

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

In the Matter of	)	
	)	
Lifeline and Link Up Reform And Modernization	)	WC Docket No. 11-42
	)	
Lifeline and Link Up	)	WC Docket No. 03-109
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Advancing Broadband Availability Through Digital Literacy Training	)	WC Docket No. 12-23
	)	

**MOTION REQUESTING ACCEPTANCE AND CONSIDERATION OF SUPPLEMENT  
TO PETITION FOR RECONSIDERATION AND EMERGENCY PETITION TO  
REQUIRE RETENTION OF PROGRAM-BASED ELIGIBILITY DOCUMENTATION**

TracFone Wireless, Inc. (“TracFone”), by its attorneys, pursuant to Section 1.429(d) of the Commission’s rules (47 C.F.R. § 1.429(d)), respectfully requests the Commission to accept and consider its Supplement to Petition for Reconsideration and Emergency Petition to Require Retention of Program-Based Eligibility Documentation (“Supplement and Emergency Petition”), previously filed on May 30, 2012.<sup>1</sup> In the Supplement and Emergency Petition, TracFone asks the Commission to require all Eligible Telecommunications Carriers (“ETCs”) that view documentation of program-based Lifeline eligibility, as required by Section 54.410(c)(1)(i)(B) of the Commission’s rules (47 C.F.R. § 54.410(c)(1)(i)(B)), to retain such documentation for a period of at least three years. As explained in this Motion, the rule proposed in TracFone’s Supplement and Emergency Petition is a logical outgrowth of the issues raised in the Notice of

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<sup>1</sup> Section 1.429(d) of the Commission’s rules provides that “[n]o supplement to a petition for reconsideration ... will be considered except upon leave granted pursuant to a separate pleading stating the grounds for acceptance of the supplement.”

Proposed Rulemaking precipitating the Lifeline Reform Order.<sup>2</sup> Moreover, the Commission’s consideration of TracFone’s Supplement and Emergency Petition would not prejudice any interested party. As such, the Commission should accept and consider the Supplement and Emergency Petition.

## **BACKGROUND**

In 2011, the Commission commenced the process of comprehensively reforming the Universal Service Fund’s Lifeline program by issuing the Lifeline Reform NPRM. One of the purposes of the reforms proposed in the Lifeline Reform NPRM was to “significantly bolster protections against waste, fraud, and abuse.”<sup>3</sup> Among the reforms proposed by the Commission was a modification to the initial certification procedures used by ETCs to ensure that Lifeline applicants are eligible for Lifeline benefits by virtue of their participation in a qualifying low income assistance program. Specifically, the Commission proposed the following: “We propose to amend section 54.409(d)(1) to eliminate the self-certification option and require all consumers in all states to present documents to establish eligibility for the program.”<sup>4</sup> While the Commission proposed that consumers “present” documentation of eligibility, it did not include a specific proposal regarding whether ETCs should be permitted or required to retain a copy of the documentation after it is presented to them.

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<sup>2</sup> *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 *et al.*, Notice of Proposed Rulemaking, FCC 11-32 (2011) (“Lifeline Reform NPRM”).

<sup>3</sup> *Id.*, ¶ 1.

<sup>4</sup> *Id.*, ¶ 170. At the time the Commission issued the Lifeline Reform NPRM, Section 54.409(d)(1) of the Commission’s rules permitted consumers to prove eligibility for Lifeline by self-certifying that they were eligible for Lifeline support based on participation in certain federal programs or by providing documentation showing that they met the income threshold requirements for obtaining Lifeline benefits. The requirement that ETCs review documentation of Lifeline eligibility is commonly referred to as full certification.

In the Lifeline Reform Order, the Commission adopted numerous reforms to the Lifeline program.<sup>5</sup> Those reforms included a requirement that in states where a state Lifeline administrator or other state agency is not responsible for the initial determination of Lifeline eligibility and an ETC does not have access to a database containing information about a prospective subscriber's income-based or program-based eligibility, an ETC must "review documentation that establishes that the prospective subscriber meets the income-eligibility [or program-eligibility] criteria."<sup>6</sup> The Commission's amended rules also provided that ETCs must maintain a record that they reviewed documentation provided by consumers, but may not keep copies of the documentation that they claim to have reviewed.<sup>7</sup>

On April 2, 2012, TracFone timely filed a Petition for Reconsideration and Clarification ("Petition for Reconsideration"), in which it asked the Commission to reconsider the full certification requirement because it is burdensome to Lifeline applicants and is not an effective way to prevent enrollment in Lifeline programs by persons who are not eligible for Lifeline support. The effective date of the full certification rule was June 1, 2012. As of the end of May 2012, the Commission had not issued an order addressing TracFone's Petition for Reconsideration. Recognizing that the effective date of the full certification requirement was imminent, TracFone filed the Supplement and Emergency Petition on May 30, 2012, to alert the Commission that a full certification requirement, without a document retention requirement,

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<sup>5</sup> See *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656 (2012) ("Lifeline Reform Order").

