

November 9, 2017

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: WC Docket No. 17-287
WC Docket No. 11-42
WC Docket No. 09-197
NOTICE OF EX PARTE PRESENTATION**

Dear Ms. Dortch:

On November 7, 2017, Josh Finestone, Vice President of Legislative Affairs, of Navigators Global, Mark Rubin, Senior Executive, Government Relations, TracFone Wireless, Inc. (“TracFone”), David Avila, Associate Vice President, TracFone, and undersigned counsel for TracFone, met with Nicholas Degani, Senior Counsel to Chairman Ajit Pai, and with Dr. Jay Schwarz, Wireline Advisor to Chairman Pai. Mr. Rubin, Mr. Avila, Nancy Victory of DLA Piper, LLC, and undersigned counsel, also met that day with Commissioner Brendan Carr, and with Jamie Susskind, Chief of Staff to Commissioner Carr. On November 8, 2017, Mr. Rubin, Mr. Avila, Ms. Victory, Charles Shipp of SC Partners, LLC, and undersigned counsel met with Commissioner Mike O’Rielly and with Amy Bender, Legal Advisor to Commissioner O’Rielly.

During these meetings, we discussed several issues regarding the Lifeline program, most importantly, the proposal to eliminate participation in Lifeline by non-facilities-based Eligible Telecommunications Carriers (“ETCs”). This proposal is included in the draft Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry in the above-captioned dockets, released October 25, 2017 and scheduled to be considered at the November 16, 2017 Commission meeting (“Draft Lifeline Item”). During the meetings, we also discussed TracFone’s pending emergency petition for interim waiver of the Lifeline minimum service standards codified at 47 C.F.R. § 54.408(b) to enable TracFone to conduct a market test of its “units” plan,¹ and retention of a 60-day port freeze rule for all Lifeline services. We provided each attendee with a presentation document which summarized the positions discussed. A copy of that document is enclosed as Attachment A.

The primary focus of our presentation in these meetings concerned the Commission’s proposal in the Draft Lifeline Item to revise its rules to limit participation in the Lifeline program to ETCs who provide service using their own facilities. This proposal would exclude from the

¹ TracFone Wireless, Emergency Petition for Interim Waiver or In the Alternative, to Conduct Market Test, WC Docket Nos. 09-197, 10-90, and 11-42 (filed Nov. 3, 2017).

Lifeline program all ETCs who provide service on a resale basis, including TracFone. Currently, more than 75 percent of Lifeline consumers receive services provided by non-facilities-based ETCs. Accordingly, adoption of the reseller exclusion proposal would have the effect of disrupting Lifeline services currently received by almost three-quarters of low-income Lifeline customers. Many non-facilities-based providers, like TracFone, have focused on delivering innovative, high quality services to low-income Lifeline-eligible households. The fact that the vast majority of Lifeline households have chosen to enroll in those providers' programs demonstrates the broad consumer preference for such services.

Elimination of all non-facilities-based providers from Lifeline would leave few choices for Lifeline customers, eliminating competition in the provision of services – and the benefits therefrom – that non-Lifeline customers today routinely enjoy. Exclusion of resellers would limit Lifeline consumers' choices to facilities-based wireless Lifeline providers (of which there are very few) and wireline local exchange carriers whose services are rarely chosen by Lifeline consumers. As discussed during the meetings, several major wireline telephone companies have succeeded in being relieved of their obligation to provide Lifeline service and are exiting that market. The proposed reseller exclusion would thus directly harm the approximately 8 million currently-enrolled Lifeline households, which include single mothers, armed services veterans, the disabled, and the elderly.² Such an outcome is not in the public interest or consistent with the statutory goals of the Lifeline program. Further, imposing a facilities-based requirement for participation in Lifeline is directly contrary to Section 10 of the Communications Act (47 U.S.C. § 160) which requires that the Commission forbear from application and enforcement of the facilities-based requirement in Section 214(e)(1) (47 U.S.C. § 214(e)(1)) once the Commission has determined (as it has) that all three prongs of the statutory forbearance test have been met.³ Finally, such a drastic and undeveloped idea as elimination of an entire category of providers should be considered, if at all, in the context of the notice of inquiry phase of the proceedings, not in the rulemaking phase.

The Commission's stated reason for proposing to exclude non-facilities-based providers from the program is to address waste, fraud and abuse in the Lifeline program. However, there is no basis upon which to conclude either that all Lifeline fraud has been caused by wireless resellers or that all wireless resale Lifeline providers are engaged in fraudulent conduct. Accordingly, the proposal is definitely NOT the appropriate one to address the Commission's concerns regarding program fraud. Instead, the Commission should be looking at other alternatives, including conduct-based requirements that would be applicable to all Lifeline

² The severe impact of this proposal was recently noted in comments filed by the National Association of State Consumer Advocates ("NASUCA"). In comments filed on November 8, 2017 in these proceedings, NASUCA stated that "[t]he elimination of non-facilities-based service would thus gut the Lifeline program and effectively end its provision of critical communication services to millions of low-income households." (NASUCA Comments in WC Docket Nos. 17-287, 11-42, and 09-195, at 2).

