

Greenberg Traurig

Mitchell F. Brecher
(202) 331-3152
BrecherM@gtlaw.com

April 7, 2006

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

**Re: CC Docket No. 01-92 - Developing a Unified Intercarrier
Compensation Regime
CC Docket No. 96-45 - Federal-State Joint Board on
Universal Service
NOTICE OF EX PARTE PRESENTATION**

Dear Ms. Dortch:

This letter is submitted on behalf of our client, TracFone Wireless, Inc. (“TracFone”), in response to the ex parte notice filed by T-Mobile USA, Inc. (“T-Mobile”) in the above-captioned dockets dated April 4, 2006. In that letter, T-Mobile reiterates its support for a Universal Service Fund (USF) contribution methodology based on a combination of working telephone numbers and capacity-based factors, and abandons its long-held preference for a revenues-based contribution methodology. T-Mobile also states its view that USF should be supported by a broad base of contributors including cable modem, digital subscriber line (DSL) and other broadband providers, IP-enabled service providers, prepaid calling card providers and others.

TracFone concurs with T-Mobile that the contribution base should be broadened to include all who provide interstate telecommunications. TracFone also agrees with T-Mobile that the Commission should take responsible steps to limit future growth of the USF and to freeze support at current levels. However, TracFone respectfully disagrees with certain other portions of T-Mobile’s stated position.

TracFone is especially concerned about T-Mobile’s plea to apply a numbers-based contribution methodology (with a fifty percent “discount”) for prepaid wireless services. TracFone has demonstrated to the Commission in prior submissions that a numbers-based contribution methodology -- with or without a “discount” -- is wholly inappropriate for prepaid wireless services. As T-Mobile candidly acknowledges in its letter, prepaid customers are not

billed monthly and therefore cannot be charged a standard monthly universal service fee (T-Mobile letter at 3). With no opportunity to recover their USF contributions through surcharges on customer bills, providers of prepaid wireless service must either absorb those costs themselves or include them in their rates.

T-Mobile states that under the current revenues-based system, it contributes about \$0.42 per month per customer to USF. T-Mobile is justifiably concerned that under a numbers-based methodology, its per customer USF liability would increase. Assuming a \$1.00 charge, T-Mobile's monthly per customer USF contribution would more than double -- from \$0.42 to \$1.00 (T-Mobile letter at 3). Like CTIA, T-Mobile has proposed a fifty percent "discount" on the per number charge for prepaid wireless. If that discount were implemented, T-Mobile's monthly per customer USF contribution would increase from \$0.42 to \$.50 -- less than a twenty percent increase. T-Mobile notes the very real possibility that the actual per number charge might exceed \$1.00, in which case the increase would be even greater.

What T-Mobile seems to ignore is that its customer and usage data are not necessarily typical of the prepaid wireless industry. TracFone has stated on the record that, based on its actual interstate telecommunications service revenue (TracFone does not utilize the 28.5 percent wireless safe harbor), its monthly per customer USF contributions are about \$0.06 per month. Imposition of a \$1.00 per month per number USF charge would increase TracFone's contributions by more than 1,600 percent -- considerably greater than the 100 percent increase which T-Mobile would face. Application of the CTIA/T-Mobile fifty percent "discount" would cause TracFone's monthly per customer contributions to jump from \$0.06 to \$.50 -- more than an 800 percent increase -- far above the 20 percent increase which T-Mobile would experience.

This disparity illustrates the conceptual flaw in the CTIA/T-Mobile discount approach. Stated simply, one size does not fit all. In considering the merits of the proposal to permit stated discounts off the standard monthly per number charge, the Commission should remain mindful of the fact that the "discount" plan (at any discount level) will impact specific prepaid providers differently, depending on the level of their customers' interstate usage. A plan, like the CTIA/T-Mobile plan, which would increase one prepaid provider's USF costs by twenty percent while increasing a competing provider's USF costs by 800 percent with no change in either provider's usage or revenue hardly can be deemed to comply with the requirement codified at Section 254(d) of the Communications Act that the contribution methodology be "equitable and nondiscriminatory."

What cannot be determined from the T-Mobile letter is how important the USF treatment of prepaid wireless is to T-Mobile's overall CMRS operations. T-Mobile states that fourteen percent of its customers are prepaid customers (T-Mobile letter at 2). It does not indicate what percentage of its customers' total usage is prepaid usage or what percentage of its revenues are derived from prepaid services. Based upon TracFone's experience and publicly-available data, it is known that prepaid usage and revenues per prepaid customer are generally lower than post-paid usage and post-paid per customer revenues. Thus, it cannot be determined whether a twenty

percent increase in USF contributions for the prepaid portion of T-Mobile's business will have any noticeable impact on its USF funding obligation. In contrast, TracFone's business is entirely prepaid. That 800 percent increase in USF costs which would result from the CTIA/T-Mobile "discount" plan would affect the entirety of TracFone's business.

