**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, DC 20554**

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| In the Matter of<br><br>TracFone Wireless, Inc. Petition for Declaratory Ruling | WC Docket Nos. 09-197, 03-109 |

# REPLY COMMENTS OF NEXUS COMMUNICATIONS, INC.

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## SUMMARY

Eligible telecommunications carriers ("ETCs") concentrating on the Low Income market, such as Nexus Communications Inc. ("Nexus"), seem to be a victim of their own success. As these ETCs began to offer technology and service packages tailored to, and appealing to, the Low Income market, take up rates for the Low Income program increased for the first time since the program's inception. Before this, the program was chronically and severely underutilized.

Rather than applaud this success, and perhaps offer constructive suggestions based on legitimate concerns, AT&T and the Public Utilities Commission of Ohio ("PUCO") raise complaints that boil down to objecting to the fact that competitive providers do not follow the same business model as incumbent carriers. But part of the genius of Section 214(e) is that it mandates that the provision of supported services for Low Income consumers be subject to the same competitive forces as apply to the local exchange market generally under Section 251. Competitors – at least successful ones – rarely simply mimic the services, prices, and technology of their rivals. A successful competitor will offer something ***different*** and ***better.*** Based on Nexus' experience, including its success in the marketplace, Low Income consumers view prepaid wireless services as both different and better than standard ILEC fixed landline offerings. This is the natural result of competition and innovation, and should be celebrated, not condemned.

On the specific question of waiving the portion of the service activation fee ("SAF") not covered by Link Up, AT&T has no general problem with an ETC waiving the balance of the SAF, because AT&T waives a portion of its own SAF. But, it argues, this practice should only be permitted for carriers who mainly serve consumers who can afford to pay the full SAF themselves and purchase more expensive service packages. The effect of this position, of

course, is that SAF reimbursement for serving Low Income customers would be available only to those carriers who serve such customers as an afterthought (such as AT&T), rather than those carriers who focus on the specific needs of this group (such as Nexus). For its part, PUCO suggests that the facilities employed and service packages offered by wireless carriers are suspect and in need of clarification, apparently for no other reason than that they are different from traditional ILEC offerings. The true nature of PUCO's concerns is unclear, as evidenced by statements such as this one: "[u]nlike traditional wireline Lifeline service in which the value provided does not change even if the service offering does, the value provided by a wireless carrier offering Lifeline service at no cost may change when a service offering changes."[1] Other than an unexplained preference for "traditional wireline" service, it is hard to discern any specific objection to wireless Lifeline offerings. Indeed, while evidently concerned about the "value" a Lifeline customer receives, PUCO's comments miss the fact that where consumers – perhaps especially low income consumers – have competitive options, they themselves are the best arbiters of which options offer them the highest "value."

Perhaps most startling is PUCO's seeming indifference to the plight of more than 1 million low income[2] and 500,000 unemployed[3] Ohioans, all whom can surely benefit from, and in some cases may depend critically on, pre-paid wireless services in their search for employment. PUCO's concerns may be motivated by the fact that Low Income funding is going up as a result of ETC success in serving heretofore ignored low income consumers. But particularly in the context of the Low Income program, this phenomenon is surely a measure of

[1] PUCO Comments at 7-8. It is unclear what PUCO means by "at no cost" in this sentence. Nexus' subscribers pay monthly fees in connection with the service, and also pay for additional minutes.

[2] U.S. Census Bureau. (2010). *State & County Quickfacts: Ohio*. Retrieved January 10, 2011, available at http://quickfacts.census.gov/qfd/states/39000.html.

