Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
TracFone Wireless, Inc.	)	WC Docket No. 08-197
	)	
Petition for Declaratory Ruling	)	

COMMENTS OF COMPETITIVE ELIGIBLE TELECOMMUNICATIONS CARRIERS

I. Introduction

dPi Mobile, LLC, Terracom, Inc., Midwestern Telecom, Inc., Fast Phones, Inc., Express Phone Service, Inc., Digital Express, Inc., Global Connection, Inc., Easy Telephone Service, Inc., Telecom Service Bureau, Inc., Absolute Home Phones, Inc. and Affordable Phones, Inc. (collectively, "CETC Commenters") hereby respond to the Petition for Declaratory Ruling ("Petition") filed by TracFone Wireless, Inc. ("TracFone") regarding the Commission's regulations on low income Universal Service Fund ("USF" or "Fund") support. Each of the CETC Commenters is a wireless carrier that is authorized or has applied for Eligible Telecommunications Carrier ("ETC") authority to receive low income support from the USF. TracFone's petition urges the Commission to issue a Declaratory Ruling which would alter the current Lifeline and Link Up regulations. The CETC Commenters urge the Commission to not issue such a Declaratory Ruling as TracFone is clearly seeking to impose additional, anti-competitive restrictions on receipt of low income USF which would unfairly limit the support that other wireless ETCs can receive. To the extent that the Commission wishes to respond to

the Petition, it should rule in a manner that fosters competition and encourages ETCs to reach customers not currently served by existing lifeline providers.

TracFone's primary focus appears to be to limit Link Up funding to those wireless carriers who may choose to waive their setup fee for customers. Preventing carriers from waiving their setup fees while remaining eligible for Lifeline or Link Up harms ETCs who serve low income consumers and is not in the public interest. Rather, carriers should be able to provide discounts to Lifeline customers and still be eligible for Link Up. Otherwise customers will likely be harmed as they must make the choice between paying additional setup charges or declining the service they seek.[1]

II. TracFone Attempts to Narrowly Define "Customary Charge" are Contrary to the Aims of the Fund.

TracFone's primary position is a clear attempt to limit the ability of other wireless carriers to receive Link Up support. TracFone's primary complaint appears to be that carriers sometimes waive these charges for certain customers. That such charges are not always charged to customers does not prevent them from being "customary"; rather, a charge is customary if it is the ordinary stated price. As such, the Commission should continue to permit carriers to receive Link Up even if not all customers are charged the setup fees in question or these charges are waived for customers in some instances.

Current rules state that carriers can get support for one-half of their customary setup charges.[2] In order to receive this support, carriers must reduce the amount charged to qualifying

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[1] TracFone also wishes the Commission to issue a ruling indicating that a carrier must receive ETC status as a wireless provider before receiving support for wireless service. The CETC Commenters support this position, and believe that it is clear under the existing rules that carriers need wireless authorization from a state commission or the FCC as an ETC before receiving support for wireless low income services. A Declaratory Ruling that states that which is already clear under the Rules is not necessary and an inefficient use of Commission resources.

[2] 47 C.F.R. § 54.413.

customers and give them a no cost payment plan for any unreduced charges.[3] Traditionally, these "customary" charges were proven through demonstrating that the amounts were located in a carrier's tariff. After the passage of the 1996 Act, the Commission, on recommendation from the Joint Board, eliminated this tariff requirement in order to reduce competitive distortions that may occur if carriers are required to tariff these setup charges.[4]

TracFone, however, appears to want the Commission to define "customary" setup fees in a manner that prevents carriers from waiving some or all of them to some or all of its customers. In TracFone's view, a charge is customary only if all customers are charged it in full.[5] Further, if the unsupported portion of a setup charge is waived, TracFone would deem that the customary charge is actually only the un-waived portion (thus reducing the support to the low income consumer).[6] TracFone's view, however, is incorrect. TracFone references carriers who may charge a setup charge solely for the purpose of receiving Link Up as its primary justification for its concern.[7] Obviously, such a practice should be discouraged. To that end, the CETC Commenters agree that a charge should apply both to Lifeline and non-Lifeline customers. As evidence that such a charge exists, if a carrier has a stated setup charge, identified in terms of service or elsewhere, that statement should be considered as *prima facie* proof that the customary charge exists. This designation should not change even if that charge is waived or reduced for certain customers as part of promotions or attempts to meet the market.

The ability to waive a charge is particularly true for Lifeline customers. Services provided by CETCs, including TracFone, are increasingly competitive. Customers look for

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[3] *Id.*

[4] *Federal - State Joint Board on Universal Services*, Recommended Decision, 12 FCC Rcd 87, ¶ 427 (1996).

[5] Petition, at 6.

[6] *Id.* at 5.

[7] *Id.*

specials, bargains, and the best overall value for their services. This consumer behavior is economically rational as these consumers are, by definition, on limited technology budgets. CETCs, wireless and wireline, typically must focus on customers not-served by dominant carriers (for instance RBOCs or CMRS license holders). Simply put, these carriers typically do not want to serve the Lifeline customer. Unlike incumbents, CETCs compete aggressively for Lifeline customers. As a result CETCs tend to have a higher percentage of Lifeline customers than more established providers. Over the past three to four years, non-dominants' customer bases have transitioned from 95% non-Lifeline to 95+% Lifeline in many cases. As such, CETCs should not be penalized because they choose to waive certain charges for these Lifeline customers, and yet have the "Customary Charge" defined as what is the stated charge for Lifeline customer. TracFone's interpretation would be that the "Customary Charge" is only what is actually charged, notwithstanding promotions, fee waivers or competitive discounts. Implementing the proposal from TracFone would drive providers away from their commitment to continue community outreach to find additional Lifeline customers who do not currently participate in the program. Thus, if an ETC can appeal to a low income consumer by waiving a portion of the setup charges, then this behavior should be encouraged by the Commission and it should not effect the designation of the stated charge as "customary" under the rules. If a carrier, in an attempt to woo a low income consumer, wishes to waive the charge rather than offer a no cost extended payment plan for the start up charge, carriers should be encouraged to do so, as such waivers will inure to the public benefit.

