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October 22, 2012

Hon. Kenneth C. Hill, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition to Eliminate State Lifeline Credit*
Docket No. 12-00035

Dear Chairman Hill:

Please find attached AT&T Tennessee's legal brief in support of the Industry Coalition Petition to Eliminate the State Lifeline discount.

The brief sets out legal argument in support of the petition, building upon the uncontroverted testimony of AT&T Tennessee's witness Paul Stinson. Mr. Stinson's is the only testimony in the record.

As discussed in the brief, the unfunded, landline-only state Lifeline discount is severely outdated. The state discount is at odds with the changes in technology, market conditions, and, most importantly, changed law on telecommunications at both the federal and state level. As a result, the state Lifeline discount now:

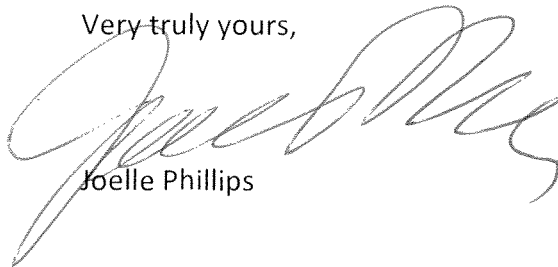
- **Conflicts with section 245(d) of the Federal Telecommunications Act of 1996**, which is the applicable provision of federal law governing universal service programs, including Lifeline;
- **Raises serious constitutional concerns** because of its application to only one type of telecommunications competitor and because it is unfunded – placing the program at odds with both the takings and equal protection clauses of the state and federal constitutions; and
- **No longer has a rational basis as a result of the FCC's reform of the federal Lifeline program to which it relates.** In fact, the FCC's elimination of the federal matching aspect of the federal Lifeline program and the FCC's establishment of a nation-wide federally-funded discount, which can be used by low-income consumers regardless of the type of technology they choose, have eliminated the very basis on which the state's Lifeline discount was premised.

For all of these reasons, the state Lifeline discount is now in conflict with federal and state law, and the TRA should end it. For the many reasons discussed in Mr. Stinson's testimony, however,

Hon. Kenneth C. Hill, Chairman
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ending the state's unfunded, landline-only discount will not deprive Tennessee's low income consumers of the low-cost connectivity it was designed to provide.

Very truly yours,

A handwritten signature in black ink, appearing to read "Joelle Phillips", written over the typed name.

Joelle Phillips

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition to Eliminate State Lifeline Credit*

Docket No. 12-00035

AT&T TENNESSEE'S BRIEF
IN SUPPORT OF ELIMINATION OF UNFUNDED STATE LIFELINE DISCOUNT

INTRODUCTION

AT&T Tennessee has joined with a coalition of industry members seeking elimination of the unfunded, landline-only state Lifeline discount. As explained by AT&T Tennessee's witness Paul Stinson, the only witness to file any testimony in this docket, the state Lifeline discount is outdated – it has not kept pace with fundamental changes in the law, the competitive landscape, and telecommunications technology. As Mr. Stinson explains, the state Lifeline discount was put into place in 1991, when local telecommunications was largely a regulated monopoly and traditional landline service was the only option available to most consumers. At that time, Tennessee adopted its Lifeline program so that its residents would be eligible to receive additional “matching” funds from the federal Lifeline program. Since the state program was put into place, the telecommunications market in Tennessee has become fully competitive, with landline and wireless telecommunications providers (as well as “intermodal” providers like cable operators and Voice over Internet Protocol (“VoIP”) providers) competing in the telecommunications marketplace. Most recently, the Federal Communications Commission (“FCC”) has eliminated its matching credits, and also recognized that the Lifeline discount

should be applied uniformly to telecommunications customers regardless of the voice telephony technology they use.

The Tennessee Lifeline program has not kept pace with these changes. Because the TRA lacks jurisdiction over wireless and VoIP providers, the program is applied only to landline telecommunications providers, meaning that wireless, VoIP and other intermodal competitors are not required to provide the discount. Yet, landline providers are required to compete with these alternative providers for business. And the existence of this vibrant competition prevents landline providers from raising their rates on other services to compensate for the unfunded Lifeline discount, as they may have been able to do in 1991 when the state Lifeline program was established. Continuing the state Lifeline program under these circumstances raises not only the policy concerns discussed by Mr. Stinson in his uncontroverted testimony, but also several legal concerns. Specifically:

- Section 254(f) of the Telecommunications Act of 1996 provides that state programs requiring carriers to contribute to the goal of “universal service” – including the Lifeline Program¹ – must be accomplished on an “equitable and non-discriminatory basis” and must provide sufficient support mechanisms. An unfunded mandate, which is applied only to one type of carrier, conflicts with both of these requirements;
- The application of the unfunded Lifeline discount to landline providers, but not to other providers of voice telephony like wireless and VoIP, does not comport with principles of equal protection, and serves no rational purpose given recent changes in the federal Lifeline program eliminating matching credits and treating voice telephony providers in a technology-neutral manner; and
- Because landline carriers are not able to recoup their cost of providing the unfunded Lifeline discount through adjustment of regulated rates – as they may have been able to do when the state Lifeline program was enacted – the program takes

¹ See http://transition.fcc.gov/wcb/tapd/universal_service (describing the four federal programs designed to advance the goal of universal service, including the Lifeline Program).

landline carriers' services without providing compensation, in tension with traditional protections against governmental takings without compensation.

