

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

In the Matter of)	
)	
Telecommunications Carriers Eligible To Receive Universal Service Support)	WT Docket No. 09-197
)	
Federal-State Joint Board on Universal Service Lifeline and Link Up)	WT Docket No. 03-109
)	
TracFone Wireless, Inc. Petition for Declaratory Ruling)	

REPLY COMMENTS OF TRACFONE WIRELESS, INC.

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SUMMARY

Those commenters who have asserted a right to receive Link Up support from the Universal Service Fund for service commencement charges not actually imposed on customers have not shown that the requirement that such charges be “customary” allows Link Up support to be provided for such not-actually-imposed charges. Moreover, the Commission’s rules contemplate that Link Up funds be used to reduce, but not eliminate, such charges. Those who believe that the Commission’s rules should be changed to allow Link Up to cover the entirety of service commencement charges should ask the Commission to commence a rulemaking in accordance with the Administrative Procedure Act. Allowing ETCs to receive free money from the USF for activation and connection charges not actually imposed is not necessary to encourage marketing of Lifeline programs. TracFone has more than 3 million active Lifeline customers and has not needed Link Up support for bogus service commencement charges to effectively market Lifeline service.

ETCs should not be allowed to unilaterally expand the scope of their ETC designations to include wireless USF-supported services in states where the designating state commission does not have or does not exercise authority under state law to designate wireless ETCs. In such states, only the FCC, pursuant to Section 214(e)(6) of the Communications Act, is authorized to designate ETCs for provision of wireless services.

None of the commenters have provided any basis for allowing ETCs to provide USF-supported service in a state without using their own facilities, at least in part, to provide such USF-supported services in that state. TracFone has not asserted that the ETC’s facilities must be located in each state where the ETC is providing USF-supported service; only that the ETC’s own facilities -- wherever those facilities are located -- must be used, at least in part, to provide USF-supported service in any state where it has been designated as an ETC.

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TracFone Wireless, Inc., by its attorneys, hereby submits its reply comments in the above-captioned matter.

INTRODUCTION

In its petition for declaratory ruling filed on December 1, 2010, TracFone requested that the Commission issue a declaratory ruling confirming the following: 1) an Eligible Telecommunications Carrier (“ETC”) is not entitled to receive reimbursement from the federal Universal Service Fund (“USF”) for providing Link Up benefits unless the ETC has and actually imposes on its customers customary charges for commencing telecommunications service; 2) a carrier designated as an ETC by a state commission only to provide wireline services may not expand the scope of its ETC designation to include wireless services without obtaining wireless ETC designation from a designating authority empowered to confer such designation; and 3) to be designated as an ETC in a state, the designated ETC must use its own facilities, at least in part, to provide USF-supported services within the ETC’s service area in the designating state.

TracFone’s petition drew public comment from several entities including AT&T, Inc. (AT&T), the Staff of the Public Utilities Commission of Ohio (“PUCO”), a group of eleven

competitive ETCs (“CETC Commenters”), Budget Prepay, Inc. and GreatCall, Inc. (“BudgetPrepay/GreatCall”), and Nexus Communications, Inc. (“Nexus”). In these reply comments, TracFone will address comments received on each of the three issues set forth in its declaratory ruling petition as appropriate.

I. Nothing in the Record Contradicts the Fact that Under the Commission’s Rules, Link Up Support May Only Be Provided to Those ETCs Who Actually Impose Customary Service Commencement Charges on their Customers.

In its petition, TracFone described situations in which certain ETCs were claiming and receiving Link Up support from the USF when, in fact, their customers, often -- in some cases, never -- actually had to pay any portion of a service commencement charge not covered by the USF through the Link Up portion of the low-income program. TracFone indicated that it was aware of at least one ETC (Nexus) which engaged in this practice. However, it did not state or did it intend to suggest that Nexus is the only ETC doing so. Indeed, other ETCs appear to be engaged in similar practices.

