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

In the Matter of IP-Enabled Services	WC Docket No. 04-36

Reply Comments of TracFone Wireless, Inc.

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July 14, 2004

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SUMMARY

In these Reply Comments, TracFone continues to support the propositions advocated in its initial comments filed in this proceeding and points out that numerous parties simultaneously filed initial comments that articulate positions similar to those of TracFone. As with its initial comments, TracFone's reply comments are limited to the universal services issues raised in the Notice of Proposed Rulemaking.

The record developed by the comments in the IP-Enabled Services proceeding overwhelmingly compels the Commission to require IP-enabled service providers to contribute to the Universal Service Fund ("USF"). The commenters agree that requiring IP-enabled services which are substitutable for telecommunications services, such as VoIP, to contribute to the USF is critical to ensuring the preservation and promotion of the fund, and an exemption for IP-enabled services would create an un-level playing field where one form of technology would be favored over others. TracFone also specifically agrees that any exemption for VoIP providers from contribution to the USF would have a disproportionate impact on wireless carriers and their customers. In addition, TracFone urges the Commission, when establishing criteria to determine whether VoIP providers should be required to contribute to the fund, not to utilize as a factor whether the service employs North American Numbering Plan ("NANP") resources. A NANP-based criterion would be inappropriate for determining contribution obligations to the USF because not all VoIP applications utilize NANP numbers.

In regard to the two contribution methodologies previously proposed by the Commission in another proceeding, the "connections"-based methodology and the telephone-numbers-based methodology, various parties commented that these methodologies are improper and should not be adopted for a variety of reasons. TracFone agrees with these parties and continues to advocate continuation of a revenues-based methodology. In addition, TracFone maintains that

the two alternative contribution methodologies cannot be adopted as they would violate the Communications Act for two significant reasons: 1) not every telecommunications carrier that provides interstate telecommunications would be required to contribute to the fund; and 2) the contributions resulting from these methodologies would not be equitable and nondiscriminatory.

Finally, the majority of commenters responded in the affirmative to the Commission's inquiry regarding whether non-facilities-based providers of IP-enabled services should be required to contribute to the fund. TracFone agrees that the obligation to contribute to the Universal Service Fund should not vary depending on whether a VoIP service provider is a facilities-based or non-facilities-based.

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TracFone Wireless, Inc. ("TracFone"), by counsel, hereby submits its reply comments in response to the Notice of Proposed Rulemaking released by the Commission on March 10, 2004.[1]

I. INTRODUCTION

TracFone is a provider of prepaid wireless service that has participated in the IP-Enabled Services proceeding and has also participated extensively in the *Universal Service Contribution Methodology* proceeding.[2] On May 28, 2004, TracFone submitted initial comments in the *IP-Enabled Services* proceeding. TracFone advocated broadening the base of contributors to the Universal Service Fund to address the potential erosion of the interstate revenue base attributable to shifts in usage away from traditional telecommunications services to new IP-enabled services, such as Voice over Internet Protocol ("VoIP"). In addition, TracFone explained, as it has

[1] IP-Enabled Services (*Notice of Proposed Rulemaking*), FCC 04-28, (rel. April 10, 2004) ("NPRM" or "Notice").

[2] Federal-State Joint Board on Universal Service, CC Docket No. 96-45 *et al.*, (*Report and Order and Second Further Notice of Proposed Rulemaking*), FCC 02-329, released Dec. 13, 2002 (*Report and Order* and *Second Further Notice*), *reconsidered in part,* (*Order and Order on Reconsideration*), FCC 03-20, released Jan. 30, 2003, *further reconsidered in part,* (*Order and Second Order on Reconsideration*), FCC 03-58, released Mar. 14, 2003.

throughout the *Universal Service Contribution Methodology* proceeding, that the best way to sustain a sufficient Universal Service Fund is by utilizing a contribution methodology based upon revenue derived from telecommunications rather than a "connections"-based system or a telephone numbers-based system. TracFone maintained that neither the connections-based methodology nor the telephone numbers-based methodology should be adopted as both methodologies would violate the Communications Act for two key reasons: (1) not every telecommunications carrier that provides interstate telecommunications service would be required to contribute to the fund and (2) the contributions would not be equitable and non-discriminatory. Finally, TracFone stated that both facilities-based and non-facilities-based providers of IP-enabled services should be required to contribute to the fund on an equal basis as do facilities-based and non-facilities-based providers of traditional telecommunications services.