For these reasons, discussed in detail below, the TRA should eliminate the state's unfunded Lifeline discount. This would leave customers and providers of voice telephony on an equal footing, with all qualified customers entitled to a uniform \$9.25 discount and all providers compensated out of the federal Lifeline fund to which they contribute.

BACKGROUND

As explained in the uncontroverted Direct Testimony of AT&T Tennessee witness Paul Stinson, the Lifeline program is really two separate programs:

- The **federal** Lifeline program, which qualifying customers can use to purchase either landline or wireless service, and which currently reimburses the carrier with a \$9.25 monthly Lifeline credit; and
- Tennessee's **state** Lifeline program, which qualifying consumers can use only on landline service, and which currently does not provide any reimbursement to carriers for their provision of the \$3.50 state Lifeline credit to qualifying customers.²

This section of AT&T Tennessee's brief explains how and why these two programs were created and how they have evolved over the last two decades to their current forms.

A. Creation of the Federal and State Lifeline Programs.

The FCC developed the federal Lifeline program in 1985 to "provide[] a discount on phone service for qualifying low-income consumers to ensure that all Americans have the opportunities and security that phone service brings, including being able to connect to jobs, family and emergency services."³ The FCC has jurisdiction over both landline and wireless carriers, and the federal Lifeline program has applied to both landline and wireless services

² Stinson Direct at 4-5.

³ FCC Encyclopedia, *Lifeline Program for Low-Income Consumers*, at <http://www.fcc.gov/lifeline>.

since 1997.⁴ The federal Lifeline program has always reimbursed carriers on a dollar-for-dollar basis for the federal Lifeline discounts they provide qualifying customers.⁵

Under the federal Lifeline program as originally implemented, the amount of federal Lifeline discounts available to qualifying customers depended on whether Lifeline discounts were also available at the state level. The federal Lifeline program originally provided qualifying customers in every state a baseline amount of federal Lifeline support.⁶ And, if a state provided a state Lifeline matching discount as well, qualifying customers in that state received supplemental support from the federal fund in addition to the baseline federal support they received.⁷

This was the landscape in 1991 when the Tennessee Public Service Commission (“TPSC”) created the state Lifeline program. Around that time, the TPSC explained that the state Lifeline program “was specifically designed for the purpose of providing low income consumer assistance for telephone service and for meeting certification criteria of the Federal Communications Commission (FCC) in order to be eligible for a federal matching assistance program.”⁸ By creating the state Lifeline program, the TPSC ensured that qualifying Tennessee consumers would receive a larger (the maximum) federal Lifeline discount than they otherwise would have received.

⁴ See Stinson Direct at 4-5. See also Report and Order, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 12 FCC Rcd 8776 (1997) (“*First Universal Service Order*”).

⁵ See Stinson Direct at 4-5.

⁶ *Id.* at 6.

⁷ *Id.* See also *First Universal Service Order*, 1997 WL 225470 (explaining in 1997 that “[t]he federal [Lifeline] fund will also provide \$1.00 of additional support for every \$2.00 of support provided by the states, up to a maximum of \$1.75 so that the maximum federal support would be \$7.00”).

⁸ Amended Order, *In Re Adoption of Lifeline Assistance Program*, Docket No. 91-08797, at 1 (TPSC Mar. 4, 1992).

The TPSC did not create a fund to directly reimburse carriers for the state Lifeline discounts it required them to provide.⁹ When the TPSC initially created the state Lifeline program and directed AT&T Tennessee's predecessor, South Central Bell ("SCB"), to participate, the TPSC authorized SCB to "recover" any revenue deficiency created by this program from SCB's "deferred revenues" in accordance with the Regulatory Reform Plan in effect at that time.¹⁰ The "deferred revenues" account was allowed to expire in 1995.¹¹ Although no explicit funding mechanism existed after that, the TPSC had authority under the rate-based, rate-of-return regulation that prevailed at the time to allow landline carriers to "make up" for the losses they incurred in providing the state Lifeline credits by increasing their prices for other services.¹²

B. The Telecommunications Act of 1996 and Deregulation of the Telecommunications Market.

In 1996, Congress passed the Telecommunications Act, which "has fostered and accelerated the development of competition in local telecommunications markets across the nation."¹³ "The 1996 Act also, for the first time, wrote into law the [FCC]'s long-standing policy of supporting universal service."¹⁴ Among many other things, the 1996 Act called for the creation of a joint federal-state board (the "Joint Board") to assist in implementing the Act's

⁹ Stinson Direct at 8.

¹⁰ See Order, *Adoption of Lifeline Assistance Program*, Docket No. 91-08797, at 4 (TPSC Dec. 20, 1991).

¹¹ Stinson Direct at 10.

¹² See *id.* at 8-9.

