

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on Universal Service)	
)	
TracFone Wireless, Inc.)	CC Docket No. 96-45
)	
Petition for Designation as an Eligible)	
Telecommunications Carrier in the State of)	
New York)	

COMMENTS OF FRONTIER COMMUNICATIONS OF NEW YORK, INC.

Gregg C. Sayre

Associate General Counsel – Eastern Region

FRONTIER COMMUNICATIONS
OF NEW YORK, INC.

180 South Clinton Avenue
Rochester, New York 14646-0700
Tel: (585) 777-7270
Fax: (585) 263-9986
gregg.sayre@frontiercorp.com

July 26, 2004

SUMMARY OF FRONTIER'S COMMENTS

Designating TracFone as an ETC in Frontier's study areas is not in the public interest. Its circular argument that designating additional ETCs in RTC study areas is always in the public interest should be rejected, as should its unsupported claims that designating it to be an ETC will advance universal service. TracFone does not compete with Frontier and is not a new entrant, so designating it as an ETC will not promote or increase competition in Frontier's study area. Nor will it bring the benefits of competition to consumers in Frontier's study area. As a reseller with no control over service quality or cellular coverage, TracFone will not increase its service territory, improve its service quality, or decrease its prices if it is certified. The only result from designating TracFone as an ETC would be to increase its profits, while denying potential USF funding to facilities-based carriers.

TABLE OF CONTENTS

I.	INTRODUCTION AND BACKGROUND.....	2
II.	DESIGNATION OF TRACFONE AS AN ETC IN FRONTIER’S RTC STUDY AREAS AND TRACFONE’S PROPOSED FORBEARANCE ARE NOT IN THE PUBLIC INTEREST	2
A.	<u>USF Funding Would Not Expand TracFone’s Service in New York State</u>	2
B.	<u>USF Funding Would Not Lower TracFone’s Prices in New York State</u>	3
C.	<u>USF Funding of TracFone Would Retard Rural Service Expansion</u>	4
D.	<u>USF Funding of Resellers Would Severely Strain the Universal Service Fund</u>	6
E.	<u>TracFone’s Public Interest Arguments are Fatally Flawed</u>	6
1.	TracFone’s Public Interest Argument is Legally Flawed	6
a.	USF Is Not Intended To Promote Competition	6
b.	TracFone’s Competitive Argument Nullifies the Public Interest Test.....	8
2.	TracFone’s Public Interest Argument is Factually Flawed.....	9
III.	DESIGNATION OF TRACFONE AS AN ETC WILL NOT ADVANCE UNIVERSAL SERVICE.....	10
IV.	TRACFONE’S PETITION SHOULD BE HELD IN ABEYANCE, OR IN THE ALTERNATIVE, DESIGNATED ONLY WITH RESPECT TO THE EXISTING RULES	11
V.	CONCLUSIONS	12

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint Board on Universal Service)	
)	
TracFone Wireless, Inc.)	CC Docket No. 96-45
)	
Petition for Designation as an Eligible)	
Telecommunications Carrier in the State of)	
New York)	

COMMENTS OF FRONTIER COMMUNICATIONS OF NEW YORK, INC.

Frontier Communications of New York, Inc. (“**Frontier**”)¹, an incumbent local exchange rural telephone company (“**RTC**”), by its attorney, respectfully submits these comments regarding the petition of TracFone Wireless, Inc. (“**TracFone**”) for designation as an Eligible Telecommunications Carrier (“**ETC**”) in the State of New York (“**Designation Petition**”) as a reseller of other carriers’ facilities-based commercial mobile radio service (“**CMRS**”) and TracFone’s petition requesting that the Commission forbear from applying the section 214(e)(1)(A) requirement that an ETC must provide service in whole or in part using its own facilities (“**Forbearance Petition**”).