The premise underlying TracFone’s request is simple: the Commission’s rules and the policies underlying creation of the Link Up program contemplate the use of USF support to offset (*i.e.*, to reduce, but not eliminate) the costs to consumers of commencing telecommunications service, such that service commencement charges may be more affordable to low income households. This is clear from even a cursory reading of the Commission’s rules. Section 54.411(a)(1) describes Link Up as “[a] reduction in the carrier’s customary charge for commencing telecommunications service for a single telecommunications connection at a consumer’s principal place of residence. The reduction shall be half the customary charge or \$30.00, whichever is less.”¹

¹ 47 C.F.R. § 54.411(a)(1) (emphasis added).

It has been nearly a quarter century since the Commission established the Link Up program in 1987. From its inception, Link Up was intended to be an offset -- not an elimination -- of service commencement charges incurred by low-income consumers. In its Report and Order creating Link Up, the Commission described the program as recommended by the Federal-State Joint Board, as follows: “. . . the Joint Board recommends that a program of federal assistance to qualified low income households that would help defray the one time charges for commencement of service. This program, which has been described as a program to ‘Link Up America,’ would offset one half of the charges for commencing telephone service, up to \$30 dollars, for qualifying households.”²

There is no doubt that the purpose for Link Up is and has always been to use federal support (initially through access charges, since 1997 through the USF) to reduce normally applicable service commencement charges paid by low income customers by up to one-half, but not to exceed \$30.00. Recovery by ETCs of Link Up funds in excess of one-half of their actual service commencement charges (that is, the charges that consumers really are required to pay) not to exceed \$30 violates the long-codified Commission rule and the policies which underlie that rule.³

Not surprisingly, the only commenters which have asserted a right to receive Link Up support in excess of one-half of the customary service commencement charges paid by customers are several ETCs who appear to be recipients of such federal largesse. Both Nexus and the Competitive ETCs claim an entitlement to receive complements of contributors to the

² MTS and WATS Market Structure, 2 FCC Rcd 2953 (1987) (emphasis added).

³ PUCO asserts that “customary charges for commencing service” should be limited to charges for the actual physical connection of facilities and should not include activation charges. (PUCO Comments, at 3-4). While PUCO’s interpretation of the rule does not appear unreasonable, TracFone takes no position as to whether Link Up support should be available to offset service activation charges which are customarily imposed.

Federal USF Link Up support funds, without regard to whether or not their customers actually pay all or any portion of those carriers' nominal service commencement charges.⁴

Nexus asserts that TracFone would have low income customers be required to pay "out-of-pocket" in order to receive Link Up funding.⁵ Contrary to Nexus's observation, this is not about what TracFone would have; it is about what the Commission's rules require. As noted above, the Commission's Link Up rule is clear and explicit. Link Up is a reduction in a carrier's customary service commencement charge; it is not an elimination of that charge. By definition, reducing a charge means that some portion of the charge (*i.e.*, the charge minus the reduction) is to be paid by the customer. If, as Nexus and the Competitive ETCs suggest, they believe that low income customers should have the entirety of carrier service commencement charges funded by Link Up support, they should petition the Commission to commence a rulemaking proceeding to modify the Link Up rules such that Link Up would cover one hundred percent of the service commencement charges, rather than one-half of the charges up to \$30.00. Contrary to any suggestion that TracFone is asking for a narrow interpretation of the rule, TracFone is asking only that the existing rule be applied and enforced as it was promulgated.⁶ Those commenters

⁴ The Competitive ETCs have proposed that if an ETC has a stated service commencement or setup charge and identifies the charge in its terms of service or elsewhere, such statement should be *prima facie* proof that it has such a customary charge. Competitive ETCs' Comments, at 3. In other words, so long as a charge is "stated" somewhere, then those companies should be allowed to receive \$30 per customer from the USF without regard to whether its customers actually have to pay such charges. That proposal should be rejected by the Commission as being facially violative of the requirement that Link Up support be provided only for customary service commencement charges, *i.e.*, charges that are customarily imposed on customers.

⁵ Nexus Comments, at 4.

⁶ Apparently, Nexus is aware that the rule contemplates a reduction in carriers' customary service commencement charges, rather than a complete replacement of those charges with Link Up support, since Nexus itself quotes the very rule which describes Link Up as a charge reduction. *Id.*

who are unhappy with the current rule should seek a rule change in accordance with the rulemaking procedures codified in the Administrative Procedure Act.