¹³ See Seventh Report and Order and Thirteenth Order on Reconsideration in CC Docket No. 96-45 Fourth Report and Order in CC Docket No. 96-262 and Further Notice of Proposed Rulemaking, *In the Matter of Federal-State Joint Board On Universal Service*, 14 FCC Rcd. 8078, ¶1 (1999) ("*Joint Board on Universal Service 7th Report & Order*").

¹⁴ *Id.*

universal service goals.¹⁵ The “universal service principles” to be followed by the Joint Board and the FCC include:

- “All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service”; and
- “There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.”¹⁶

Section 254(f) of the 1996 Act authorizes states to adopt their own regulations concerning universal service, so long as they are consistent with the federal program. Specifically, section 254(f) provides that if a state adopts its own universal service regulations, “[e]very telecommunications carrier that provides intrastate telecommunications services shall contribute, *on an equitable and nondiscriminatory basis*, in a manner determined by the State to the preservation and advancement of universal service in that State.”¹⁷ In addition, while “[a] State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State,” it may do so “*only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms* to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.”¹⁸ These requirements of section 254(f) are consistent with Tennessee’s own “telecommunications services policy,” which is intended to “protect consumers without unreasonable prejudice or disadvantage to any telecommunications services provider.”¹⁹

¹⁵ See 47 U.S.C. § 254(a)(1).

¹⁶ *Id.* § 254(b).

¹⁷ *Id.* § 254(f) (emphasis added).

¹⁸ *Id.* (emphasis added).

¹⁹ T.C.A. § 65-4-123. See also Tennessee Regulatory Authority, Message from the TRA, at <http://tennessee.gov/tra/> (“The mission of the Tennessee Regulatory Authority (TRA) is to promote the public

Of course, in addition to advancing universal service, the 1996 Act was also intended to create a competitive market for local telecommunications, in which, to the extent possible, rates would be set by market forces rather than federal and state rate regulation. The FCC recognized, however, that such deregulation could affect the ability of states to support universal service.²⁰ As the FCC explained, “[i]mplicit universal service support is becoming less sustainable as competition increases, because a carrier charging rates significantly above cost to a class of customers may lose those customers to a competitor charging cost-based rates.”²¹ Although declining to offer federal funding support or to require states to adopt explicit funding mechanisms, the FCC has made clear that, to the extent states choose to maintain their own universal service programs, the FCC “assumes that states will take some action, whether through rate design or through an explicit support mechanism, to support universal service within the state.”²²

In 1997, the FCC expanded the federal Lifeline program to cover wireless services.²³ Neither the TPSC nor the TRA regulate wireless services, so understandably, the state Lifeline program was never modified to require wireless providers to offer the unfunded state Lifeline discount to their customers.²⁴

interest by balancing the interests of utility consumers and providers while facilitating the transition to a more competitive environment.”).

²⁰ See *Joint Board on Universal Service 7th Report & Order*, 14 FCC Rcd. 8078, ¶ 46. “Historically, states have ensured universal service principally through implicit support mechanisms, such as geographic rate averaging and above-cost pricing of vertical services, such as call waiting, voice mail, and caller ID.” *Id.* ¶ 45.

²¹ *Id.* ¶ 7.

²² *Id.* ¶ 46.

²³ See *First Universal Service Order*, 1997 WL 225470.

²⁴ *Stinson Direct* at 4-5. See also, e.g., *Order Refusing Issuance of Declaratory Ruling, In re Declaratory Ruling and Nunc Pro Tunc Designation of Nexus Communications as an Eligible Telecommunications Carrier*, 2010 WL 3564811, at *5 (TRA Aug. 2, 2010) (“[T]he Authority finds that it does not have jurisdiction over wireless providers based on the express definition of ‘nonutilities’ found in T.C.A. § 65-4-101(6)(F)[.]”); *Federal Preemption of Proposed Amendment Related to Eligible Telecommunications Carriers*, Op. Att. Gen. No. 10-78, at 2 (Tenn. A.G.

C. Recent Changes to the Federal Lifeline Program and Their Implications For Tennessee's Lifeline Program.

On February 6, 2012, the FCC released an order announcing significant reforms to update the federal Lifeline program and keep pace with technological and competitive changes.²⁵ These changes were designed to modernize the program in light of technology and market changes, to curtail fraud, waste and abuse in the program, and to control growth of the program while better aligning it with the goals of the National Broadband Plan.²⁶

Under the modernized program, the federal Lifeline program no longer provides “matching credits” to states that provide their own state Lifeline credit. Instead, qualifying customers now receive the same amount of federal Lifeline discount – \$9.25 – whether or not they receive a state Lifeline discount.²⁷ In addition, the FCC recognized the need to revise the federal Lifeline program to place all the various providers of voice telephony services on an equal footing. As the FCC explained: “When the [Lifeline] program was first established in the 1980s, mobile phones and VoIP did not exist as a retail consumer product, only incumbent telephone companies provided local telephone service, and the program was designed for carriers whose rates were regulated. Today, consumers have various options for fixed or

June 2, 2010) (“The TRA has broad jurisdiction over wireline carriers but only very limited jurisdiction over wireless carriers.”). Similarly, the TRA is not permitted to regulate retail VoIP service. T.C.A. § 7-59-307(d).