[3] Ohio Department of Job and Family Services, Bureau of Labor Market Information, *Civilian Labor Force Estimates, November 2010*, Retrieved January 10, 2011, from http://lmi.state.oh.us/laus/OhioCivilianLaborForceEstimates.pdf.

policy success – not failure. As discussed in our opening comments, wireless services are likely to be more useful than a fixed landline service to those seeking employment, both because calls can be sent and received away from home, and because highly useful features like voice mail are normally included with even the most basic wireless service. If even one unemployed Ohioan finds employment or higher paying employment just one month sooner due to access to telecommunications services, the societal benefits (in terms of increased tax revenues, reduced unemployment payments, etc.) readily outweigh years of Lifeline and Link Up subsidies for such a consumer. In other words, even aside from the social benefits of increased telephone penetration among low income consumers, fully supporting wireless services within the universal service program is entirely sensible as a purely economic matter as well.

It appears that PUCO is uncomfortable with competitive ETCs such as Nexus that view serving the needs of low income consumers as a business opportunity, rather than as an obligation. One way of looking at USF payments for providing service to low income consumers is to relieve an ILEC of some of the economic burden of meeting a social obligation imposed by regulation. That perspective – the perspective that PUCO seems to have – probably made sense in the years before the passage of the 1996 Act. But another way of looking at USF payments is as a means to change the economic incentives facing both low income consumers – making it easier for them to obtain extremely useful services – and potential service providers – making it economically viable to serve a portion of the population that would otherwise be unattractive as a business proposition. This latter perspective—the only one consistent with Section 214(e) and the fundamental pro-competitive policies of the 1996 Act—recognizes that marketplace forces can be directly applied to the challenge of reaching out to, and serving the communications needs of, low income consumers. Allowing market forces to operate in this arena is a great departure from the traditional status quo of, in effect, twisting the arm of the ILEC to serve a market the ILEC would rather ignore. The role of regulation in a market-oriented system is much reduced. But just as the overall telecommunications marketplace has loudly and unequivocally expressed its preference for wireless services over landline services, so too do low income consumers prefer (if given the option) to meet their basic telecommunications needs via wireless services—including, specifically, prepaid wireless services, which allows these consumers to carefully control their expenditures. Unfortunately, it appears that PUCO's approach to Lifeline and Link Up service is still mired in the old model of twisting the ILEC's arm, rather than harnessing market forces to achieve the program's objectives.

Putting aside PUCO's backward-looking policy perspective, in fact there is no basis in the statutory and regulatory requirements governing ETC designation and the Lifeline/Link Up program for any of the limitations that PUCO would impose. To the contrary, the pro-competitive and technology-neutral mandates for these programs, contained both in the Communications Act and in Commission rules and orders, are clear and sound. They do not support TracFone's petition for a declaratory ruling, and they do not support the proposals embodied in PUCO's comments.

For these reasons, there is no basis for making the changes that PUCO (or AT&T or TracFone) propose. But to the extent that the Commission may be interested in considering changing regulations and policies, this is not the appropriate proceeding to do so. Instead, it must initiate a rulemaking. Indeed, even AT&T recognizes that a rulemaking is the more appropriate venue for TracFone's concerns. Such a proceeding is unwarranted, however, because providing low income consumers with wireless telephony, competitive service options, and market-based pricing options fulfills the statutory goals set out by Congress for the Low

Income program. None of the commenters has shown any reason for imposing a new, overly restrictive interpretation on the Commission's Link Up rule or for imposing a technology limitation on the ETC designation process or facilities requirement.

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## REPLY COMMENTS OF NEXUS COMMUNICATIONS, INC.

Commenters largely agree with Nexus Communications, Inc. ("Nexus") that no changes to the Commission's rules are necessary and that it would be inappropriate for the Commission to adopt the changes requested by TracFone in the context of a petition for declaratory rulemaking.[4] TracFone has requested the Commission to declare that the common practice of waiving the balance of the service activation fee ("SAF") not covered by Link Up funding disqualifies the SAF from being considered a "customary charge" under the Commission's rules, despite the fact that this phrase has never been interpreted by the Commission and the fact that the practice furthers program goals of getting telephone service to people who otherwise could not afford it. TracFone also urges the Commission to impose technology-specific limitations on the ETC designation process and a technology-specific gloss on the statutory facilities requirement, despite the fact that no such limitations exist in, or are even consistent with, the statute or regulations, and despite the Commission's explicit policy of technology-neutrality. The only two commenters to disagree with Nexus' position on the SAF, AT&T and the Public Utilities Commission of Ohio ("PUCO"), either agree that a declaratory ruling is an inappropriate forum for making such changes or advocate entirely different changes not even requested by TracFone and otherwise lacking any legal or policy basis. No other commenter