As described in these Reply Comments, the record compiled in this proceeding reveals strong support for the notion that VoIP providers should be required to contribute to the USF. On the other hand, the record reveals minimal support for changing the contribution system from a revenue-based methodology to a connection-based or working telephone number-based methodology. In addition, the record also shows that parties participating in the proceeding support the concept that both facilities-based and non-facilities-based VoIP providers should be required to contribute to the USF. TracFone continues to support the propositions it advocated in its initial comments and is encouraged by the similar support provided by other commenting parties.

II. THERE IS BROAD SUPPORT FOR REQUIRING ALL ENTITIES WHO DERIVE REVENUE FROM PROVIDING INTERSTATE TELECOMMUNICATIONS TO CONTRIBUTE TO THE UNIVERSAL SERVICE FUND.

A. Applying Universal Service Obligations to VoIP Service Providers is Necessary to Ensure the Preservation of the USF and to Maintain a Level Playing Field.

In reviewing comments filed by other parties in this proceeding, TracFone is struck by the fact that a substantial majority of the parties agree that at least some category of IP-enabled service providers, including VoIP providers, should be required to contribute to the USF.[3] Various commenters maintain that as networks increasingly transition to IP-based technology, applying universal service obligations to all entities that provide interstate telecommunications is critical to ensuring the promotion and preservation of the USF. Another theme among numerous commenters is that the failure to impose universal service obligations on IP-enabled service providers could create an unlevel playing field that encourages the use of one technology over another solely for the purpose of avoiding government-imposed economic obligations. Creation of such arbitrage opportunities would be directly contrary to the Commission's stated policy objective that any universal service contribution methodology should be competitively neutral.[4] Similarly, some commenters pointed out that assessing universal service contribution obligations on all providers of voice service will ensure that the universal service program remains

[3] See, *e.g.*, comments of CenturyTel, BellSouth, Federation for Economically Rational Utility Policy, Valor Telecommunications of Texas and Iowa Telecommunications, Time Warner Inc., MCI, U.S. Conference of Catholic Bishops, PointOne, AT&T, Virgin Mobile, Arizona Corporation Commission, Microsoft Corp., Ohio Public Utilities Commission, Sprint, Cox Communications, Comcast, Verizon, Global Crossing North America Inc., Local Government Coalition, Alliance for Public Technology et al., Virginia State Corporation Commission, Minnesota Public Utilities Commission, Rural Independent Competitive Alliance, United States Telecom Association, Independent Telephone and Telecommunications Alliance, and Maine Public Utilities Commission.

[4] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, (*First Report and Order*), released May 8, 1997, at ¶ 21 ("[C]ompetitive neutrality should be among the principles that guide the universal service support mechanisms and rules.").

competitively and technologically neutral. TracFone agrees that erosion of the USF can be abated if the base is expanded to capture revenues earned by VoIP providers. Without requiring providers of IP-enabled services which are substitutable for traditional telecommunications services to contribute to the fund, TracFone concurs that the USF program would be unjustly favoring one technology over others and would be encouraging a class of free riders.

B. Any Exemption for VoIP Providers from USF Contribution Obligations Would Fall Disproportionately on Wireless Carriers and their Customers, Including Prepaid Wireless Service Providers and Customers of Those Services.

The comments of Virgin Mobile are particularly relevant and insightful in regard to the effect a VoIP exemption from contribution to the Universal Service Fund could have on prepaid wireless providers and their consumers. Virgin Mobile argues that as VoIP services become more prevalent, revenues from traditional wireline services will decline.[5] Because the majority of VoIP services are presently provided by wireline carriers, the impact of exempting VoIP providers from USF contribution obligations would fall disproportionately on wireless carriers and their customers.[6] Virgin Mobile notes that exemption of VoIP providers from the obligation to contribute to the USF would be unfair and would discriminate against wireless carriers and their consumers in general and prepaid wireless carriers and their consumers in particular, especially younger and less affluent consumers who use prepaid wireless services.[7] TracFone concurs with that analysis and conclusion.

In addition, Virgin Mobile points out that industry analysts believe that VoIP is likely to become a significant source of revenue. Therefore, Virgin Mobile asserts that exempting revenues from VoIP services from USF contribution obligations is not permissible merely

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[5] Virgin Mobile comments at page 7.

[6] Id.

[7] Id. at page 8.

because those services and carriers who offer service using VoIP technology would be *de minimis* contributors to the USF.