See *Constitutionality of T.C.A. § 65-21-114 Concerning Countywide Telephone Calling*, Tenn. Op. Atty. Gen. No. 01-115, 2001 WL 837959 (Tenn. A.G. July 20, 2001).

²⁵ Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Lifeline and Link Up Reform and Modernization*, 27 FCC Rcd. 6656 (2012) (“*Lifeline Report & Order*”). The FCC’s order was ably summarized by the TRA staff in its presentation during the TRA’s March 6, 2012 *Workshop to Gather Information on FCC Report and Order and Further Notice of Proposed Rulemaking – Comprehensive Low-Income Program Reform Released February 6, 2012*.

²⁶ See Stinson Direct at 7.

²⁷ *Id.* This means that landline carriers in Tennessee will continue providing the federal \$9.25 Lifeline discount – for which they are reimbursed from the federal universal service fund – if the TRA grants the relief sought in this docket. *Id.* at 5.

mobile services, many of which are not rate regulated.”²⁸ Thus, under the new federal rules, Lifeline-eligible customers may use the funded \$9.25 federal credit toward the purchase of any type of voice telephony service, including wireless and VoIP services.²⁹

The state Lifeline program, by contrast, has remained essentially unchanged since its creation more than two decades ago, despite the dramatic changes in the Tennessee marketplace and in public policy as implemented by the General Assembly. In sharp contrast to 1991, today:

- The incentive that led the TPSC to develop the state Lifeline discount – to ensure that qualifying Tennessee consumers would receive a larger federal Lifeline discount than they otherwise would have received – no longer exists because all qualifying landline, wireless and other voice telecommunications customers now receive \$9.25 in federal Lifeline discounts regardless of whether the state requires its own Lifeline discount³⁰;
- Eighty percent of Tennesseans who are eligible to receive the state Lifeline discount on landline services choose to forego it and apply their federal Lifeline discount to wireless services, for which the state Lifeline discount is not available³¹;
- Rate-base, rate-of-return regulation of all providers – which ostensibly allowed the TRA to ensure that landline providers recovered their costs of providing the state Lifeline credits – no longer exists in Tennessee.³² Instead, landline carriers today choose alternate regulatory plans, such as “price regulation” (which permits the carrier to set rates within available “head room”) or “market regulation” (which precludes any TRA jurisdiction over retail rates or service terms);
- Fierce intermodal competition from wireless and VoIP providers, as well as cable companies, makes it impossible for landline carriers to charge higher rates to other customers to make up the cost of providing state Lifeline credits to qualifying customers³³; and

²⁸ *Lifeline Report & Order*, 27 FCC Rcd. 6656, ¶ 20.

²⁹ *See id.* ¶¶ 8-9, 44-48.

³⁰ Stinson Direct at 5-6, 16-19.

³¹ *Id.* at 13.

³² *Id.* at 10-12; 16-19. *See also* T.C.A. § 65-5-109(m)-(r).

³³ Stinson Direct at 11-12.

- Accordingly, the Lifeline discount has become an annual \$3.9 million loss for landline carries – a loss that is not borne by their wireless and intermodal competitors.³⁴

ARGUMENT

I. In Light of Dramatic Advances In The Telecommunications Market, the Unfunded State Lifeline Program No Longer Complies With The Telecommunications Act's Requirements That State Universal Service Programs Provide A Support Mechanism And Be Equitable And Nondiscriminatory.

Section 254 of the 1996 Act addresses the requirements for carriers to support “universal service.”³⁵ The concept of “universal service” has evolved with changes in the telecommunications market. Originally, the term meant a single provider offering a single network to which all customers could be connected. With the evolution of technology and competition, however, both Congress and the FCC have refined the concept to focus instead on supporting a basic level of affordable connectivity to all consumers in a manner that is explicit (not hidden in implicit subsidies or pricing policies) and portable (so that competition across technologies can flourish).³⁶

In the 1996 Act, Congress established requirements regarding the manner in which the FCC is permitted to support the goal of universal service. The 1996 Act also defines and limits state authority to adopt regulations to accomplish this goal. Specifically, section 254(f) provides:

A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, *on an equitable and nondiscriminatory basis*, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to

³⁴ *Id.* at 20.

³⁵ 47 U.S.C. § 254.

³⁶ See generally Huber Kellogg & Thorne, *Federal Telecommunications Law*, ¶ 6.1 (2d ed. 1999).

provide for additional definitions and standards to preserve and advance universal service within that State *only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.*³⁷

Today's state Lifeline program is inconsistent with section 254(f), for two reasons. First, it does not contain any support mechanism, much less one that is "specific, predictable, and sufficient."³⁸ Although the lack of such a support mechanism arguably may have been acceptable while competition in the local telecommunications market was in its nascent stages, it should not continue in the fully competitive market that exists today in Tennessee.

