

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

In the Matter of)	
)	
Lifeline and Link Up Reform and Modernization)	WC Docket No. 11-42
)	
Telecommunications Carriers Eligible For Universal Service Support)	WC Docket No. 09-197
)	
Connect America Fund)	WC Docket No. 10-90

**MOTION FOR STAY OR, IN THE ALTERNATIVE, DEFERRAL OF THE EFFECTIVE
DATE OF REVISED 47 C.F.R. § 54.407(C)(2)**

TracFone Wireless, Inc. (“TracFone”), by its attorneys, hereby moves the Commission to stay the effective date for the revision to Section 54.407(c)(2) of the Commission’s rules (47 C.F.R. § 54.407(c)(2)), a rule commonly referred to as the de-enrollment for non-usage rule. In the alternative, TracFone requests that the Commission voluntarily defer the effective date of that rule revision until it has had an opportunity to address the important legal and public interest questions about the rule which have been raised on reconsideration.

Section 54.407(c)(2) was revised in the Commission’s recent Lifeline Modernization Order.¹ The revised rule, when effective, will reduce the period for de-enrollment for non-usage (applicable only to those Lifeline providers who do not collect and assess monthly fees from their subscribers) from 60 consecutive days to 30 consecutive days. Under the currently-effective version of Section 54.407(c)(2), customers are de-enrolled for not using their Lifeline service for 60 consecutive days. TracFone has petitioned the Commission to reconsider this rule

¹ Lifeline and Link Up Reform and Modernization, et al. (Third Report and Order, Further Report and Order and Order on Reconsideration), 31 FCC Rcd 3962 (2016) (“Lifeline Modernization Order”).

change.² Two other commenting parties – the Joint ETC Petitioners, and Sprint Corporation – supported TracFone’s request for reconsideration of that rule revision. Importantly, no commenters opposed reconsideration of the de-enrollment for non-usage rule.

Absent action by the Commission on reconsideration, that rule change is scheduled to become effective December 1, 2016 – less than three months from the date of this motion. TracFone recognizes that the Lifeline Modernization Order has generated multiple petitions for reconsideration and that a substantial number of important reconsideration issues are pending, including several other reconsideration issues raised by TracFone. TracFone also recognizes that there is little time between now and December 1 for the Commission to take further action in this proceeding and to address those reconsideration issues. Several of the key reforms adopted in the Lifeline Modernization Order involve changes which will be phased in over several years. Examples include the minimum service standards for voice and broadband Lifeline service; the scheduled phase out of voice-only Lifeline service; and the creation and implementation of the National Verifier to verify applicant qualifications and make Lifeline eligibility determinations.

Unlike those rule changes, the revised de-enrollment for non-usage rule will not be phased in. Unless stayed or deferred, it will take effect on December 1, 2016. In order to afford the Commission a reasonable opportunity to address the reconsideration challenges to that rule and to avoid imposing burdens on Lifeline providers, and on the Universal Service Administrative Company (“USAC”) and, most importantly, to prevent hardship to Lifeline households who face de-enrollment and loss of Lifeline service due to no fault of their own, TracFone respectfully asks the Commission either to stay implementation of the rule or to voluntarily defer the effective date of that rule revision until the Commission has had the

² Petition for Reconsideration of TracFone Wireless, Inc., filed June 23, 2016, at 23-25.

opportunity to address and resolve the important legal and public interest questions before it regarding the reduction in the de-enrollment for non-usage period.