These Comments will show that designating TracFone, or any of the hundreds of other pure wireless resellers, as an ETC would tend to diminish the availability of service in rural

¹ Frontier also files these comments on behalf of its affiliated New York incumbent local exchange carriers, some of which are rural and one of which is non-rural: Frontier Communications of AuSable Valley, Inc. (rural), Frontier Communications of Sylvan Lake, Inc. (rural), Frontier Communications of Seneca-Gorham, Inc. (rural), Ogden Telephone Company (rural), Frontier Telephone of Rochester, Inc. (non-rural) and Citizens Telecommunications Company of New York, Inc. (rural, although TracFone designates it as non-rural).

areas, strain the Universal Service fund, and accomplish nothing but increasing TracFone's profits at the expense of the nation's telecommunications users and carriers. Hence, neither the designation of TracFone as an ETC in RTC service territories nor the proposed forbearance is in the public interest.

I. INTRODUCTION AND BACKGROUND

TracFone seeks to be designated as an ETC throughout New York State and asserts that it already provides service in every zip code in the State.²

Because TracFone seeks to be designated as an ETC throughout a large number of RTC study areas, it must demonstrate that it meets the minimum criteria of Section 214(e)(1) and that designating it as an ETC in the RTCs' study areas "is in the public interest."³

Because TracFone has no facilities of its own, its Designation Petition must fail for both rural and non-rural areas unless the Commission forbears from enforcing the facilities requirement of Section 214(e)(1)(A).

II. DESIGNATION OF TRACFONE AS AN ETC IN FRONTIER'S RTC STUDY AREAS AND TRACFONE'S PROPOSED FORBEARANCE ARE NOT IN THE PUBLIC INTEREST

A. USE Funding Would Not Expand TracFone's Service in New York State.

TracFone is a non-facilities based reseller that can only provide service where its underlying carriers provide service. As such, it is totally unable to expand the availability of its own or any other carrier's service. In fact, according to its Designation Petition it already

² Designation Petition at 8. This assertion should be taken with a grain of salt, given the large "No Coverage" areas in northern and southwestern New York shown on the coverage map on TracFone's website, but Frontier will assume this assertion to be true. See http://www.TracFone.com/images/covmaps2/1100P_MAP.jpg

³ 47 U.S.C. § 214(e)(2).

provides service throughout New York State. Its argument that it “will provide a valuable alternative to the existing telecommunications services available in those areas”⁴ is misleading at best. TracFone will not expand its coverage in any way. Both TracFone and its underlying carriers are already providing their services throughout New York State. The public interest does not require the Commission to grant USF funding to benefit a carrier that already claims to be fully serving the territory in question. Universal service funding should be reserved for carriers that can and will expand universal service.

B. USF Funding Would Not Lower TracFone’s Prices in New York State.

TracFone proudly asserts that it charges the same prices to customers throughout the United States, regardless of its costs in rural areas, even though its costs in some rural areas are higher than its prices.⁵ Apparently, TracFone’s market is sufficiently competitive that prices are set by competition, not by individual carriers’ costs. It follows that if TracFone is granted USF funding, consumers will not see a penny of it. Nothing would be accomplished other than to increase TracFone’s profits.

In this respect, it is very hard for Frontier to understand how TracFone’s ETC certification can possibly be consistent with the intent of the Commission’s regulations. As required by §§54.313 and 54.314 of the regulations, TracFone has certified that “all high-cost support provided to TracFone will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.” Because TracFone is not a facilities-based carrier, it must be planning to use the funds to provide, maintain and upgrade its services. TracFone does not allege that it is going to upgrade any services, and a reseller counts on its

⁴ Designation Petition at 10.

⁵ Designation Petition at 2.

underlying carriers for maintenance, which means that TracFone must be planning to use the funds simply for the “provision ... of ... services.” Because it procures its services from its underlying carriers, it appears that this certification means only that TracFone proposes to apply its USF funds to its wholesale bills. This is hardly what the Act or the regulations intend. USF funding is not intended to subsidize the purchase of services by one carrier from another.

C. USF Funding of TracFone Would Retard Rural Service Expansion.

It is Frontier’s position that few if any wireless carriers, either facilities-based or resale, should be certificated as ETCs in RTC service areas, because the detriments to the public interest of such certifications far outweigh the benefits. Frontier has submitted a number of comments in designation proceedings to this effect, most recently on Dobson Cellular’s petition for ETC designation in New York State. If the Commission agrees with Frontier’s position on Dobson, which is one of TracFone’s underlying carriers, the same factors should compel rejection of TracFone’s petition. However, if the Commission certifies Dobson and other TracFone suppliers, the Commission must recognize what the impact of TracFone’s certification would be on its suppliers.

