

Before the
Federal Communications Commission
Washington, DC 20554

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

**REPLY COMMENTS OF NEW AMERICA'S OPEN TECHNOLOGY
INSTITUTE AND NATIONAL HISPANIC MEDIA COALITION**

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New America’s Open Technology Institute (OTI) and the National Hispanic Media Coalition (NHMC), together “Commenters,” file these reply comments in response to NTCA’s *Petition for Temporary Waiver* (NTCA Petition) and TracFone’s *Renewed Motion for Declaratory Ruling or for Waiver for the Purpose of Conducting a Market Test of Consumer Demand for Lifeline Service Offerings* (TracFone Motion).¹ The NTCA Petition seeks a “temporary” waiver for its members and all similarly situated operators from the 18 mbps download/2 mbps upload fixed broadband minimum standard to allow providers to continue offering 10 mbps download/1 mbps upload plans. The TracFone Motion asks the Federal Communications Commission (FCC) to allow it to satisfy the voice minutes and data minimum standards by offering its subscribers a bucket of 2,000 “units” that customers could use for either voice or data. And in the record, the National Lifeline Association (NaLA) asks the FCC to delay all minimum service standards until 2021 when the State of the Lifeline Marketplace report is complete.²

As an initial matter, Commenters oppose eliminating or relaxing the Lifeline minimum standards. The minimum standards are there to ensure equitable, high-quality broadband service to all low-income Americans. During the 2016 Lifeline modernization proceeding, minimum standards were debated extensively, and the FCC ultimately adopted the standards in the 2016 Lifeline Modernization Order. Attempts by NTCA, TracFone, and the National Lifeline Association to relitigate these broader issues are misplaced in an adjudicatory setting.

The NTCA Petition does not make a persuasive case for why a blanket waiver of the 18 mbps download/2 mbps upload minimum standard for its members is necessary or in the public interest. However, the FCC should consider waiving the minimum standards if there is evidence

¹ Renewed Motion for Declaratory Ruling or for Waiver for the Purpose of Conducting a Market Test of Consumer Demand for Lifeline Service Offerings, Dkt. No. 11-42 (July 25, 2018); Petition for Temporary Waiver of NTCA – The Rural Broadband Association, Dkt. No. 11-42 (July 23, 2018) (“NTCA Petition”).

² Comments of National Lifeline Association at 7, Dkt. No. 11-42 (Aug. 30, 2018).

that providers will exit the market on a widespread basis without such relief. Finally, Commenters are interested in better understanding the “units-based” approach in the TracFone Motion and would urge the Commission to allow additional opportunities to examine that proposal.

I. The Lifeline minimum service standards ensure equitable, high-quality broadband service.

The Lifeline minimum standards empower consumers by ensuring that low-income Americans have access to equitable, high-quality broadband service. In deciding the current tiers of minimum standards, the FCC stated “Lifeline customers should not need to accept ‘second-tier’ service, and that functional Internet access is essential to allow consumers to fully participate in society.”³ Given the importance of the internet in Americans’ lives, and the lack of broadband competition in general, minimum standards are necessary to give consumers confidence that they will receive broadband and phone service that fits their needs regardless of what Lifeline plan they chose. Further, Lifeline is a household program, which means minimum standards should be set based on the household rather than the individual. And the FCC required annual updates to the minimum standards to support an evolving level of telecommunications services.⁴

The FCC established a clear methodology for setting the minimum standards. It stated that it would “establish minimum service standards for all Lifeline supported services based on services to which a ‘substantial majority’ of consumers have already subscribed.”⁵ While there is no official definition of “substantial majority,” the 2016 Lifeline Modernization Order, for its purposes, stated that a “substantial majority” means the service that 70% of Americans receive. For fixed broadband, the FCC set the speed standard at 10 mbps download/1 mbps upload, based

³ Third Report and Order, Further Report and Order, and Order on Reconsideration, Lifeline and Linkup Reform and Modernization, Dkt. No. 11-42 (Apr. 27, 2016), FCC 16-38, ¶75 (internal citations omitted) (citing OTI’s comments among others) (“2016 Lifeline Modernization Order”); see also Comments of New America’s Open Technology Institute at 4, Dkt. No. 11-42 (Aug. 31, 2017), <https://ecfsapi.fcc.gov/file/60001223302.pdf>.

⁴ 2016 Lifeline Modernization Order ¶¶7, 88-89.

⁵ *Id.* ¶74.

on Form 477 data.⁶ That standard will increase to 18 mbps download/2 mbps upload on December 2, 2018.

