Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight	))	WC Docket No. 05-195

COMMENTS OF TRACFONE WIRELESS, INC.

Mitchell F. Brecher

GREENBERG TRAURIG, LLP
2101 L Street, NW
Suite 1000
Washington, D.C. 20037

Its Attorneys

November 13, 2008

Table of Contents

Summary

TracFone Wireless, Inc. commends the Commission's inquiry into the management, administration and oversight of the Universal Service Fund (USF). As both a contributor to the USF and as an Eligible Telecommunications Carrier (ETC) which receives reimbursement for providing Lifeline service, TracFone has a profound interest in the effective and efficient management of the USF. However, TracFone requests that the Commission balance the need for careful management of USF resources with the need to ensure that low income households are able to benefit from participation in the Lifeline program.

Under current rules, applicants for enrollment in Lifeline and Link-Up under program-based eligibility are required to self-certify to their Lifeline providers under penalty of perjury that they participate in one of the qualifying programs. If an ETC relies upon a customer's self-certification in conformance with the rules, and if the ETC incurs costs in providing Lifeline service to the customer, the ETC should not be financially responsible for a customer's fraudulent self-certification. The vast majority of Lifeline customers comply with the self-certification requirements. However, the potential risk to ETCs of losing USF reimbursement for those customers who falsify their certifications will discourage ETCs from aggressively promoting their Lifeline services and will cause Lifeline participation rates by qualified low income consumers to remain disappointingly low. In order to prevent Lifeline customers from violating the one Lifeline service per household requirement, TracFone recommends that the Commission require the establishment of a data base of customer name/address information which all ETCs could access for the limited purpose of determining any other ETC is providing Lifeline service to a customer with the same address.

The role of the Universal Service Administrative Company (USAC) should be limited to being the administrator of the USF. USAC should not establish enforcement or regulatory

policy. Rather than making its own interpretative decisions and disallowing reimbursement claims or seeking refunds of already paid amounts based on those decisions, where there are questions regarding eligibility, documentation or other issues, USAC should seek rulings from the Commission's Wireline Competition Bureau. USAC should not place the onus on the ETCs -- which already have rendered service and incurred costs in doing so -- to appeal those disallowances to the Commission.

When conducting audits of ETCs' performances, USAC should use statistically valid sampling techniques and should not be allowed to extrapolate large numbers of irregularities and violations based on very limited samples. Finally, any employee bonus system implemented by the USF administrator should not create financial incentives for USAC executives to disallow legitimate reimbursement claims by ETCs for costs prudently expended in providing service, especially service to low income households.

Adoption of the modest suggestions contained in these comments will improve management, administration and oversight of the USF without undermining the ability of ETCs to provide service to consumers who qualify for low income support from the USF.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Comprehensive Review of the Universal Service	)	WC Docket No. 05-195
Fund Management, Administration, and Oversight	)	

COMMENTS OF TRACFONE WIRELESS, INC.

TracFone Wireless, Inc. ("TracFone"), by its attorneys, hereby submits its comments in response to the Notice of Inquiry issued by the Commission in the above-captioned proceeding.[1]

Introduction

TracFone is a reseller of Commercial Mobile Radio Services ("CMRS"). It offers prepaid wireless services. By order issued April 11, 2008, the Commission designated TracFone as an Eligible Telecommunications Carrier ("ETC") for the limited purpose of offering Lifeline service in the states of Alabama, Connecticut, Delaware, Massachusetts, New Hampshire, New York, North Carolina, Pennsylvania, Tennessee, and Virginia, and in the District of Columbia.[2] TracFone also has been designated as an ETC in the states of Florida, Georgia and Michigan and has pending applications for ETC designation in several additional states. In addition, TracFone has experience as a provider of Lifeline service since it offered a special Lifeline program for victims of Hurricane Katrina pursuant to the Commission's Katrina Lifeline program.[3] During the short period that the Katrina Lifeline program was operational (between December 2005 and

---

1 Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight (*Notice of Inquiry*), FCC 08-189, released September 12, 2008 ("Notice" or "NOI").
2 Federal-State Joint Board on Universal Service, *et al*, 23 FCC Rcd 6206 (2008) ("TracFone ETC Order").
3 Federal State Joint Board on Universal Service, 20 FCC Rcd 17883 (2005).

