

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Telecommunications Carriers Eligible	)	WC Docket No. 09-197
For Universal Service Support	)	

**TRACFONE WIRELESS, INC.’S SECOND AMENDMENT TO PETITION TO  
EXPAND ELIGIBLE TELECOMMUNICATIONS CARRIER DESIGNATION  
TO INCLUDE TRIBAL LANDS AND MOTION FOR EXPEDITED ACTION**

TracFone Wireless, Inc. (“TracFone”), by this filing, amends its Petition to Expand Eligible Telecommunications Carrier Designation to Include Tribal Lands, filed with the Commission on September 11, 2017, and amended on September 18, 2017, and requests the Commission to grant the long-pending Petition on an expedited basis. TracFone amends its Petition to reflect its current proposed enhanced Lifeline offering for residents of Tribal lands and to provide updated data regarding Lifeline services being provided to residents of Tribal lands by other carriers. TracFone’s Petition has been pending for over 17 months with no action by the Commission. There is no basis for continuing to delay the availability of TracFone’s enhanced Lifeline offering to qualifying low-income households residing on Tribal lands.<sup>1</sup>

**I. BACKGROUND**

In the Petition, TracFone requested that the Commission expand its Eligible Telecommunications Carrier (“ETC”) designation to include Tribal lands within certain states for which the Commission authorized TracFone to provide Lifeline service (“FCC-designated

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<sup>1</sup> In accordance with 47 C.F.R. § 54.202(c), TracFone is sending a copy of this filing to the relevant tribal governments and tribal regulatory authorities.

states”) in a 2008 Order.<sup>2</sup> Those states include: Alabama, Connecticut, New York, North Carolina, and Virginia.<sup>3</sup> As explained in the Petition, in the 2008 TracFone ETC Designation Order, the Commission “clarif[ied] that TracFone’s designated service areas do not encompass federally-recognized tribally-owned lands.”<sup>4</sup> The Commission did not include Tribal lands in TracFone’s designated Lifeline service areas because TracFone did not request ETC designation for Tribal lands in its petitions for designation as an ETC.<sup>5</sup> As TracFone explained in the Petition, grant of the Petition would benefit the public interest by allowing TracFone to provide enhanced Lifeline benefits to Tribal land households in FCC-designated states and introducing more robust competition in the provision of Lifeline service in general and expanding the availability of mobile broadband service to Tribal land residents in particular.

In the nearly 18 months since TracFone filed its Petition (on September 11, 2017), the Commission has not taken any action regarding TracFone’s request. The Commission has not even issued a public notice seeking comments nor contacted TracFone regarding the Petition.

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<sup>2</sup> See *Federal-State Joint Board on Universal Service, TracFone Wireless, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of New York et al.*, Order, 23 FCC Rcd 6206 (2008) (“TracFone ETC Designation Order”) (designating TracFone as an ETC for Lifeline support only in New York, Virginia, Connecticut, Massachusetts, Alabama, North Carolina, Tennessee, Delaware, New Hampshire, Pennsylvania, and the District of Columbia). TracFone’s Petition only includes those FCC-designated states in which Tribal lands are located.

<sup>3</sup> TracFone’s Petition also listed Massachusetts as one of the FCC-designated states. However, in its First Amendment to Petition to Expand Eligible Telecommunications Carrier Designation to Include Tribal Lands, filed on September 18, 2017, TracFone deleted all references to Massachusetts in its Petition and advised the Commission that it does not seek to expand its ETC designation to include Tribal lands within Massachusetts. TracFone filed the amendment after being advised by the Massachusetts Department of Telecommunications and Cable that it has asserted jurisdiction over ETC designations pursuant to 47 U.S.C. § 214(e)(2) and state law.

<sup>4</sup> TracFone ETC Designation Order, ¶ 17. The FCC’s rules define “Tribal lands” to include “any federally-recognized Indian tribe’s reservation, pueblo, or colony” and other types of lands not relevant to TracFone’s Petition. 47 C.F.R. § 54.400(e).