The FCC adopted the same “substantial majority” standard for mobile. In implementing that standard for mobile data allowances, however, the FCC chose to phase-in the minimum over three years to allow mobile carriers to ease into the new standard. Specifically, using the method put forth in paragraph 94 of the 2016 Lifeline Modernization Order would have established a 2 GB minimum allowance in 2016. However, the FCC phased that standard in over two years, with 2 GB not becoming the minimum until December 2018.

Without enforceable standards, low-income communities risk having access to only the barest of plans, which are unworkable for even basic daily needs. Minimum standards are necessary to ensure that low-income consumers get services that are comparable to those of their peers, and that the Lifeline program helps reduce, rather than increase, the digital divide between low-income households and their more affluent peers. The minimum standards established by the FCC in 2016 reflected the agency’s conclusion that low-income Americans receive telecommunications service that will actually meet their needs and that consumers can be confident will be robust and reliable.⁷ The FCC should be therefore establish and enforce vigorously the minimum service standards in the program, rather than waive them.

II. The NTCA Petition fails to make a substantive case for a waiver.

The NTCA Petition seeks a “temporary”⁸ waiver of the fixed wireline minimum standard of 18 mbps download/2 mbps upload. The waiver would allow its members and similarly situated operators to continue offering a 10 mbps download/1 mbps upload plan to “grandfather” in

⁶ *Id.* ¶¶81, 86.

⁷ Then-Commissioner Pai even criticized the 2016 LMO for establishing minimum standards that were too low. Dissenting Statement of Commissioner Pai, 2016 Lifeline Modernization Order, at 210.

⁸ The petition does not propose a timeframe for the temporary waiver.

current Lifeline subscribers. NTCA's members could then offer an 18 mbps download/2 mbps upload plan at a higher price that consumers could apply the Lifeline discount to if they so choose. NTCA argues that because an increase in speeds to 18 mbps download/2 mbps upload would require an increase in price, a waiver of the minimum standard would be in the public interest.⁹ However, NTCA has not made a case that a waiver is necessary or in the public interest.

As an initial matter, the Lifeline program should be designed to both maximize consumer participation and consumer choices. Rates should therefore be affordable, and the program should encourage competition. Moreover, these issues were fully briefed during the 2016 Lifeline modernization proceeding and the FCC determined that minimum standards would be overall beneficial to consumers. There were no surprises in the updated minimum standards: the FCC established a method by which it would annually update the minimum standards, and there is no reason to think the FCC would deviate from that method.

NTCA provides no new persuasive data that calls these conclusions or methods into question. NTCA provides no evidence that prices will increase, or by how much—the severity of such a hypothetical price increase is directly relevant to whether NTCA members need a waiver. Nor does NTCA provide evidence that its members are incapable of providing Lifeline service at the \$9.25 price point.¹⁰ It merely relies on the unsupported claim that higher speeds means higher prices. That statement might be accurate, but a waiver request requires more than merely reciting

⁹ NTCA Petition at 4.

¹⁰ To the extent providers as a general matter are less able to provide a cost-free service to Lifeline subscribers, the FCC should consider raising the subsidy rather than waiving minimum standard requirements.

that simple adage. Further, it is axiomatic that price per bit of data decreases over time, further undermining NTCA's argument that prices *must* increase.¹¹

A waiver of the type requested by NTCA reduces incentives for providers to invest in their networks and services. Regardless of whether the NTCA is acting pursuant to that motive,¹² such a waiver would have that effect. In essence, the waiver would allow NTCA members to continue offering broadband service that does not meet the minimum standards set by the FCC. Should NTCA members receive such a waiver, their incentive to invest in their networks, to improve their infrastructure, and to reduce their prices would be substantially reduced, as there would be less pressure to make those investments and improve their networks. And given the annual nature of the waiver requests already, future requests would further slow this investment and deployment, further harming America's most vulnerable populations.

The petition leaves many more questions unanswered as well. Are NTCA members building out network infrastructure that would necessitate an increase in price, or is this simply rent-seeking behavior? Would a speed increase to the new minimum standard congest their networks such that user experience would worsen or certain users or services would have to be throttled? How long do NTCA members need to come into full compliance with the minimum standards at the \$9.25 price point? Also, were NTCA members able to comply with the 10 mbps download/1 mbps upload minimum standards despite its filing an identical petition for waiver in October 2017?¹³ These questions remain unanswered, yet their answers are crucial in determining whether a waiver is necessary.

¹¹ "The Price per Megabit per Second has Gone Down 90 Percent," NCTA Blog, (March 17, 2017), <https://www.ncta.com/whats-new/the-price-per-megabit-per-second-has-gone-down-90-percent>.

¹² NTCA Petition.

¹³ NTCA Petition at 1 ("This waiver renews a nearly identical request made in 2017[.]").

The FCC should not grant the relief requested. The petition is devoid of evidence to support its claims and of concrete reasons why a waiver is necessary or in the public interest.