June 1, 2006), TracFone was able to provide nearly 30,000 displaced hurricane victims with free handsets and wireless airtime in accordance with the provisions of the Katrina Lifeline program.

In the months following its designation as an ETC in April 2008, TracFone has commenced offering its Lifeline service under the brand name, SafeLink Wireless, in several states and now is in the process of expanding the service's availability to additional states. Under TracFone's SafeLink Wireless Lifeline program, qualified low income households receive at no charge wireless handsets and specified quantities of airtime each month. Moreover, those supplies of free airtime "roll over" to the following month such that unused minutes remain in the Lifeline customers' accounts for use in subsequent months.

As both a contributor to the Universal Service Fund ("USF") and as a recipient of USF funding as a result of its designation as an ETC and provision of Lifeline service, TracFone has a profound interest in the effective and efficient operation of the federal Universal Service Fund programs in general, and in Lifeline in particular. For that reason, TracFone applauds the Commission's initiative in seeking proactive steps to strengthen management, administration and oversight of the USF. However, TracFone respectfully urges the Commission to remain mindful of the important public interest objectives which underlie the universal service provisions of the Communications Act and to avoid imposing rules and procedures on the Universal Service Administrative Company "USAC") -- the administrator of the USF, and on ETCs which are so burdensome as to undermine those goals. In short, the Commission should not allow its zeal to improve the management and efficiency of the USF to lead to requirements and obligations and creation of risks for ETCs which produce the unintended consequence of discouraging ETCs from actively promoting USF low income programs and thereby making those programs less available to those that need them most -- low income households.

I. ETCs Should Not Bear the Entire Risk of Lifeline Customer Fraud

While instances of waste, fraud and abuse in certain USF programs have been well-documented and reported, most of the reports of such waste, fraud and abuse have involved the USF's Schools and Libraries (E Rate) program and the high cost programs.[4] TracFone is not aware of any comparable reports of waste, fraud and abuse which have permeated the low income programs, especially Lifeline. This is not to suggest that such conduct affecting the Lifeline program could not occur; only that it has not occurred to any significant degree.

Under the Commission's rules, applicants for Lifeline benefits in federal default states with program-based eligibility obligations are required to self-certify their participation in qualified programs under penalty of perjury. Once a low income consumer has self-certified to his or her household's program-based eligibility, the ETC is required to enroll the consumer in its Lifeline program. As the Commission noted in adopting the self-certification requirement for program-based eligibility, program-based eligibility encourages eligible consumers to participate in Lifeline, imposes minimal burdens on consumers, and such self-certification is easily verifiable.[5] TracFone agrees that self-certification is the only practicable method for enabling ETCs to enroll large numbers of qualified low income households into their Lifeline programs. TracFone has learned that many low income consumers simply do not have readily available documentation which proves their participation in qualifying programs. To require such customers to produce documentation of eligibility would delay their enrollment and, in many cases, cause them not to enroll in Lifeline. Under the current rules, ETCs are in full compliance

---

4 See, *e.g.*, Government Accountability Office, Telecommunications, Greater Involvement Needed by FCC in the Management and Oversight of the E-Rate Program, GAO-05-151 (Feb. 9, 2005); GAO, Telecommunications, FCC Needs to Improve Performance Management and Strengthen Oversight of the High-Cost Program, GAO-08-633, (June 2008).

5 Lifeline and Link-Up (*Report and Order and Further Notice of Proposed Rulemaking*), 19 FCC Rcd 8302 (2004) at ¶ 27 ("Lifeline and Link-Up").

with the Commission's rules when they accept a Lifeline applicant's enrollment based upon the applicant's self-certification of its program-based eligibility.[6]

The vast majority of Lifeline applicants honestly and correctly self-certify to their program-based eligibility with the threat of perjury penalties providing a sufficient incentive not to falsely self-certify. On rare occasions, some applicants may self-certify in a false and dishonest manner. Although the Commission's rules properly place the risk of such fraudulent self-certifications on the wrongdoer, TracFone is concerned that USAC, in a well-intentioned effort to prevent waste, fraud and abuse, may shift the risk of such fraud from the wrongdoers onto the shoulders of the ETCs who accepted the customers' self-certifications as required by the Commission's rules and who incurred the costs of providing such service in reliance upon those self-certifications. This occurs when USAC disallows reimbursement to ETCs or seeks refunds of Lifeline funding provided to ETCs who relied in good faith -- as they are required to do -- on customer certifications of program-based eligibility which later are determined to be fraudulent.[7]