As noted above, when the TPSC created the state Lifeline program in 1991, it authorized AT&T Tennessee's predecessor SCB to "recover" any revenue deficiency created by the program from SCB's "deferred revenues" account, pursuant to the Regulatory Reform Plan in effect at that time.³⁹ The Regulatory Reform Plan expired in 1995.⁴⁰ After its expiration, AT&T Tennessee arguably could have made up the unfunded Lifeline discount by raising the prices of other services. Thus, as explained by Mr. Stinson, the arguable "support mechanism" in place at that time was simply the existence of rate-base, rate-of-return regulation that prevailed in a non-competitive market, which ostensibly provided carriers the opportunity to make up for the lost revenues caused by the mandated state Lifeline discount through rates charged to other customers.

In the current, fully competitive local telecommunications market, however, carriers are unable to spread out the cost of the state Lifeline discount's "social pricing" obligation. This is

³⁷ 47 U.S.C. § 254(f) (emphasis added).

³⁸ *Id.*

³⁹ See Order, *Adoption of Lifeline Assistance Program*, Docket No. 91-08797, at 4 (TPSC Dec. 20, 1991).

⁴⁰ See Order, *Earnings Investigation of South Central Bell Telephone Company (1993-1995)*, Docket No. 92-13527, at 16 (TPSC Aug. 20, 1993).

especially true given that telecommunications carriers now compete with cable, VoIP, wireless and other intermodal competitors that are *not* subject to the state Lifeline discount. As the monopoly model has been dismantled and intermodal competition has flourished, any arguable support mechanism to reimburse the landline carriers who are required to provide the state Lifeline discount vanished.

Second, the state Lifeline program does not comply with section 254(f)'s requirement that "[e]very telecommunications carrier . . . contribute [to universal service] on an equitable and nondiscriminatory basis." Tennessee's state Lifeline program is discriminatory and inequitable because it applies only to landline providers and not to wireless providers who compete against them in the highly competitive communications marketplace. As a result, landline providers are burdened with \$3.9 million of annual government-imposed costs that do not apply to their wireless and intermodal competitors.⁴¹

As it exists today, the Tennessee state Lifeline program does not comply with section 254(f). Therefore, the TRA should follow the FCC's lead and reform the state's Lifeline program, like the FCC has reformed the federal program. By eliminating the unfunded state Lifeline discount, all Lifeline eligible customers in Tennessee would receive the uniform \$9.25 monthly federal Lifeline credit, regardless of the technology they use.

⁴¹ Cf., e.g., *AT&T Corp. v. Public Utility Comm'n of Texas*, 373 F.3d 641, 645-46 (5th Cir. 2004) (holding that state regulation requiring all telecommunications carriers providing intrastate service to pay a percentage of their total telecommunications revenue originating in state into a state universal service fund, rather than percentage of receipts from intrastate calls alone, was not "equitable and nondiscriminatory" and therefore violated section 254(f) of the 1996 Act, because the regulation forced multijurisdictional carriers to pay higher fees on revenue from interstate calls than interstate-only providers paid).

II. The Imposition Of The Unfunded State Lifeline Discount In Light Of The Changes to the Federal Program And The Transformation Of The Telecommunications Market Raises Serious Constitutional Concerns.

A. There is no longer any rational basis for maintaining a State Lifeline Program that applies to landline carriers only, and doing so clashes with federal and state equal protection guarantees.

As explained above, today's consumers have numerous technology options that provide connectivity to their communities. That connectivity is the goal of programs like the Lifeline program. Yet government is not free to pursue even laudable goals (like this connectivity or "universal service") without observing constitutional constraints. The state Lifeline program, as it currently exists, is in tension with the principles of equal protection espoused in the state and federal constitutions, because there is no rational basis for the state to continue imposing an unfunded state Lifeline discount on landline carriers only. The state Lifeline program's original purpose – to capture the benefit of matching federal credits offered at that time – no longer exists following the FCC's recent adoption of a uniform, technology-neutral \$9.25 federal Lifeline credit. Nor is there any current purpose for requiring only landline carriers to provide the unfunded state Lifeline credit, because landline customers are entitled to the same \$9.25 federal Lifeline credit as customers of wireless and inter-modal competitors – competitors that are not subject to the unfunded state Lifeline credit.

The federal Equal Protection Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."⁴² Similarly, Article 1,

⁴² U.S. Const. Amend. 14, § 1.

Section 8 of the Tennessee Constitution states “[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.”⁴³ The Tennessee Supreme Court has “consistently held that the state equal protection guarantee is co-extensive with the equal protection provisions of the Fifth and Fourteenth Amendments of the U.S. Constitution.”⁴⁴ Both provisions “guarantee[] that ‘all persons similarly circumstanced shall be treated alike.’”⁴⁵

Although “[e]qual protection does not require that all persons be dealt with identically,” it “does require that a distinction made have some relevance to the purpose for which the classification is made.”⁴⁶ “[T]he challenged classification must ‘bear some rational relationship to legitimate state purposes.’”⁴⁷ Under this standard, “[t]here must be reasonable and substantial differences in the situation and circumstances of the persons placed in different classes which disclose the propriety and necessity of the classification.”⁴⁸ In sum, “[t]he fundamental rule is that all classification must be based upon substantial distinctions which make one class really different from another; and the characteristics which form the basis of the classification must be germane to the purpose of the law.”⁴⁹

⁴³ Tenn. Const. Art. 1, § 8.

