov/news/8584.htm.

15 Charter, Blue Ribbon Commission on America's Nuclear Future (filed March 1, 2010), *available at* http://www.brc.gov/pdfFiles/BRC_Charter.pdf ("BRC Charter").

16 Energy and Water Development and Related Agencies Appropriations Act, 2010 Pub. L. No. 111-85, 123 Stat. 2845, 2864-65 (Oct. 2009).

17 BRC Charter, ¶ 4.

obligation under the contract to take and dispose of HLW and SNF. Nothing in the NWPA, or in the contracts entered into pursuant to Section 302 (standard contracts),[18] ties either of these obligations to progress on the Yucca Mountain repository or the use of the Yucca Mountain repository for the disposal of HLW or SNF. On the contrary, consistent with the statute, the standard contracts provide that "DOE shall accept title to all SNF and/or HLW, of domestic origin, generated by the civilian nuclear power reactor(s) specified in appendix A, provide subsequent transportation for such material to the DOE facility, and dispose of such material in accordance with the terms of this contract" without specifying a particular disposal site or method.[19] Thus, the statutory and contractual language is clear that the obligations to collect and to pay the waste fee are ongoing and tied to DOE's obligation to take and dispose of SNF and HLW, but not to the Yucca Mountain project. Those statutory and contractual obligations remain in place today.

Under the statutory and contractual scheme, payment of the fees continues to provide the consideration for DOE's performance of its obligations to dispose of these materials.[20] DOE, moreover, has clearly stated that termination of the Yucca Mountain project does not affect its commitment to fulfill its contractual obligations to take and dispose of HLW and SNF.[21] Accordingly, the fact that DOE will not pursue the Yucca Mountain repository does not provide a basis to stop the collection and payment of the consideration for acceptance and disposal of HLW and SNF.

DOE's conclusion that its obligation to dispose of these materials – and thus the need to collect a fee to recover the costs of such disposal – is independent of the status of the Yucca Mountain repository, or any other repository, has been supported by the courts. As explained by the D.C. Circuit in *Indiana Michigan*:

> DOE's duty ... to dispose of the SNF is conditioned on the payment of fees by the owner ... *Nowhere, however, does the statute indicate that the obligation ... is somehow tied to the commencement of repository operations* ... The only limitation placed on the Secretary's duties ... is that that duty is "in return for the payment of fees established by this section."[22]

Similarly, courts have made clear that the waste fee is intended to defray the costs of a wide set of activities relating to permanent disposal. In *State of Nev. ex rel. Loux,* the court concluded that the NWPA requires the Waste Fund to cover the costs of a broad array of activities that relate to the ultimate disposal of waste, including pre-site characterization activities conducted

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18 10 C.F.R. § 961.11 (text of the standard contract).

19 *Id.*, Art. IV.B.1.

20 NWPA, sec. 302(a)(5)("Contracts entered into under this section shall provide that ... (B) in return for the payment of fees ... the Secretary ... will dispose of the [HLW] or [SNF] ... .").

21 *See supra* note 13.

22 *Indiana Michigan Power Co. v. Dept. of Energy*, 88 F.3d 1272, 1276 (D. C. Cir. 1996) (quoting NWPA, sec. 302(a)(5)(B)) (emphasis added).

by a state in which a repository may potentially be sited.[23] Significantly, moreover, in *Alabama Power*, which was decided after the Joint Resolution of Congress approving the Yucca Mountain site (i.e., the Yucca Mountain Development Act) became law, the court did not limit Section 302(d) to activities associated with Yucca Mountain; instead, the court noted that Section 302(d) permits expenditures for activities that "entail some sort of advancement or step toward permanent disposal, or else an incidental cost of maintaining a repository."[24] These cases are consistent with Congress's intent that the Waste Fund be used to pay the costs of DOE's entire disposal program, rather than only the costs of a particular repository.[25]

Basis for Any Adjustment to the Fee

The remaining question for decision is whether there is, at this time, a basis for the Secretary to propose to Congress an adjustment of the fee. As stated above, the NWPA prescribes that the fee "shall be equal to 1.0 mil" per kilowatt-hour of electricity generated and sold by nuclear utilities. The fee can be altered under the NWPA only through the adjustment provision of Section 302(a)(4), which requires the Secretary to propose an adjustment to the fee "[i]n the event the Secretary determines that either insufficient or excess revenues are being collected, in order to recover the costs incurred by the Federal Government that are specified in subsection (d)" and further provides Congress an opportunity to either allow the proposal to become law or enact contrary legislation. In other words, the NWPA requires the fee to remain at the statutorily-prescribed rate of 1.0 mill unless and until the Secretary determines an adjustment is necessary because excess or insufficient revenues are being collected. If the Secretary makes such a determination, the Secretary must report that determination to Congress, and wait 90 days to see whether Congress acts to disturb that judgment.[26]

The NWPA does not prescribe a methodology for how the Secretary must carry out the fee adequacy review provision of Section 302(a)(4). Rather, the NWPA gives the Secretary discretion in how he administers that provision each year.[27] Over the years, the Secretary has