Furthermore, Nexus's suggestion that customers receive Link Up funding is itself inaccurate. Nexus's low income customers do not receive Link Up funding from the USF, Nexus receives that USF support. For every customer which Nexus -- or any other ETC (including any of the Competitive ETCs) -- enrolls in its Lifeline/Link Up program, that carrier receives from the USF \$30 (assuming that the ETC claims to have a "customary" service commencement charge of at least \$60). The ETC receives \$30 per customer whether or not the customer pays a single dime to connect to the carrier's network, activate or otherwise commence service. In short, providing Link Up support to ETCs in such circumstances is simply a bequest of free money from the USF to those carriers -- money with an already burdened and growing USF cannot afford.

Both Nexus and the Competitive ETCs take the position that a "customary" charge does not mean that consumers actually have to pay the charge. In contrast, Budget Prepay/GreatCall acknowledge that for a charge to be customary, "[a]ll customers may pay it."⁷ According to Nexus, TracFone has asked the Commission to take a narrow interpretation of the term "customary" -- a term which Nexus asserts that the Commission has never interpreted. In the absence of any Commission discussion of "customary" which supports the view that USF should be provided to ETCs to offset or replace charges whether or not the charges are actually imposed on consumers, Nexus relies upon regulations governing the health insurance industry.⁸ Of course, this is not about the health insurance industry. It is about telecommunications. More

⁷ Budget Prepay/GreatCall Comments, at 5.

⁸ Declaration of August H. Ankum, PH.D and Olesya Denney, PH.D, attached to Nexus's Comments, at 16 ("Ankum/Denney Declaration").

specifically, it is about the Commission's rules governing the low income programs supported by the Universal Service Fund, specifically, the Link Up program.

There is no need to resort to irrelevant insurance regulation analogies to interpret the meaning of "customary" as used in Section 54.411 of the Commission's rules. It is a simple, commonly understood term with standard definitions readily available. For example, according to the American Heritage Dictionary of the English Language (Fourth Edition), customary means "commonly practiced, used or encountered; usual." The Random House Dictionary of the English Language defines customary as "according to or depending on custom; usual; habitual" and identifies as synonyms "wonted, accustomed, conventional, common, regular," and "usual."

If a telecommunications carrier nominally has a charge with a label like "service activation fee" or other term for a commencement of service charge, but does not actually require its customers to pay any portion or all of that charge, either through the guise of routinely waiving the charge, or allowing the customer to avoid the charge simply by purchasing increased usage, it cannot seriously be suggested that the charge is imposed on a "usual" basis or that it is imposed on a "regular" basis. In such circumstances, the charge is not a customary charge within any normally accepted definition of customary and TracFone sees no public interest benefit in handing over funds from the USF to give to ETCs who do not regularly or usually impose and collect such charges from their customers.⁹

If there is any question that the position claimed by the Competitive ETCs and Nexus defies rationality and, if approved by the Commission, would make a mockery of the Link Up

⁹ Even in situations where such charges are imposed and collected, pursuant to Section 54.411, ETCs may only receive amounts equal to half the charge, not to exceed \$30. Thus, if a carrier has a nominal "customary" service commencement charge of \$70, but the entirety of the charge above \$30 is "waived," then, at most, the ETC would be entitled to \$15 in Link Up support (half the real "customary" charge).

program, consider the following: if, as suggested by those commenters, a “customary” service commencement charge subject to reimbursement from the USF is whatever charge is “stated” by the carrier without regard to whether or not all, some, few, or no customers are required to pay the charge, then any ETC could “state” a service commencement charge of \$100, \$500, \$1,000 -- or any other made up amount, then “waive” or otherwise not require the customer to pay all or any portion of the “stated” charge, and collect \$30 per customer from the USF. Not only would this effectively “game” the Link Up portion of the low-income program, more importantly, it would divert potentially millions of dollars per year from the USF to the pockets of those carriers -- moneys which could be used to provide high cost support to rural areas, enhance Lifeline benefits to low-income consumers, and fund broadband deployment. Given the stated concerns about controlling the size of the USF and preventing waste, fraud and abuse which have been articulated by the Federal-State Joint Board and others, as well as stated concerns about there being sufficient USF resources to support broadband deployment in high cost areas and to support affordable broadband service to low income households,¹⁰ this is no time for the Commission to sit back and allow ETCs to take money from the USF to offset charges which they do not actually impose on or collect from their customers.

