

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

In the Matter of

Federal-State Joint Board on Universal Service

CC Docket No. 96-45

OPPOSITION OF BELLSOUTH CORPORATION

BELLSOUTH CORPORATION

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OPPOSITION OF BELLSOUTH CORPORATION

BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries (“BellSouth”), hereby submits its opposition to the petition for forbearance filed by TracFone Wireless, Inc. (“TracFone”) in the above-captioned proceeding.¹

I. INTRODUCTION AND SUMMARY

On June 7, 2004, TracFone filed a petition seeking designation as an eligible telecommunications carrier (“ETC”) throughout the state of New York.²

Contemporaneously, TracFone filed a companion petition³ asking the Commission to

¹ See *Parties Are Invited to Comment on TracFone Wireless’ Petition For Designation As An Eligible Telecommunications Carriers in the State of New York and Petition for Forbearance From Application of Section 214*, CC Docket No. 96-45, *Public Notice*, DA 04-1822 (rel. June 24, 2004). Because TracFone has failed to meet the Section 10 standard for forbearance, the Commission must necessarily deny the petition for ETC designation as well. Even if the Commission were to grant the forbearance request, it should deny the ETC application for the same reasons set forth in this opposition.

² TracFone Wireless, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of New York, CC Docket No. 96-45 (dated June 7, 2004) (“TracFone ETC Petition”).

³ TracFone Wireless, Inc. Petition for Forbearance, CC Docket No. 96-45 (dated June 8, 2004) (“TracFone Forbearance Petition”).

forbear from applying the requirement in Section 214(e)(1)(A) of the Communications Act of 1934, as amended, (“Act”), which mandates that a common carrier designated as an ETC offer services supported by the federal universal service support mechanism either “using its own facilities or a combination of its own facilities and resale of another carrier’s services.”⁴

As a pure reseller of CMRS services, TracFone is not eligible to receive universal service support. As indicated above, the statute expressly requires an ETC to use either its own facilities or a combination of its own facilities and those of another carrier. Forbearance from applying this statutory requirement is the only means by which a pure reseller such as TracFone could become eligible to receive universal service support. As demonstrated more fully herein, however, TracFone has failed to meet the statutory test for forbearance set forth in Section 10 of the Act.⁵ Grant of the instant request would establish bad precedent by creating inefficient and artificial competition, placing undue pressure on the size of the universal service fund, and adversely affecting consumers. In addition, a grant of forbearance would conflict with a number of statutory and public policy objectives. Accordingly, the Commission must deny the instant request.

II. TRACFONE HAS NOT SATISFIED THE THREE-PRONGED TEST FOR FORBEARANCE.

TracFone has failed to carry the burden of demonstrating that the Commission should forbear from applying the statutory requirement that an ETC recipient provide

⁴ 47 U.S.C. § 214(e)(1)(A).

⁵ 47 U.S.C. § 160.

services using either its own facilities or a combination of its own facilities and those of another carrier. Under Section 10 of the Act, the Commission may forbear from applying a statute only if it finds that (1) enforcement of this requirement is not necessary to ensure that rates and practices are just and reasonable and not unjustly or unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.⁶ TracFone has made none of these showings. Moreover, not only is TracFone's request wholly inconsistent with a number of existing statutory and Commission objectives but it also would completely undermine recent actions designed to ensure that the universal service fund remains "specific, predictable, and sufficient."⁷ Accordingly, the Commission must deny the petition.

A. Increased Competition Alone Is Not Sufficient To Grant Forbearance.

To support its request, TracFone relies heavily on the argument that forbearance will promote competition by encouraging CMRS resellers to enter the market.⁸ Increased competition, though relevant, is not a *per se* demonstration that an ETC designation will serve the public interest. The Commission has already found that competition simply for competition's sake is not enough. Indeed, the Commission has expressly concluded that "the value of increased competition, by itself, is not sufficient to satisfy the public interest test" of Section 214(e).⁹ Rather, other factors must be considered and weighed, including

⁶ 47 U.S.C. § 160(a).

⁷ 47 U.S.C. § 254(b)(5).

⁸ See TracFone Forbearance Petition at 7-8, 11.