⁴⁴ *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509, 518 (Tenn. 2005).

⁴⁵ *In re Adoption of M.J.S.*, 44 S.W.3d 41, 59-60 (Tenn. App. 2000) (quoting *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 152-53 (Tenn. 1993)).

⁴⁶ *State v. Wyrick*, 62 S.W.3d 751, 792 (Tenn. Crim. App. 2001) (quoting *Baxstrom v. Herold*, 383 U.S. 107, 113 (1966)) (internal quotation marks omitted).

⁴⁷ *Wyrick*, 62 S.W.3d at 792 (quoting *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40 (1973)).

⁴⁸ *State v. Tester*, 879 S.W.2d 823, 829 (Tenn. 1994) (quoting *State v. Nashville, Chattanooga & St. Louis Railway Co.*, 135 S.W. 773, 775-76 (Tenn. 1910)).

⁴⁹ *State v. Whitehead*, 43 S.W.3d 921, 927 (Tenn. Crim. App. 2000) (quoting *Tester*, 879 S.W.2d at 829).

Given the recent changes to the federal Lifeline program and the sweeping advances in communications technology, the state's landline-only Lifeline program is no longer reasonable. To begin with, the state landline-only discount is no longer needed to serve the original purposes of the state Lifeline program. The TPSC's 1992 Amended Order succinctly explained the dual purpose of the state Lifeline discount:

This program was specifically designed for the purpose of providing low income consumer assistance for telephone service and for meeting certification criteria of the Federal Communications Commission (FCC) in order to be eligible for a federal matching assistance program.⁵⁰

In its February Lifeline Order, the FCC made numerous modifications to the Federal Lifeline program in recognition of the dramatic changes in telecommunications since the program was created. Several of those changes are particularly relevant to this case – the adoption of a uniform discount amount that the FCC has concluded is sufficient to provide appropriate support to Lifeline-eligible subscribers nationwide and the elimination of tiered support based on state “matching” discounts.

As a result of the FCC's actions, neither of the purposes that prompted the creation of the Tennessee Lifeline program are rationally served by its continuation. The first purpose – creating assistance for telephone service for low income consumers – has been satisfied as a result of the FCC's implementation of the uniform \$9.25 discount nationwide. As discussed above, the FCC determined that this discount was sufficient to accomplish the program's goal of ensuring access to telecommunications services. The second purpose of the state Lifeline credit

⁵⁰ Amended Order, *In Re Adoption of Lifeline Assistance Program*, Docket No. 91-08797, at 1 (TPSC Mar. 4, 1992).

– meeting the criteria for a federal matching advantage – is now moot because the FCC has eliminated the matching element of the federal program.

Moreover, there is no reason to *continue* imposing the state Lifeline discount on landline carriers in light of the changes to the federal Lifeline program and the FCC’s recognition that the Lifeline program should be applied in a technology-neutral manner. The goal of the Lifeline program is to “ensur[e] the availability of voice service for low-income Americans.”⁵¹ As the FCC has recognized, today voice service is available from a variety of providers, including landline carriers, wireless carriers, cable companies, and VoIP providers.⁵² The recent shift toward the use of wireless service as a substitute for landline residential service is especially striking. The FCC “recently found that 92 percent of Americans subscribe to mobile phone service.”⁵³ “More than 30 percent of adults in the general population live in households with only wireless phones, while more than 45 percent of 18-24 year olds have ‘cut the cord.’”⁵⁴

Given these fundamental changes in the marketplace, the FCC no longer “distinguish[es] between fixed and mobile services in [its] goals of ensuring the availability of voice and broadband service to low-income Americans.”⁵⁵ In a recent proceeding related to the federal universal service fund, the FCC updated its definition of the service supported by the fund to the technology-neutral “voice telephony service.”⁵⁶ “The Commission found this to be a more technologically neutral approach that focuses on the functionality offered, and not on the

⁵¹ *Lifeline Report & Order*, 27 FCC Rcd. 6656, ¶ 27.

⁵² *See id.* ¶ 20 (“Today, consumers have various options for fixed or mobile services, many of which are not rate regulated.”); ¶ 47 (“[V]oice telephony may be provisioned over broadband (IP-enabled) networks.”).

⁵³ *Id.* ¶ 21.

⁵⁴ *Id.*

⁵⁵ *Id.* ¶ 38.

⁵⁶ *Id.* ¶¶ 45, 47 (citing Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Connect American Fund a National Broadband Plan for Our Future*, 26 FCC Rcd. 17663, ¶ 78 (2011)).

specific technology used to provide the supported service, while allowing services to be provided over any technology platform.”⁵⁷ Soon after, the FCC “update[d] the definition of Lifeline to be consistent with [its] newly revised definition of the supported service as ‘voice telephony service.’”⁵⁸ The FCC explained that “this approach simply shifts to a technologically neutral approach by defining supported services in functional terms, ensuring that voice service can be provided over any platform.”⁵⁹

Despite the fact that Tennessee customers now purchase voice service from a variety of service providers, the unfunded state Lifeline credit still applies only to landline carriers. As the FCC’s recent decisions make clear, landline carriers are similarly situated to wireless and VoIP providers for Lifeline purposes. And there is no rational basis to continue imposing unfunded state Lifeline discounts only on landline carriers. The TRA lacks state authority to impose regulatory requirements like the Lifeline discount on wireless or VoIP carriers, and therefore it should not impose the requirement on landline carriers either.⁶⁰

B. Because the Tennessee Lifeline Program Is Unfunded And Landline Carriers In The Now-Competitive Market Cannot Make Up The Lifeline Discounts They Provide By Raising Prices On Other Services, The Program Threatens To Undermine The Just Compensation Principles Embodied In the Federal and State Constitutions.