Such a shift in who bears the risk of fraud would be unfortunate, unfair and contrary to the goals of the Universal Service program. To date, the most significant failing of the low income programs in general and Lifeline in particular has not been the occasional provision of benefits to consumers who have perjured themselves by falsifying their program-based eligibility. Rather, it has been the shockingly low level of participation in Lifeline and receipt of benefits by those consumers for whom the Lifeline program was created. According to Commission data, less than thirty-four percent of eligible low income households nationwide

---

[6] 47 C.F.R. § 54.409 (d).

[7] To the extent that imposition of an eligibility confirmation obligation on ETCs would require ETCs to access federal and state data bases on a real time basis to verify Lifeline applicants' enrollment in qualifying programs, TracFone has learned that many of the governmental agencies which administer those programs are not prepared to accommodate such access by ETCs.

participate in Lifeline.[8] In many states, including jurisdictions where TracFone has been designated as an ETC, the level of participation is far lower, *e.g.*, Alabama - 8.5 percent; Florida - 13.5 percent; Tennessee - 6.4 percent, Virginia - 6.6 percent; Washington, DC - 21.5 percent.[9]

As part of the Commission's inquiry into ways to improve the management, administration and oversight of the USF, TracFone urges that significant attention be focused on the ongoing problem of low participation by qualified low income households. This is critical. In the Notice, the Commission stated its primary goal in initiating this proceeding is to ensure that sufficient safeguards are in place for the USF to operate "as Congress intended."[10] What Congress intended is articulated in the Communications Act itself: "Consumers in all regions of the Nation, including low-income consumers and those in rural, insular and high cost areas, should have access to telecommunications and information services . . . that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas."[11] Thus, any inquiry into USF management, administration and oversight must include an evaluation of how the USF is advancing the statutory goal of affordable service for low income consumers. If current USF administration, management and oversight practices are undermining achievement of that goal by imposing obstacles to the prompt enrollment of qualified low income consumers into the low income programs, particularly Lifeline, than those practices need to be revised so as to facilitate timely availability to all households, including low income households, of affordable telecommunications service.

---

[8] Lifeline and Link-Up, at Appendix K - Section 1: Baseline Information Table 1.A, Baseline Lifeline Subscription Information (Year 2002).
[9] *Id.*
[10] Notice at ¶ 2.
[11] 47 U.S.C. § 254(b)(3) (emphasis added). See also Lifeline and Link-Up, at ¶ 3 ("Those principles also recognize that ensuring rates are affordable is a national priority.").

There may be various reasons why Lifeline participation levels are so low. However, one important reason may be that ETCs have little incentive to actively promote Lifeline. An ETC offering Lifeline service to low income consumers who follows the applicable federal and state rules, including the applicable customer eligibility certification rules, and who incurs the cost of providing discounted service (or, in TracFone's case, free service) to such customers, should not bear the risk of being denied reimbursement or being required to refund previously-reimbursed amounts as a result of customer fraud which the ETC has no practical ability to detect or prevent.[12]

In addition to the equipment and service costs incurred by an ETC such as TracFone, ETCs must incur other costs in order to comply with applicable ETC requirements. Such additional costs include advertising of the availability of Lifeline service, participation in the FCC Form 497 reporting and reimbursement claim process, and compliance with USAC audit procedures and requirements.[13] TracFone (and presumably other ETCs) incur the costs of providing Lifeline service with the expectation that portions of their costs of providing that discounted or free service will be covered by the USF.

Rather than holding ETCs liable for customer eligibility certification fraud, TracFone respectfully suggests that the Commission require USAC to reimburse ETCs for the costs

---

[12] The risk of non-reimbursement of costs incurred is borne by all ETCs. In TracFone's case, the burden is especially great since, in addition to providing Lifeline customers with free airtime, TracFone provides handsets to customers at no charge. While the handsets are free to TracFone's Lifeline customers, they are not free to TracFone which must purchase the handsets from various handset vendors.

