**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| In the Matter of | ) | |
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| Universal Service Contribution Methodology | ) | WC Docket No. 06-122 |
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## COMMENTS OF TRACFONE WIRELESS, INC.

TracFone Wireless, Inc. ("TracFone"), by its attorneys, hereby submits its comments on the issues set forth in the notice of proposed rulemaking portion of the Commission's Report and Order and Notice of Proposed Rulemaking issued in this proceeding.[1] In that report and order, the Commission took several critically important steps to ensure the continuing sufficiency of the federal Universal Service Fund ("USF") while the Commission examines more fundamental USF issues, including contribution methodology reform. First, the Commission increased the wireless safe harbor from 28.5 percent to 37.1 percent -- a level which the Commission has determined more closely reflects the actual interstate usage of wireless services in the current marketplace. Second, the Commission determined that providers of interconnected Voice over the Internet Protocol (VoIP) services must contribute to the USF without regard to whether such services, which indisputably utilize "telecommunications," fit within the definitions of "telecommunications service" or "information service."

The USF Contribution Methodology Order & NPRM also includes a notice of proposed rulemaking which seeks to further refine the record concerning the requirements established in

[1] Universal Service Contribution Methodology, *et al.* (*Report and Order and Notice of Proposed Rulemaking*), FCC 06-94, released June 27, 2006 ("USF Contribution Methodology Order & NPRM").

the report and order portion. First, the Commission seeks comment on whether to raise or eliminate the wireless safe harbor and the manner in which wireless providers should determine their actual interstate and international end-user revenues. Second, the Commission seeks comment on VoIP service providers' USF contribution obligations established in the USF Contribution Methodology Order & NPRM. In these comments, TracFone urges the Commission to eliminate the safe harbor or establish a safe harbor percentage that will encourage wireless providers to report actual interstate and international end-user revenues, suggests methods for determining interstate and international revenues, and notes its support for the Commission's decision to access USF contribution obligations on VoIP service providers.

## I. The Commission Should Establish a Safe Harbor That Encourages Wireless Providers to Report Actual International and Interstate Revenues.

In the USF Contribution Methodology Order & NPRM, the Commission raised the wireless safe harbor from 28.5 percent to 37.1 percent based, in part, on a traffic study conducted by TNS Telecoms for TracFone.[2] The TNS Telecoms study focused on the interstate minutes of use of seven large national mobile wireless service providers during the third quarter of 2004. The Commission noted that 37.1 percent was the highest percentage of interstate usage of a wireless service provider supported by the record.[3] The Commission requests comments on whether to eliminate or raise the wireless safe harbor and on how wireless carriers should determine actual usage.[4]

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[2] Letter from Mitchell F. Brecher, counsel for TracFone, to Ms. Marlene Dortch, Secretary, filed February 23, 2005 in CC Docket No. 96-45, transmitting the bill harvesting study prepared for TracFone by TNS Telecoms entitled "Wireless Provider Bill Analysis 3rd Quarter 2004" ("TNS Letter").

[3] USF Contribution Methodology Order & NPRM at ¶ 25.

[4] See id. ¶ 66.

The Commission should eliminate the safe harbor because virtually all wireless providers are able or should be able to identify the originating and terminating locations either by terminating or originating address in the case of calls to or from wireline telephones, or by originating or terminating cell sites in the case of calls to or from wireless devices. As such, wireless providers should be required to report actual interstate telecommunications service revenues to the Commission. In the alternative, TracFone recommends that the Commission increase the wireless safe harbor and that wireless carriers be permitted to use the safe harbor only if they are able to demonstrate to the Commission that technical limitations impair their ability to compile actual interstate usage data.

In 1998, the Commission established safe harbor percentages to be used by specific categories of wireless service providers to allocate telecommunications revenues between interstate and intrastate jurisdictions to determine their USF contribution obligations. At that time, parties to the relevant Commission proceeding asserted that it would be difficult for wireless telecommunications providers to identify revenues as interstate or intrastate. As such, the Commission identified safe harbor percentages that "reasonably approximate[d]" what it believed at the time to be the percentage of interstate wireless telecommunications revenues generated by wireless service providers. The safe harbor percentage for CMRS providers was initially established at 15 percent.[5]

In 2002, the Commission raised the wireless safe harbor to 28.5 percent based on information it received from the wireless industry.[6] Although the percentage of interstate usage

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[5] Federal-State Joint Board on Universal Service (*Memorandum Opinion and Order and Further Notice on Proposed Rulemaking*), 13 FCC Rcd 21252, ¶¶ 1, 6, 11 and 13 (1998).