I. The Current Non-Usage Rule Has Worked Well and Should Not Be Changed.

The current version of Section 54.407(c)(2) requires de-enrollment of no charge Lifeline customers who do not use their Lifeline service for a 60 day period, subject to a 30 day notice period codified at Section 54.405(e)(3) of the rules (47 C.F.R. § 54.405(e)(3)). That rule was established in the Commission’s 2012 Lifeline Reform Order.³ As explained in that order, the 60 day non-usage rule is consistent with a recommendation of the Government Accountability Office (“GAO”) and is modeled on 60 day non-usage rules which have been adopted and successfully implemented by several state commissions.⁴ In promulgating the 60 day non-usage rule in 2012, the Commission described the rule as being “fiscally responsible and balances the interests of subscribers with the risks associated with potential waste in the program.”⁵

What has changed between 2012 and 2016 to warrant a conclusion that the 60 day non-usage rule is no longer fiscally responsible and no longer balances the interests of subscribers with the risks associated with potential program waste? Nowhere in the Commission’s one paragraph explanation for that rule change in the Lifeline Modernization Order does the Commission answer – or even discuss – that question. The only explanation offered by the

³ Lifeline and Link Up Reform and Modernization, et al. (Report and Order and Further Notice of Proposed Rulemaking), 27 FCC Rcd 6656 (2012) (“2012 Lifeline Reform Order”).

⁴ *Id.*, ¶¶ 257-261. Significantly, none of the state commissions which adopted a 60 day non-usage rule have found any reason to revise their non-usage rules.

⁵ *Id.*, ¶ 258.

Commission for this rule change which reduces the non-usage period by fifty percent⁶ is that the Commission has now broadened the definition of usage to include texting.⁷

The Commission's expansion of the definition of usage to include outbound texting is commendable.⁸ Indeed, given the reliance by many consumers, including many Lifeline consumers, on texting as their preferred means of communication, this was the right thing to do. However, nothing in the record indicates the existence of any correlation between availability of texting and the reasons for non-usage by Lifeline customers. Both TracFone and Sprint identified reasons why their Lifeline customers do not use the service for 60 days. TracFone's reasons for its customers' non-usage include temporary absence from the country and incapacity.⁹ Sprint indicated that the three primary reasons for its customers' non-usage are i) lost or misplaced handsets, ii) hospitalization, and iii) broken handsets.¹⁰ Inclusion of outbound texting in the definition of usage will have no impact on customer non-usage when the reasons

⁶ While it is common to describe the rule change as reducing the de-enrollment for non-usage period from 60 to 30 days, in fact, the rule change reduces the non-usage period from 90 days to 45 days. Under the current rule, a Lifeline customer who does not use the service for 60 consecutive days receives notice and is afforded a 30 day post-notice period to use the service before being de-enrolled. Under the revised rule, a customer who does not use the service for 30 consecutive days receives notice and is afforded only a 15 day period to use the service before being de-enrolled.

⁷ Lifeline Modernization Order, ¶ 415.

⁸ TracFone has sought reconsideration of the limitation on texting to outbound (sent) texts. For reasons discussed in TracFone's comments in the rulemaking proceeding and in its petition for reconsideration, TracFone believes that all texting – sent and received – is usage and should be considered as such for purposes of the de-enrollment for non-usage rule. Receipt of a sent text is usage as is receipt (*i.e.*, answering) a received voice telephone call. Although TracFone urges the Commission to reconsider its limitation to outbound texting at the earliest opportunity, that request is not part of this stay motion.

⁹ TracFone Petition for Reconsideration, at 23.

¹⁰ Comments of Sprint Corporation, at 6.

for non-usage are any of those identified impediments to usage – illness, being out of the country, or broken or lost handsets.

II. This Stay Request Meets the Four Prong Standard for Stays.

TracFone recognizes that stays are not routinely granted. In order to warrant a stay, a requester must demonstrate the following: 1) that it is likely to prevail on the merits; 2) that without a stay there will be irreparable injury; 3) that no parties will be harmed by issuance of a stay; and 4) that a stay will serve the public interest.¹¹ Courts have also held that where a stay movant makes a particularly compelling showing as to one prong, it need not show as much regarding the other prongs.¹² Specifically, where a movant makes a strong showing of irreparable injury or lack of harm to others then the success on the merits showing may be less substantial.¹³

a. Implementation of the Revised 30 Day Non-Usage Rule Will Cause Irreparable Injury.