III. The Commission should consider TracFone’s “units-based” proposal, but only if more details are provided.

Commenters would like to learn more about the “units-based” proposal in the TracFone Motion. While we do not endorse the units-based proposal without additional details, if the FCC ultimately decides to grant any relief in this context, it should grant it across the industry rather than to just one provider.

TracFone has two primary concerns with the minimum standards increase and the voice phase-out. First, consumers still want voice service; and second, increasing the data allowance from 1 GB to 2 GB may force some providers to stop providing voice service altogether. To address some of these concerns, TracFone proposes to meet the mobile data and voice allotment standards by giving customers a bucket of “units” they could use for either data or voice. Each customer would get 2,000 units, and the customer could choose whether to use those units on voice (one unit equals one voice minute) or data (one unit equals 1 MB) or a combination of both. The units proposal “would empower Lifeline consumers to determine how to use their Lifeline service to best meet their” needs.¹⁴ TracFone proposes to conduct a market test and provide information from that test to the FCC.¹⁵

Much like the NTCA Petition, the TracFone Motion leaves out crucial details. Why does the company think a full year is warranted to test this business model? Could it conduct the test in a

¹⁴ Renewed Motion For Declaratory Ruling Or For Waiver For The Purpose Of Conducting A Market Test Of Consumer Demand For Lifeline Service Offerings, WC Docket No. 17-287, WC Docket No. 11-42, WC Docket No. 09-197, (July 25, 2018), <https://ecfsapi.fcc.gov/file/1072596869225/TracFone%20-%20Renewed%20Motion%20for%20Declaratory%20Ruling%20or%20for%20Waiver%20for%20the%20Purpose%20of%20Conducting%20Market%20Test%20sent%207-25-18.pdf>, (“TracFone Motion”) at 5.

¹⁵ *Id.*

shorter time period? Will it continue to provide a fully-compliant service to customers while testing the units model? Will the units-based business model be deployed only in certain markets or will it be across TracFone's entire footprint? How long will it take TracFone to produce its report, and will it be made public? Would it oppose the FCC granting a similar waiver to any company willing to conduct tests meeting the same criteria TracFone outlined? And last, given how inexpensive it is to provide voice minutes, why is one unit worth only one voice minute rather than more?¹⁶

Should TracFone answer these questions to the public's and the FCC's satisfaction, it would be reasonable for the FCC to allow a limited-time market test. The benefits of such a flexible plan could be beneficial to consumers, especially those that want to continue using voice service but where Lifeline-supported voice options are insufficient.

Thus, TracFone should provide more information regarding its proposal and only then should the FCC make a decision on whether to grant the requested relief.

IV. NaLA's pause and study proposal would only be appropriate if certain conditions are met.

In the record, NaLA argues that the FCC "should at least suspend any future increases to [the minimum standards] until it completes the State of the Lifeline Marketplace report, which the Commission is required to do by June 30, 2021."¹⁷ This pause and study option could be beneficial if it meets three conditions.

First, the delay should be time limited, preferably nine months or shorter. This cabined approach should give providers sufficient time to determine whether, to avoid exiting the market,

¹⁶ The largest wireless carriers provide *unlimited* voice minutes and texting while limiting data, meaning providing voice minutes is likely very inexpensive. Joshua Sherman, *Your Wireless Carriers Are Doing Better, and We Have the Numbers to Prove it*, Digital Trends (Apr. 29, 2017), <https://www.digitaltrends.com/mobile/your-wireless-carrier-is-gouging-you-and-we-have-the-numbers-to-prove-it>.

¹⁷ Comments of National Lifeline Association at 7, Dkt. No. 11-42 (Aug. 30, 2018).

they need to offer a “units-based” plan or other approach to meet the new minimum standards. It also has the benefit of ensuring that the waiver does not perpetuate longer than is necessary to make that determination, which would harm Lifeline subscribers for no reason. Providers could always seek more time in the event that nine months is not long enough to make that determination, but nine months is by design a generous time frame.

Second, carriers should submit robust economic impact studies that are publicly available.¹⁸ If the FCC decides to pause minimum standard increases for any amount of time to allow providers to experiment with different business models, it should require that those providers provide publicly-available information about those experiments to help determine whether further minimum standard changes are necessary.

Third, resellers should provide data about the wholesale rates they pay for network access. This information is vital in helping the public and the FCC determine whether minimum standards, and the applicable business models, are sustainable and to determine whether the FCC should make regulatory changes to help ensure the sustainability of the Lifeline program.

V. Conclusion

The FCC should reject the NTCA Petition and should consider granting the TracFone Motion only if TracFone provides more information about its plans. Similarly, the FCC should consider a pause and study approach only if certain conditions are met.

¹⁸ At the very least, the reports should be available to advocates and researchers.