[4] *See* Comments of Competitive Eligible Telecommunications Carriers at 1; Comments of Budget PrePay, Inc., and GreatCall, Inc. at 5.

disputes that any consideration of TracFone's requests are appropriate only in a rulemaking proceeding. As a result, the Commission should deny the TracFone petition in its entirety.

## I. IT WOULD BE ANTICOMPETITIVE TO LIMIT PARTIAL WAIVERS OF SAFs TO ILECS' WIRELINE CUSTOMERS

As pointed out in Nexus' initial comments, AT&T waives the balance of its SAF not covered by Link Up for its Low Income customers.[5] AT&T recognizes that "there are many legitimate reasons" for waiving a portion of the SAF, such as being ordered by a state commission to do so.[6] AT&T even states that during promotional periods, it waives *some or all* of the SAF for all customers, not just Low Income customers.[7] It argues that this practice is justified, however, because the out-of-pocket payment by some of its customers most of the time (outside of promotional periods) insulates AT&T from any of the "concerns" raised by TracFone.

AT&T's argument boils down to a policy under which large, rich, multi-product ILECs can both waive their SAFs for low income consumers and get reimbursed for the waiver, while small firms focused on the needs of this market segment would not be able to do so. The distinctions AT&T draws are based on the characteristics of its customers rather than any substantive differences between its practices and those of low income focused ETCs like Nexus. In reality, the economic result is the same regardless of which company offers a partial waiver of the SAF: the Low Income consumer receives additional benefits at the carrier's expense, and the program's goal of expanding telephony services to the poor is advanced.[8]

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[5] Nexus Comments at 6. *See also* AT&T Comments at 3-4.
[6] AT&T Comments at 3.
[7] *Id.* at 4.
[8] AT&T seems oblivious to the contradiction between its recognition that a state may – as a condition of ETC designation – direct an ETC to waive an SAF, and its suggestion that an ETC that complies with such an order, *on the express understanding on the part of the state itself* that Link Up funding would be available to cover the non-waived portion of the SAF, can still be deprived of such funding by the FCC. The FCC and the states have each been delegated by Congress certain specific responsibilities for administering the USF program, and neither is free

For its part, PUCO does not take issue with waivers, but rather claims that Link Up should only cover customers who are connected to certain kinds of facilities. Although it is unclear precisely what PUCO is advocating, it appears to be arguing that only the connection of a physical wire to a consumer's network interface device ("NID") outside a residence qualifies for Link Up. Recognizing that its proposition would constitute a new substantive interpretation of the regulation, but seeking to avoid the need for a formal rulemaking, PUCO requests that the Commission provide guidance on what constitutes the appropriate facilities for carriers providing service using wireless technology for purposes of Link Up funding. This request is not only outside the scope of what TracFone has requested, and, therefore, outside the scope of this proceeding, it is an attempt to impose a new and additional constraint on the availability of Link Up funding that – aside from being wrong on the merits – is entirely inappropriate outside a formal rulemaking proceeding.

In addition to these procedural deficiencies, the interpretation that PUCO seems to be advocating is based on an inaccurate and outdated view of the means by which telecommunications services—whether landline or wireless—are provisioned. Specifically, PUCO argues that "'commencing service' means an actual physical connection of facilities and does not include 'activation.'"[9] This proposition makes little sense, because even landline local exchange carriers typically maintain a soft dial tone at premises with no active customers, meaning that there is no need to physically connect facilities when a new customer requests a service. A carrier using wireline technology "connects" a residential customer to its network in the vast majority of cases by taking the service order, setting up a billing account and activating, in the carrier's back office computers, a new account over the existing physical wire connection

to ignore the actions taken by the other in fulfilling its delegated responsibilities. *See* notes 15 and 18 *infra,* and accompanying text.