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[23] *State of Nev. ex rel. Loux v. Herrington*, 777 F.2d 529, 532 (9th Cir. 1985). The issue in that case was whether Nevada was entitled to access the Waste Fund to pay for its pre-site characterization monitoring and testing activities at Yucca Mountain. Despite the fact that the NWPA – in sections 116(c)(1)(A) and 117(c)(8) – expressly authorizes funding of only *post*-site characterization monitoring and testing activities, the court liberally construed other NWPA provisions as also authorizing funding of *pre*-site characterization monitoring and testing activities. *Id.* at 532-35. The court indicated that a liberal construction of the NWPA's funding provisions is necessary to effectuate the statutory purpose of ensuring that generators and owners of HLW and SNF bear the full costs of the disposal of their HLW and SNF. *Id.* at 532. *See also Indiana Michigan*, 88 F.3d at 1275 (indicating that Congress intended Section 302(d) of the NWPA, which governs Waste Fund expenditures, to be interpreted more liberally than other sections of the NWPA).

[24] *Alabama Power*, 307 F.3d at 1313.

[25] *See* S. Rep. No. 100-517 at 1-2 (1988) ("The Nuclear Waste Policy Act of 1982 (NWPA) establishes a national policy and *program for safely storing, transporting, and disposing of spent nuclear fuel and high-level radioactive waste*. ... The NWPA also establishes a nuclear waste fund, to be composed of payments made by generators of spent fuel and high-level waste, from which the costs of *the program* are paid.") (emphases added).

[26] NWPA, sec. 302(a)(4); *Alabama Power*, 307 F.3d at 1308.

[27] *Alabama Power*, 307 F.3d at 1308. That court further observed that any challenge to DOE's decision would face an "insurmountable burden of proof" and that "[g]iven the nebulous calculations that must be made in order to assess the costs of waste storage that will be incurred in the distant future, it is not surprising that the statutory fee has never been challenged by the utilities." *Id.* at 1309.

used this flexibility to implement varying approaches to evaluate the adequacy of the waste fee.[28] These approaches reflected the evolving nature of the disposal program, including changes in the direction of the program and changes in expectations concerning what activities would be undertaken in the future, what costs would be incurred, and what future market conditions would be. None of these annual evaluations has ever led to a conclusion that the fee of 1.0 mill per kilowatt-hour of electricity was either insufficient or excessive such that an adjustment was necessary to ensure full cost recovery. It has, thus, remained unchanged since it was first established.

In this instance, we are aware of no evidence that would provide a reasoned and sound basis for determining that excess or insufficient revenues are being collected for the costs for which DOE is responsible under the NWPA's statutory scheme (and under its contractual obligations entered into pursuant to that scheme). At the direction of the President and with funding provided by Congress, the Secretary has established the Blue Ribbon Commission to analyze alternatives and to provide recommendations for disposal of these materials. Future decisions as to these matters will be informed by the recommendations of the BRC. At this time, however, the BRC has not reported, and thus no action has been or could be taken in light of its recommendations. Accordingly, there is no basis to say that the Department's means of meeting its statutory and regulatory obligations will require more or less money than would be collected through continued assessment of the fee at the level it has been set at for several decades. In such a situation, the relevant language of the NWPA requires (or, at the least, permits) the amount of the waste fee to remain at the amount set by the NWPA itself. In particular, because the Secretary cannot make an affirmative "determin[ation]" that "insufficient or excess revenues are being collected," the Secretary may decide not to propose a change to the fee. Such an approach is consistent with DOE's past annual reviews, which have stated that DOE's policy is to propose a change to the fee only "when there is a compelling case for the change."[29]

Additionally, to the extent that there is information bearing on the total cost of alternative means of disposing of the materials at issue, that information supports retaining the fee at its current level. Over more than two decades, both before and after Yucca Mountain was designated as the site for which an application should be filed, the Secretary's fee reviews have uniformly determined that the fee should remain at the present rate. Before Yucca Mountain was

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[28] For example, in the 1987 assessment, the number of cases (involving different host rock and locations among two repositories) was reduced from 10 to 5, as a result of the President's decision in May 1986 to approve only 3 candidate sites for characterization. In 1989, the number of cases was reduced to 1, as a result of the Nuclear Waste Policy Amendments Act's designation of Yucca Mountain as the only site to be characterized for the first repository. Program changes in other years were similarly reflected in fee adequacy assessments for those years. Notably, all fee adequacy assessments since 1995 have assumed that the NWPA's 70,000 MTHM emplacement limit would be repealed by Congress so that only one repository would be constructed to receive all the SNF produced by existing reactors. *See* Bechtel SAIC Company, LLC, History of Total System Life Cycle Cost and Fee Adequacy Assessments for the Civilian Radioactive Waste Management System, MIS-CRW-SE-000007 REV 00, at 10, 12, and 14-33 (Sep. 2008).

