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**SUPREME COURT OF
THE STATE OF WASHINGTON**

ASSURANCE WIRELESS USA, L.P.,
F/K/A VIRGIN MOBILE USA, L.P.,

Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,

Respondent.

**MEMORANDUM OF *AMICI CURIAE*
OF FORMER FCC COMMISSIONERS
MIGNON L. CLYBURN AND ROBERT M. MCDOWELL
IN SUPPORT OF PETITION FOR REVIEW**

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I. IDENTITY AND INTEREST OF AMICI

Former Commissioners of the Federal Communications Commission (“FCC”) Mignon L. Clyburn and Robert M. McDowell (the “Former Commissioners”) respectfully submit this Memorandum of Amici Curiae. As more fully explained in their concurrently filed Motion for Leave to File Memorandum of Amici Curiae, throughout their careers the Former Commissioners have demonstrated a strong interest in the continued success of the FCC’s Lifeline program (“Lifeline”).

II. INTRODUCTION

The Former Commissioners strongly recommend that this Court grant the Petition for Review by Petitioner Assurance Wireless USA, L.P. (“Assurance”) because it raises important public interest issues. As described below, the availability of free service through the FCC’s Lifeline program for low-income households has increased telephone penetration in Washington and across the country. Imposing state taxes on this free service would threaten the viability of the program and would undermine

the FCC's Constitutionally-mandated control over its programs and funds.

The opinion on appeal in this case fundamentally mischaracterizes the relationship between the FCC and the Universal Service Administrative Company ("USAC"), the FCC's contractor that administers the Lifeline program. By ignoring the FCC's control of Lifeline and its authority over USAC's ministerial actions, the Court of Appeals reached the misguided conclusion that USAC acts independently from the FCC and, thus, USAC (or Assurance) must pay state taxes.

This conclusion is not merely wrong, but it also presents an existential threat to the noble goals of Lifeline. Any attempt to impose a sales tax on free Lifeline services would have devastating consequences. USAC is not subject to sales taxation because the universal service fund is federal money. Furthermore, USAC is forbidden by the FCC from allowing service providers to use federal Lifeline funds to pay any sales tax therefore forcing carriers to choose between providing

Lifeline services at a loss or discontinuing service to low-income individuals.

The only alternative is to charge the sales tax to low-income subscribers who depend on Lifeline's free services. If they must pay a sales tax, they could be forced to quit the program because they could not afford the additional cost.

Each result is contrary to Congress and the FCC's purposes for creating Lifeline. Furthermore, the conclusion that USAC acts independent of the FCC not merely threatens FCC control but creates a Constitutional violation of the private non-delegation doctrine. The public's interests in a viable Lifeline program and in Constitutionally-required FCC control of USAC are grounds for the Court to grant the Petition.

III. ARGUMENT

This Court should grant a Petition for Review if it "involves an issue of substantial public interest." RAP 13.4(b). The Former Commissioners respectfully submit that Assurance's Petition easily meets that standard. This dispute affects not just

Assurance but all low-income individuals in Washington—and potentially elsewhere—who subscribe to Lifeline services (“Subscribers”). Contrary to federal law and policy, imposing state sales tax on Assurance (1) undermines the availability of critical Lifeline services to Subscribers; (2) is inconsistent with the well-established law that, as required by the Constitution’s non-delegation doctrine, USAC is subordinate to the FCC in the distribution of funds from the U.S. Department of the Treasury (“U.S. Treasury”). Accordingly, the public has a “substantial interest” in this appeal.¹

A. Lifeline Is a Critically Important Federal Program That Makes It Possible for Low-Income People to Obtain Phone Service.

The Lifeline program is crucially important to the nation because it ensures access to affordable communications service for more than 38 million eligible low-income individuals.

¹ The Former Commissioners defer to Assurance’s Petition regarding the Issues Presented for Review and the Statement of the Case.