T-Mobile expressly acknowledges that the consumers which would be most adversely affected by a numbers-based contribution methodology are "families and low income consumers," and that such increases will dampen demand for service by such consumers (T-Mobile letter at 4). Despite this recognition, T-Mobile continues to support a numbers-based plan for such services tempered only by its proposed "discount." As described above, even with that "discount," some providers' USF costs would increase eight fold. Passing such increases on to consumers will do far more than "dampen demand." It will result in those services becoming unaffordable to many consumers, especially low volume consumers and low income consumers. It strains credulity to suggest that an eight-fold increase in USF costs imposed upon those providers who serve low volume, low income consumers and ultimately, on the consumers themselves, would promote universal service.

T-Mobile asks the Commission to implement the adjustments proposed by CTIA, T-Mobile, and Verizon (T-Mobile letter at 4). Unlike CTIA and T-Mobile, Verizon has not proposed a discounted per number charge for prepaid wireless. The Commission's -- and T-Mobile's -- attention is directed to the ex parte letter submitted jointly by Verizon Communications and Verizon Wireless on March 3, 2006 in CC Docket No. 96-45. Attached to that letter is a document captioned "Universal Service Contribution Methodology." At p. 3 of that document, Verizon and Verizon Wireless state as follows with respect to prepaid wireless services:

It is more difficult for prepaid wireless providers to pass through a monthly per number assessment because they do not send monthly bills to customers. Since prepaid wireless customers do not buy service by the month but instead buy blocks of minutes, often in low amounts, a per-month assessment is not feasible. The FCC should either preserve the current revenues-based assessment for prepaid wireless, or adopt a per-number assessment that reflects the unique characteristics of this service.

Nothing in the above statement suggests that Verizon favors the CTIA/T-Mobile fifty percent "discount" for prepaid wireless, as stated by T-Mobile. Instead, Verizon's stated position as reflected in its March 3, 2006 ex parte letter, recognizes that per month assessments on prepaid wireless services are not feasible and suggests either preservation of revenues-based assessments or per number assessments which reflect prepaid wireless's unique characteristics.

Finally, T-Mobile's assertion that there is a jurisdictional basis for a numbers-based contribution methodology is not correct and warrants response. In asserting that the

Communications Act provides legal authority to establish a Federal Universal Service Fund contribution methodology based on working telephone numbers, T-Mobile relies solely upon a twenty-two year old case: National Association of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert. den.*, 469 U.S. 1227 (1985) (“NARUC v. FCC”).

NARUC v. FCC involved a very different set of circumstances and is readily distinguishable from the instant situation. In NARUC v. FCC, the Commission established end user access charges to be imposed by local exchange telephone companies to recover the interstate portion of their plant which was jointly used for interstate and intrastate services. In conformance with the Supreme Court’s holding in Smith v. Illinois Bell Telephone Co., 282 U.S. 133 (1930), the costs of telephone plant, including jointly used plant, are separated between the interstate and intrastate jurisdictions pursuant to Commission rules established in consultation with a Federal-State Joint Board established under Section 410(c) of the Communications Act. The end user charges at issue in NARUC v. FCC involved only the manner in which those costs allocated to the interstate jurisdiction were to be recovered -- a matter clearly within the Commission’s statutory authority. The Commission’s action in that situation did not extend to intrastate services or to recovery of costs assigned to the intrastate jurisdiction.

In contrast, basing USF contributions on working telephone numbers has nothing to do with the Commission’s jurisdiction over interstate plant costs or interstate services. There is no jurisdictional separation between the interstate and intrastate “costs” of a telephone number. Indeed, telephone numbers can be assigned and often are assigned when there is no use of those numbers to access interstate services. It is one thing for the Commission to establish rules to govern the recovery of interstate costs -- a matter clearly within its jurisdiction. It is quite another thing for the Commission to purport to establish rules which impose additional costs upon intrastate services -- a matter beyond the scope of its jurisdiction. See, Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393 (Fifth Cir. 1999). At best, whether the Commission has jurisdiction under the Communications Act to establish a USF contribution methodology based on working telephone numbers is problematic and should be avoided for legal as well as public policy reasons.

Pursuant to Section 1.1206(b) of the Commission’s rules, this letter is being filed electronically. If there are questions, please communicate directly with undersigned counsel for TracFone.

Sincerely,



Mitchell F. Brecher

Ms. Marlene H. Dortch
April 7, 2006
Page 5

cc: Mr. Ian Dillner
Ms. Jessica Rosenworcel
Mr. Scott Bergmann
Mr. Barry Ohlson
Ms. Dana Shaffer
Mr. Aaron Goldberger
Mr. Thomas Navin
Ms. Narda Jones
Ms. Cathy Carpino
Mr. Thomas Buckley
Mr. Greg Guice
Mr. James Lande
Ms. Carol Pomponio