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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

**JUN - 8 2004**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Federal-State Joint Board on Universal Service )  
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CC Docket No. 96-45

**PETITION FOR FORBEARANCE**

**TRACFONE WIRELESS, INC.**

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June 8, 2004

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## SUMMARY

TracFone Wireless, Inc. ("TracFone"), a reseller of commercial radio services ("CMRS") throughout the United States, has applied to the Commission for designation as an eligible telecommunications carrier ("ETC"). In this petition for forbearance, TracFone is asking the Commission to forbear from applying the requirement in Section 214(e)(1)(a) of the Communications Act that a common carrier designated as an ETC shall offer services supported by the Federal Universal Service support mechanisms using either its own facilities or a combination of its own facilities and another carrier's services.

Section 10 of the Act directs the Commission to forbear from applying any regulation or any provision to a telecommunications carrier or service, if the Commission determines that three conditions are present. For the following reasons, these conditions are satisfied. First, enforcement of such regulation or provision of the Act is not necessary to ensure that "charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier...are just and reasonable and are not unjustly or unreasonably discriminatory." As a CMRS reseller, TracFone will continually be subject to competition from a multiplicity of providers, including the underlying CMRS carriers from whom it purchases services on a wholesale basis. This constant competition ensures that TracFone will provide services at rates which are just and reasonable and which are not unreasonably discriminatory.

Second, enforcement of the facilities-based provision is not necessary for the protection of consumers. TracFone's request for forbearance will not reduce the amount of funding available for universal service programs, and therefore, will not take any benefits of the universal service programs away from consumers. In addition, those consumers who currently receive USF-supported services will continue to receive the same universal service benefits even if TracFone's petition for forbearance is granted.

Third, forbearance from applying the facilities-based requirement is consistent with the public interest. The Commission's 1997 decision that it is neither in the public interest nor would it promote competitive market conditions to exercise forbearance authority concerning the facilities requirement for ETC designation under Section 214(e)(1)(a) of the Act has no relevance to the resale of CMRS service. TracFone purchases wireless service from underlying carriers who, for the most part, do not receive support from the USF. Those few underlying carriers who are ETCs are not subject to rate regulation, and therefore, are not required to reflect their receipt of universal service support in the wholesale rates which are charged to TracFone. Rather, the rates charged by TracFone's underlying vendors are the result of arm's length negotiations based on market conditions, and do not reflect receipt of universal service support. Overall, forbearance from enforcing the facilities requirement against pure CMRS resellers will achieve the Commission's goal of establishing competitively neutral universal service support mechanisms and rules. In particular, forbearance will promote competition among providers of services supported by the universal service program by encouraging CMRS resellers to enter the market for such services and to offer services to consumers in competition with those offered by wireline carriers, including ILECs.

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**PETITION FOR FORBEARANCE**

TracFone Wireless, Inc. (“TracFone”), by its attorneys, pursuant to Section 10 of the Communications Act of 1934 (“Communications Act” or “Act”), as amended,<sup>1</sup> hereby petitions the Commission to forbear from applying the requirement in Section 214(e)(1)(A) of the Act<sup>2</sup> that a common carrier designated as an eligible telecommunications carrier (“ETC”) shall offer services supported by the Federal universal service support mechanisms using either its own facilities or a combination of its own facilities and another carrier’s services.<sup>3</sup>

**INTRODUCTION**

Pursuant to the Communications Act, the Commission established the Universal Service Fund (“USF”) to ensure affordable telecommunications service to all consumers. The USF is funded by contributions from providers of interstate telecommunications services and provides funds to carriers for several universal service support mechanisms, including programs for schools, libraries, and rural health care providers, as well as for high-cost, rural, and insular

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<sup>1</sup> 47 U.S.C. § 160.

<sup>2</sup> 47 U.S.C. § 214(e)(1)(A).