For nearly a century, Congress has imposed a “universal-service mandate” on the FCC—an obligation to ensure broad availability of affordable communications services throughout the country and to all citizens. *Consumers’ Rsch. v. FCC*, 67 F.4th 773, 2023 WL 3244274, at *1 (6th Cir. May 4, 2023) (“*Consumers’ Research (II)*”). Lifeline is the longest-operating federal universal service program, created by the FCC in 1985 to address the effects of the breakup of the AT&T monopoly on low-income consumers. *Lifeline & Link Up Reform & Modernization, Rep. & Order & Further Notice of Proposed Rulemaking*, 27 FCC Rcd. 6656, 6662-63 (Feb. 6, 2012) (“*Lifeline Reform Order*”). Eleven years later, Congress included Lifeline in its broader universal service mandate. Pub. L. No. 104-104, § 101, 110 Stat. 56, (codified at 47 U.S.C. § 254).

Lifeline is intended to ensure “the availability of communications services for low-income households” across the United States through specified subsidies to service providers in

the program (“Carriers”) for services provided to individuals who qualify based on their income. *Lifeline Reform Order*, 27 FCC Rcd. at 6660; *see also Consumers’ Research (II)*, 2023 WL 3244274, at *2 (FCC established Lifeline “to assist low-income communities”). When creating the Lifeline program over 35 years ago, the FCC found that access to telephone service had become crucial to people’s full participation in our society and economy, which is increasingly dependent upon the rapid exchange of information. *See MTS and WATS Market Structure, Amendment of Parts 67 & 69 of the Commission’s Rules & Establishment of a Joint Board, Rep. & Order*, 50 Fed. Reg. 939, 941 ¶ 9 (Jan. 8, 1985) (“1985 Lifeline Order”). In many cases, particularly for the elderly, poor, and disabled, communications services truly are a lifeline to the outside world.

Id.

Many Carriers allow Subscribers to obtain service at no cost. Free Lifeline service is critically important to Subscribers, many of whom do not have bank accounts, have lower credit

scores, or simply cannot afford to pay anything for communications services. For decades, it has been the bipartisan consensus of federal and state policymakers that low-income consumers should have choices comparable to any other person in terms of service options and price ranges.

The Lifeline program has significantly increased the number of low-income households that now use these services to connect with others for their employment, healthcare, and educational needs. The FCC found that, “the gap between telephone penetration rates for low-income and non-low-income households ha[d] narrowed from about 12 percent in 1984 to 4 percent in 2011.” *Lifeline Reform Order* at 6664. As Commissioner Clyburn noted in 2014, “Lifeline has significantly increased penetration rate[s] for phone service for low-income households since the ‘80s, and as the FCC predicted in 1985, it has been a ‘true lifeline to the outside world.’” Mignon Clyburn, Former FCC Commissioner, Remarks at American Enterprise Institute on Reforming Lifeline for the Broadband Era 2 (Nov.

12, 2014), <https://docs.fcc.gov/public/attachments/DOC-330453A1.pdf> (referencing *1985 Lifeline Order*, 50 Fed. Reg. at 941).

The availability of no-cost wireless service like that offered by Assurance to Lifeline subscribers has driven increases in Lifeline subscription rates. See John Horrigan, *The Lifeline Market*, Benton Institute for Broadband & Society (Feb. 28, 2022), <https://www.benton.org/blog/lifeline-market> (stating that consumer participation in Lifeline increased from 6 million customers in 2008 to 18 million in 2012 because of entry by wireless carriers that could offer service at no cost to program participants).

B. The Imposition of Unrecoverable Costs on Carriers, Such as State Taxes, Jeopardizes the Very Existence of Lifeline.

The attempt by the Department of Revenue (“DOR”) to collect state taxes on Lifeline threatens the program’s very existence. Lifeline, like the FCC’s other universal service programs, is funded by mandatory payments (referred to as

“contributions”) from communications service providers into the federal Universal Service Fund (“USF”), which is held at the U.S. Treasury. 47 U.S.C. § 254(d); *Consumers’ Research (II)*, 2023 WL 3244274, at *1, 2 (explaining how carriers fund universal service programs, including Lifeline). These contributions are used by the FCC “to expand and advance telecommunications services to the nation.” *Consumers’ Research (II)*, 2023 WL 3244274, at *2. Because under the FCC’s rules these federal funds cannot be used to pay state taxes, any imposition of state taxes will threaten the Lifeline program in Washington in multiple ways.