There is no dispute and little doubt that the fifty percent reduction in the non-usage period will cause millions of qualified low-income households to lose their Lifeline-supported service. Consumers who will be adversely impacted by the reduced non-usage period including many of the nation's most vulnerable groups including, *e.g.*, disabled persons, unemployed and homeless veterans, economically-disadvantaged minorities, and the elderly. As TracFone and Sprint demonstrated, even under the currently-effective 60 day non-usage rule, many Lifeline customers who are de-enrolled for temporary non-usage fully intend to remain Lifeline

¹¹ Washington Metropolitan Transit Com. v. Holiday Tours, Inc. 559 F.2d 841 (D.C. Cir. 1977) (“WMATC”); Virginia Petroleum Jobbers Association v. FPC, 259 F.2d. 921 (D.C. Cir. 1958).

¹² *See WMATC, supra*; Davis v. Pension Benefit Guaranty Corp., 571 F.3d 1288, 1291-1292 (D.C. Cir. 1999).

¹³ *See WMATC* at 843, Davis at 1291-92,

customers and promptly re-enroll upon learning that they have lost their Lifeline service. TracFone indicated that about twenty-five percent of its de-enrolled customers re-apply the following month, and that seventy percent of those re-apply within the first 15 days of the month.¹⁴ Sprint's experience is similar and its data show how much worse the de-enrollment/re-enrollment problem would become if a 30 day rule were implemented. According to Sprint, of its Lifeline customers who had no usage for 30 days, thirty-eight percent subsequently resumed usage within 15 days and sixty-six percent resumed usage within 60 days.¹⁵

TracFone and Sprint are the two largest providers of Lifeline service and are, by far, the two largest providers of no charge Lifeline service subject to the non-usage de-enrollment rule. Between them they serve millions of households who are subject to the non-usage rule and they de-enroll many thousands of customers each month under the current rule. Those de-enrollment numbers would increase dramatically if the non-usage period were to be reduced to 30 days. Accordingly, many thousands of Lifeline households each month will learn that they have lost their service (often while they are hospitalized, out of the country or while they do not have a working phone). In addition to the time and inconvenience of having to re-apply, those customers will lose their access to essential services (including emergency services) while they await completion of the application process, including re-verification of their eligibility, and subsequent re-enrollment. Such service disruptions can – and often do – cause irreparable harm to consumers. Millions of de-enrolled consumers will temporarily lose their ability to contact family members, healthcare providers, and current and potential employers as well as to make N11 calls during the period while they are going through the re-application process and eventual re-enrollment. Moreover, commencing December 1, 2016, Lifeline customers will have access

¹⁴ TracFone Petition for Reconsideration, at 24.

¹⁵ Sprint Comments, at 6.

to broadband Internet access service. De-enrollment based on 30 days' non-usage will result in millions of Lifeline customers losing their recently-acquired broadband service, at least temporarily. It is difficult to imagine any reform less conducive to the goal of broadband adoption and utilization among low-income households than to take away Lifeline-supported broadband, even temporarily pending re-enrollment, to consumers who temporarily stopped using the service due to illness, absence from the country or lack of working devices. In addition to those unfortunate circumstances, USAC, already in the midst of major projects such as the development and implementation of the National Verifier, will have to allocate resources to handle millions of re-enrollment applications, thereby burdening its limited resources. These are significant harms which can easily be avoided by maintaining the current rule pending reconsideration.

b. Stay of the Rule Will Not Cause Harm to Other Parties.

No one will be hurt by delaying implementation of the revised de-enrollment for non-usage rule – not the USF, not USAC, not ETCs. It is noteworthy that TracFone requested reconsideration of the rule change in its June 23, 2016 petition for reconsideration. Had any interested person feared that the requested relief would cause it harm, such persons had ample opportunity to raise their concerns about such harm in responses to TracFone's petition. Not a single commenter did so. Although unstated by the Commission, it appears that the reduction in the non-usage de-enrollment rule may have been the result of a Commission perception that such a reduction might somehow conserve USF resources. However, there is no evidentiary basis for such speculation. Indeed, any concern about impact on the USF is contradicted by the very high re-enrollment data placed on the record by TracFone and Sprint. Since most Lifeline consumers de-enrolled for temporary non-usage intend to continue to use the service and re-apply for

enrollment, there is not likely to be any savings to the USF. In fact, the administrative costs of re-enrolling those customers are likely to far outweigh any short term savings resulting from temporary de-enrollment of such consumers.

c. A Substantial Showing on the Merits Has Been Made for Reconsideration of the De-enrollment for Non-usage Rule Revision.