<sup>5</sup> See *id.* ¶ 17 n.49. Those ETC petitions were filed in 2004.

Shortly after TracFone filed its Petition, the Commission adopted two limitations on enhanced Tribal Lifeline support, as detailed in its 2017 Lifeline Order released on December 1, 2017.<sup>6</sup> First, the Commission implemented a facilities requirement for ETCs receiving enhanced Lifeline support for providing service to residents of Tribal lands. Regarding wireless services, the Commission stated that it was “limit[ing] enhanced Tribal support to ... fixed or mobile wireless facilities-based Lifeline service provided on Tribal lands with wireless network facilities covering all or a portion of the relevant Lifeline ETC’s service area on Tribal lands ... .”<sup>7</sup> TracFone, as a reseller, would not be eligible to receive enhanced Lifeline support for service provided to residents of Tribal lands, if this facilities requirement had become effective (as explained below, it did not). The facilities requirement was a departure from the Commission’s prior decisions to forbear from the requirement in Section 214(e)(1)(A) of the Communications Act of 1934, as amended (47 U.S.C. § 214(e)(1)(A)) that ETCs shall offer services, at least in part, over their own facilities.<sup>8</sup> Second, the Commission limited enhanced Tribal Lifeline support to residents of rural areas on Tribal lands.<sup>9</sup>

Several petitions for review of the limitations on enhanced Lifeline support in the 2017 Lifeline Order were filed with the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”). Although the Commission denied a request to stay the limitations in the 2017 Lifeline Order, the D.C. Circuit granted a motion for stay. Therefore, the limitations never

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<sup>6</sup> See *Bridging the Digital Divide for Low-Income Consumers et al.*, Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, 32 FCC Rcd 10475 (2017) (“2017 Lifeline Order”).

<sup>7</sup> See *id.* ¶ 24.

<sup>8</sup> See, e.g., *Lifeline and Link Up Reform and Modernization et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 6656, ¶ 368 (2012) (“2012 Lifeline Reform Order”).

<sup>9</sup> See 2017 Lifeline Order, ¶ 3.

became effective. On February 1, 2019, the court unanimously issued an opinion in which it held that the Commission's adoption of the two limitations on enhanced Lifeline support was "arbitrary and capricious by not providing a reasoned explanation for its change of policy that is supported by record evidence" and granted the petitions for review.<sup>10</sup> Specifically, the D.C. Circuit found:

By departing from its prior forbearance policy without reasoned explanation and failing to consider key aspects of the program — e.g., facilities-based providers' unwillingness to offer Tribal Lifeline services, the effect of eliminating the enhanced Tribal subsidy on access and affordability, the effect of directing the subsidy only to facilities-based providers on network buildout, and the reliance interests of these carriers and their consumers — the Commission's adoption of the Tribal Facilities Requirement was arbitrary and capricious.<sup>11</sup>

Regarding the Commission's limitation of enhanced Lifeline support to residents of rural Tribal lands, the D.C. Circuit held that "the Commission pointed to no record evidence that telecommunications services are more available or more affordable for low-income consumers on urban Tribal lands than on rural Tribal lands, such that the enhanced subsidy would be less necessary in urban areas for furthering the Lifeline program's primary goals of access and affordability."<sup>12</sup>

The court vacated the 2017 Lifeline Order and remanded the matter to the Commission.<sup>13</sup> As such, there is no facilities requirement nor a rural limitation applicable to ETCs for receipt of enhanced Lifeline support for service to residents of Tribal lands. Moreover, there is no basis for denying or continuing to delay action on TracFone's Petition to expand its Lifeline service area to include Tribal lands in FCC-designated states.

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<sup>10</sup> *National Lifeline Assoc. v. Federal Communications Commission*, No. 18-1026, 2019 U.S. App. LEXIS 3278, at \*2-3 (D.C. Cir. Feb. 1, 2019).

<sup>11</sup> *Id.* at \*26-27.

<sup>12</sup> *Id.* at \*27.

<sup>13</sup> *Id.* at \*34.