Similarly, TracFone also agrees with Verizon which states that the Commission should impose the same universal service obligations on all providers of voice services - both circuit-switched and VoIP - regardless of the technology used to provide those services.[8] Any decision to treat providers of VoIP services differently from traditional wireline carriers with respect to universal service obligations would be neither equitable nor nondiscriminatory.[9]

C. A Factor in Determining Whether a VoIP Service Provider is Required to Contribute to the USF Should be Whether the VoIP Service is Substitutable for Traditional Telecommunications Services. Contribution to the USF, However, Should Not be Based on Whether the VoIP Service Uses NANP Resources.

In determining which IP-enabled services should be required to contribute to the USF, various commenters maintained that if the IP-enabled service is a functional equivalent to plain old telephone service ("POTS"), then it should be required to contribute. TracFone agrees that if IP-enabled services, including VoIP, are easily substitutable for traditional telecommunications services, then the providers of those IP-enabled services should be required to contribute to the USF based on the revenues derived from those services, irrespective of how those services may be classified for other regulatory purposes. Such a requirement would be consistent with the national policy codified at Section 254 of the Act that there be a Universal Service Fund supported by interstate telecommunications so that affordable phone service would be available nationwide and to provide support to schools, libraries and rural health care centers for their telecommunications needs.

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[8] Verizon comments at page 56.

[9] Id. at page 58.

Several commenters, including Cox Communications and Comcast Corporation, have suggested that a four-part test be utilized to determine whether VoIP providers should be required to contribute to the fund.[10] Under this test, the VoIP provider would be required to contribute if (1) the service uses North American Numbering Plan ("NANP") resources; (2) the service can receive calls from or terminate calls to the public switched telecommunications network ("PSTN"); (3) the service is a plausible replacement for traditional telephone service; and (4) the service uses IP transmission between the service provider and the end user. Other parties have offered variations on the above-mentioned four-part test. Although TracFone believes that a list of criteria ought to be utilized in determining whether a VoIP service provider should be required to contribute to the USF, TracFone does not believe the criteria should include whether the service uses NANP resources. This requirement is inappropriate for determining who should contribute to the fund because not all VoIP applications utilize the NANP. Rather, TracFone believes that the relevant criteria should include whether the VoIP service provides consumers with voice telephony capabilities and whether the service can be used to initiate calls and receive calls between consumers connected to the PSTN as well as whether the service uses IP transmission between the service provider and the end-user.

III. THERE IS LITTLE SUPPORT FOR THE NOTION THAT THE ADVENT OF IP-ENABLED SERVICES WARRANTS CHANGING THE USF CONTRIBUTION METHODOLOGY TO A CONNECTIONS-BASED OR A TELEPHONE NUMBERS-BASED SYSTEM.

A. Numerous Parties Agree that a Contribution Mechanism Based on Either of The Two Alternative Methodologies Would be Improper for Varying Reasons.

The Notice asks whether the advent of IP-enabled services weighs in favor of any of the specific reforms currently under consideration in the *Universal Service Contribution*

[10] Cox comments at page 18, Comcast comments at page 3.

Methodology proceeding.[11] Commenters have not offered broad support for replacing the current methodology with either a connections-based contribution methodology or a telephone numbers-based contribution methodology. In fact, various parties have stated that in light of the advent of IP-enabled services, a contribution mechanism based on either of the above-mentioned alternative methodologies would be improper. TracFone agrees with these parties' contentions and continues to assert, that a revenue-based methodology should be maintained.

For example, Global Crossing notes that a funding mechanism based either on working telephone numbers or network connections would not properly capture IP-enabled service providers.[12] Specifically, Global Crossing states that IP-enabled services can be supported over pre-existing broadband connections and there is no way to determine which IP-enabled service provider a consumer is utilizing in this situation.[13] Therefore, a connections-based mechanism would not be enforceable, would not properly capture all IP-enabled service providers, and would disproportionately burden facilities-based providers. According to Global Crossing, a funding mechanism based upon the use of telephone numbers also would not necessarily capture IP-enabled service providers.[14] Global Crossing identifies Pulver as an example which demonstrates that IP-enabled service providers do not need to assign traditional telephone numbers to their end user customers.[15]

Likewise, the U.S. Conference of Catholic Bishops *et al.* ("USCCB") advocates in favor of an all-revenue assessment system, in part, because of the impossibility of distinguishing

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[11] *Notice of Proposed Rulemaking* at ¶ 64.

[12] Global Crossing comments at pages 13 – 14.

[13] Id.

[14] Id.

