



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
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July 20, 2009

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Reply Comments of the PaPUC

Ms. Marlene Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Petition of TracFone Wireless, Inc. for Modification of Annual Verification Condition in the FCC's 2005 Forbearance Decision Docket No. 96-45.

Petition of TracFone Wireless, Inc. for Waiver of Rule 54.403(a)(1), 47 C.F.R. § 54.403(a)(1) governing Tier 1 Lifeline Support, Docket Nos. 96-45 and WC 03-109.

Petition of I-Wireless for Forbearance from Eligible Telecommunications Carrier Facilities Requirement, Docket No. 96-45, DA 09-1269

Petition of Head Start Telecommunications for Forbearance From Eligible Telecommunications Carrier Facilities Requirement, Docket No. 96-45, DA 09-1268

Dear Secretary Dortch:

The Pennsylvania Public Utility Commission (PaPUC) files these Reply Comments in the above-referenced dockets. The PaPUC supports the Comments opposing additional regulatory relief for TracFone. The PaPUC also supports the Comments that oppose the petitions of I-Wireless and Head Start. Those petitioners seek forbearance from the statutory obligation to own facilities under Section 254 of the Telecommunications Act of 1996 (TA-96) as well as current Federal Communications Commission (FCC) requirements (the Forbearance Petitions).

The FCC should deny the TracFone Petition and the Forbearance Petitions based on the reasons set out below. The PaPUC further asks the FCC to grant the PaPUC's pending request to reexamine statutory forbearance from the Section 254 obligation, an obligation that requires Eligible Telecommunications Carriers (ETCs) to provide Federal Universal Service Fund (FUSF) service using some of their own facilities.

The FCC's decision to grant forbearance from the Section 254 obligation to own facilities as a precondition to getting ETC designation was done so that wireless resellers without facilities could provide customer choice, high-quality service, and mobility.¹ These are non-statutory principles not set out in Section 254(b)(6). These principles were never developed under Section 254(b)(7) using the Section 254(a)(2) process of Joint Board consultation as required by Section 254(b)(7). The carriers' reliance on the FCC's prior extension of Lifeline Service program support to other wireline Competitive Local Exchange Carriers (ILECs) in 1996² does not translate into support for wireless ETCs, particularly when the FCC's latest pronouncement expressly rejected the Joint Board's proposal for a Mobility Fund.³

The Comments of the Oregon Public Utility Commission correctly suggest that Section 254(a)(1) defines the appropriate process for reviewing universal service principles.⁴ The PaPUC reminds the FCC that the 10th Circuit decision in *Qwest*

¹ *In Re: Petition of TracFone for Forbearance*, Docket No. 96-45 (September 8, 2005), paragraphs 13 and 15; *In re: Petition of TracFone Wireless for ETC Designation*, Docket No. 96-45 (FCC April 16, 2008), paragraph 15 ("We find that TracFone's universal service Lifeline offering will provide a variety of benefits to Lifeline-eligible consumers including increased consumer choice, high-quality service offerings, and mobility.").

² See, *Petition for Waiver of TracFone Wireless*, Docket No. 96-45 (May 4, 2009), pp. 5-7.

³ Compare *In re: High-Cost Universal Service Fund*, Docket No. 96-45 (FCC November 20, 2007), paragraphs 3 and 16-18 with *In re: High-Cost Universal Service Fund*, Docket No. 96-45 (FCC November 5, 2008), Order on Remand and Report and Order and Notice of Proposed Rulemaking, paragraph 37 ("We have carefully reviewed the Joint Board's *Comprehensive Reform Recommended Decision* and the comments that were filed in response to the Commission's *Joint Board Comprehensive Reform NPRM*. We choose not to implement those at this time.").

⁴ *In re: Petition of TracFone Wireless*, Docket No. 03-109 (July 6, 2009)(The Oregon PUC urged "the FCC to deny this and any other waiver request related to the equal support rule and to address these issues in its comprehensive FUSF reform proceedings.").

Communications v. the Federal Communications Commission, 398 F.3d 1222, 1234 (10th Cir. 2005) (*Qwest Communications*) requires the FCC to base its universal service policies on Section 254(b) principles. While Section 254(b)(7) allows the FCC to establish additional principles, the *Qwest Decision* rejected the FCC's attempt to elevate one principle in Section 254 above all others, let alone non-statutory principles like choice, high-quality service, and mobility. That same issue is relevant here because I-Wireless and Head Start seek the same forbearance based on that rationale. The FCC's decision to elevate these principles above others may well contravene *Qwest Communications* even if the Section 254(a)(2) process were followed.