⁹ *Federal-State Joint Board on Universal Service; Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of*

the impact of multiple designations on the universal service fund and the impact of such designations on consumers.¹⁰

The Commission's recent decision to consider increased competition as just one of many factors when evaluating an ETC applicant is not only consistent with the public interest analysis required by Section 214(e), but also reflects the Commission's overall desire to inject some much needed discipline into the ETC designation process. Indeed, in three recent ETC designation proceedings, the Commission conducted an unprecedented public interest analysis that was more rigorous than those in the past and imposed new, ongoing commitments on the ETC applicants.¹¹ According to the Commission, "these steps are appropriate in light of the increased frequency of petitions for competitive ETC designations and the potential impact of such designations on consumers in rural areas."¹² Clearly, the Commission is moving in a direction designed to manage the growth of the universal service fund and send appropriate signals to

Virginia, CC Docket No. 96-45, *Memorandum Opinion and Order*, 19 FCC Rcd 1563, 1565, ¶ 4 (2004) ("*Virginia Cellular Order*"); *Federal-State Joint Board on Universal Service; Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, *Memorandum Opinion and Order*, 19 FCC Rcd 6422, 6424, ¶ 4 (2004) ("*Highland Cellular Order*").

¹⁰ *Virginia Cellular Order*, 19 FCC Rcd at 1565, ¶ 4; *Highland Cellular Order*, 19 FCC Rcd at 6423-24, ¶ 4.

¹¹ *Virginia Cellular Order*, 19 FCC Rcd at 1565, ¶ 4; *Highland Cellular Order*, 19 FCC Rcd at 6423-24, ¶ 4; *Federal-State Joint Board on Universal Service; Guam Cellular and Paging, Inc. d/b/a Saipancell; Petition for Designation as an Eligible Telecommunications Carrier on the Islands of Saipan, Tinian, and Rota in the Commonwealth of the Northern Mariana Islands*, CC Docket No. 96-45, *Order*, DA 04-2268 (rel. July 23, 2004).

¹² *Virginia Cellular Order*, 19 FCC Rcd at 1565, ¶ 4; *Highland Cellular Order*, 19 FCC Rcd at 6424, ¶ 4.

potential market entrants. As demonstrated more fully below, a grant of forbearance would seriously undermine these efforts and adversely affect consumers.

B. Allowing Pure Resellers To Obtain Universal Service Support Would Threaten the Viability of the Universal Service Fund and Harm Consumers.

Grant of TracFone's forbearance request would establish bad precedent and poor public policy by jeopardizing the long-term sustainability of the universal service fund and placing undue burdens on consumers. TracFone claims that 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."¹³

According to TracFone, the amount of funding it would receive would be negligible or *de minimis*.¹⁴ This argument is fatally flawed as it assumes that TracFone will be the only CMRS reseller to potentially receive universal service support. This view is extremely shortsighted. Nothing in TracFone's request distinguishes its circumstances from those of any other reseller. If the Commission were to grant the instant forbearance request, there would inevitably be a deluge of similar pleas made by other pure resellers (CMRS and wireline) as these carriers rush to seek federal support.

Grant of forbearance would create an artificial incentive for pure resellers to seek ETC designation in order to obtain a new stream of revenue. The Commission has already acknowledged "the increased frequency of petitions for competitive ETC

¹³ TracFone Forbearance Petition at 7.

¹⁴ TracFone ETC Petition at 12.

designations and the potential impact of such designations on consumers in rural areas.”¹⁵ In addition, the Commission has expressed “increasing[] concern[] about the impact on the universal service fund due to the rapid growth in high-cost support distributed to competitive ETCs.”¹⁶ Grant of forbearance would be a giant step backward in the Commission’s on-going efforts to reform the universal service system and ensure the long-term viability of the universal service fund.

In addition, designating pure resellers as ETCs would place significant pressure on the size of the fund. To accommodate an expanding base of ETCs and ensure adequate support to each of these carriers to carry out their obligations to provide affordable service to the public, the universal service fund would necessarily have to increase. There are two ways to finance a larger universal service fund: (1) by expanding the pool of providers subject to universal service contributions; or (2) by raising the level of carrier contributions. Although the Commission is considering whether to reduce or expand the pool of providers required to contribute to the universal service fund in a number of separate proceedings,¹⁷ it is unclear when the Commission will reach a

¹⁵ *Virginia Cellular Order*, 19 FCC Rcd at 1565, ¶ 4.

¹⁶ *Id.* at 1577, ¶ 31; *Highland Cellular Order*, 19 FCC Rcd at 6433, ¶ 25.