The suggestion of the Competitive ETCs that limiting Link Up support to a portion of the service commencement charges actually imposed would “drive away” ETCs from engaging in outreach to low-income Lifeline-eligible customers is ludicrous.¹¹ The absurdity of this proposition (if we can not get free money from the USF through Link Up, then we will not market Lifeline to low income consumers) is illustrated by TracFone itself. As noted by Nexus,

¹⁰ See, e.g., Federal-State Joint Board on Universal Service, Lifeline and Link Up (Recommended Decision), FCC 10J-3, released November 4, 2010, and separate statements of Joint Board Members appended thereto.

¹¹ Competitive ETCs’ Comments at 4.

TracFone is prohibited from obtaining Link Up support pursuant to the conditions imposed on TracFone by the Commission's order granting TracFone forbearance from the facilities-based service requirement of Section 214(e)(1)(A) of the Communications Act.¹² TracFone has never sought Link Up support and it has never attempted to establish activation, service commencement, or connection charges -- nominal or otherwise -- on any Lifeline or non-Lifeline customer. To date, TracFone has been designated as a Lifeline-only ETC in 34 states and currently serves more than 3 million Lifeline customers. Nexus itself notes that in no fewer than eleven states TracFone is the largest provider of Lifeline Service.¹³ TracFone has experienced this remarkable growth in its Lifeline service despite not commencing Lifeline service in any state until 2008, and in most, states, not until 2009-2010. TracFone's success in creating the nation's first prepaid wireless Lifeline program, expanding that program to meet the changing needs of Lifeline customers, and increasing enrollment to more than 3 million customers, plainly contradicts the Competitive ETCs' unsupported and inherently wrong proposition that without Link Up support to offset waived or otherwise not imposed charges ETCs will be discouraged from seeking to provide Lifeline service and from aggressively marketing Lifeline services. Moreover, Nexus's own recognition as reflected in its Ankum/Denney Declaration of TracFone's growth as a Lifeline provider, notwithstanding the conditions imposed by the Commission as part of forbearance, and without the supplement support from Link Up, belies the suggestion that the declaratory relief being sought by TracFone's petition would erect barriers to entry.¹⁴

¹² Nexus Comments at 3

¹³ Ankum/Denney Declaration at 10.

¹⁴ Ankum/Denney Declaration, at 11.

II. An ETC Designated by a State Commission Pursuant to Section 214(e)(2) of the Communications Act May Not Exceed the Scope of Its ETC Designation by a State Commission Based Upon Applicable State Law.

In the second part of its declaratory ruling petition, TracFone raised a situation in which a carrier had been designated as an ETC by a state commission whose authority under applicable state law limited the state commission to designating wireline ETCs. That state commission (the Tennessee Regulatory Authority) specifically lacks jurisdiction to designate wireless ETCs and its grant of ETC designation to the ETC in question (Nexus) was expressly limited to being an ETC for wireline service only. Nexus asserts in its comments that such limitations are not technology neutral and that once designated as an ETC a carrier may use any facilities -- wireline or wireless -- to provide services supported by the Universal Service Fund.¹⁵ As indicated by the Tennessee Regulatory Authority orders appended to TracFone's petition as Attachments 2, 3, and 4, the Tennessee Regulatory Authority does not share Nexus's view that once that commission designated Nexus as an ETC, it was powerless to limit the scope of that designation, notwithstanding the fact that the Tennessee Authority lacks authority over Commercial Mobile Radio Service (CMRS) providers, "in both the broad sense and specifically as to ETC designation."