[13] Beyond those costs which must be incurred by all ETCs, TracFone has had to incur very substantial internal and external costs as a result of the Commission's condition imposed on TracFone that it obtain a certification from every Public Safety Answering Point (PSAP) where TracFone plans to provide Lifeline service that its customers are able to access 911 and E911 service without regard to activation status or availability of prepaid minutes. TracFone ETC Order at ¶ 21.

covered by the Lifeline program for all Lifeline customers whose eligibility has been certified in compliance with applicable federal or state requirements. In those rare instances where customers have falsified their self-certifications, USAC should be authorized to take such actions as necessary to recover those costs from the wrongdoer, rather than from the ETC who followed the applicable federal and state eligibility certification rules only to learn later that the customers had engaged in fraud. Of course, in situations where an ETC fails to properly certify a Lifeline customer's eligibility in full conformance with the applicable requirements, that ETC should bear the risk of fraud. In such situations, USAC should not reimburse the ETC and if the ETC has been reimbursed and the ETC's failure to follow the rules discovered in a subsequent audit, USAC should seek repayment by the ETC of such improperly paid amounts.

Another aspect of the Lifeline customer certification of eligibility process which warrants reform involves the one Lifeline service per household requirement. The problem is not with the requirement itself, but rather with how ETCs providing Lifeline are able to confirm that an applicant for Lifeline service does not receive Lifeline service (or that no one else in his/her household receives Lifeline service) from another ETC. When the rules were promulgated only wireline ETCs offered Lifeline and, in most locations, only one ETC offered Lifeline -- typically the incumbent LEC. It was a simple task for an ILEC to access its own data base to confirm whether any other Lifeline accounts were associated with a specific address. Now that multiple ETCs -- wireline and wireless -- offer Lifeline, such confirmation of compliance with the one per household requirement is far more complicated.

For example, when an applicant for Lifeline service represents to TracFone that no one in the applicant's household receives Lifeline service from another ETC, there is no means for TracFone -- or any ETC -- to determine whether that representation is correct. This problem could be resolved by a data base comprised of customer name/address information for all ETCs serving a specific area. ETCs could access that data base for the limited purpose of determining whether any other ETC is providing Lifeline to a customer with the same address. That data base could be maintained by USAC itself or perhaps by another neutral organization such as the Alliance for Telecommunications Industry Solutions (ATIS). TracFone recommends that the Commission, as part of its inquiry into USF management, administration and oversight, consider establishment of a data base which ETCs could use to determine whether applicants for Lifeline are in compliance with the one per household requirement, and that ETCs be required to access that data base to determine whether applicants for Lifeline service (or anyone within the applicant's household) receives Lifeline benefits from another ETC.

II. USAC's Responsibilities are Administrative. It Should Not Establish Enforcement or Regulatory Policy

As the Commission quite correctly has stated in the Notice, under Part 54 of the Commission's rules, USAC is the USF administrator; it is not permitted to make policy decisions without Wireline Competition Bureau guidance.[14] Establishing the appropriate responsibilities for the Administrator is a critical aspect of effective and efficient USF management, administration and oversight. TracFone is concerned that on some occasions, the Administrator has overstepped the bounds of its responsibilities and made its own interpretative decisions and policy judgments on USF issues.

For example, on August 18, 2008, AT&T Inc. filed with the Commission a request for review of a Decision of the Universal Service Administrator in which it has challenged certain USAC Management Responses of Independent Audit Reports.[15] Among the specific auditor

---

[14] Notice at ¶ 30.
[15] Request of Review by AT&T Inc. of Decision of the Universal Service Administrator, WC Docket No. 03-109, filed August 18, 2008.

findings and USAC management responses challenged by AT&T is a finding that AT&T violated Section 54.101(a) of the Commission's rules by failing to advertise specifically the availability of toll blocking. Despite the fact that the Commission's rules only require ETCs to "publicize the availability of Lifeline service in a manner reasonably designed to reach those likely to qualify for the service,"[16] USAC's auditors and USAC itself have taken the position that AT&T was somehow required to advertise toll blocking specifically and that its failure to do so placed it in violation of the general Lifeline advertising requirement set forth at Section 54.101(a).