As the Tennessee telecommunications market has evolved and the availability of implicit subsidies through rate-regulation has largely disappeared, the state Lifeline program’s unfunded requirement to discount service has come into tension with the constitutional principle that one’s property should not be taken without just compensation. The Takings

⁵⁷ *Lifeline Report & Order*, 27 FCC Rcd. 6656, ¶ 45.

⁵⁸ *Id.* ¶ 47.

⁵⁹ *Id.* ¶ 48.

⁶⁰ *See supra* note 24.

Clause of the Fifth Amendment provides that “[n]o person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”⁶¹ Similarly, Article 1, Section 21 of the Tennessee Constitution commands “[t]hat no man’s particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor.”⁶² Both provisions “require that any taking of private property by a government be for a public use” and require payment of just compensation to the affected property owner.⁶³ These provisions are designed “to prevent the government ‘from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’”⁶⁴ Even “a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”⁶⁵

As circumstances have changed in the Tennessee communications market, the state Lifeline program’s unfunded Lifeline discount threatens to undermine these constitutional principles. The unfunded state Lifeline discount is one of the last remaining vestiges of the TRA’s regulation of retail prices charged by landline telephone companies. The state’s law has steadily moved from a regulated monopoly model (in which one carrier served as the exclusive provider of telephone service in a geographic territory and had its prices prescribed by

⁶¹ U.S. Const. Amend. V.

⁶² TN Const. Art. 1, § 21.

⁶³ *Metropolitan Government of Nashville & Davidson County v. Allen Family Trust*, 2009 WL 837731, at *4 (Tenn. App. Mar. 27, 2009).

⁶⁴ *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522 (1998) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

⁶⁵ *Id.* at 523 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)) (internal quotation marks omitted).

regulators) to the competitive model in place today (in which retail prices are set by carriers competing in a market with multiple providers and diverse technologies). The Tennessee Market has become robustly competitive.⁶⁶ Indeed, for the great majority of landline carriers in Tennessee, the TRA no longer has jurisdiction to establish retail rates or to regulate retail terms of service.⁶⁷

As described in Mr. Stinson's testimony, the state Lifeline program was established at a time when the TPSC set all of the rates that all of a carrier's customers paid, at a level that presumably would allow the carrier to recover the costs of providing the required Lifeline discounts. And customers who did not like the rates that were established in that manner could not choose to buy services from another provider at different rates, because there was no competition at the time. As a result, even though there was no dollar-for-dollar reimbursement as in the federal program, there was at least an argument that carriers might recover the cost of the discounts through the provision of other services to other ratepayers and were therefore receiving just compensation for their services. Now, by contrast, because their services are subject to pricing competition, not rate regulation, it cannot be reasonably argued that landline carriers can recover the state Lifeline discount by raising prices on services to other customers.

The Tennessee Appellate Court and the Tennessee Attorney General have both rejected similar attempts to require telecommunications carriers to provide service without receiving just compensation. *AT&T Communications of South Cent. States, Inc. v. Cochran* concerned a

⁶⁶ The competitive nature of Tennessee's telecommunications market cannot be seriously contested. In fact, evidence demonstrating the competitive nature of AT&T Tennessee's most rural rate groups was conceded in TRA Docket No. 10-00108.

⁶⁷ See TCA 65-5-109(m)-(r).

TPSC order designed to prevent Tennessee consumers in twelve counties from being charged long distance rates for certain local calls. In “each of twelve counties of the State there are at least two local exchanges; so that, in these counties, some intra-county telephone calls require the service of inter LATA, or long distance connection between exchanges.”⁶⁸ As a result, customers in some counties were required to pay long distance charges when placing calls within the county. To avoid this result, the TPSC “adopted a policy of eliminating long distance charges on telephone calls within a single county.”⁶⁹ The TPSC entered an order stating that “[a]ll IXC (long distance carriers) providing intrastate service in Tennessee will provide inter LATA intra-county calling toll free to all Tennessee customers effective October 15, 1994.”⁷⁰ The affected IXCs filed suit, arguing that the order deprived them of their property without compensation, in violation of the federal and state takings clauses. The Appellate Court agreed, explaining:

The order of the Commission “demands” or “takes” property, not for public use, but for private use of an individual at his demand. The utility is entitled to some compensation from the member of the public receiving the benefit of the demand. The right to compensation is “property” which may not be taken without just compensation.