[9] PUCO Comments at 3.

in order to permit the customer telephone equipment to communicate with the network. It is the rare residential customer that does not already have all the necessary physical wire connections in place. In other words, for the vast majority of service "connections," there is no physical work done to connect the customer's NID to the network—there is no "truck roll."

To connect customers to a *wireless* network, a carrier follows a process that is basically the same: in addition to service ordering processes, a carrier activates the new account in its back office computers that then permit the customer's telephone to communicate with the network. In other words, service activation for wireline service is substantively the same as for wireless services, and therefore, a fee to cover the carrier's set up costs for a wireless customer is just as legitimate as a fee to set up a wireline customer. To treat these costs differently would be anticompetitive and a violation of the Commission's policy of technology neutrality. To the extent that the Commission considers PUCO's request for clarification, which again, would be inappropriate in this proceeding, it should recognize that there is no legitimate basis for introducing the false distinction between "connection" costs versus "activation" costs.

Nexus' customary charges for its services and service activation are listed in its informational tariffs and price lists, which constitute Nexus' binding common carrier offerings. As a common carrier, Nexus is required to serve all potential users indifferently, and the prices, terms, and conditions in its tariffs must be offered to all its customers.[10] A typical Nexus tariff states that "[a] Service Activation Fee ['SAF'] of $72.00 is required to activate a customer's service irrespective of product offering."[11] This language constitutes Nexus' legally-binding

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[10] *Virgin Islands Telephone Corp. v. FCC,* 198 F.3d 921, 929 (D.C. Cir. 1999); *Nat'l Assoc. of Regulatory Utility Commissioners v. FCC*, 553 F.2d 601, 608 (D.C. Cir. 1976); *In Re Federal-State Joint Board on Universal Service,* Report and Order, 12 FCC Rcd 8776, ¶ 785 (FCC rel. May 8, 1997) ("1997 Universal Service Order").

[11] *See e.g.*, Nexus Communications, Inc. Statement of Terms and Conditions for the Furnishing of Wireless Service in the State of Georgia at 14; West Virginia Informational Wireless Services Tariff of Nexus Communications, Inc. d/b/a TSI at 42.

common carrier offering to all customers in that state. Any partial waivers applicable to Low Income customers are set out in a separate, distinct section that governs the customer's receipt of Low Income funding along with and related terms and conditions. Clearly, the fact that Nexus has specific and separate provisions that apply to prospective Low Income customers, does not convert its offering to other potential customers into a nullity. The standard language applying the $72 SAF to all customers is more than sufficient to qualify this charge as "customary" for purposes of the Link Up rule.[12]

Nexus is not alone in charging an SAF for wireless services. In fact, charging an SAF is a wireless industry standard, rather than an exception. For example, each of the top five wireless providers in the nation charge SAF—AT&T, Verizon (including the formerly Alltel operations, which continues to have separate pricing), Sprint-Nextel, T-Mobile and US Cellular. Similarly, a Nexus survey identified over 40 other wireless carriers that charge SAF, including seventeen carriers that charge an SAF on prepaid plans.[13] In the wireline industry, SAFs (non-recurring service connection fees) appear to be nearly universal. Specifically, in an FCC survey, residential connection charges were present in each of the 95 sampled cities (cities that represent 45 states and eight largest ILECs, including AT&T, Verizon and Qwest).[14] A review of specific ILEC tariffs shows that the ILEC SAFs are sometimes composed of several fees, such as

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[12] 47 C.F.R. § 54.411(a).