If a reseller is certified, then the reseller rather than the underlying wholesale carrier will take the USF funding for each of the reseller’s customers. The wholesale carrier, however, is also a retail carrier. As between an underlying carrier and its resellers, every customer that the reseller takes or keeps away from the underlying carrier means USF dollars that will flow to the reseller and will be denied to the facilities-based carrier. The impact of this mechanism would damage universal service. Funds would be flowing away from the only carriers capable of expanding and improving service in rural areas, and flowing to carriers that are completely incapable of improving cellular coverage. Congress had a reason to require ETCs to have

facilities, and the reason is clearly apparent in this situation. Resellers such as TracFone cannot expand universal service, and their receipt of USF funds would deny funding to carriers that can.

TracFone makes much of a 1997 Commission statement that resellers should not receive universal service support when they are buying services at a discount from retail rates that already reflect support.⁶ TracFone claims that its underlying CMRS wholesale prices, as opposed to ILEC wholesale prices, do not in any way reflect universal service support.⁷ There are severe logical problems with this argument. First, it relies on the unsupported assumption that TracFone's wholesale prices have nothing to do with its underlying carriers' costs. This is an unlikely proposition. Second, it assumes either that its underlying carriers are not entitled to universal service support (in which case TracFone should not receive it either), or that its underlying carriers do not flow through such support to their customers (in which case TracFone may be expected to do the same). In either case, this argument does not buttress TracFone's claim that supporting TracFone would be in the public interest.

Even if its argument were correct that its wholesale costs do not (yet) reflect universal service support of its underlying carriers, such a proposition does not justify forbearance from enforcing the requirement that ETCs provide supported services in whole or in part through their own facilities. It is hardly in the public interest to forbear from enforcing this requirement and granting USF funding to a carrier that already provides service throughout New York State, that cannot expand or improve service coverage and would take away funding from carriers that can, and that offers no plans to change its nationwide rate structure and thus would retain its USF funding as pure profits.

⁶ Forbearance Petition at 2-3.

⁷ Forbearance Petition at 9.

D. USF Funding of Resellers Would Severely Strain the Universal Service Fund.

For every facilities-based carrier, there may be dozens of resellers. If the Commission nullifies, through forbearance, the requirement that ETCs use at least some of their own facilities to provide supported services, the Commission may confidently expect hundreds if not thousands of ETC applications and the Universal Service Fund may confidently expect a drain starting with TracFone's trickle and proceeding to a torrent of funding to carriers that have no capability of improving the availability or quality of service.

E. TracFone's Public Interest Arguments are Fatally Flawed.

While TracFone attempts to dress up its arguments with reference to universal service issues, TracFone offers essentially the same argument that many other CMRS ETC applicants have offered with respect to the public interest issue. The argument, distilled to its essence, is that designating the applicant as an additional ETC in an RTC's study area creates competition, competition is in the public interest, therefore designating the applicant as an additional ETC in the RTC's study area is in the public interest. This argument is both legally and factually flawed.

1. TracFone's Public Interest Argument is Legally Flawed. Consideration of competitive benefits in the public interest analysis is flawed for two reasons. First, it confuses the twin goals of the Communications Act – promotion of competition and advancement of universal service – and converts the USF mechanism from a means for promoting universal service to a means of promoting competition. Second, it totally nullifies the public interest test.

a. USF Is Not Intended To Promote Competition. In the 1996 Act, Congress established two goals – promotion of competition and advancement of

universal service.⁸ In Sections 254 and 214(e), Congress established the goals of universal service and a mechanism for achieving those goals. The designation of ETCs is a critical part of the mechanism for achieving the goals of universal service. Rural ETCs are key to achieving the goals of universal service because they use the monies provided by the Universal Service Fund (“USF”) to provide to rural consumers the services supported by universal service at prices comparable to those charged in urban areas and at a high quality.