In its petition for reconsideration, and in the supporting comments of Sprint and the Joint ETC Petitioners, substantial showings have been made that the reduction in the de-enrollment for non-usage rule from 60 days to 30 days will do nothing to improve the Lifeline program, will not conserve USF resources, will deprive (even temporarily) many low-income Lifeline-eligible households of service which they rely upon, and that the rule revision should be reconsidered. At the very least, TracFone's petition and supporting comments of others make a compelling case for reconsideration. The rule revision is not the subject of a pending appeal so the "success on the merits" standard is not entirely appropriate. Given the flexible manner which courts and agencies have balanced the prongs of the stay standard, the fact that significant and important reasons for reconsidering the rule change are before the Commission is more than sufficient to warrant a stay based upon the strong irreparable injury and lack of harm to other parties showings. At the very least, the Commission should provide a reasoned analysis for the revision to Section 54.407(c)(2), including identification of any public interest benefits anticipated to result from the rule change beyond stating that the reduction in the de-enrollment for non-usage period was imposed as a *quid pro quo* for including outbound texting as a permissible usage for purposes of the rule. The Commission should stay or otherwise defer any change to the de-enrollment for non-usage rule until that explanation has been provided.

d. A Stay of the Revision to Section 54.407(c)(2) Will Serve the Public Interest.

Finally, staying the effective date of the revision to Section 54.407(c)(2) will serve the public interest. As described in this motion, it is questionable whether there will be any public interest benefit resulting from the rule change. There is no question that millions of Lifeline-eligible low-income households will lose service at least temporarily if the reduced 30 day non-usage de-enrollment rule goes into effect as scheduled on December 1, 2016. The public interest will be served by the Commission taking the time to fully examine the record, including the information placed on the record by TracFone's reconsideration petition and other parties' supporting comments before implementing a major rule change which will profoundly and adversely impact Lifeline providers, USAC and, most importantly, low-income households who participate in the program.

III. If the Commission Does Not Grant a Stay, It Should Voluntarily Defer the Effective Date of the Revision to 47 C.F.R. § 54.407(c)(2).

For the reasons described in this motion, TracFone respectfully submits that its request for stay of the effective date of the revisions to Section 54.407(c)(2) – the de-enrollment for non-usage rule – meets each prong of the judicial standard for stays, and that a stay should be ordered. If the Commission chooses not to issue the requested stay then, in the alternative, TracFone respectfully requests that the Commission exercise its discretion to defer the effective date of that rule change. Such discretion is explicitly provided for in the Commission's rules. Section 1.427(a) of the rules (47 C.F.R. § 1.427(a)) provides that any rule issued by the Commission will be made effective not less than 30 days from the time it is published in the Federal Register. However, that section further provides that a rule's effective date shall be 30 days after the date of Federal Register publication “unless a later date is required by statute **or is otherwise specified by the Commission.**” (emphasis added). The highlighted language from

the last sentence of Section 1.427(a) states clearly and unequivocally that the Commission may specify another effective in situations where it deems an alternative and later effective date appropriate. Given the significant unresolved legal and public interest questions regarding the reduction in the non-usage period, the Commission should exercise its discretion to defer the effective date of that rule change until it has determined whether or not reducing the de-enrollment for non-usage period from 60 days to 30 days is appropriate.

Conclusion

For the reasons stated in this motion, TracFone respectfully moves the Commission to stay the effective date of the revisions to Section 54.407(c)(2) of its rules. In the alternative, TracFone requests that the Commission exercise its discretion to defer the effective of that rule change until it has completed its review of the record before it seeking reconsideration of that rule change.

Respectfully submitted,

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