<sup>6</sup> 47 C.F.R. § 54.410(c)(1)(i)(B).

<sup>7</sup> See 47 C.F.R. § 54.410(c)(1)(iii) (ETCs must "keep and maintain accurate records detailing the ... documentation a subscriber provided to demonstrate his or her eligibility for Lifeline"); 47 C.F.R. § 54.410(c)(1)(ii) (ETCs "[m]ust not retain copies of the documentation of a subscriber's program-based eligibility for Lifeline services").

would create an opportunity for unscrupulous ETCs to cause waste, fraud, and abuse of Universal Service Fund resources. In the Supplement and Emergency Petition, TracFone asked the Commission to require all ETCs that receive Lifeline eligibility documentation to retain the documentation for not less than three years.<sup>8</sup> As explained in detail in that filing, without a document retention requirement, ETCs would be able to claim that they reviewed documentation without any auditable evidence that the documentation was actually produced by consumers and reviewed by ETCs.

On July 9, 2012, the Commission's Wireline Competition Bureau issued a Public Notice seeking comment on TracFone's petition to require document retention.<sup>9</sup> As explained in this Motion, TracFone's proposal is a logical outgrowth of the full certification rule proposed by the Commission in the Lifeline Reform NPRM. Furthermore, all interested parties had an opportunity to comment on TracFone's document retention proposal. As such, there are valid grounds for the Commission to accept and consider TracFone's Supplement and Emergency Petition.

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<sup>8</sup> TracFone has also filed a petition seeking waiver of Commission rules 54.410(b)(1)(ii) and 54.410(c)(1)(ii) (47 C.F.R. § 54.410(b)(1)(ii), (c)(1)(ii)), which prohibit ETCs from retaining copies of documents proving an applicant's Lifeline eligibility. *See* Petition for Waiver of Lifeline Rules Prohibiting Retention of Income-Based and Program-Based Eligibility Documentation, WC Docket No. 12-23 *et al.*, filed January 22, 2014 ("Petition for Waiver"). The Petition for Waiver remains pending.

<sup>9</sup> *Public Notice - Wireline Competition Bureau Seeks Comments on TracFone Petition to Require Retention of Lifeline Program-Based Eligibility Documentation*, WC Docket No. 12-23 *et al.*, DA 12-1095, released July 9, 2012.

**THE SUPPLEMENT AND EMERGENCY PETITION PROPOSES A RULE  
THAT IS A LOGICAL OUTGROWTH OF THE FULL CERTIFICATION  
RULE AS INITIALLY PROPOSED BY THE COMMISSION**

The Administrative Procedure Act (“APA”) “requires an agency conducting notice-and-comment rulemaking to publish in its notice of proposed rulemaking ‘either the terms or substance of the proposed rule or a description of the subjects and issues involved.’”<sup>10</sup> To comply with the APA, a final rule adopted by an agency does not need to be the precise rule proposed in the relevant NPRM. However, the final rule must be “a logical outgrowth of its notice.”<sup>11</sup> In other words, the logical outgrowth doctrine asks if the “substance of an agency’s final rule strays too far from the description contained in the initial notice...”<sup>12</sup> The purpose of the logical outgrowth doctrine is to ensure that interested parties had fair notice of the final rule such that they could have anticipated that the substance of the rule was a possibility.<sup>13</sup> The document retention requirement proposed by TracFone is a logical outgrowth of the full certification requirement proposed in the Lifeline Reform NPRM, and as such, may be properly considered and adopted by the Commission.

In the Lifeline Reform NPRM, the Commission proposed to “eliminate the self-certification option and require all consumers in all states to present documents to establish eligibility for the program.”<sup>14</sup> As noted above, the Commission proposed that consumers “present” eligibility documentation, but did not include any proposal regarding whether ETCs

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<sup>10</sup> *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007) (quoting 5 U.S.C. § 553(b)(3)).

<sup>11</sup> *Agape Church, Inc. v. FCC*, 738 F.3d 397, 411 (D.C. Cir. 2013) (quoting *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006) (quotation omitted)).

<sup>12</sup> *Council Tree Commc'ns, Inc. v. FCC*, 619 F.3d 235, 249 (3d Cir. 2010).

<sup>13</sup> *See id.* (citing *Int'l Union, United Mine Workers v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259-60 (D.C. Cir 2005)).

<sup>14</sup> Lifeline Reform NPRM, ¶ 170.

must return the documentation to consumers or maintain a copy of the documentation. However, when the Commission adopted the full certification rule in the Lifeline Reform Order, it clarified that ETCs must review eligibility documentation and maintain a record that they reviewed documentation, but may not retain copies of the documentation. In support of the Commission's decision to prohibit document retention, the Commission cited, as an example, comments requesting that ETCs "not be required to retain documents containing potentially sensitive information."<sup>15</sup> Thus, commenters anticipated that a requirement governing the ETCs' handling of the documentation after it was presented by consumers was an issue that could be addressed as part of the rule governing certification of Lifeline eligibility.