Promotion of competition is not a goal of universal service.

Considerations of whether an applicant will be a stronger or better competitor if it is designated as an ETC and therefore receives USF monies are irrelevant to the purposes for which ETCs are designated. Consideration of competitive issues in the public interest analysis is contrary to the statute in that it converts the USF mechanism into a means of promoting competition, which Congress never intended for it to do. The mechanism for promoting competition is found in Sections 251 and 252.

It is the funding of consumers, not carriers, that is required and proper under the Act.⁹ Considering competitive issues in the public interest analysis improperly results in the USF supporting not only consumers, but also every competitor regardless of whether it makes economic sense to fund every carrier and whether funding every carrier actually advances the goals of universal service.

⁸ Alenco Communications, Inc. v. FCC, 201 F.3d 608, 620 (5th Cir. 2000) (“Alenco”).

⁹ *Id.*

At bottom, considering competitive issues in the public interest analysis thwarts Congressional intent, converts the USF mechanism to a means of promoting competition when it is supposed to advance universal service, and creates undue, and unsustainable, burdens on the USF.

b. TracFone's Competitive Argument Nullifies The Public Interest Test

Allowing “increased competition” to satisfy the public interest analysis under Section 214(e)(2) would render the public interest test completely meaningless because such an analysis would always result in the designation of additional ETCs in RTCs’ study areas. Providing USF monies to any competitor will make that competitor stronger and more viable; thus it would always be in the public interest to designate additional ETCs if promotion of competition is a key factor in evaluating the public interest. If it were always in the public interest to designate additional ETCs in RTCs’ study areas, however, there would be no need for the public interest test. Instead, Congress could have mandated the designation of multiple ETCs in RTC study areas, just as it did for non-rural study areas.

Congress, however, specifically required a public interest inquiry in RTC study areas and did not require that more than one ETC ever be designated in RTC study areas. Any public interest analysis that considers competitive benefits is therefore contrary to the statute. Senator Dorgan made clear Congress’ view

that “[in] some markets; namely, high-cost rural areas, competition may not serve the public interest.”¹⁰

To avoid rendering the public interest test a nullity (and thereby violating a canon of statutory construction), it is necessary to engage in a factual analysis to determine on a case-by-case basis whether designating a specific applicant as an ETC in a specific RTC’s study area promotes the goals of universal service.

2. TracFone’s Public Interest Argument is Factually Flawed.

TracFone asserts repeatedly that it competes with the RTCs, but offers no specific facts to demonstrate that it competes with them. It provides no facts specific to Frontier’s study areas to demonstrate that it competes with Frontier or whether the benefits of competition are realized as a result of its provision of service in Frontier’s study areas. Absent such a showing, the Petition must be denied.

Moreover, TracFone’s assertion that it competes with Frontier is incorrect.

TracFone does not compete with Frontier.

TracFone provides a service that, at best, is complementary to that offered by Frontier. TracFone’s service is not viewed by consumers or by Frontier as a substitute. The fact that it is available in Frontier’s study areas brings to consumers none of the benefits of true competitive entry.

Frontier and its affiliates have experienced true competitive entry. In those instances, Frontier has experienced a reduction in the number of lines it serves as customers elect to take service from the competitor rather than from Frontier. Frontier has been unable to quantify any similar line loss resulting from TracFone’s provision of service, or from any other

¹⁰ 141 Cong. Rec. S7951.

wireless carrier. The simple truth is that wireless service is not replacing wireline service in Frontier's study areas. TracFone does not compete with Frontier for the services supported by universal service, and providing it with USF monies will neither increase competition, nor produce the benefits of competition in Frontier's study areas.

Frontier is aware that some wireless ETC applicants have argued that they will be able to compete with wireline services if they are able to use USF monies to build out their networks into the hinterlands and away from heavily traveled highways and cities. TracFone, of course, cannot make this argument because it has no network.