[13] In addition to Nexus, seventeen other carriers charge SAFs on prepaid wireless plans: Alaska Wireless Communications LLC; Cellular South; Chariton Valley Communications; Corr Wireless; DPI Teleconnect, L.L.C.; Illinois Valley Cellular - IV Cellular; I-Q Telecom, Inc.; Lucky Wireless; Mobi PCS (Coral Wireless); Pine Tree Cellular (Maine); Smith Bagley - Cellular One; STi Prepaid, LLC; Telrite - Life Wireless; Terracom Wireless; True Wireless, LLC; West Central Wireless (Right Wireless); and YourTel America, Inc. Other wireless carriers that charge SAF include the following: Airlink Mobile; Arctic Slope Wireless; Caprock Cellular; CellularOne of East Texas; CloseCall America, Inc.; Cordova Wireless Communications Inc; Cross Mobile - Mobilz; E.N.M.R. Telephone Cooperative - Plateau Wireless; FTC Communications, Inc.; Immix - Keystone Wireless; Greatcall, Inc., d/b/a Jitterbug Wireless; Lamar County Cellular; Long Lines Metro; North East Colorado Cellular - Viaero Wireless; nTelos; OTZ Telecommunications Inc. - OTZ Cellular; SouthernLINC; and Union Wireless - Union Telephone Company.

[14] *See* FCC 2008 Reference Book of Rates, Price Indices, and Household Expenditures for Telephone Service, Table 1.3, available at http://www.fcc.gov/wcb/iatd/lec.html.

"service ordering" (including "service establishment" and "records only"), "central office connection" and "premises work" fees.[15] The fact that ILECs may charge a service order (or even a "records only") non-recurring charge that is separate from physical wiring charges is another indication that SAFs are legitimate even if no physical wiring takes place.

Unlike these ILECs, however, Nexus is not subject to traditional regulation. Moreover, Congress' delegation to state commissions of authority to designate ETCs for purposes of the federal USF program does not include assessing the "value" of the ETC's services, or approving specific charges. The state commission's delegation of power from Congress is defined by Section 214(e), which directs the state to confirm that the ETC will provide the supported services using—at least in part—its own facilities, and that the ETC will properly advertise them.[16]

Nowhere in the statute, regulations, or Commission orders have the states been appointed watchdogs of some undefined level of "value" of wireless ETC services that would effectively permit otherwise illegal rate regulation.[17] To the contrary, efforts to assess the "value" of the services being offered by an ETC would appear to impinge upon the question of what services

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[15] See for example, AT&T Tariff Illinois Bell Telephone Company, I.C.C. No. 19, Part 3, Sec. 1 p. 1 available at http://cpr.bellsouth.com//pdf/ic/0003-0001.pdf.

[16] The FCC, not the states, determines what the specific supported services *are*. It has settled on the list contained in 47 C.F.R. § 54.101(a). These are: voice grade access to the public switched network, local usage, dual tone multi-frequency signaling or its functional equivalent, single-party service or its functional equivalent, access to emergency services, access to interexchange service, access to directory assistance, and toll limitation for qualifying low income consumers. In this respect, the interplay between the responsibilities delegated to states and the FCC under Sections 214(e) and 254 is akin to that between the responsibilities delegated to the states and the FCC under Sections 251 and 252 of the Act. Under Sections 251 and 252, the FCC sets generally applicable rules regarding ILECs' pro-competitive duties, while states apply those rules in specific arbitrations between ILECs and CLECs. And, just as the FCC will in certain instances assume a state's arbitration functions under Section 252(e)(5), so too will the FCC at times assume a state's ETC certification functions under Section 214(e)(6).

[17] PUCO recently asked for comment in its state-level proceeding on prepaid Low Income regarding what constitutes sufficient "value" for such services, again, without citing any legal basis that it has the authority to make such determinations, particularly with respect to the rates of entities that are not rate regulated and particularly with respect to wireless providers. *In Re Commission Investigation into the Provision of Prepaid Lifeline Service by Competitive Eligible Telecommunications Carriers*, Entry, PUCO Case No. 102377-TP-COI (rel. Nov. 3, 2010).

are supported, a task that, as noted above, Congress has delegated to the FCC, not the states. In the case of wireless services in particular, the FCC has clearly held that:[18]

> Section 332(c)(3) of the Act preempts states from regulating the rates and entry of CMRS providers. . . Therefore, states may extend generally applicable, ***competitively neutral requirements*** ***<u>that do</u>*** ***<u>not regulate rates</u>*** or entry and that are consistent with sections 214 and 254 of the Act to all ETCs in order to preserve and advance universal service.