## II. SECOND AMENDMENT

In the Petition, TracFone stated that as a recipient of federal Tribal lands support (\$25.00) and non-Tribal lands support (\$9.25) for a total of \$34.25 in monthly support per subscriber, TracFone would offer Lifeline customers residing on Tribal lands in FCC-designated states unlimited airtime voice minutes, unlimited text messaging, and 2 GB of mobile broadband data each month. TracFone advises the Commission that it has increased its proposed enhanced Lifeline benefits for residents of Tribal lands to include unlimited airtime voice minutes, unlimited text messaging, and 4 GB of mobile broadband data each month. Although the Commission has not established a minimum amount of data that must be offered to receive Lifeline Tribal lands support, TracFone's offering significantly exceeds the amount of mobile broadband data that it provides to its non-Tribal Lifeline customers (*i.e.*, 1 GB). Moreover, as required by Commission rules, TracFone certifies that it will pass through to Tribal land residents the entire amount of federal Universal Service Fund support it receives for providing Lifeline service to residents of Tribal lands.<sup>14</sup>

In the Petition, TracFone stated that Tribal customers would have the option of receiving a free Android smartphone or using their own smartphone. Under TracFone's amended proposed offering, all Tribal customers will receive a free Android smartphone that must be used to access TracFone's service. The smartphone provided by TracFone at no charge will be Wi-Fi capable, as required by the Commission's rules,<sup>15</sup> and will be activated on the network of the underlying carrier that provides the best coverage to the customer based on the customer's residential address. This amended offering will enable TracFone to ensure that each customer residing on Tribal lands receives an optimal service experience.

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<sup>14</sup> See 47 C.F.R. § 54.403(a)(3).

<sup>15</sup> See 47 C.F.R. § 54.408(f)(1).

By this amendment, TracFone also updates information in the Petition regarding other ETCs that receive enhanced Lifeline support for services provided to residents of Tribal lands in TracFone's FCC-designated states. TracFone's statements in the Petition that no ETCs are providing Lifeline service on Tribal lands in Connecticut and Virginia and that only a few households in New York are benefitting from the enhanced Lifeline support continue to be accurate.<sup>16</sup> In Alabama, North American Local LLC ("North American Local"), a wireless provider, receives over 75 percent of the Tribal lands support in Alabama.<sup>17</sup> North American Local's Tribal lands Lifeline plan available for no charge includes 1,000 minutes, unlimited texts, and 100 MB of mobile data.<sup>18</sup> TracFone's proposed offering to Tribal residents is far more generous. TracFone's no charge Tribal lands Lifeline plan will offer unlimited voice minutes, unlimited texts, and 4 GB of mobile broadband data.<sup>19</sup>

In North Carolina, Frontier Communications of the Carolinas Inc. ("Frontier"), a wireline carrier, continues to be the only ETC that receives a significant amount of Tribal lands support.<sup>20</sup> Frontier's Tribal lands Lifeline plan offers eligible households a monthly discount of up to \$34.25 off the monthly service charge. Frontier's bundled Internet and unlimited voice service terms are no longer available on its website. While wireline and wireless services are not

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<sup>16</sup> See LI05 Annual Low Income Support Claimed by State and Company January 2016 through December 2018.xlsx, available at <http://www.usac.org/about/tools/fcc/filings/2019/q2.aspx> ("USAC Low Income Support Report").

<sup>17</sup> See *id.*

<sup>18</sup> See <https://www.northamericanlocal.com/sign-up>.

<sup>19</sup> North American Local also offers residents of Tribal lands Lifeline plans with unlimited minutes and texts and higher amounts of data, but those plans only provide 3 GB of data at most and require enrolled customers to pay a monthly fee (1 GB for \$10.99; 2 GB for \$19.99; or 3 GB for \$29.99). See *id.*

<sup>20</sup> See USAC Low Income Support Report (in 2018, Frontier received \$16,968 in Tribal lands support and CenturyLink Carolina Telephone and Telegraph Company, the only other recipient of Tribal lands support in North Carolina, received \$27).

directly comparable, there is no doubt that TracFone's Tribal lands no charge Lifeline offering would provide Tribal lands households with a significantly less expensive and more affordable alternative bundled service that includes unlimited voice and text service, as well as the benefits of 4 GB per month of mobile broadband Internet access service.