Such a flexible rule on Link Up is beneficial to low income consumers. Increasingly, growth in low income subscribers has been as a result of ETCs reaching out to customers not served by traditional distribution chains, such as big box stores or Internet retailing. This growth

was recently noted in the GAO study of the low income program.[8] Outreach to underserved customers through non-traditional distribution chains involves real costs in reaching and establishing these customers. These are the charges that traditional setup charges recouped. That noted, if a customer balks in response to a stated setup charge, is it in the public interest to not allow that customer to receive a discount at all? Certainly, if a customer can be charged less, or even nothing, for account setup as a reduction of the customary charge, and the ETC can still receive the Link Up support they would otherwise receive, the result is a net gain toward meeting the policy objectives of the Fund by encouraging customers to sign up for supported services.[9]

III. "Facilities-based" Does Not Require Facilities Be Located in a Particular State.

TracFone also attempts to make the definition of "facilities-based" more difficult to obtain, in a manner that is not competitively neutral. While TracFone correctly identifies that the Commission's current rules require carriers to be facilities-based to be eligible for ETC support (unless a company receives a waiver of this rule, as TracFone has), it appears that TracFone's approach may be moving toward requiring carriers to have facilities in more than one location. Such an interpretation would be inconsistent with modern network architecture and would not be competitively neutral, and is also inconsistent with the Commission's existing rules and their policy objectives.

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[8] *Telecommunications: Improved Management Can Enhance FCC Decision Making for the Universal Service Fund Low-Income Program*, U.S. Government Accountability Office, GAO 11-11, at 17-18 (Oct. 28, 2010).

[9] Some commenters may argue that the growth of the Fund in recent years makes a tightening of low income support essential. But, the subsidies provided by the Low Income fund are essentially a right owed to the consumer. When eligible consumers do not take these services, it should be considered a failure of the Fund to meet its objectives to reach ubiquitous service levels among low income consumers. To the extent that the growth of the Fund is an issue, reductions should be focused outside of the low income area.

TracFone correctly notes that Commission regulations specifically prohibit states from requiring ETCs from maintaining facilities in specific service areas.[10] TracFone references the Commission's example of a switch in San Antonio being used to provide service in Dallas, but fails to provide the Commission's full justification for such a rule. The Commission concluded that allowing carriers to use facilities unfettered by geographic requirements would be

> economically efficient because it does not create artificial incentives to deploy redundant facilities when those facilities are not otherwise economically justified. In addition, we conclude that our determination not to impose restrictions based solely on the location of facilities used to provide the supported services is competitively neutral in that it will accommodate the various technologies and entry strategies that carriers may employ as they seek to compete in high cost areas.[11]

This same logic applies to the use of facilities across multiple states for low income consumers. There is no legal, technological or policy reason to require facilities to be placed in every state by every carrier seeking ETC status. If TracFone's proposal were adopted, ETCs wishing to serve a nationwide customer base would be required to deploy facilities into all states even if there were no technological reason to do so. The result would be a less efficient cost structure for ETCs which would not further the public interest.

In spite of the Commission's concerns expressed in 1997 that states could create rules that impede competitive entry by ETCs, TracFone is urging the Commission to harm competition by requiring carriers to have facilities in every state in which they seek ETC status.[12] Such a rule would create the same competitive inequities that Commission prevented when it created 54.201(g). There is no reason why the same concerns that the Commission expressed with regards to service areas would end at the state lines. Modern networks can utilize common

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[10] Petition, at 15.

[11] *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 177 (1997) ("1997 Order").

[12] Petition at 16-17.

facilities and a multi-state architecture, which provides greater flexibility and efficiency for ETCs. To require that ETCs install facilities in every state in which they operate is no less damaging to the competitive environment than a state commission requirement to have facilities in specific service areas.

The existing Commission Rules are sufficient. If a carrier uses a facility located in one state to provide services in another state, the carrier is "facilities-based" under Section 214(e)(1)(A) of the Act[13] and thus permitted to apply for ETC status without seeking a waiver of Commission rules. Yes, carriers should be required to serve at least some of its customers in a particular state "either using its own facilities or a combination of its own facilities and resale" , as is the case under existing precedent.[14] But, the physical location of those facilities should not be relevant to the ability of ETCs to meet this requirement.

IV. Conclusion

The Commission should reject TracFone's attempt to limit Link Up and Lifeline support for other ETCs and decline to issue the Declaratory Ruling requested by TracFone. To the extent that Commission believes such a ruling is necessary, it should clarify that the Link Up rules permit carriers to waive customary setup charges. Further, the Commission should reaffirm that

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[13] 47 U.S.C. § 214(e)(1)(A).

[14] *Id.;* 1997 Order, at ¶ 154-68.

the requirement that carriers use their own facilities does not require ETCs to deploy facilities in every state in which it provides supported services.

Respectfully submitted,

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