

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FILED/ACCEPTED

MAY 20 2009

Federal Communications Commission
Office of the Secretary

In the Matter of)
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TracFone Wireless, Inc.'s Petition for Waiver of)
47 C.F.R. § 54.403(a)(1))
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~~EC~~ Docket No. 96-45 *e*
WC 03-109

PETITION FOR WAIVER

TracFone Wireless, Inc. ("TracFone"), pursuant to Section 1.3 of the Commission's Rules (47 C.F.R. § 1.3), petitions for waiver of Commission Rule 54.403(a)(1) (47 C.F.R. § 54.403(a)(1)), which defines the Tier One Lifeline support available to eligible telecommunications carriers ("ETCs"). This requested waiver would maximize the Lifeline benefit for TracFone's Lifeline-eligible households by allowing TracFone to receive the maximum available Tier One Lifeline support of \$6.50 per month in all service areas, provided that it pass through to its Lifeline customers the full amount of Lifeline support it receives from the federal Universal Service Fund ("USF") and that it provide its Lifeline customers with an additional monthly Lifeline benefit of not less than \$3.50. Grant of this waiver will enable TracFone to provide a monthly Lifeline benefit of \$13.50 wherever it offers its SafeLink Wireless Lifeline service.

Under the current Lifeline support rule, ETCs who are themselves not subject to the Commission's rules regarding Subscriber Line Charges ("SLCs") do not receive the full \$6.50 in Tier One Lifeline support in numerous Lifeline service areas. This situation discourages such ETCs from offering a higher Lifeline benefit to consumers, or from offering any Lifeline service at all, because the ETCs must incur significant unreimbursed costs to provide the Lifeline benefit to customers.

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TracFone's waiver request seeks to maximize the amount of the Lifeline benefit TracFone provides to qualified Lifeline-eligible low-income households and thereby would promote participation in Lifeline by qualified low volume households.¹

ARGUMENT

Under 47 C.F.R. § 1.3, the Commission has authority to waive its rules based on a showing of good cause. "The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest."² In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.³ Thus, "waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."⁴ As explained in this Petition, Section 54.403(a)(1), which limits TracFone's Tier One Lifeline support to the SLC of an ILEC serving TracFone's service area, does not reflect current circumstances and fails to serve the public interest. Grant of TracFone's waiver request will greatly benefit Lifeline-eligible consumers by allowing TracFone to offer them the

¹ On March 5, 2009, TracFone filed a Petition for Rulemaking to Revise Universal Service Support Available to Eligible Telecommunications Carriers in CC Docket No. 96-45. In that petition, TracFone asked the Commission to amend the definition of Tier One Lifeline support in § 54.403(a)(1) to allow all ETCs to receive the maximum available Tier One Lifeline support of \$6.50 per month in all service areas, provided that the ETCs commit to pass through to their Lifeline customers the full amount of Lifeline support they receive from the federal USF and provide their Lifeline customers with an additional amount of not less than \$3.50 per month in the form of Lifeline benefits. Only one party, the Independent Telephone & Telecommunications Alliance, commented on the petition.

² Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 ((DC Cir 1990) (citing WAIT Radio v. FCC, 418 F.2d 1153, 1159 (DC Cir. 1969)).

³ See WAIT Radio, 418 F.2d at 1159.

⁴ Northeast Cellular Telephone Co., 897 F.2d at 1166.

maximum Lifeline benefit. Currently, that maximum benefit is 68 minutes of free airtime per month.

I. Basing Tier One Lifeline Support on Incumbent Local Exchange Carriers' Subscriber Line Charges Is Not Appropriate in Current Circumstances and Does Not Serve the Public Interest.

Since 1985, the Commission has administered two programs designed to increase subscribership by reducing charges to low-income consumers: Lifeline and Link Up. The Lifeline Assistance program provides federal universal service support to reduce the monthly service charges paid by qualifying low-income households.⁵ Under the Lifeline program, low income consumers who qualify for the program are able to apply for Lifeline benefits through an ETC -- often, but not always, their incumbent local exchange carrier (ILEC). These companies are then reimbursed through the Low Income Program of the USF for the revenue they forgo by providing Lifeline benefits, usually in the form of discounted service to eligible households. The amount of reimbursement received by ETCs such as TracFone is equal to the federal support amount per household, as defined in Section 54.403.

Section 54.403(a)(1) provides ETCs with four tiers of monthly federal Lifeline support.