TracFone's document retention proposal set forth in the Supplement and Emergency Petition, like the existing Commission rule prohibiting retention of eligibility documentation, is a logical outgrowth of the full certification proposal included in the Lifeline Reform NPRM. Both the Commission's current rule and TracFone's proposed rule address the manner in which ETCs must treat documentation presented by consumers. Moreover, TracFone's document retention proposal is an issue that was subject to public comment. The Commission issued a Public Notice seeking comment on TracFone's Supplement and Emergency Petition, and with the exception of one entity, all commenters supported the document retention proposal. Those commenters included the nation's leading providers of Lifeline service.<sup>16</sup> As a result, interested parties would not be prejudiced by the Commission's consideration of the Supplement and Emergency Petition

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<sup>15</sup> Lifeline Reform Order, ¶ 101 n.275.

<sup>16</sup> The ETCs filing comments in support of TracFone's document retention proposal included the following: i-wireless, LLC; Nexus Communications, Inc.; NTCH, Inc.; Sprint Nextel Corp.; and a coalition of current and prospective ETCs comprised of Absolute Home Phones, Inc., Absolute Home Phones, Inc. dba Absolute Mobile, Absolute Mobile, Inc., Blue Jay Wireless, LLC, Boomerang Wireless, LLC, Easy Telephone Services Company dba EasyWireless, Global Connection Inc. of America, TAG Mobile, LLC and Telrite Corporation.

because they had fair notice of TracFone’s proposed document retention rule, anticipated that the Commission could adopt the rule, and had an opportunity to file comments.<sup>17</sup> Accordingly, there are ample grounds for the Commission to accept and consider TracFone’s document retention proposal.

Finally, TracFone acknowledges that Lifeline eligibility documentation contains individuals’ personal and private information that must be securely protected from unauthorized access and public disclosure. As evidenced by a notice of apparent liability recently issued against TerraCom, Inc. (“TerraCom”) and YourTel America, Inc. (“YourTel”), the Commission’s interest in protecting consumers from violations of their privacy rights is paramount.<sup>18</sup> In the TerraCom NAL, the Commission proposes to fine TerraCom and YourTel \$10 million for several violations of consumers’ privacy rights, including storing consumers’ personal information, such as names, addresses, and social security numbers, on an unsecured Internet server that could be accessed by the public. Such conduct is inexcusable and illegal and should be addressed through an enforcement proceeding. However, certain ETCs’ violations of their customers’ privacy rights should not guide the Commission’s consideration of TracFone’s document retention proposal.

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<sup>17</sup> See *Health Insurance Association of America, Inc., v. Shalala*, 23 F.3d 412, 421 (D.C. Cir. 1994) (adequate notice is provided if “the final rule is a ‘logical outgrowth’ of the proposals on which the public had the opportunity to comment”); see also *Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000) (“the logical outgrowth test normally is applied to consider whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule.”).

<sup>18</sup> See *TerraCom, Inc. and YourTel America, Inc.*, Notice of Apparent Liability for Forfeiture, File No. EB-TCD-13-00009175, October 24, 2014 (“TerraCom NAL”).

The personal information included in documents proving Lifeline eligibility is similar to the personal information disclosed on applications for Lifeline benefits. All Lifeline applicants must provide their name, address, date of birth, and last four digits of their social security number.<sup>19</sup> ETCs have a statutory duty to protect consumers' personal information whether it is found on a Lifeline application or in eligibility documentation. As a means to ensure that eligibility documentation is protected from disclosure, TracFone recommends that the Commission require all ETCs to implement safeguards to address privacy concerns regarding retention of consumers' eligibility documents. For example, ETCs can be required to encrypt copies of documents, store them in secure storage media separate from other databases, limit access to the documents, and obtain advance consent from consumers on Lifeline application forms. These proposed safeguards will guarantee that ETCs are aware of and will comply with their existing legal duty to protect consumers' personal information from unauthorized or public disclosure.

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<sup>19</sup> See 47 C.F.R. § 54.410(d).

**CONCLUSION**

TracFone respectfully requests that the Commission grant TracFone’s Motion and promptly accept and consider its Supplement and Emergency Petition to require ETCs to retain copies of documentation of Lifeline eligibility. TracFone’s proposed rule, if adopted by the Commission, is a logical outgrowth of the Commission’s full certification rule as proposed in the Lifeline Reform NPRM. Moreover, all interested parties had a fair opportunity to comment on TracFone’s document retention proposal, so the Commission’s amendment of its rules to require retention of eligibility documentation would not prejudice any interested parties.

Respectfully submitted,

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