### **III. REQUEST FOR EXPEDITED ACTION**

TracFone requests that the Commission consider and grant its long-pending Petition on an expedited basis. There is no legal basis for delaying or denying grant of TracFone's request to expand its ETC designated area to include Tribal lands. First, the sole reason that the Commission carved out Tribal lands from the designated service areas in TracFone's FCC-designated states was that TracFone specifically excluded Tribal lands from its application seeking ETC designation. In other words, it was TracFone's decision in 2004 to exclude Tribal areas from its proposed Lifeline service area. It was not the Commission's decision to impose such a limitation. At the time when TracFone filed its ETC applications with the Commission, in 2004, TracFone did not offer service to Tribal lands in the FCC-designated states. Now it is able to provide Lifeline service to Tribal lands. Like other ETCs, including other non-facilities-based ETCs, it should be permitted include Tribal lands within its Lifeline service area.

Second, the Commission previously determined that TracFone met the federal requirements for designation as an ETC for the purpose of receiving federal Lifeline support. Given that federal Tribal lands support is a type of federal Lifeline support, TracFone has already demonstrated that it meets the requirements for designation as an ETC for the purpose of receiving federal Tribal lands support.

Third, there are no Commission rules or orders limiting the receipt of enhanced Lifeline support to facilities-based ETCs. Section 214(e)(1)(A) of the Communications Act of 1934, as

amended (47 U.S.C. § 214(e)(1)(A)) provides that ETCs shall offer services, at least in part, over their own facilities.<sup>21</sup> Although TracFone, as a reseller, does not offer services over its own facilities, in 2005, the Commission exercised its forbearance responsibilities under Section 10 of the Communications Act (47 U.S.C. § 160) with respect to the facilities-based service requirement.<sup>22</sup> In 2012, the Commission found that the forbearance from the facilities requirement in Section 214(e)(1)(A) of the Communications Act was applicable to all non-facilities-based providers.<sup>23</sup> Both the TracFone Forbearance Order and the 2012 Lifeline Reform Order are applicable and effective Commission precedent. As described above, the Commission's effort to limit enhanced Lifeline support for services provided to residents of Tribal lands to facilities-based ETCs was found to be unlawful and was vacated by the D.C. Circuit. Indeed, the D.C. Circuit noted, "[t]he Commission also failed to justify its fundamental policy reversal on forbearing the 'own facilities' requirement in light of its previous findings regarding the important role of non-facilities-based providers in promoting affordable telecommunications service."<sup>24</sup> Therefore, there is no legal justification for denying TracFone's Petition to expand its ETC designated area to include Tribal lands. As such, TracFone requests that the Commission grant its petition (which has been pending for nearly 18 months) on an expedited basis, so that TracFone can promptly provide enhanced Lifeline benefits to Tribal land

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<sup>21</sup> See also 47 C.F.R. § 54.201(d)(1).

<sup>22</sup> See *Federal-State Joint Board on Universal Service; Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, 20 FCC Red 15095 (2005) ("TracFone Forbearance Order").

<sup>23</sup> See 2012 Lifeline Reform Order, ¶ 368.

<sup>24</sup> *National Lifeline Assoc.*, at \*15; see *id.* ("the Commission rescinded its policy of forbearance as to the Tribal Lifeline program without conducting a new forbearance analysis or providing any reasoned explanation for its reversal.").



households that are eligible for Lifeline service and increase competition in the market for Lifeline service consistent with the public interest.

### **CONCLUSION**

Based on the foregoing and for the reasons stated in its Petition, TracFone requests that the Commission promptly grant its Petition to expand its designated service area to include Tribal lands in Alabama, Connecticut, New York, North Carolina, and Virginia.

Respectfully submitted,

**TRACFONE WIRELESS, INC.**



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