If Subscribers were required to bear the burden of state taxes, Carriers could no longer offer or advertise Lifeline as a “free” service. Placing the responsibility for paying sales taxes on Subscribers also would create price confusion among existing and potential Subscribers and create barriers to their acquisition of the service (particularly for Subscribers who do not have bank accounts). These barriers to participation in Lifeline would erode

the benefits of the program and discourage participation, which is the exact opposite of the intent of the program.

Similarly, if Carriers had to bear the costs of state taxes, they would face reduced incentives to participate in Lifeline. Federal USF funds cannot be used to pay sales taxes. The FCC requires Carriers to use USF funds “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended” and to “pass through the full amount of the [Lifeline] support to the qualifying low-income consumer.” 47 C.F.R. §§ 54.7, 54.403(a)(1). For this very reason, USAC cannot pay any state taxes. Moreover, Carriers provide Lifeline service on very narrow margins. Consequently, Carriers would have to pay state taxes through other revenue streams—effectively forcing them to choose between offering Lifeline at a loss or not participating in Lifeline at all. The Former Commissioners fear that for-profit commercial companies will naturally opt for the latter and withdraw from the program. Such a result would frustrate the FCC’s mandate to serve the public

interest by enabling low-income households to have access to Lifeline service. *See* 47 U.S.C. § 254(b)(3); *id.* § 254(j); *see also id.* § 214(e)(6).

The implications of this dispute extend beyond Washington's borders. Other states could be encouraged to impose taxes on Lifeline, which would damage the program nationwide. The ramifications also extend beyond Lifeline. Other federal universal service programs could be subject to the same harmful effects that a sales tax on Lifeline would cause. For example, the Affordable Connectivity Program, enacted by Congress in 2021 to subsidize broadband access for low-income households, which is based on many of the same criteria used to determine eligibility for Lifeline, could be harmed by Washington's tax on low-income communities. *Compare* 47 C.F.R. §§ 54.400-423 (Universal Service Support for Low-Income Consumers) *with id.* §§ 54.500-523 (Universal Service Support for Schools and Libraries), *id.* §§ 54.600-633 (Universal

Service for Rural Health Care Program), *and id.* §§ 54.1800-1813 (Affordable Connectivity Program).

Accordingly, the public has a strong interest in protecting Lifeline from this serious threat.

C. The Court of Appeals' Opinion Threatens the FCC's Constitutionally-Mandated Control Over USAC.

The Court of Appeals' opinion fundamentally mischaracterizes the USAC's distribution of federal USF funds from the U.S. Treasury as a purchase by USAC of a retail service subject to state taxes. The opinion thus jeopardizes the FCC's necessary and Constitutionally-mandated control over USAC.

The FCC maintains sole authority over Lifeline, subject only to Congressional action. USAC does not set or advocate policy; or interpret statutes, policies, or FCC rules; and has no power or authority other than that bestowed upon it by the FCC. USAC merely performs a "ministerial" role for, and is entirely "subordinate" to, the FCC. *Consumers' Research (II)*, 2023 WL

3244274, at *15; *Consumers' Research v. FCC*, 63 F.4th 441, 445, 451 (5th Cir. 2023) (“*Consumers' Research (I)*”).

Specifically, USAC does not have the power to choose to incur state tax obligations for a USF distribution from the U.S. Treasury. The FCC must approve every distribution of USF funds by USAC, and the FCC also approves USAC's budget. 47 C.F.R. § 54.715(c). The FCC has authorized USAC to distribute federal USF funds solely to reimburse carriers for their costs of providing Lifeline services. *Id.* §§ 54.407, 54.702. Similarly, the Lifeline budget does not include any funds for payment of state taxes. *See id.* § 54.423. The Former Commissioners are unaware of any other States collecting state taxes on Lifeline services or of any authority that would permit USAC to use USF funds to pay state taxes.