<sup>3</sup> Concurrent with the filing of this Petition for Forbearance, TracFone has filed a Petition for Designation as an Eligible Telecommunications Carrier in the State of New York (“NY ETC Petition”). This Petition for Forbearance constitutes the Petition referenced on page three of the NY ETC Petition. TracFone plans to seek ETC status in additional states. Accordingly, this Petition is applicable to all subsequent ETC petitions filed by TracFone that relate to other states.

areas, and low-income consumers.<sup>4</sup> Section 214(e) of the Act provides that a common carrier designated as an ETC shall be eligible to receive universal service support in accordance with Section 254 of the Act. Section 214(e)(1)(A) further provides that a carrier designated as an ETC shall offer services supported by universal service support mechanisms by using either its own facilities or a combination of its own facilities and resale of another carrier's services.

In the Commission's 1997 Report and Order implementing Section 254 of the Communications Act and establishing a universal service support system, the Commission noted that it was appropriate for Congress to deny ETC status to carriers that provide service solely by reselling the services of other carriers "because pure resellers receive the benefit of universal service support by purchasing wholesale services at a price that already includes the universal service support payment received by the incumbent provider."<sup>5</sup> The Commission further stated that if pure resellers could be designated as ETCs, and therefore, be eligible to receive universal service support payments, they "would receive a double recovery of universal support payment because they would recover the support incorporated into the wholesale price of the resold services in addition to receiving universal service support directly from federal universal service mechanisms."<sup>6</sup> In the USF Report and Order the Commission considered whether to forbear from applying the facilities requirement of Section 214(e)(1)(A) to pure resellers, and determined that it would not be in the public interest to allow resellers to receive a double recovery.<sup>7</sup> However, as explained *infra*, the Commission's 1997 premise that all resold services receive universal service support is not correct. As will be described in greater detail in Section

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<sup>4</sup> See 47 U.S.C. § 254.

<sup>5</sup> Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, ¶ 161 (1997) ("USF Report and Order"); see *id.* ¶ 166.

<sup>6</sup> *Id.* ¶ 179.

<sup>7</sup> *Id.*

III of this petition, Commercial Mobile Radio Services (CMRS) purchased by TracFone for resale receive no such support.

TracFone is the nation's leading provider of prepaid wireless telecommunications services. It is a reseller of CMRS services throughout the United States. TracFone provides service through a "virtual network" consisting of services obtained from more than thirty licensed operators of wireless networks. TracFone's arrangements with these underlying wireless carriers enable it to offer services wherever any of those providers offer service in the United States. These arrangements have enabled TracFone to offer wireless telecommunications service in virtually any U.S. market where wireless service is available, including offshore markets such as Alaska, Hawaii, Puerto Rico and the U.S. Virgin Islands. Moreover, TracFone's rates are the same everywhere. A TracFone customer in Creston (Ashe County), North Carolina pays the same per minute charge for service as a TracFone customer in New York City, Miami or Washington, DC, even though TracFone's cost of service varies widely, with the rates charged to it by smaller, independent CMRS vendors often considerably higher than the wholesale rates charged to TracFone by the major national CMRS providers.

Even without designation as an ETC, TracFone considers itself to be a universal service provider. Unlike traditional wireless carriers, TracFone customers are not required to enter into term contracts; they are not subject to penalties for early termination; they are not charged for "buckets" of minutes each month, irrespective of whether they actually use those minutes; they are not subject to credit checks or customer deposits. Instead, TracFone customers pay in advance only for service which they will use. The prices which are quoted to TracFone customers are the prices which those customers are charged for TracFone service with no extraneous surcharges or "pass through" charges added to customer bills. In fact, there are no customer bills. Because of the manner in which TracFone prices its service, TracFone service is widely used by lower income, lower volume consumers, including the elderly, students, the

economically disadvantaged, and transient users – those consumers who are intended to benefit from the federal universal service programs and to whom wireless services are otherwise not available or not affordable. Since TracFone is able to provide service on a resale basis throughout virtually the entire United States, TracFone is able to serve consumers in rural and high cost areas.