³ For similar reasons, the conclusion in the draft item limiting enhanced support on tribal lands to just facilities-based providers should not be adopted.

providers. Each provider's compliance with those requirements could be applied annually or every two years to maintain a carrier's eligibility for the program.⁴ For the foregoing reasons, TracFone urges the Commission to remove the facilities-based eligibility proposal from the item (or, as suggested above, to remove it to the notice of inquiry portion). Alternatively, at a minimum, the Commission should specifically seek comment on other alternatives better targeted at addressing waste, fraud and abuse, such as recurring conduct-based eligibility requirements which would be applicable to all providers.⁵ Attached to this letter as Attachment B is a list of rule proposals which would, if adopted, prevent waste, fraud and abuse of Universal Service Fund resources in connection with the Lifeline program. For example, the Commission could require that existing ETCs that have had a certain level of Payment Quality Assurance (PQA) failures (more than 10%) and/or audit issues (more than 5% money returned) in any one year will be suspended for a minimum of one year and until the provider demonstrates its inefficiencies have been corrected. Other suggested rules are set forth in Attachment B. TracFone respectfully requests that the Commission include these proposed rules in the notice of proposed rulemaking and that it invite comment on those rule proposals.

Pursuant to Section 1.1206(b), this letter is being filed electronically. If there are questions, please communicate with undersigned counsel for TracFone.

Sincerely,



Mitchell F. Brecher

Enclosure

cc: Hon. Brendan Carr
Ms. Jamie Susskind
Hon. Michael O'Rielly
Ms. Amy Bender
Mr. Nicholas Degani
Dr. Jay Schwarz, Ph.D

⁴ As TracFone has advocated before, the best way for the Commission to prevent waste, fraud and abuse is to promulgate and enforce meaningful fraud prevention rules which would be applicable to all Lifeline providers, and to hold all Lifeline providers accountable and subject to sanctions and loss of eligibility for violation of those fraud prevention rules. Some such fraud prevention rule proposals for the Commission's consideration are attached as Attachment B.

⁵ Doing so would also have the benefit of helping to keep the Commission's options open and consistent with Administrative Procedure Act requirements should it determine to adopt eligibility requirements better suited at addressing waste, fraud and abuse that are raised during the proceeding.

Attachment A

TracFone Wireless, Inc.

Presentation to FCC

WC Docket No. 17-287

WC Docket No. 11-42

WC Docket No. 09-197

November 2017



TracFone's Units Proposal

FCC Should Promptly Grant Interim Waiver

- Consumer Benefit – 1,000 units per month
 - Each unit = 1 minute of voice or 1 MB of mobile broadband
- Allows consumers to control how to use their Lifeline support.
- Would enable TracFone to conduct a market test while FCC considers Units plan in rulemaking.
- Prompt action is needed to meet the Dec. 1, 2017 minimum standards increase date.

FCC Should allow 60 day port freeze for all Lifeline services

- Agrees that 12 month port freezes deny consumer choice and are inappropriate.
- 60 day port freeze is consistent with current USAC practice.
- A reasonable approach to accommodate consumer choice and preventing some consumers from “gaming” the system as has happened in California.
- Any Lifeline customer whose service does not work reliably at home should be free to switch providers at any time.

Proposal to Limit Lifeline to “facilities-based” providers would violate the Communications Act and is bad policy

- Purpose for Lifeline is affordable service (not deployment of networks).
- Low-income households have embraced the innovative offerings of wireless providers.
 - Approximately 75% of Lifeline customers have chosen non-facilities-based providers.
 - 86% of Lifeline customers have chosen wireless services (demonstrating an overwhelming consumer preference for wireless Lifeline).

Proposal Should Be Deferred to Notice of Inquiry Phase

- The way to stop program fraud is to take steps to prevent program fraud (not eliminate an entire category of providers who are preferred by about 75% of consumers).
- Before removing wireless resellers from Lifeline, the FCC should consider the conduct of all providers of Lifeline service -- facilities-based and resellers - regarding universal service:
 - Which providers have been subject to enforcement actions based on fraudulent conduct in connection with Universal Service Fund-supported programs?
 - Which providers have engaged in conduct which has resulted in waste, fraud and abuse of USF resources which have not been subject to enforcement actions?