While states may not regulate wireless ETC rates, over the years a practice has developed of states requiring wireless carriers to file, as a condition of ETC designation, a published price list or informational tariff. This acts as a public declaration of the carrier's common carrier offering, and wireless ETCs have generally accepted these requirements as a reasonably ancillary exercise of states' federally delegated authority to designate ETCs, and of the requirement that the ETC's provision of the nine supported services be advertised. This does not, however, empower the state commission to directly regulate wireless ETC rates, or otherwise determine that the wireless carrier's pricing package does not provide sufficient value.[19]

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[18] *In Re Federal-State Joint Board on Universal Service*, Report and Order, 20 FCC Rcd 6371 (FCC rel. Mar. 17, 2005) at ¶ 31.

[19] That is, the delegation of authority to designate ETCs cannot be read to contradict the ban on state-level rate and entry regulation of wireless carriers contained in Section 332(c). In this regard, it is important to read the complementary delegations of authority in Section 214(e) (to the states) and Section 254 (to the FCC) in harmony. In these provisions, Congress has established a set of policies for meeting universal service goals that depend on the cooperative and coordinated actions of both the FCC and state regulators. States have the primary role in designating ETCs, including imposing reasonable conditions on such designations. Once a state has designated an ETC, it is the federal government's role to collect and distribute universal service funds in accordance with the terms, goals and policies of the universal service program. It would make no sense, either as an administrative matter or as a matter of statutory interpretation, and would raise significant constitutional concerns about due process and confiscation, to permit states to include as a condition on ETC certification an obligation on the new ETC to waive the SAF (which has occurred in those states where Nexus does so) and then, purportedly acting under the same statutory authority, to permit the FCC (via USAC) to deny Link Up support when the ETC complies with the state's requirement. This is particularly so in the case of wireless ETCs, where – in light of Section 332(c)'s general ban on state ratemaking for wireless carriers – the sole authority that a state might have to even indirectly regulate the ETC's rates (which is what a mandatory SAF waiver amounts to) arises from the operation of the universal service program itself. Thus, while the FCC may, in an appropriate rulemaking proceeding, make prospective changes to the operation of the USF program (consistent, of course, with statutory requirements), it would be improper for the FCC to interpret or modify program rules retroactively (as in a declaratory ruling proceeding such as this one) in a manner that effectively contradicts or nullifies express conditions on ETC certification duly imposed by a state.

TracFone's unfounded allegation that Nexus' SAF is "fictional" is an attempt to play on the misguided idea that state commissions "should" be ensuring "adequate value" for Low Income—which, judging by PUCO's comments, would seem to be measured by the ILEC yardstick—or that there simply cannot be any legitimate connection/activation charges for wireless services because there is no truck roll. The latter point was addressed above. As to the former, state commissions are not empowered to judge whether any particular package, particularly the pricing, provides "value." If the Commission were to follow PUCO's approach, any service offering that did not mimic the ILEC's service would be found lacking, a position that is simply incompatible with the Commission's competition policy and the basis for the 1996 Telecommunications Act. There is no need to police product offerings in competitive markets because an end-user chooses providers and product offerings that deliver most value from a particular end-user's standpoint. An ETC that offers an "inferior value" would lose customers to competitors. The fact that wireless ETCs focusing on the Low Income segment are gaining customers is an indication that a growing number of Low Income customers are finding wireless Low Income product offerings more "valuable" that the ILEC Low Income product offerings.