Tier One is the federal baseline Lifeline support amount which is defined as:

The tariffed rate in effect for the primary residential End user Common Line charge of the incumbent local exchange carrier serving the area in which the qualifying low-income consumer receives service, as determined in accordance with §69.104 or §§ 69.152(d)(1) and 69.152(q) of this chapter, whichever is applicable.

Tier One support is designed to offset the applicable monthly End user Common Line Charge, also known as the SLC, which is currently capped at \$6.50.⁶ An additional \$1.75 per

⁵ Federal -State Joint Board on Universal Service, 12 FCC Rcd 8776, ¶ 329 (1997).

⁶ See Access Charge Reform, 15 FCC Rcd 12962, ¶ 214 (2000); see also 47 C.F.R. § 69.104(n)(1).

month in federal support (Tier Two support) is available to ETCs if the ETC certifies that it will pass through the full amount of that support to its Lifeline customers and that it has received any necessary non-federal regulatory approvals to implement the further reduction in rates.⁷ A third tier of up to \$1.75 in federal support (Tier Three support) is available to ETCs to match 50 percent of any additional state-mandated support or Lifeline support otherwise provided by the ETC. An ETC must certify that it will pass through the full amount of that support to its Lifeline customers and that it has received any necessary non-federal regulatory approvals to implement the further reduction in rates to receive Tier Three support.⁸ Finally, Tier Four provides additional federal Lifeline support of up to \$25 per month to ETCs providing Lifeline service to residents of Tribal lands.⁹

ETCs that do not serve Tribal lands are entitled to receive a maximum of \$10.00 per month in federal Lifeline support (i.e., \$6.50 (Tier One) plus \$1.75 (Tier Two) plus \$1.75 (Tier Three)). However, to be reimbursed \$10.00 from the USF, the ETC must provide a Lifeline benefit of at least \$13.50. An original purpose for the Lifeline support at the inception of the Commission's Lifeline rules, including Section 54.403, was to reduce end user charges borne by low income households, including a waiver of the federal SLC.¹⁰ The federal SLC, which is the starting point for calculating the total Lifeline federal support, is assessed on subscribers by ILECs to recover a portion of the subscriber loop costs assigned to the interstate jurisdiction.¹¹ Currently carriers other than ILECs may be designated as ETCs. Such ETCs do not assess SLCs

⁷ 47 C.F.R. § 54.403(a)(2).

⁸ 47 C.F.R. § 54.403(a)(3).

⁹ 47 C.F.R. § 54.401(a)(4).

¹⁰ See Federal-State Joint Board on Universal Service, 12 FCC Rcd 8776, ¶ 341 (1997).

¹¹ Id. n.848.

on their subscribers, nor are they required to do so. Nonetheless, the amount of Lifeline support provided to such ETCs and passed through to their Lifeline customers is limited by ILEC SLCs -- charges that have no bearing on the amounts charged by those ETCs to their customers. Whether or not ILEC SLC levels were ever an appropriate factor for basing the amount of Lifeline support available to ETCs, it no longer is an appropriate factor, given changes in the overall telecommunications marketplace and specific changes in the number and nature of designated ETCs providing Lifeline services to low income households.

II. Tier One Lifeline Support Is Based on Commission-Imposed Subscriber Line Charges That Are Not Relevant to Non-ILEC Service, Including Wireless Service.

Prior to 1997, only ILECs were eligible to receive Lifeline support. In a Recommended Decision regarding implementation of the Telecommunications Act of 1996, the Federal-State Joint Board on Universal Service (“Joint Board”) noted that, at that time: “[b]ecause the federal component of Lifeline currently is a waiver of the SLC, Lifeline benefits cannot be applied to services without a SLC (such as wireless services or voice mail).”¹² The Joint Board recommended that Lifeline support not be limited to ILECs, thereby allowing other non-ILEC carriers, including wireless carriers, to receive Lifeline support from the Universal Service Fund and to provide Lifeline service to qualified low income households.¹³ The Commission agreed with the Joint Board that telecommunications carriers other than ILECs “should have the opportunity to compete to offer Lifeline service to low-income consumers and in turn receive support in a manner similar to the current program.”¹⁴ The Commission further determined that ETCs that did not charge a SLC would pass through any Lifeline support directly to the

¹² Federal-State Joint Board on Universal Service, Recommended Decision, 12 FCC Rcd 87, ¶ 409 (1996).

¹³ See id., ¶ 424.