USAC has no other independent authority over Lifeline. The FCC, not USAC, makes all decisions about who gets paid for what and how much:

- The FCC, not USAC, identifies which Subscribers are eligible for Lifeline, based on their qualification for other federal aid programs. 47 C.F.R. §§ 54.409-10.
- The FCC, not USAC, approves which Carriers may provide Lifeline service, and each Subscriber picks his or her Carrier. *Id.* § 54.201.
- The FCC, not USAC, sets the monthly reimbursement rate. *Id.* § 54.403(a).

USAC performs its ministerial services to the FCC pursuant to regulations adopted by the FCC and a “Memorandum of Understanding Between the Federal Communications Commission and the Universal Service Administrative Company.” (the “MOU”)² The MOU states, “[a]s part of its duties and subject to the Commission’s rules and oversight, USAC . . . administers the disbursement of universal service

² Memorandum of Understanding between the Federal Communications Commission and the Universal Service Administrative Company, (Dec. 19, 2018), <https://www.fcc.gov/sites/default/files/usac-mou.pdf>.

support payments.” MOU at 2. The MOU confirms that funds for Lifeline and other Universal Service programs “are maintained at the U.S. Treasury” and “**are federal funds.**” MOU at 1 (emphasis added). The MOU further provides that “USAC understands and agrees that ***all disbursements from the USF Treasury account require approval by an FCC certifying official.***” MOU at 12 (emphasis added).

Wrongly attempting to paint USAC as independent of the FCC, DOR incorrectly asserted that, “FCC does not directly interact with Assurance. . . .” Resp. Answer to Appellant’s Pet. for Rev. 25. To the contrary, USAC does not have “any binding legal relationship between it and any of the USF’s beneficiaries,” such as the Carriers or Subscribers. *USAC v. Post-Confirmation Comm. (In re Incomnet, Inc.)*, 463 F.3d 1064, 1075 (9th Cir. 2006) (relating to the status of contributions into the USF once the telecommunications carrier files bankruptcy). Moreover, the FCC has numerous direct touchpoints with Carriers. As noted above, USF distributions are made from the U.S. Treasury to

Carriers. Furthermore, the FCC, not USAC, resolves disputes by Carriers about Lifeline. 47 C.F.R. § 54.719; *Consumers' Research (I)*, 63 F.4th at 451. The FCC also reviews and approves Carriers' paperwork regarding Lifeline. 47 C.F.R. § 54.407(d); FCC CP 137-141. And Carriers must certify to the FCC their compliance with Lifeline rules. FCC CP 141.

For these reasons, the Court of Appeals' conclusion—that USAC can buy telecommunications services using Lifeline funds independently from the FCC's authority and surveillance—threatens the FCC's necessary subordination of USAC. That conclusion violates the private non-delegation doctrine under the U.S. Constitution. *See Consumers' Research (II)*, 2023 WL 3244274, at *15 (USAC subordination to FCC authority not a private non-delegation); *Consumers' Research (I)*, 63 F.4th at 450-451(same).

The public has a strong interest in maintaining FCC control over USAC and avoiding a Constitutional violation. This Court should grant the Petition in light of this interest.

IV. CONCLUSION

For these reasons, the Former Commissioners strongly urge this Court to grant the Petition for Review. The public has substantial interests in protecting both (1) the free Lifeline program for low-income individuals and (2) the FCC's Constitutionally mandated subordination of USAC.

DATED this 6th day of June, 2023.

I certify that this Memorandum contains 2,493 words, in compliance with the RAP 18.17(c)(9) limit of 2,500 words.

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CERTIFICATE OF SERVICE

I, Christopher Durbin, declare under penalty of perjury under the laws of the State of Washington that I am Of Counsel in the law firm of Cooley LLP, at all times hereinafter mentioned, I was and am a resident of the State of Washington, over the age of 18 years, not a party to the above-entitled action, and competent to be a witness herein.

On this 6th day of June, 2023, I caused copies of the foregoing document to be served on the following via E-mail:

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