TracFone, through its resale agreements with its underlying carriers, has the ability to provide all services and functionalities supported by the universal service program, as detailed in Section 54.101(a) of the Commission's Rules (47 C.F.R. § 54.101(a)). Upon designation as an ETC, TracFone will provide all services and functions considered to be part of universal service to any customer requesting service within the designated service areas. Although TracFone has contributed to the USF with respect to all of its operations since 1997, absent the Commission's forbearance from application or enforcement of the Section 214(e)(1)(A)'s facilities requirement, TracFone is not eligible to receive payments from the USF, notwithstanding the facts that 1) TracFone provides service to consumers who are intended beneficiaries of the federal Universal Service Fund; 2) TracFone provides service in high cost, rural, and insular areas which are intended to receive universal service support; 3) TracFone provides and advertises the availability of all services supported by universal service support mechanisms; and 4) TracFone is and has been a contributor to the Universal Service Fund.

### **ARGUMENT**

Section 214(e)(1)(A) of the Communications Act requires that a common carrier designated as an eligible telecommunications carrier ("ETC") shall offer services supported by the Federal universal service support mechanisms using either its own facilities or a combination of its own facilities and another carrier's services. However, Section 10 of the Act directs the Commission to forbear from applying any regulation or any provision of the Act to a telecommunications carrier or telecommunications service, or classes of such carriers or services,

if the Commission determines that three conditions are present: (1) enforcement of such regulation or provision of the Act is not necessary to ensure that “charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier . . . are just and reasonable and are not unjustly or unreasonably discriminatory;” (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such regulation or provision is consistent with the public interest.<sup>8</sup> Section 10 further provides that forbearance is in the public interest if the Commission determines that forbearance from application of a statutory provision or a regulation promotes competition among providers of telecommunications services.<sup>9</sup> TracFone’s request that the Commission forbear from requiring TracFone to offer services supported by universal service support mechanisms by using, in part, its own facilities meets each of the three conditions in Section 10 and thus, the Commission should grant TracFone’s Petition for Forbearance.

**I. Enforcement of the Requirement That ETC Carriers Utilize Their Own Facilities Is Not Necessary to Ensure Rates that are Just and Reasonable and not Unreasonably Discriminatory.**

Enforcement of the requirement in Section 214(e)(1)(A) that carriers designated as ETCs provide service supported by the universal service support mechanisms, at least in part, by utilizing their own facilities is not necessary to ensure that the charges, practices, or classifications of telecommunications carriers are just and reasonable and not unjustly or unreasonably discriminatory. TracFone, as a CMRS reseller, will always be subject to competition from a multiplicity of providers, including its underlying CMRS carriers from whom it purchases service on a wholesale basis for resale. The existence of such competition ensures that TracFone will provide service at rates which are just and reasonable and which are not unreasonably discriminatory. Perhaps more importantly, TracFone offers services in competition

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<sup>8</sup> 47 U.S.C. § 160 (a)(1) - (3).

<sup>9</sup> 47 U.S.C. § 160 (b).

with carriers, including wireline carriers, who are ETCs and who therefore receive USF support. Market forces are far more likely to produce rates which are just and reasonable and which represent value to consumers if multiple providers in such markets have the opportunity to receive universal service support rather than if just one provider may receive such support.

Absent forbearance, those CMRS customers who obtain services from resellers, including TracFone's customers, could be subject to relatively higher rates than are customers of those telecommunications service providers which receive universal service support. Unlike CMRS resellers that provide service solely by reselling underlying carriers' services, CMRS resellers that utilize, in part, their own facilities to provide service, and facilities-based wireline carriers are eligible to receive universal service support payments. However, like carriers that utilize, in part, their own facilities to provide telecommunications services, CMRS resellers, such as TracFone, are required to make contributions to the USF. Thus, without forbearance, CMRS resellers that do not use their own facilities provide services to high-cost areas without the benefit of any payments from the USF, while competitors of such resellers are eligible to receive universal service support payments. As a result, CMRS resellers that do not meet the facilities-based requirement of Section 214(e)(1)(A) must recover from their customers the full cost of providing service to high-cost areas, as well as the cost of their Universal Service contributions. Therefore, customers of CMRS resellers located in high-cost areas may be subject to rates that are considered unjust or unreasonable when compared to rates charged to similarly situated customers by carriers that are eligible to receive universal service support payments to recover the cost of serving high-cost areas. Forbearance from application or enforcement of the requirement that ETCs utilize at least, in part, their own facilities, promotes the statutory criterion codified at Section 10(a)(1) of the Communications Act of ensuring just and reasonable and not unreasonably discriminatory rates.