[15] Id.

between intrastate and interstate telecommunications services.[16] USCCB further states that by keeping a revenue-based system, the inequities of a connections-based approach would be avoided.[17]

Although Virgin Mobile did not comment specifically either on the connections-based or telephone numbers-based methodologies, Virgin Mobile did state that in establishing a new regime for the USF assessment system, the communications industry should be required to pay a comparable percentage of their respective revenues into the USF, thereby indicating its continuing support for a revenue-based methodology in an environment which includes IP-enabled services such as VoIP.[18]

B. The Reasoning Behind Commenters' Arguments Supporting Changing to a Connections-Based or Working Telephone Numbers-Based Contribution Methodology is Flawed. The Alternative Methodologies are Unlawful -- a Fact Ignored by Their Proponents.

Several proponents of reforming the USF contribution methodology continue to argue in this proceeding that the contribution methodology should be changed to a connections-based or working telephone numbers-based methodology.[19] Those parties support the above-mentioned alternative methodologies for one reason only: they have concluded that these methods would reduce, or in some cases, largely eliminate, their contributions to the USF. Furthermore, the reasoning behind the commenters' arguments for the need to change to a connections-based or a working telephone numbers-based methodology is based on erroneous premises.

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[16] USCCB comments at page 36.

[17] Id. at 38.

[18] Virgin Mobile comments at page 9.

[19] See comments of MCI, PointOne, AT&T, Voice on the Net Coalition, Ad Hoc Telecommunications Users Committee, and Level 3 Communications.

MCI claims that a revenues-based methodology would be impossible to apply in a rational manner, and raises the issue of "problems" created by the increased bundling of service offerings that include services subject to varying regulatory treatment.[20] Similarly, PointOne argues that connections/numbers-based assessments would eliminate the task of differentiating service revenues between interstate and intrastate and between telecommunications revenue and other revenue. TracFone and various other parties have responded to these concerns in the *Universal Service Contribution Methodology* proceeding. As TracFone previously explained, concerns about bundling are belied by marketplace experience and, to the extent that such concerns are valid, means are available to address those concerns, such as safe harbors which can be adjusted when necessary.[21]

AT&T argues that VoIP providers would be fully included in a numbers/capacity-based system because experience to date confirms that VoIP services are almost always associated with

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[20] It should be noted that for the past two years, MCI has been advocating in favor of a layers approach for telecommunications policy. This approach consists of breaking network functions into four layers: a physical layer (actual physical infrastructure), a logical layer (connects physical infrastructure to higher layers), an applications layer (contains applications that use IP data such as e-mail and web browsing), and a content layer (actual content created by the applications, such as test, speech, images and video). According to MCI, the ultimate responsibility for the USF funding requirement should reside at the physical layer. Specifically, MCI supports using the connections-based approach as a concept of associating universal service payments <u>not</u> with service provision, but instead with the physical facilities along which the information moves. Under such a model, consumers would be assessed a fee for each connection (wireline phone connection, wireless connection, etc.) to the network. For the reasons discussed in the remainder of Section III. B. of TracFone's Reply Comments, TracFone believes the connections-based methodology is inequitable and discriminatory. Moreover, limiting USF contribution responsibility to those entities which operate the physical facilities used to provide telecommunications would violate the statutory directive that "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute . . . ."

[21] For example, in 2003, the State of Virginia recognized that revenues from bundled communications services can be reasonably allocated when it passed legislation to permit companies to make reasonable allocations among bundled transactions that include communications services and other services taxed at different rates. VA Code Ann. §58.1-3812(L).

NANP numbers. Contrary to AT&T's argument, not all VoIP applications use NANP numbers and it is likely that more VoIP providers would shift away from a system based on NANP numbers if the USF contribution methodology was based on a numbers/capacity-based system. As mentioned earlier, Global Crossing in its comments specifically addressed this argument by stating:

> As Pulver demonstrates, IP-enabled service providers do not need to assign traditional telephone numbers to their end user customers. Indeed, considering the exhaust pressures on the North American Numbering Plan ("NANP") and the potential for a host of new IP-enabled services that may require "telephone numbers," it is not unreasonable to assume that the NANP as it is known today is simply a transitional vehicle to a new numbering system.[22]

Despite the proponents' arguments in favor of the two alternative methodologies, these methodologies suffer from both legal and policy deficiencies. As previously stated in the Introduction to these reply comments and in TracFone's initial comments, the two alternative contribution methodologies proposed by the Commission would be unlawful because they would violate the Communications Act for two key reasons: (1) not every telecommunications carrier that provides interstate telecommunications service would be required to contribute to the fund and (2) the contributions would not be equitable and non-discriminatory.