¹⁴ See Federal -State Joint Board on Universal Service, 12 FCC Rcd 8776, ¶ 365.

consumer in the form of a reduction in the total amount to be charged to the Lifeline customer.¹⁵ The Commission explained that requiring such ETCs to pass through the Lifeline support amounts to customers did not interfere with states' authority to regulate intrastate service because a portion of every carrier's charge can be attributed to the interstate jurisdiction.¹⁶ The Commission provided the following reasoning as to why the amount of Lifeline support for all ETCs is linked to the SLC whether or not the ETC charges a SLC:

The interstate portion of ILECs' rates to recover loop costs is, almost without exception, greater than the amount of the SLC cap for residential subscribers; we are therefore confident that this amount is a reasonable proxy for the interstate portion of other eligible telecommunications carriers' costs. Thus, we conclude that we may require an amount equal to the SLC cap for primary residential and single-line business connections to be deducted from carriers' end-user charges without infringing on state ratemaking authority. Furthermore, we find that providing the same amount of Lifeline support to all eligible telecommunications carriers, including those that do not charge SLCs, advances competitive neutrality.¹⁷

Of course, when the ETC providing Lifeline service is a wireless carrier, there is no issue of possible infringement on state ratemaking authority. Pursuant to Section 332(c)(3) of the Communications Act,¹⁸ states are preempted from regulating the rates charged by commercial mobile service providers. Therefore, whether or not ILEC SLCs are a "reasonable proxy" for interstate loop costs, SLCs and interstate loop costs bear no relevance to the Lifeline benefits offered by wireless ETCs to their qualified low income Lifeline customers.

As acknowledged by the Commission in 1996, using an ILEC's SLC was only as a proxy for other ETCs' interstate costs. A specific ILEC's SLC in no way accounts for or reflects costs

¹⁵ Id. ¶ 366.

¹⁶ Id.

¹⁷ Id. ¶ 367.

¹⁸ 47 U.S.C. § 332(c)(3).

incurred by non-ILEC ETCs, including wireless ETCs, that have completely different cost structures and business models than ILECs subject to the Commission's rules governing SLCs. Moreover, unlike ILECs' customers, non-ILEC ETCs' customers, including wireless ETCs' customers, are not assessed Commission-mandated SLCs by their ETCs. Therefore, there is no relationship between an ILEC's SLC and the amounts that a non-ILEC ETC's customer, including a wireless ETC's customer, is charged for service. Neither should there be any relationship between an ILEC's SLC and the amount of Lifeline benefit which should be available to a low income Lifeline customer. By this Petition, TracFone requests the Commission waive this rule as applied to TracFone.

III. The Requested Waiver Will Allow TracFone to Receive the Maximum Allowable Subscriber Line Charge As Tier One Support and Promote the Public Interest by Providing an Enhanced Benefit to Its Lifeline Customers.

TracFone asks the Commission to waive § 54.403(a)(1) so that TracFone may receive the maximum allowable Tier One support of \$6.50 throughout all states, conditioned on it providing an additional \$3.50 in monthly Lifeline benefit. This waiver will allow TracFone to provide a uniform Lifeline benefit (currently, 68 free minutes of wireless airtime per month) to all of its low income Lifeline customers throughout the country, irrespective of the SLC charged by ILECs who provide service in areas where TracFone Lifeline customers reside.

In many states, the SLC charged by the largest ILEC in the state is less than \$5.00.¹⁹ There are 14 states that have ILECs serving a substantial portion of the states that charge a SLC

¹⁹ California (\$2.23 – Verizon; \$4.39 - AT&T); District of Columbia (\$3.86 - Verizon); Illinois (\$4.52 – Illinois Bell Telephone Co.); Iowa (\$4.84 - Qwest); Minnesota (\$4.96 - Qwest); and Nebraska (\$4.78 - Qwest). See USAC FCC Filings for 2009, Second Quarter Appendices, Table LI10 (Tier 1 Amounts Reported by All Companies).

less than \$6.00, but greater than \$5.00.²⁰ There are only 15 states, plus Puerto Rico and the U.S. Virgin Islands, in which all ILECs charge the highest permissible SLC rate of \$6.50, thereby ensuring that ETCs in those states and territories may receive and provide to their Lifeline customers the maximum Lifeline benefit.

The Commission has designated TracFone as an ETC in the following jurisdictions: Alabama, Connecticut, Delaware, District of Columbia, Massachusetts, New Hampshire, New York, North Carolina, Pennsylvania, Tennessee, and Virginia. TracFone has also been designated as an ETC by state commissions in Florida, Georgia, Michigan, New Jersey, and West Virginia. TracFone currently provides Lifeline service in several states that include service areas served by ILECs with SLCs less than \$6.00 (e.g., Michigan, New York, North Carolina, Pennsylvania, Tennessee, and Virginia). In addition, TracFone has ETC petitions pending in several states including states in which a primary ILEC has an SLC less than \$6.00 (e.g., California, Kentucky, Illinois, Missouri, Nebraska, Ohio, Washington and Wisconsin).