There are other examples of situations where USAC has taken actions based on its own or its auditors' interpretations of applicable rules or policy judgments rather than seeking Commission or Bureau guidance. In that same AT&T request, AT&T objects to USAC's conclusion that ETCs were obligated to maintain copies of Lifeline customer self-certifications prior to the effective date of a Commission rule requiring that such certifications be maintained. Another ETC -- Qwest Communications International Inc. -- has deemed it necessary to challenge a USAC determination that self-certification by Lifeline applicants that they reside on tribal lands is not sufficient for ascertaining customers' tribal residency and entitlement to the enhanced benefits available to tribal residents.[17]

These requests to review USAC decisions are pending before the Commission and they no doubt will be considered by the Commission in due course. By identifying these examples, it is not TracFone's intent to ask the Commission to decide in favor of AT&T and Qwest or against USAC. The point is that once USAC sought to interpret the scope of the applicable Lifeline

---

[16] 47 C.F.R. § 54.405(b).

[17] Request for Review by Qwest Communications International Inc. of Decision of the Universal Service Administrator, WC Docket No. 03-109, filed April 25, 2008.

requirements in a manner which deviated from the plain language of the rules and the expectations of the industry, it should have been required to seek rulings from the Wireline Competition Bureau rather than accepting the auditor's conclusions and disallowing reimbursement claims. By doing so, USAC placed ETCs who have acted in good faith in the difficult position of either accepting the USAC conclusions and disallowance of reimbursement or petitioning the Commission for review of those administrator decisions, long after they incurred the expenses of providing Lifeline service to low income customers who certified to their eligibility to participate in Lifeline. USAC's role is to be the Administrator. It is not to be the enforcer of Commission rules or the regulator of the Commission's USF programs. The Commission, either directly, or though the Wireline Competition Bureau, should be responsible for making determinations and clarifying the meaning of the applicable requirements and regulations.[18]

Related to USAC's proper role as the USF Administrator is the manner in which it conducts internal audits and the positions it takes based on those audits. It is TracFone's understanding that USAC will extrapolate large numbers of violations and irregularities based on extremely small samples of audited accounts and seek substantial ex post facto recovery of USF reimbursements from ETCs based on those limited samples. At the very least, all USAC audit sampling techniques should be based on samples deemed to be statistically valid utilizing generally accepted sampling principles.

---

[18] Section 1.2 of the Commission's Rules (47 C.F.R. § 1.2) provides that the Commission on motion or on its own motion may issue a declaratory ruling terminating a controversy or removing uncertainty. The declaratory ruling process would be an appropriate mechanism for USAC to use when it or its auditors reach conclusions which involve determinations as to applicable requirements governing the USF programs.

III. Administrator Executive Compensation Based on Preventing Waste, Fraud, and Abuse May Create Perverse Incentives to Disallow Legitimate and Prudent USF Expenditures

At paragraph 6 of the Notice, the Commission notes that it has directed the Administrator to establish an incentive-based system for executives to reduce improper payments. Specifically, bonuses must be based at least in part on success in reducing and preventing improper payments.[19] TracFone believes that USAC, like many organizations, should reward and incentivize excellent performance with monetary bonuses. Prevention of waste, fraud and abuse is a legitimate basis for rewarding such performance. However, it is important that any such bonus system not create perverse incentives on executives to disallow legitimate reimbursement claims by ETCs for costs prudently expended by those ETCs in providing services pursuant to USF programs, including low income programs. The Commission should ensure that USAC not implement a merit bonus policy which creates incentives for USAC executives to disallow proper support and reimbursement claims.

Conclusion

As described in these comments, TracFone encourages this proceeding into the management, administration, and oversight of the Universal Service Fund, and encourages the Commission to promulgate such regulations as necessary and appropriate to enhance those efforts and to ensure that the resources of the Universal Service Fund are deployed in an efficient manner. However, at the same time, TracFone notes that well-intentioned efforts to manage the USF may, without appropriate limitation, have the untoward effect of discouraging active participation by ETCs in universal service programs. Accordingly, TracFone respectfully

[19] Notice at ¶ 6.

requests that the Commission fully consider the views expressed herein and that it take actions consistent with those views.

Respectfully submitted,

TRACFONE WIRELESS, INC.

Mitchell F. Brecher
GREENBERG TRAURIG, LLP
2101 L Street, NW
Suite 1000
Washington, D.C. 20037

Its Attorneys

November 13, 2008