**II. Consumers Will Not Be Harmed If TracFone Provides Services Supported by the Universal Service Program By Reselling the Services of Other Carriers.**

Application to TracFone of the requirement that ETCs utilize their own facilities to provide service is not necessary to protect consumers. A primary purpose of universal service is to ensure quality services to consumers in all regions of the United States at “just, reasonable, and affordable rates.”<sup>10</sup> TracFone’s request that the Commission forbear from applying the facilities requirement to it will not reduce the amount of funding available for universal service programs, and therefore, will not take any benefits of the universal service programs away from consumers. Moreover, those consumers who currently receive USF-supported services will continue to receive the same universal service benefits and will not be economically harmed if TracFone’s petition for forbearance is granted.

To determine the contribution factor to be applied to telecommunications carriers’ revenues, the Universal Service Administrative Company (“USAC”), the administrator of the USF, projects universal service program costs and expenses for the upcoming quarter that the Commission approves.<sup>11</sup> The Commission’s rules allow USAC to request authority from the Commission to borrow funds commercially, if the contributions received by the USAC in a quarter are insufficient to cover the universal service support payments and administrative costs.<sup>12</sup> Consumers are guaranteed that they will receive all the benefits of the universal service programs.

In addition, allowing CMRS resellers to become ETCs will benefit consumers in high cost areas and consumers with limited incomes because such consumers will have additional carriers from which to purchase basic telecommunications services, including wireless services. Indeed, the Federal-State Joint Board on Universal Service has stated that an applicant for ETC

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<sup>10</sup> 47 U.S.C. § 254(b).

<sup>11</sup> 47 C.F.R. § 54.709 (a).

<sup>12</sup> 47 C.F.R. § 54.709 (c).

designation that uses resale as part of its plan to serve all customers upon reasonable request demonstrates its capability and commitment to provide service.<sup>13</sup> This is no less true for a CMRS ETC applicant who uses resale to serve all of its customers. Thus, forbearance will actually serve the interests of consumers by facilitating the provision of service to all consumers who reasonably request service, promoting competition, and placing downward pricing pressure on all carriers serving those consumers. Finally, as noted in the preceding section, without forbearance, potential customers of TracFone's services located in high-cost areas will be harmed because TracFone will not have the opportunity to make available to those potential customers wireless services at rates made possible to Universal service support.

**III. Forbearance From Applying the Requirement that ETC Carriers Utilize Their Own Facilities Will Promote Competition Among Providers of Services Supported by the Universal Service Fund and Will Serve the Public Interest.**

Forbearance from applying the statutory requirement that ETC carriers utilize their own facilities will promote competition among providers of services supported by the universal service fund and will serve the public interest. In the USF Report and Order, the Commission considered whether to exercise its forbearance authority pursuant to Section 10 of the Communications Act to permit pure resellers to become eligible for universal service support. The Commission made no findings concerning the first two criteria for forbearance under Section 10 of the Act, *i.e.*, enforcement of the relevant provision is not necessary to ensure (1) that service is just and reasonable and not unjustly or unreasonably discriminatory and (2) that consumers will be protected.<sup>14</sup> However, the Commission concluded that "it is neither in the public interest nor would it promote competitive market conditions" to exercise its forbearance authority concerning the facilities requirement for ETC designation under Section 214(e)(1)(A)

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<sup>13</sup> See Federal-State Joint Board on Universal Service, Recommended Decision, CC Docket No. 96-45, ¶ 26 (Feb. 27, 2004).