While Nexus credibly argues that Section 214(e) does not distinguish ETC designations based on technology, that argument overlooks the fact that Congress included subsection (e)(6) in Section 214 which reserves to the Commission authority to designate ETCs in situations where state commissions lack such authority. Under Nexus's interpretation, Section 214(e)(6) would be largely superfluous. Per Nexus's view, once a carrier purporting to be a wireline carrier secures ETC designation from a state commission, that carrier would be free to provide

¹⁵ Nexus Comments, at 9.

Lifeline and other Universal Service Fund-supported services using wireless facilities, including resold wireless services. Thus, there would never be a need for a carrier to seek ETC designation from the Commission pursuant to Section 214(e)(6) so long as it was designated as a wireline ETC, even where the state commission lacks authority to designate CMRS providers as ETCs.

TracFone uses this occasion to clarify that the declaratory relief requested in Section II of its petition is limited to Tennessee-type situations where ETCs attempt to do an end run around the state commission's jurisdictional limits by obtaining wireline ETC designation and unilaterally expanding that designation to offer wireless services in contravention of state law. TracFone does not disagree with Nexus that, in the absence of such limits on state commissions' ETC designation authority, once designated as an ETC, the carrier may provide services using any available technology provided that it offers USF-supported service in that state, at least in part, using its own facilities.

III. ETCs Must Use Their Own Facilities, At Least in Part, to Provide Universal Service Fund-Supported Service in Any State Where They Have Been Designated as an ETC.

In its petition, TracFone sought clarification by the Commission of what should be obvious -- that ETCs must use their own facilities, at least in part, to provide Universal Service Fund-supported service in any state where they have been designated as an ETC. Unless they use their own facilities, at least in part, to provide USF-supported service in a state, then they must request and obtain regulatory forbearance from the Commission pursuant to Section 10 of the Communications Act¹⁶ as TracFone and others have done, and they must, like TracFone and other non-facilities-based ETCs, comply with whatever conditions on forbearance are imposed by the Commission.

¹⁶ 47 U.S.C. § 160.

The comments indicate that there appears to be a misunderstanding about this portion of TracFone's petition. Contrary to the claim of the Competitive ETCs, TracFone has not asserted that ETCs must have facilities in every state where they are designated as ETCs.¹⁷ Rather, TracFone's petition sought clarification through a declaratory ruling that some portion of an ETC's USF-supported service in a state must be provided using the ETC's own facilities rather than resale of another provider's facilities. Where those facilities are located -- whether within the state or outside the state, does not matter. In this regard, the Competitive Carriers' and the Commission's attention is directed to page 17 of TracFone's petition which states as follows:

For example, a transmission line or switch located in California cannot be deemed to constitute "facilities" for Section 214(e)(1)(A) purposes in Alabama, unless, of course, that transmission line or switch in California is being used to transmit or route USF-supported services to customers in Alabama.

As described in the above quotation from TracFone's petition, facilities may be located in any state, provided that they are used to provide USF-supported service in states where the ETC operates. If Nexus, one of the Competitive ETCs, or any other ETC wishes to use its switch in California to route Lifeline customer calls in Alabama, it may do so consistent with Section 214(e)(1)(A). What it may not do under Section 214(e)(1)(A) is provide service in Alabama entirely through the resale of other providers' services and claim to be facilities in Alabama solely because it owns a switch in California, if that switch is not used to provide USF-supported service in Alabama.

¹⁷ Competitive ETCs' Comments, at 6 ("There is no logical, technological or policy reason to require facilities to be placed in every state by every carrier seeking ETC status.").

CONCLUSION

As described in these reply comments, the initial comments submitted in this proceeding offer no legal or public interest rationales not to grant the declaratory relief requested in TracFone's petition for declaratory ruling. Accordingly, TracFone reiterates its request that the Commission promptly issue a declaratory ruling in accordance with the requests set forth in TracFone's petition and in these reply comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Raymond Lee, a Legal Secretary with the law firm of Greenberg Traurig, LLP, hereby certify that on January 10, 2011, a true and correct copy of the foregoing Reply Comments of TracFone Wireless, Inc. was sent via electronic mail, to the following address unless stated otherwise.

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