Proposal Should be Deferred to Notice of Inquiry phase [cont.]

- Whether the proposal to exclude qualified ETCs from the program complies with Section 10 of the Communications Act (47 USC § 160)?
- What impact will such exclusion have on the market for Lifeline services?
- What economic rationale, if any, is there for such a limitation?
- What will be the consumer impact of having only one “facilities-based” wireless Lifeline option (Sprint/Assurance) in much of the nation?
- Which sections of the Communications Act (if any) justify converting Lifeline from a low-income assistance program into another high cost network deployment program?
- What will be the impact of removal of resale Lifeline providers on adoption of broadband by low-income households?

Attachment B

FRAUD PREVENTION RULES FOR THE COMMISSION'S CONSIDERATION

- a. Prohibit in-person handset distribution. As long ago as 2013, TracFone recommended that the Commission prohibit Lifeline providers from handing out wireless devices in connection with their Lifeline offerings on a real time basis. The spectacle of sales agents literally handing out phones on street corners, outside government assistance offices, in front of churches, out of car trunks, etc. has been the source of many news reports critical of the program. Not only is this practice difficult to police and conducive to fraud it has tarnished the perception of an important program which has been invaluable to low-income families and which is helping to bridge the digital divide. Carefully tailored exceptions to such a prohibition could be crafted for social service agencies and groups (versed in program rules) who are working on group sign-up events.
- b. Prohibit Incentive-based Agent compensation. In the Draft Lifeline Item (at ¶ 86), the Commission requests comment on a proposal to prohibit incentive-based compensation (*i.e.*, agent commissions) on Lifeline enrollments and to prohibit persons responsible for verifying applicant eligibility for Lifeline from being compensated based on commissions. TracFone has made similar proposals in the past and is gratified that the Commission has included it in the Draft Lifeline Item. So long as persons who solicit customers for enrollment and those who verify applicant eligibility have economic incentives to enroll Lifeline customers or to approve applicants, some will look for ways to maximize enrollments (and thereby maximize their own compensation) by seeking ways to avoid the Lifeline eligibility verification processes. By prohibiting incentive-based agent compensation either at the solicitation stage or the eligibility verification process stage, the Commission could remove much of the incentives which have led to attempts to defraud the program.
- c. Implement measures to ensure agent accountability. Those measures could include requiring agents to register with USAC, as Chairman Pai has suggested to USAC in his July 27, 2017 letter; lock agents out of the NLAD after an agent has submitted too many invalid subscriber entry attempts; refer to the Enforcement Bureau for possible enforcement action those agents who have improperly enrolled or re-certified Lifeline consumers or who have engaged in program violations. In addition, TracFone proposes that the Commission require all Lifeline providers to develop procedures to ensure that their agents soliciting customers and their agents and others involved in the eligibility verification processes are completely separated from each other.
- d. Improve Enforcement of the One-per-Household Rule. In 2012, the Commission established a one-per-household rule which allowed for enrollment of multiple persons claiming residence at the same address, provided that they completed a form called the Independent Household (IEH) Worksheet in a manner which indicated that the persons were not part of the same household as other Lifeline enrollees claiming the same address. Shortly after development of the IEH Worksheet, TracFone concluded that the

worksheet was susceptible to abuse since there was no way for ETCs to verify whether applicant responses to the worksheet were correct. TracFone filed several ex parte letters asking the Commission to address this shortcoming. The multiple address problem is especially difficult to manage in multi-person residence situations such as assisted living facilities, retirement centers, homeless shelters, etc. As a way to allow multiple persons residing at such addresses to enroll in Lifeline while preventing fraud, TracFone has suggested that Lifeline applications from persons residing at such multi-person residences be accompanied by certifications from facility managers (such as the director of a homeless shelter or a retirement facility) that the applicant resides at that address and that the applicant is not part of the same household as any other resident already receiving Lifeline-supported service. While this process would create some additional steps to be taken by the ETC and by the operator of the residential facility, it would be much more effective and detecting and preventing fraudulent enrollment than the currently-used IEH Worksheet.

- e. Enhanced Requirements to Ensure Carrier Accountability. The Commission may lawfully impose uniform standards of conduct on all ETCs involved in the Lifeline program. For example, all ETCs are subject to periodic Payment Quality Assurance (PQA) reviews by USAC as well as periodic audits. If PQA failures exceed a specified level (e.g., 10 percent) or if audits result in return of more than five percent of disbursements for any audit period, then the provider should be required to demonstrate that the deficiencies which caused those results have been rectified. ETCs unable to demonstrate those corrections would be suspended from the program. Once an ETC has been suspended based upon PQA or audit results, it should be required to post a performance bond based on a specified percentage of its expected annual revenues from the Lifeline Program.