[6] 1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American

provided by wireless carriers ranged from 10 percent to 28.5 percent, the Commission chose to use the upper end of the percentage range as the safe harbor. The Commission explained:

> [I]t is appropriate to revise the safe harbor for mobile wireless providers to correspond to the highest estimate of minutes of use provided by the wireless carriers. Setting the safe harbor at the high end of the range of estimates provided by the wireless studies should provide mobile wireless providers an incentive to report their actual interstate telecommunications revenues if they are able to do so.[7]

When the Commission recently raised the wireless safe harbor to 37.1 percent, it again stressed its "policy preference that providers contribute to the Fund based on their actual data rather than on a safe harbor percentage where possible."[8]

TracFone agrees with the Commission that wireless service providers should contribute to the USF based on actual interstate usage. TracFone urges the Commission to eliminate the safe harbor, or alternatively, adopt a higher safe harbor for wireless service providers to encourage reporting of actual data. As the Commission recognized in 2002, the existence of a wireless safe harbor percentage effectively caps the percentage of interstate usage upon which the USF contribution obligation may be assessed. Wireless service providers with interstate usage below the safe harbor will report actual interstate revenues to the Commission while wireless service providers with interstate usage at or above the safe harbor will rely on the safe harbor to calculate their interstate revenues, since their USF contributions based on their actual interstate revenues would be higher than if they avail themselves of the safe harbor. Thus, a higher safe harbor would create a greater incentive for wireless service providers to utilize available technology to calculate and report actual interstate revenues. Moreover, the

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Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms (*Report and Order and Second Notice of Proposed Rulemaking*), 17 FCC Rcd 24952, ¶ 21 (2002).

[7] Id. ¶ 22.

[8] USF Contribution Methodology Order & NPRM, ¶ 28.

elimination of the safe harbor would require wireless carriers to use available technology to calculate and report actual interstate revenues.

There is no doubt that some wireless providers have available originating and terminating location data (at least by cell site) since that information is shown on service invoices rendered to their customers. If a wireless provider possesses information to indicate on a consumer's bill that a specific call originated at one identified location and terminated at another identified location, clearly that provider should be able to determine easily which calls originated and terminated at locations (including cell sites) in the same state (*i.e.*, intrastate calls) and which originated and terminated at locations (including cell sites) in different states or terminated at foreign locations (*i.e.*, interstate or foreign calls). TracFone recognizes that some wireless providers include this information on customer invoices, but that others do not do so. Indeed, some providers include location information for portions of their traffic, but not for all of their traffic. TracFone also acknowledges that some of its underlying vendors provide such location-specific information, while other vendors list calls by originating and terminating NPA. However, the fact that <u>some</u> providers are able to identify which calls are interstate and which are intrastate indicates that the technology is likely to be available to <u>all</u> providers to make those determinations. If, for some reason, specific providers may lack the resources to avail themselves of that technology, the burden should be on those providers to justify to the Commission why the technology is unavailable to them or, if available, why they should not be required to avail themselves of it in order to report interstate usage for USF purposes based on actual usage rather than a safe harbor.

If the Commission does not eliminate the safe harbor, TracFone advocates the establishment of a higher safe harbor than the percentage the Commission recently adopted. The

Commission determined the current safe harbor percentage based on the TNS Telecoms study submitted by TracFone. When TracFone filed the TNS report with the Commission, it advised the Commission that the database used by TNS Telecoms was imperfect and likely significantly understated wireless providers' actual interstate usage.[9] In particular, TracFone stated that the study only analyzed residential customer billing records, thereby ignoring business customer data. Business customers tend to make a higher percentage of interstate calls, and therefore, the TNS Telecoms interstate usage percentages were understated. TracFone also noted that it sought quantitative data concerning wireless providers' interstate usage, but TNS Telecoms' data was the only available data. TracFone filed the TNS Telecoms study with the Commission to address the Commission's request for data regarding wireless interstate usage and to advise the Commission that the level of interstate usage of wireless services was substantially above 28.5 percent. As TracFone explained in the TNS Letter, the data contained in the TNS Report was the best information available to it. TracFone continues to believe that the wireless safe harbor is unnecessary, that it is likely to result in understating actual wireless industry interstate revenue and resulting USF contributions, and it should be eliminated.