But, on the merits, Nexus believes that there can be no question as to the value of the services it provides. The numbers leave no doubt that wireless services, and particularly prepaid services, are giving Low Income Americans the kind of telephone service that they need. Studies show that when Low Income families choose their phone service, they generally choose wireless.[20] Wireless services provide critical benefits for Low Income Americans that improve their security, mobility, and economic welfare in ways that are particularly important given the economic and social challenges they face. Numerous studies have demonstrated that wireless

[20] Janice A. Hauge, et al., *Whose call is it? Targeting universal service programs to low-income households' telecommunications preferences,* 33 Telecomm. Pol'y 129, 136 (2009), *available at* http://warrington.ufl.edu/purc/purcdocs/papers/0805_Hauge_Whose_Call_is.pdf

phones help low income Americans in profound ways, and that they recognize it. Low Income Americans also recognize the benefits of prepaying for wireless services. In the last few years, the increase in prepaid subscribership has been particularly high in low income households, which makes sense, as prepayment allows these families to effectively manage their costs and avoid unexpected fees. Studies have shown that low income customers choose prepaid in higher numbers than any other group.[21]

Given these strong and undeniable industry and marketplace trends, to the extent "value" is a relevant question, Nexus submits that landline ILECs offering stripped-down, low-featured fixed landline services should be called upon to explain why they are not providing mobile services and prepayment options, both of which provide such clear benefits to the target demographic of the Low Income program. The partial waivers of prepaid wireless SAFs make telephone services more affordable for low income Americans, furthering the policy goal of the Low Income program, which is to help ensure that "[q]uality services [will] be available at just, reasonable, and affordable rates" for ***all*** citizens.[22] Yet from the inception of the program until very recently, in 2008, fewer than a third of eligible subscribers were being served by the program.[23] Until the past few years, there were very few competitive providers for any Low Income services. ETCs were by-and-large ILECs, who generally ignored the needs of their Low Income customers. The most recent estimates still only reflect that approximately 32% of subscribers eligible for Low Income benefits actually receive them, a 3% rise from 2008.[24] The Commission, therefore, should encourage efforts of ETCs such as Nexus to expand their services

[21] *Id.* at 138.
[22] 47 U.S.C. § 254(b).
[23] 2009 Universal Service Monitoring Report at tbl. 2.1.
[24] See QSI Declaration at ¶ 17. Calculated from the USAC 2009 Low Income participation study.

and pro-consumer pricing policies like partial waivers.[25] It should not impose a restrictive interpretation of "customary charge" that would unfairly advantage incumbent providers and hurt consumers who benefit from the competitive offerings of ETCs like Nexus that focus on serving their needs.

For the foregoing reasons, the Commission should deny TracFone's petition in its entirety. To the extent that it wishes to consider, however, such issues as what constitutes a "customary charge" it may only do so in the context of a rulemaking as required under the Administrative Procedure Act and discussed in Nexus' comments.[26]

## II. ANTICOMPETITIVE BIAS AGAINST WIRELESS (OR NEXUS) IS NOT A LEGAL BASIS FOR IMPOSING TECHNOLOGY LIMITATIONS ON THE LOW INCOME PROGRAM

Nexus' comments explained in detail how the Commission's policy of technology neutrality applies to both the ETC designation process and the requirement that ETCs provide supported services, at least in part, over their own facilities.[27] There is simply no basis in the statute, regulations, or Commission orders to require an ETC to obtain a separate designation or deploy separate facilities if the same carrier offers services using both wireline and wireless services.[28] None of the commenters provide any legal or policy grounds that challenge this plain reading of the law.

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[25] ETCs that waive the balance of a Lifeline subscriber's SAF not covered by Link Up is good public policy, and encouraging ETCs to continue engaging in the practice is in the public interest. The remaining balance of the SAF is like a "co-pay" for medical treatment. When Nexus (or any other ETC) waives remaining balance of the SAF it is analogous to doctors waiving or reducing their fee. If doctors were penalized for engaging in the practice of waiving or reducing fees, the obvious result would be a strong disincentive for health care professionals to engage in this admirable practice. The same goes for ETCs who provide Lifeline and Link Up services to income-challenged Americans.