More specifically, a connections-based methodology would be inequitable because those interstate carriers that do not provide their own connections to the public switched network would be relieved of any obligation to contribute to universal service, irrespective of how much revenue those carriers derive from the provision of interstate telecommunications services. In addition, the contributions would not be "equitable and non-discriminatory" as required by section 254 of the Communications Act. Further, a connection-based charge would favor those carriers who serve larger volume consumers and would correspondingly disfavor those carriers

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[22] Global Crossing comments at page 14.

whose services are beneficial to and are used by lower volume users. Under a connection-based USF contribution system, some carriers, including, for example, larger interexchange carriers, would have their USF contribution obligations reduced dramatically while those providers who provide network connections but who serve lower volume users, which generate relatively lower interstate revenues, would incur significantly greater USF costs relative to revenues derived from those services. Ultimately, these USF contribution obligations are borne by those providers' customers. Thus, any methodology which shifts the USF support burden from carriers serving higher volume, higher revenue-generating customers to lower volume lower revenue-generating customers will result in that burden being absorbed by lower volume consumers who are often lower income consumers – in direct contravention of the public policy objectives which underlie the Universal Service Fund.

Similarly, the working telephone number-based methodology would suffer from all of those same legal infirmities, as would a connections-based methodology. First, use of telephone numbers assigned to end-users is not a rational basis for identifying "[e]very telecommunications carrier that provides interstate telecommunications services." Most telephone numbers are assigned by providers whose primary business is local exchange telecommunications service. There is no correlation between assignment of telephone numbers as part of an exchange telecommunications service and provision of "interstate" telecommunications. Second, the numbers-based approach would allow interexchange carriers to avoid almost all responsibility to contribute to the Universal Service Fund since services rendered by IXCs to most customers do not involve assignment of telephone numbers, irrespective of how extensively customers use those services or how much revenues are generated from such services. Third, a flat telephone number-based fee would be especially unfair to low-volume consumers who would be assessed a monthly USF charge regardless of how much or how little they use their phone for interstate service. Finally, VoIP services currently are provided with and without traditional telephone numbers. A contribution methodology based solely on telephone number assignments would push the VoIP industry into using a non-numbers based system.

Rather than switching to a different contribution methodology, the Commission should require VoIP providers to contribute to the USF based on a revenues-based methodology. In addition, the Commission should give recently implemented changes to the contribution methodology time to take full effect before trying to assess whether radical changes are necessary to sustain the fund.[23]

IV. NON-FACILITIES-BASED PROVIDERS OF IP-ENABLED SERVICES SHOULD BE REQUIRED TO CONTRIBUTE TO THE FUND.

In the Notice, the Commission asked parties to comment on whether non-facilities-based providers of IP-enabled services should be required to contribute to the fund. Most commenters addressing that issue state both facilities-based providers and non-facilities-based providers should be treated equally.[24] TracFone agrees that the obligation to contribute to support of universal service should not vary depending on whether a VoIP service provider invests in its own facilities or is a non-facilities-based service provider. The entity who provides telecommunications to consumers and who derives revenue from the provision of telecommunications to consumers should be required to contribute to the support of universal service based on those revenues.

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[23] Although TracFone continues to support a revenues-based contribution methodology, it also continues to favor refinements to that methodology as necessary and appropriate to ensure that all providers of interstate telecommunications contribute and that they do so in an equitable and nondiscriminatory manner. For example, TracFone long has advocated elimination of the wireless safe harbor.

[24] See *e.g.*, comments of Time Warner, Inc., Cox Communications, Inc. and Verizon, Inc.

V. CONCLUSION

For the reasons set forth above and in its initial comments, TracFone supports the notion that all entities who derive revenue from providing interstate telecommunications, including those who do so using IP-enabled technology, should be required to contribute to the USF. This position is also supported by the majority of commenters in this proceeding and is consistent with the public interest policies which underlie the Universal Service requirements codified in the Act. Also, for the reasons described in these comments, the advent of IP-technology does not warrant replacing the current revenues-based USF contribution methodology with an alternative connections or telephone-numbers based methodology. Moreover, the two alternative proposals currently under consideration in the *Universal Service Contribution Methodology proceeding* would not comply with the relevant provisions of the Communications Act or the Commission's competitive neutrality requirement. Finally, the obligations to contribute to the fund should be applied to all providers of voice services regardless of whether the provider is facility-based or non-facility-based.

Respectfully Submitted,

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