The significant adverse impact caused by tying TracFone's Tier One Lifeline support to ILECs' SLCs can be seen by looking at how a SLC lower than \$6.50 decreases available Lifeline benefits to TracFone's Lifeline consumers who reside in areas served by such ILECs, irrespective of which ETCs are providing Lifeline service to those consumers. For example, in the District of Columbia where Verizon is the only ILEC, a non-ILEC ETC, such as TracFone, would receive only \$3.86 in Tier One support. The maximum federal Lifeline support that could

²⁰ Arkansas (\$5.31 – Southwestern Bell); Connecticut (\$5.77 – AT&T); Indiana (\$5.55 – Indiana Bell); Kansas (\$5.31 – Southwestern Bell); Kentucky (\$5.27 – Cincinnati Bell); Maryland (\$5.68 – Verizon); Michigan (\$5.37 – Michigan Bell); Missouri (\$5.31 – Southwestern Bell); Nevada (\$5.14 – Nevada Bell); Ohio (\$5.41 – Ohio Bell); Oklahoma (\$5.31 – Southwestern Bell); Pennsylvania (\$5.91 – Verizon (portions of Verizon's service area)); Washington (\$5.88 – Qwest); and Wisconsin (\$5.09 – Wisconsin Bell). See id.

be received by TracFone in the District of Columbia would be \$7.36 (\$3.86 + \$1.75 (Tier Two) + \$1.75 (Tier Three)), assuming that TracFone offered the additional \$3.50 discount needed to qualify for Tier Three support. With only \$7.36 in available Lifeline support, TracFone would only be able to provide a \$10.86 Lifeline benefit, with the additional \$3.50 provided by TracFone -- \$2.64 below the amount of the benefit which could be made available if the Commission granted the waiver proposed herein. If TracFone wanted to provide District of Columbia Lifeline customers the full \$13.50 Lifeline benefit, which contemplated by the rules when the maximum Tier One support of \$6.50 is available, than it would incur \$6.14 in unreimbursed costs per customer each month. If TracFone were to provide the \$3.50 benefit in addition to the \$7.36 in federal Lifeline support, it would only be able to provide a monthly benefit to its customers of 55 minutes of free airtime per month-- well below the 68 minutes per month which it provides to its customers in other jurisdictions. There is no public interest benefit in TracFone providing its District of Columbia Lifeline customers 13 fewer free minutes of airtime per month than it provides to its Lifeline customers who reside across the Potomac River in Virginia, solely because Verizon has a lower SLC in Washington, DC than it does in Virginia.

Enabling TracFone to offer the full \$13.50 Lifeline benefit to all of its Lifeline customers, irrespective of the state where they reside, is particularly important in view of current economic conditions. As unemployment rises, savings are depleted, and home foreclosures rise, providing a maximum Lifeline benefit produces a modest amount of economic relief to those who need it most. TracFone wants to provide its Lifeline customers with the maximum benefit allowable. Grant of the instant waiver will enable it to provide that same maximum benefit everywhere that it is an ETC.

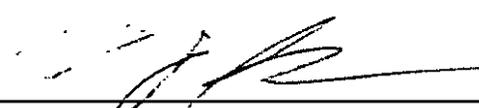
Furthermore, the proposed waiver will maintain the current tiered structure of Lifeline support while promoting the public interest by facilitating TracFone's ability to provide a nationally uniform Lifeline benefit. TracFone, like many wireless carriers, operates on a nationwide basis and provides essentially the same service to all customers. The Commission has found that national rates are in the public interest. See Connecticut Office of Consumer Counsel, 4 FCC Rcd 8130, ¶ 14 (1989). By permitting TracFone to be reimbursed for \$10.00 of the benefit provided to Lifeline customers, TracFone will be able to provide a uniform Lifeline benefit to all of its Lifeline customers, irrespective of where they reside, and irrespective of the SLC of any ILEC.

CONCLUSION

For the reasons set forth herein, TracFone respectfully asks the Commission to waive Section 54.403(a) of its Rules so as to allow TracFone to receive Tier One Lifeline support in the amount of \$6.50 in all service areas where it operates as an ETC, provided that it passes through the entire amount of federal Lifeline support and contributes an additional \$3.50 towards its customers' Lifeline benefits.

Respectfully submitted,

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