Also, there are no federal standards or guidance on what constitutes reasonable service for FUSF-supported prepaid wireless Lifeline Service provided by carriers that own no facilities. The NASUCA Comments properly point out that the FCC's own minimum standard for what constitute reasonable service for an FUSF-supported prepaid wireless Lifeline Service after Hurricane Katrina was 300 minutes.⁵ The PaPUC reminds the FCC that TracFone proposes to provide 55-79 minutes per month for FUSF-supported Lifeline Service compared to 300 minutes after Katrina Hurricane for the same service.⁶ Also, TracFone now offers 59 minutes a month for Lifeline Service in Pennsylvania.⁷

The NASUCA Comments are justifiably concerned about this variance in the number of minutes offered.⁸ The Oregon Public Utility Commission's is properly

⁵ *In re: Petition of TracFone Wireless*, Docket Nos. 96-45 and 03-109, (July 6, 2009), Comments of the National Association of Utility Consumer Advocates, page 4, n. 14.

⁶ Compare *In re: Application of TracFone Wireless, Inc. for Emergency Designation as an Eligible Telecommunications Carrier to Provide Lifeline Assistance to Hurricane Katrina Victims*, Docket No. 03-109 (November 23, 2005) ("TracFone agreed to provide 300 minutes and a free handset or 500 minutes to prior Lifeline customers of TracFone that already had a handset.") with *TracFone Petition for Waiver*, Docket No. 96-45, pp. 8 and 9 (TracFone provides 68 free monthly minutes but if support is based on a Subscriber Line Charge TracFone would supply only 55 minutes in the District of Columbia compared to 68 minutes in Virginia and Maryland.").

⁷ *TracFone Wireless*, Letter to Secretary McNulty (June 19, 2009), Effective July 1, 2009, TracFone provides 59 free minutes monthly to its Lifeline Service Customers in Pennsylvania. This is less than Maryland or Virginia but more than the District of Columbia. See Note 6 *supra*.

⁸ *In re: Petition of TracFone Wireless*, Docket Nos. 96-45 and 03-109, (July 6, 2009), Comments of the National Association of Utility Consumer Advocates, page 3.

concerned that Lifeline customers should not be limited to minimal service levels or low usage at high per-minute rates.⁹ Substantially reduced or non-existent minutes for Lifeline Service below what the FCC found to be reasonable after Hurricane Katrina may be hard to justify as consistent with Section 254(b)(1)-(6) principles, let alone any new principles like customer choice, high service quality, and mobility.

The District of Columbia Public Service Commission (DC PSC) Comments properly remind the FCC that TracFone's waiver from the Digital TV (DTV) requirements included an obligation to provide free SMS text message notices about the DTV Transition without charge to the consumer.¹⁰ The PaPUC notes that no comparable commitment exists for Lifeline Service in the pending or approved carriers' proposals to deliver prepaid wireless Lifeline Service using facilities the providers do not own.

On the issue of service quality, the PaPUC reminds the FCC that the vast majority of states do very little, if any, regulation of wireless service notwithstanding federal authorization to do that under the Omnibus Budget Reconciliation Act of 1993 (August 10, 1993).¹¹ The FCC needs to expressly address the responsibility for ensuring reasonable service quality for FUSF-supported services. While states making wireless ETC designation decisions can address this issue as part of an ETC Designation or annual reauthorization process, there is a need to clarify how that will occur in states that do not regulate wireless service or are not making wireless ETC designations under Section 254.

The PaPUC supports the filing of the Nebraska Public Service Commission (NEPSC) on the cost to universal service. The PaPUC particularly supports the NEPSC's recognition of the need to address the early adopter states like Pennsylvania and their

⁹ *In re: Petition of TracFone Wireless*, Docket No. 96-45 and 03-109 (July 6, 2009), Comments of the Oregon Public Service Commission, p. 3.

¹⁰ *In re: Petition of TracFone Wireless*, Docket No. 96-45, Comments of the District of Columbia Public Service Commission, pp. 7-8.

¹¹ See 47 U.S.C. § 332, particularly Historical and Statutory Notes.

prior universal service and intercarrier compensation reforms. Those comments are sound and deserve consideration.

The PaPUC reminds the FCC that forbearance and ETC designation of wireless carriers represents an increase to FUSF costs. The PaPUC is concerned because Pennsylvania contributes approximately \$125 million in support for FUSF services compared to FUSF support provided to carriers operating in Pennsylvania. The Universal Service Administrative Corporation (USAC) data shows that TracFone got more than 7% of Lifeline Program support in the January-March 2009 reporting period¹² even though Lifeline Service costs are increasing dramatically¹³ and the FCC's assessment now hovers in the 12% range.¹⁴ Moreover, TracFone's Lifeline Service is substantially less than that of wireless carriers like Sprint Nextel¹⁵ or

¹² www.usac.org, <http://www.usac.org/about/governance/fcc-filings/2009/quarter-3.aspx>. USAC Quarterly Low-Income Support Disbursement Amounts By Company (January-March 2009 Period) See L04 Report, 1Q2009.xlsx. TracFone's Lifeline Program support was about 4.8M of the 67.9M disbursed in January 2009, 5.5 of the 70.2M disbursed in February 2009, and 5.8M of the 70.1M disbursed in March 2009. These figures cover about 5 states not the states for which TracFone will seek support pursuant to ETC Designation or following ETC Designation. The PaPUC may file the 2nd quarter 2009 numbers when those become publicly available.