The Constitution requires “just compensation” for services or property taken by public authority. Just compensation means compensation from the public treasury or, in the case of utilities, from the member of the public receiving the benefit. It does not mean forcing a person not benefitted to pay the compensation for the benefitted non-payer.⁷¹

⁶⁸ *AT&T Communications of South Cent. States, Inc. v. Cochran*, 1995 WL 256662, at *1 (Tenn. App. May 3, 1995).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Southern Bell Tel. & Tel. Co. v. Tenn. Pub. Serv. Comm’n*, 202 Tenn. 465, 304 S.W.2d 640 (1957). at *3.

Based on this analysis, the Appellate Court concluded that the TPSC's order violated Article 1, Section 21 of the Tennessee Constitution and "also violate[d] the Fifth Amendment of the Constitution of the United States which is made applicable to the states by the Fourteenth Amendment."⁷²

Several years after the TPSC's order was struck down in *Southern Bell*, the Tennessee General Assembly enacted a statute requiring all telecommunications carriers – including IXCs – to provide inter-county, cross-LATA service at no charge to the customer. Applying the same reasoning as the Appellate Court in *Southern Bell*, the Tennessee Attorney General opined that the statute could not be applied to IXCs without violating the state and federal takings clauses.⁷³ The Attorney General reasoned that "[s]ince long distance calls are billed on a toll basis, the requirement of § 65-21-114 that such calls be toll free would mean that the long distance carrier would be required to complete these calls for no remuneration whatsoever."⁷⁴ The Attorney General concluded that § 65-21-114 "cannot be enforced in counties divided by LATA boundaries until compensation is provided from some source through some mechanism for the long distance carriers that complete such calls."⁷⁵

Similarly, the current unfunded state Lifeline discount requires landline carriers to provide discounted service to a class of customers without reimbursement from the government. And while this may have raised no constitutional red flags during the era of rate regulation, in the largely-deregulated market that exists today, landline carriers subject to the Lifeline cannot expect to recover their Lifeline losses by raising rates on other, unregulated

⁷² *Id.* (citing *Dolan v. City of Tygard*, 512 U.S. 374 (1994)).

⁷³ See *Constitutionality of T.C.A. § 65-21-114 Concerning Countywide Telephone Calling*, Tenn. Op. Atty. Gen. No. 01-115, 2001 WL 837959 (Tenn. A.G. July 20, 2001).

⁷⁴ *Id.* at *2.

⁷⁵ *Id.* at *3.

services. In this regard, the United States Supreme Court's jurisprudence concerning railroad carriage rates is instructive. In *Northern Pacific Railroad Co. v. State of North Dakota ex rel. McCue*, the Court recognized that "the state has no arbitrary power over the carrier's rates, and may not select a particular commodity or class of traffic for carriage without reasonable reward."⁷⁶ The Court explained that the Takings Clause

protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service after taking into account the entire traffic to which the rate applies, it must be concluded that the state has exceeded its authority.⁷⁷

The constitutional principles served by the federal and state takings clauses should inform the TRA's judgment regarding the petition to eliminate the state wireline-only Lifeline discount. If the state discount were eliminated, it would leave all Lifeline eligible customers in Tennessee – regardless of the technology they choose – on equal footing, with a uniform \$9.25 federal discount funded through the federal universal service fund. It would also level the field for landline providers, who already contribute substantially to the federal fund, and eliminate any risk of constitutionality problems going forward.

CONCLUSION

When the TPSC created the state Lifeline program, its goals were laudable. But now, the unfunded, landline-only state Lifeline program has become a relic that is no longer

⁷⁶ *Northern Pacific Railroad Co. v. State of North Dakota ex rel. McCue*, 236 U.S. 585, 601 (1915).

⁷⁷ *Id.* at 604. See also *Norfolk & W. Ry. Co. v. Conley*, 236 U.S. 605, 609 (1915) ("[T]he state may not select a commodity or class of traffic, and instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost, or for a compensation that is merely nominal."). Cf. *Yancy v. United States*, 915 F.2d 1534, 1539-42 (Fed. Cir. 1990) (finding taking where Department of Agriculture quarantine forced owners of healthy breeding turkeys to sell on less lucrative market for slaughter).

necessary in light of sweeping legal, technological, and market changes over the last two decades. These changes have not merely rendered the state Lifeline program irrelevant to consumers who prefer wireless service and for whom prepaid wireless providers offer Lifeline service at no charge, these changes have also undermined the legal basis of the program, which is now in tension with the 1996 Act and constitutional protections.

The TRA should eliminate its unfunded, landline-only state Lifeline discount. By doing so, the TRA will fulfill its obligation to foster a competitive Tennessee communications market and to impose only those regulations that are consistent with state and federal law. As a result of the FCC's recent action to modernize the federal Lifeline program with a nationally uniform fee, the TRA can be assured that taking these steps will not burden universal service or harm Lifeline-eligible Tennesseans. As explained in the only testimony filed in this case, those consumers will continue to have numerous options for affordable Lifeline service as a result of the federal Lifeline program.

Respectfully submitted,

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A handwritten signature in dark ink, appearing to read 'Dale Grimes', is written over a horizontal line.