TracFone agrees with the Commission's preferred policy that wireless service providers determine interstate revenues based on actual usage data. The Commission seeks comments on how wireless service providers should determine their actual interstate end-user revenues. TracFone suggests that the most accurate way to determine interstate usage for wireless customers is by using locations associated with originating and terminating wireline telephone numbers where that information is available, and by using originating and terminating cell sites for calls to or from wireless devices where that information is available. For calls placed from a

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[9] TNS Letter.

wireless phone to a landline phone, the wireless service provider should look at the originating cell site and the terminating number of the landline to determine whether the usage is interstate. For calls placed by one wireless phone to another wireless phone, the wireless service provider should look at the originating and terminating cell sites to determine whether the usage is interstate. For calls placed from a landline phone to a wireless phone, the wireless provider should look at the originating telephone number and associated location and at the terminating cell site.[10]

If cell site information is not available, then TracFone advocates the examination of originating and terminating numbering plan area (NPA or area code) data to determine the jurisdictional nature of a call. In fact, the TNS Telecoms study, upon which the Commission relied, analyzed the call records of seven wireless service providers and allocated minutes of use between interstate and intrastate jurisdictions based on the originating and terminating NPA for each call. TracFone itself uses NPA data to determine the jurisdiction of its traffic since many of TracFone's vendors do not currently provide cell site location information. This method of determining whether a call is interstate is consistent with industry practice and has been approved by the Commission in other contexts.[11] The NPA method does not account for

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[10] TracFone recognizes that a relatively small number of cell sites serve points in multiple states and that occasionally callers will travel among cell sites and sometimes between states during the course of calls. However, it seems improbable that these aberrant situations will have any statistically significant impact on the percentages of calls which are interstate based on the methodology suggested in these comments.

[11] See Starpower Communications, LLC v. Verizon South, Inc., 18 FCC Rcd 23625, ¶ 17 & n.62 (2003) ("industry practice among local exchange carriers similarly appears to have been that calls are designated as either local or toll by comparing the NPA-NXX codes of the calling and called parties.") In Starpower Communications, calls were designated as local or toll for purposes of determining reciprocal compensation. While the focus of the instant proceeding is on how to determine whether a call is interstate for purposes of determining USF contribution obligations, Starpower Communications supports the position that analysis of NPA-NXX codes is a reliable indicator of the jurisdictional nature of a call.

situations in which a wireless customer travels outside his or her home state and calls a telephone number within the home state. However, it is a reasonable and efficient way to determine whether a call is interstate until all carriers are able to capture and transmit cell site information. Reliance upon a wireless safe harbor should only be permitted in those relatively rare situations where neither originating and terminating location data based on landline telephone numbers or cell sites for wireless, or NPA data are available.

Finally, TracFone recommends that the Commission further encourage wireless service providers to use actual data to identify interstate usage by requiring carriers using the safe harbor to file plans with the Commission disclosing when they will commence using actual data and disclosing the type of actual data they intend to utilize. The Commission may also want to consider setting a deadline by which wireless carriers are required to use actual data to calculate interstate usage and associated revenues.

## II. The Commission's Establishment of USF Contribution Obligations for VOIP Service Providers Promotes Competitive Neutrality.

TracFone supports the Commission's decision to require VoIP service providers to contribute to the USF as a means to relieve the significant strain on the USF. Interconnected VoIP services, as defined by the Commission,[12] provide interstate telecommunications, and, in fact, increasingly are replacing traditional circuit switched voice services. Given that VoIP service is easily substitutable for traditional telecommunications services, the providers of VoIP service should be required to contribute to the USF based on revenues they derive from that service. As stated by

[12] In the Vonage Order the Commission defined interconnected VoIP services as services that "(1) enable real-time, two-way voice communications; (2) require a broadband connection to the user's location; (3) require IP-compatible customer premises equipment; and (4) permit users to receive calls from and terminate calls to the PSTN." USF Contribution Methodology Order and NPRM, § 15 (citing Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Utilities Commission, 19 FCC Rcd 22404 (2004)).

the Commission, it is inappropriate to exclude VoIP service providers from USF contribution requirements while traditional telecommunications providers, including wireless service providers, are required to contribute to the USF.[13] Such disparate treatment is inconsistent with the principle of competitive neutrality because it creates price distortion and an arbitrage opportunity for VoIP service providers that is incompatible with a competitive marketplace.

## CONCLUSION

For the reasons set forth above, the Commission should eliminate the wireless safe harbor and require all wireless service providers to report interstate end-user revenues based on actual data for purposes of determining USF contribution obligations. Alternatively, the Commission should increase the wireless safe harbor to encourage wireless service providers to utilize available technology to determine actual interstate usage. The Commission should also require wireless service providers to use cell site information where available to identify the jurisdictional nature of calls. Where cell site information is not available, jurisdictional determinations for USF reporting purposes should be based on the NPAs associated with each end of each call. Finally, the Commission should continue to require VoIP service providers to contribute to the USF.

Respectfully submitted,

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August 9, 2006

[13] See USF Contribution Methodology Order and NPRM, ¶ 44.