¹³ *In re: Petition of TracFone Wireless*, Docket No. 03-109 (July 6, 2009), Comments of the Oregon Public Service Commission, pp. 1-2 (TracFone's Safelink Lifeline plan could increase FUSF funding by as much as \$160M in just the first ten states where it has been introduced independent of the six other states for which it is not yet receiving support or even the 8 states where a petition is pending.").

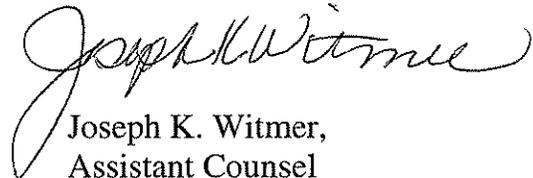
¹⁴ Federal Communications Commission, Docket No. 96-45 (FCC June 12, 2009), Proposed Third Quarter 2009 Universal Service Contribution Factor ("The Office of Managing Director (OMD) announces that the proposed universal service contribution factor for the third quarter of 2009 will increase to 0.129 or 12.9 percent.").

¹⁵ http://www.nextel.com/en/services/calling/universal_lifeline_program.shtml. Virgin Mobile's Lifeline 135 service in Pennsylvania provides 200 Anytime Minutes and Unlimited Night and Weekend Minutes, which may be used for local or long-distance calls. (Night and weekend minutes may be used before 7:00 am and after 9:00 pm Monday through Friday, and all day Saturday and Sunday.). Lifeline 135 service also includes Voice Mail, Call Waiting, Caller ID, Numeric Paging, Roaming and Three-Way Calling at no additional charge. Call forwarding is 20¢ per minute. Nextel Lifeline 135 service includes 100 Walkie Talkie minutes at no additional charge. Roaming is not included in Sprint Affiliate territories. Sprint's service seems to be based on TracFone's own filing showing that TracFone's average prepaid customers use about 200 minutes per average per month compared to an industry average of 700 minutes. Compare *In re: Universal Service*, Docket Nos. 05-337 and 96-45, TracFone ExParte (September 16, 2009) and *In re: Petition of TracFone*, Docket No. 96-45 (July 6, 2009), Comments of the National Association of Consumer Advocates, p. 2, n. 1 with *FCC Thirteenth Report*, Docket No. WT 08-72 (FCC January 16, 2009), Table 12. With average revenue per minute of \$0.05 per MOU in the wireless industry, TracFone's 68 minutes for Lifeline and TracFone's average customer average of 200 minutes represents an additional \$6.60 revenue per Lifeline customer (200 minutes – 68 minutes = 132 MOU x \$.05 = \$6.60). This does not reflect revenue for night and weekend calling of TracFone's Lifeline Service customers because TracFone does not apparently offer "free nights and weekends" to Lifeline Service customers.

Virgin Mobile¹⁶ and the FCC rejected the Mobility Fund proposed by the Joint Board.

For these reasons, the PaPUC asks the FCC to deny the TracFone Petitions as well as the Forbearance Petitions of I-Wireless and Head Start. The PaPUC also asks the FCC to grant the PaPUC's request seeking reexamination of forbearance from the Section 254 obligation to own facilities as a precondition to obtaining FUSF support. The PaPUC urges the FCC to commit to developing additional Section 254(b)(7) principles using the Section 254(a)(2) process. This includes new principles like customer choice, high service quality, and mobility. Finally, the FCC should recognize that failure to do so may run afoul of the *Qwest Communications* holding that the FCC cannot elevate one Section 254 principle to the exclusion of all others, let non-statutory principles used to justify FUSF support for Lifeline Service provided by carriers that own no facilities.

On behalf of the
Commonwealth of Pennsylvania
Public Utility Commission



Joseph K. Witmer,
Assistant Counsel
PaPUC Law Bureau
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-3663

cc: Best Copy & Printing (via E-Mail)

¹⁶ *In re: Petition of TracFone Wireless*, Docket No. 96-45, Comments of the National Association of Consumer Advocates (July 6, 2009), pp. 3-4. Virgin Mobile offers a uniform 120 minutes and a free (refurbished) handset.