¹⁷ *See, e.g., IP-Enabled Services*, WC Docket No. 04-36, *Notice of Proposed Rulemaking*, 19 FCC Rcd 4863, 4905-08, ¶¶ 63-66 (2004); *Federal-State Joint Board on Universal Service, et al.*, CC Docket Nos. 96-45, *et al.*, *Further Notice of Proposed Rulemaking and Report and Order*, 17 FCC Rcd 3752 (2002); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 92-33, 95-20, 98-10, *Notice of Proposed Rulemaking*, 17 FCC Rcd 3019, 3046-56, ¶¶ 65-83 (2002).

decision. In the absence of expanding the base of contributing providers, consumers would bear the ultimate burden of financing an expanded universal service fund through higher end-user assessments. To ensure that consumers are not unduly burdened, the Commission should deny TracFone's request.

C. Forbearance Would Undermine the Act's and the Commission's Goal To Promote Facilities-Based Competition.

Grant of the forbearance request would conflict with the Act's and the Commission's objective to increase facilities-based competition. Expanding the pool of eligible ETC candidates to include pure resellers eliminates an incentive for competitors to invest in their own facilities, contrary to the Act. Section 214(e)(1)(A) illustrates Congress's unequivocal intention to exclude pure resellers from universal service support. In addition to this express exclusion, the Act also requires a carrier that receives universal service support to "use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."¹⁸ High-cost support is intended to promote network maintenance and build-out in high-cost areas to ensure that all consumers in the Nation have access to affordable telecommunications service at reasonably comparable rates. Grant of TracFone's forbearance request would nullify this incentive and send the wrong signals to potential market entrants.

The growth of facilities-based competition remains a clear objective of the Commission. Less than two weeks ago, the Commission reiterated its commitment to "advance the cause of facilities-based competition" when it replaced the "pick-and-

¹⁸ 47 U.S.C. § 254(e) (emphasis added).

choose” rule with an “all-or-nothing” rule in order to better enable carriers to obtain mutually beneficial concessions when negotiating interconnection agreements.¹⁹ In the “pick-and-choose” proceeding, Chairman Michael K. Powell noted that “[o]ne of the Commission’s most important goals is to advance competition that is meaningful and sustainable, and that will eventually achieve Congress’ goal of reducing regulation and promoting facilities-based competition.”²⁰ Commissioner Kathleen Q. Abernathy echoed this sentiment when she acknowledged that the Commission was appropriately “mov[ing] toward adopting new rules under which competitors will be increasingly required to rely on their own facilities and to differentiate their services.”²¹ Further, in announcing the Commission’s plans to establish interim local competition rules, Chairman Powell acknowledged the importance of facilities-based competition. He stated: “Facilities-based competition brings the innovation and value that consumers demand. The [] [interim] rules will also encourage increased investment in infrastructure that will continue to drive down prices for advanced services.”²² As these recent announcements demonstrate, the Commission remains committed to promoting facilities-based competition as envisioned by Congress, and a grant of forbearance would be completely antithetical to this objective.

¹⁹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Second Report and Order*, FCC 04-164, ¶ 1 (rel. July 13, 2004).

²⁰ *Id.*, Statement of Chairman Michael K. Powell.

²¹ *Id.*, Statement of Commissioner Kathleen Q. Abernathy.

²² *FCC Chairman Michael K. Powell Announces Plans for Local Telephone Competition Rules*, FCC News Release (rel. June 14, 2004).

D. Forbearance Would Not Be Competitively Neutral As It Would Excuse Pure Resellers from Obligations Imposed on Other ETCs.

Grant of the forbearance request would conflict with the principle of competitive neutrality by relieving pure resellers from obligations recently imposed upon other carriers seeking ETC status. The Commission recently granted two CMRS carriers ETC status based, in part, upon their specific commitments to provide service to requesting customers outside of their coverage areas by modifying equipment, deploying additional antenna or equipment, and constructing additional cell sites, cell extenders, or repeaters.²³ TracFone, however, has expressed no intention to construct or deploy its own facilities. Imposing certain obligations on one class of ETCs, while excusing another class of carriers is not competitively neutral and would give pure resellers such as TracFone a competitive advantage. Moreover, there can be no justification for allowing pure resellers to enjoy the benefits of universal service support, while leaving the underlying carriers with all of the obligations and risks associated with maintaining and upgrading the network.