In this regard, the Joint Board was absolutely correct in pointing out that designation of wireless carriers as ETCs has an especially pernicious impact on the USF because wireless service does not replace wireline service.¹¹

III. DESIGNATION OF TRACFONE AS AN ETC WILL NOT ADVANCE UNIVERSAL SERVICE

The purpose and promise of universal service has already been fulfilled in Frontier's study areas. Quality service is available to all who request it at rates that reflect that some costs are recovered through the USF rather than end user rates. New York boasts a 95.2 percent subscriber rate, which exceeds the national average.¹² Focusing on consumers rather than carriers, it is difficult to understand how designation of TracFone would further advance universal service.

TracFone therefore has presented no relevant or persuasive evidence to support its

¹¹ *Federal-State Joint Board on Universal Service*, Recommended Decision, CC Docket 96-45, FCC04J-1 (rel. Feb. 27, 2004) ("Joint Board Recommended Decision") at ¶ 67.

¹² FCC Report "Trends in Telephone Service," Industry Analysis and Technology Division, Wireline Competition Bureau (rel. May 14, 2004).

contention that designating it to be an ETC will advance universal service.

IV. TRACFONE'S PETITION SHOULD BE HELD IN ABEYANCE, OR IN THE ALTERNATIVE, DESIGNATED ONLY WITH RESPECT TO THE EXISTING RULES

As the Commission is aware, numerous changes to the USF mechanism and changes to the services supported by universal service are being considered.¹³ The changes being considered could alter the eligibility requirements for being an ETC and the analytical framework applied in ETC designation proceedings, and could significantly change the workings of the USF mechanism.

Of special importance here, one proposal under consideration is whether to reduce the amount of USF the RTC receives when an additional ETC serves a line in the RTC's study area. This is an especially complex issue with respect to designating CMRS carriers as ETCs because CMRS is not a substitute service. Under the proposals being considered, USF support could flow to the CMRS carrier even though the RTC still is the carrier of last resort and is providing service to the customer as well. The issue is even more fundamental because incumbents' USF receipts are based on the costs of their networks, which remain regardless of how many customers are taking service. In any event, if the incumbent RTC's USF receipts are reduced when an additional ETC is designated, the public interest calculus will change dramatically.

Under the circumstances, any designation of TracFone as an ETC should be based on the current rules and the Commission should expressly state that the designation is not a determination of whether TracFone should be an ETC under any modified rules. The better

¹³ See, e.g., Federal State Joint Board on Universal Service, Notice of Proposed Rulemaking, CC Docket 96-45 (rel. June 8, 2004).

course would be for the Commission to cease designating additional ETCs pending resolution of the rulemaking proceedings.

V. CONCLUSIONS

Designating TracFone as an ETC in Frontier's study areas is not in the public interest. Its circular argument that designating additional ETCs in RTC study areas is always in the public interest should be rejected, as should its unsupported claims that designating it to be an ETC will advance universal service. TracFone does not compete with Frontier and is not a new entrant, so designating it as an ETC will not promote or increase competition in Frontier's study area. Nor will it bring the benefits of competition to consumers in Frontier's study area. As a reseller with no control over service quality or cellular coverage, TracFone will not increase its service territory, improve its service quality, or decrease its prices if it is certified. The only result from designating TracFone as an ETC would be to increase its profits, while denying potential USF funding to facilities-based carriers.

Finally, any designation of TracFone as an ETC in Frontier's study areas should be expressly based on a finding that it satisfies the rules as they currently exist and should be effective only as long as the rules remain unchanged. If the rules change as a result of the rulemakings and Joint Board deliberations currently underway, it is likely that the public interest calculus will change. A new determination would then have to be made as to whether designating TracFone as an ETC in Frontier's study area would have to be made under the

revised rules. The better course would be for the Commission to cease designating additional ETCs pending resolution of the rulemaking proceedings.

Respectfully Submitted,

**FRONTIER COMMUNICATIONS OF
ROCHESTER, INC.**

A handwritten signature in black ink, appearing to read "Gregg C. Sayre". The signature is written in a cursive style with a large initial "G".

Gregg C. Sayre
Associate General Counsel – Eastern Region
180 South Clinton Avenue
Rochester, New York 14646-0700
(585) 777-7270
gregg.sayre@frontiercorp.com

July 26, 2004