[29] DOE, Nuclear Waste Fund Fee Adequacy: An Assessment, DOE/RW-0291P, at 5 (November 1990); s*ee also* DOE, Fiscal Year 2007 Civilian Radioactive Waste Management Fee Adequacy Assessment Report, DOE/RW-0593, at 12 (July 2008) ("It is understood that any adjustment to the fee would require compelling evidence that such an adjustment is necessary to ensure future full cost recovery."); DOE, Memorandum for the Secretary, "INFORMATION: The 2008 Determination of the Adequacy of the Nuclear Waste Fund Fee." EXEC-2009-012439, Attachment, at 10 (September 29, 2009) (same).

designated as the sole site for characterization by the 1987 amendments, the Secretary consistently decided against proposing a fee adjustment, in part because DOE's disposal program had not yet matured to the point where program costs could be defined with sufficient certainty to justify an adjustment. For example, according to the Secretarial memo accompanying the 1984 annual review, "[s]ince substantial uncertainty surrounds both program cost and revenue projections at this time, it is prudent to delay a decision to adjust the fee structure until the program is more clearly defined."[30] Similarly, in both the 1986 and 1987 annual reviews, DOE concluded that "[f]ee revisions may be recommended within a few years, when more accurate program cost estimates will be developed as the program matures from its present conceptual design phase to the engineering design phase."[31]

Even more to the point, as recently as 2009, the analysis done by DOE determined that the fee amount was appropriate to meet the anticipated costs of the proposed Yucca Mountain repository. One cannot determine with any confidence at this time precisely how much the yet-to-be-selected disposal alternative will cost, but the closest proxy – albeit an imperfect one – is the costs of the proposed Yucca facility. Thus, the fact that the Department recently concluded that the fee should not be varied in order to meet the costs of the Yucca repository provides additional support for the conclusion that the fee should not be altered at this time (and, in particular, should not be lowered).

At the same time, it is important to note that the Department is committed to continuing to review the fee annually. If the Department, informed by the recommendations of the BRC, moves toward a means of disposal that will require a different level of fee than has been charged over the past several decades, and there is compelling evidence that the current revenues are inadequate or excessive, the Department will promptly propose an adjustment of the fee.

In sum, absent a basis for concluding that disposition will not require fees at the current level, the statute does not contemplate – and certainly does not mandate – that the Secretary raise, lower, or suspend the fee. Indeed, if the Secretary were to stop collecting the fee (i.e., by adjusting the fee to zero), that action would contravene the principle of generator responsibility embodied in Section 111(b)(4) and would be inequitable to future ratepayers. Such an adjustment would allow utilities that generate SNF during the time the fee is zero to avoid paying the costs of their SNF disposal, and would effectively shift those costs onto future ratepayers after a disposal solution is identified and the fee is adjusted back to a positive amount.[32] This type of cost-shifting was not what Congress intended when it set up the Nuclear Waste Fund.[33] It is clear

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30 DOE, Memorandum to the Secretary, "Submittal of Annual Fee Adequacy Evaluation Report for the Office of Civilian Radioactive Waste Management Program." HQZ.870307.8942, at 2 (July 16, 1984).

31 DOE, Nuclear Waste Fund Fee Adequacy: An Assessment, DOE/RW-0020, at 1-2 (March 1986); DOE, Nuclear Waste Fund Fee Adequacy: An Assessment, HQS.880517.227, at 2 (June 1987).

32 In such a scenario, attempting to collect the fee from the original generators of SNF would not be an option because neither the NWPA nor the standard contract permits retroactive adjustment of the fee. *See* 10 C.F.R. 961.11, Article VIII.A.4 ("Any adjustment to the ... fee ... shall be prospective.").

33 *See, e.g. Consolidated Edison Co. of New York, Inc. v. U.S. Dept. of Energy*, 870 F.2d 694, 698 (D.C. Cir. 1989) (recognizing that Congress intended to avoid "unfairly burdening future ratepayers.").

from the plain language of the NWPA that Congress intended utilities to pay the full costs of disposing of the SNF they generate.[34]

CONCLUSION: The NWPA provides that the standard contract requires generators or owners of HLW or SNF to pay fees in return for DOE's obligation to accept HLW and SNF and be responsible for its final disposition. DOE has clearly stated that termination of the Yucca Mountain project will not affect its commitment to fulfill its obligations under the NWPA and the standard contracts. DOE must continue to collect the fees to have sufficient revenues to carry out its obligations to accept and dispose of HLW and SNF. Presently, there is no reasonable basis, and certainly no compelling evidence, that justifies any proposed adjustment of the fee, either upwards or downwards, to achieve full cost recovery. Moreover, the best available proxy (though imperfect) indicates that the fee should be retained at the current level. Additionally, adjustment of the fee to zero would be inequitable to past and future ratepayers who pay utility bills for electricity that reflect payment of the fees. In such circumstances, the NWPA requires the fee to remain at its current amount of 1 mill per kilowatt-hour that was established in the NWPA.

[34] NWPA, sec. 111 ("Findings and Purposes ... (a) FINDINGS–THE Congress finds that ... (4) ... the costs of [HLW and SNF] disposal should be the responsibility of the generators and owners of such waste and spent fuel ... (b) PURPOSES–The purposes of this subtitle are ... (4) to establish a Nuclear Waste Fund ... that will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel.").