In addition, in the absence of owning or seeking to construct facilities, it is unclear how TracFone, if granted ETC status, would comply with the statutory requirement to use universal service support “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.”²⁴ The Commission cannot waive this statutory requirement, which dictates how universal

²³ *Virginia Cellular Order*, 19 FCC Rcd at 1570-71, ¶¶ 15-16; *Highland Cellular Order*, 19 FCC Rcd at 6429-30, ¶¶ 16-17.

²⁴ 47 U.S.C. § 254(e).

service support is to be used. Given that TracFone has failed to offer any explanation regarding its need for or plans to use universal service support, BellSouth is led to believe that TracFone is seeking universal service funding simply to generate an additional source of revenue to boost its business and expand its marketing efforts. Universal service support is not intended to serve as a windfall for carriers, and the Commission should avoid such an outcome by denying the petition.

E. “Double Recovery” Remains a Legitimate Concern That Weighs Against a Grant of Forbearance.

The Commission should reject TracFone’s argument that previous concerns about “double recovery” are irrelevant in the CMRS context.²⁵ In 1998, the Commission refused to grant a similar request to allow pure resellers to become eligible to receive universal service support, concluding that in such cases the pure resellers would receive a “double recovery.” As the Commission explained, universal service support is already incorporated into the reduced wholesale rates charged to resellers. Allowing a reseller to benefit from these lower wholesale rates and to receive universal service support as an ETC would result in a “double recovery.”²⁶

According to TracFone, forbearance is justified because the rationale used by the Commission above is inapplicable to CMRS carriers. TracFone explains that, while a

²⁵ TracFone Forbearance Petition at 9-10.

²⁶ *Federal-State Joint Board*, CC Docket No. 96-45, *Report to Congress*, 13 FCC Rcd 11501,11581, ¶ 168 (1998); *see also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Recommended Decision*, 12 FCC Rcd 87, 173, ¶ 162 (1996) (recommending that the Commission reject a request to exercise its forbearance authority to permit pure resellers to become eligible for universal service support).

LEC is required to provide at reduced rates those telecommunications services it offers to its retail subscribers, underlying CMRS carriers are under no similar obligation.

Consequently, according to TracFone, “the double recovery” the Commission sought to avoid is not at issue because most of TracFone’s vendors do not receive universal service support and the rates charged by underlying wireless carriers are negotiated rates, not statutorily reduced rates.²⁷

This argument is flawed. It cannot be automatically assumed that the universal service support received by some of TracFone’s current (or future) vendors is not somehow reflected in the wholesale rates charged to TracFone. TracFone asserts that wireless rates are set solely by market forces, including the relative bargaining power of the buyer and seller.²⁸ A carrier’s bargaining power is based upon a number of factors, including size, resources, existing business relationships, access to investment capital. Because universal service support enables ETCs to offer affordable service and deploy facilities in high-cost areas, it is reasonable to believe that this access to federal funding may play a role in a carrier’s bargaining position when negotiating business deals with other carriers and establishing the rates for its wholesale services. The fact that a CMRS carrier designated as an ETC is not obligated by law to offer resold services at a discount that incorporates the universal service funding it receives does not automatically mean that “double recovery” is completely eliminated. In deciding to exclude pure resellers from ETC eligibility, Congress and the Commission clearly wanted to ensure that this

²⁷ TracFone Forbearance Petition at 9-10.

²⁸ *Id.* at 9.

class of carriers did not receive a windfall. TracFone has failed to prove that a windfall is impossible in the context of CMRS resellers. Accordingly, the Commission should deny the forbearance petition.

III. CONCLUSION

Forbearance is a valuable tool that Congress created for the Commission to use to eliminate unnecessary and unwarranted regulation. However, forbearance can only be granted when the statutory test has been met. As demonstrated herein, TracFone has failed to satisfy the forbearance standard. Contrary to TracFone's assertions, grant of the forbearance request will not benefit consumers and serve the public interest. Rather, a grant of forbearance would establish bad precedent by creating inefficient and artificial competition, placing undue pressure on the size of the universal service fund, and imposing additional costs on consumers. In addition, a grant of forbearance would conflict with Congress's and the Commission's long-standing goal to promote facilities-based competition as well as recent Commission efforts to manage the growth and long-term sustainability of the universal service fund. In light of the foregoing, the Commission must deny TracFone's request for forbearance.

Respectfully submitted,

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July 26, 2004

CERTIFICATE OF SERVICE

I do hereby certify that I have this 26th day of July served the following parties to this action with a copy of the foregoing **OPPOSITION** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed below.

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