<sup>14</sup> USF Report and Order, ¶ 179 citing 47 U.S.C. § 160(a).

of the Communications Act. The Commission explained that forbearance in the case of pure resellers would result in such resellers receiving a “double recovery” because they would recover both the universal service support which was already incorporated into the wholesale price of the resold services and the support they would receive from the federal universal service support mechanisms as a result of their status as an ETC. According to the Commission, allowing double recovery would favor resellers over other carriers and provide inefficient economic signals to resellers, which would be inconsistent with the principle of competitive neutrality.<sup>15</sup>

That analysis is applicable only to the resale of incumbent local exchange carrier wireline local service, *i.e.*, service which already receives the benefit of support from the Universal Service Fund, and service which must be provided to resellers at government-approved “wholesale” rates based on avoided costs.<sup>16</sup> The Commission’s 1997 analysis described in the preceding paragraph has no relevance to the resale of CMRS service. TracFone purchases wireless service for resale from more than thirty underlying CMRS providers. In each case, the wholesale prices charged by those CMRS providers to TracFone is the result of arm’s length negotiation based upon the market demand for the service. Most of TracFone’s vendors are not ETCs and do not receive support from the Universal Service Fund and the rates charged by those vendors to TracFone are not subsidized by Universal Service support. Those few of TracFone’s vendors which are ETCs are not subject to rate regulation of any type and those carriers are not required to reflect their receipt of universal service support in the wholesale rates which they charge TracFone – rates which are set wholly based on market forces, including the relative bargaining power of buyer and seller. Thus, the Commission’s seven year old decision not to exercise its forbearance authority to permit resellers to obtain designation as an ETC is based on a theoretical underpinning which bears no relevance to the resale of unregulated CMRS services

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<sup>15</sup> *Id.*

<sup>16</sup> 47 U.S.C. §§ 251(c)(4), 252(d)(3).

bought and sold in a competitive marketplace, such as the services purchased for resale by TracFone.

Moreover, the statutory requirement of Section 251(c)(4) of the Act that incumbent local exchange carriers have the duty to offer for resale at wholesale rates any telecommunications service that they provide at retail to subscribers who are not telecommunications carriers<sup>17</sup> is not applicable to TracFone's vendors, none of which are incumbent local exchange carriers and none of which are subject to the resale at wholesale rate obligation imposed on incumbent local exchange carriers by Section 251(c)(4). Therefore, TracFone's underlying carriers are under no obligation to provide their services to TracFone at wholesale rates, nor are they obligated to pass through universal service support to TracFone. As such, the Commission's 1997 determination not to forbear from applying the facilities requirement of Section 214(e)(1)(A) to pure resellers has no bearing on whether TracFone, a CMRS reseller, meets the forbearance criteria set forth in Section 10 of the Communications Act.

Forbearance from enforcing the facilities requirement of Section 214(e)(1)(A) against pure CMRS resellers will achieve the Commission's goal of establishing competitively neutral universal service support mechanisms and rules. The Commission stated that "competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor or disfavor one technology over another."<sup>18</sup> The Commission further "conclude[d] that competitively neutral rules will ensure that . . . disparities are minimized so that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the

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<sup>17</sup> 47 U.S.C. § 251(c)(4); see USF Report and Order, ¶ 157 (relying on the term "resale" as used in Section 251(c)(4) to determine the meaning of "resale" as used in Section 214(e)(1)).

<sup>18</sup> USF Report and Order, ¶ 47.

available quantity of services or restricting the entry of potential service providers.”<sup>19</sup> As explained above, forbearance will alleviate the competitive disadvantage suffered by those CMRS resellers, including TracFone, that solely rely on underlying carriers’ CMRS services. In particular, forbearance will promote competition among providers of services supported by the universal service program by encouraging CMRS resellers to enter the market for such services and to offer services to consumers in competition with those offered by wireline carriers, including ILECs. In addition, forbearance will benefit consumers by allowing TracFone to charge competitive rates to consumers located in high-cost, rural and insular areas and by providing consumers, including low income consumers eligible for Lifeline service, with more options for services supported by the Universal Service Fund. Such a result will serve the public interest.

**CONCLUSION**

For all of the reasons set forth in this petition, TracFone requests that the Commission grant this Petition for Forbearance and allow TracFone to be eligible for designation as an ETC.

Respectfully submitted,

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<sup>19</sup> Id., ¶ 48; see also Federal-State Joint Board on Universal Service, Notice of Proposed Rulemaking and Order Establishing Joint Board, 11 FCC Rcd 18092, ¶¶ 125-26 (1996).