[26] Comments of Nexus Communications, Inc., *In Re TracFone Wireless, Inc. Petition for Declaratory Ruling* (filed Dec. 23, 2010) ("Nexus Comments"), p. 5-6, and *passim*

[27] *Id.* at Sections II and III.

[28] Nexus would note that TracFone has mischaracterized the facts involved with the Nexus proceeding in Tennessee. Nexus received ETC designation from the Tennessee Regulatory Authority at a time when it only provided services in Tennessee via wireline technology. Nexus still provides wireline services in Tennessee in that manner. Without delving into the details (which are irrelevant here), a dispute arose regarding how, if at all, the Tennessee Regulatory Authority's statute, which contains some limitations on that body's regulatory authority over wireless carriers,

PUCO and AT&T, who support the view that a separate "wireless" designation is required, have assumed that because many carriers employing wireless technology have received their sole designations from the FCC, those designations were "wireless-only," and that those carriers, if they wanted to utilize wireline technology, would need to obtain a separate designation. However, PUCO and AT&T cannot point to a single statute, regulation, or Commission order where such a limitation has been imposed, because not only is no such limitation included anywhere in the statute, such a limitation is directly contrary to the FCC's long-standing policies of technological neutrality.

Part of the confusion stems from the fact that most CMRS carriers do not also have landline operations, and traditional landline carriers – including CLECs – to the extent they have had wireless operations, have handled those operations via a legally separate entity that would normally require a separate ETC certification. Carriers that truly integrate wireless and landline operations are relatively rare. Part of the confusion also arises from language in the statute that deals with situations where a state commission may lack jurisdiction over a prospective ETC, 47 U.S.C. § 214(e)(6). That section provides:

> In the case of a common carrier. . . that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the Commission consistent with applicable Federal and State law.

This provision plugged a hole in the ETC designation process that mainly applied to wireless carriers. While Congress delegated primary authority over ETC designations to the states, some

affected the technologies that Nexus may use to provide the supported services. While Nexus believes that its Tennessee designation is (and always has been) technologically neutral, as required by federal law, in order to avoid further disputes with the Tennessee regulators, Nexus determined to not provide wireless services to Low Income participants in Tennessee. TracFone's characterization of this situation, on page 12 of its petition, is simply inaccurate. In fact, if a potential customer enters a Tennessee ZIP code into the Lifeline section of Nexus' website for wireless services, they are promptly told that funding is not available in Tennessee for wireless services. *See* https://www.reachoutmobile.com/index.php/site/page/tennessee_customer_message. That being said, this is due to an issue of Tennessee state law, and Nexus stands by its position that an ETC designation is sufficient to provide the supported services regardless of the mode of technology used to deliver them to needy Americans.

state commissions take the view that their own state-level enabling statutes do not permit them to pass in any way on the activities of a wireless provider.[29] In such situations, Congress could either have (a) chosen to limit the ability of competing firms to be designated as ETCs or (b) provided a mechanism to ensure that even in states where the PSC might have jurisdictional limitations, the full benefits of competition would be available by means of multiple ETC designations, including ETCs using multiple technologies. Congress chose the latter course – confirming both the pro-competitive and technologically neutral policies underlying the universal service program.

In practical terms, what this provision means is that, for example, if a carrier providing service using wireless technology applies for ETC status before a state commission, and the state commission determines that it lacks appropriate jurisdiction, the carrier should instead apply to the FCC. The fact that the entity being designated as an ETC will receive its designation from the FCC rather than from a state does not remotely suggest that a limitation on the technology that the ETC may or must use has been imported *sub silentio* into the designation process. This same conclusion applies to designations made by states. A state's review of an ETC application – even by an entity that will provide wireless services – has nothing to do with *regulating* such services. The analysis only requires the state commission to determine whether the *entity* will provide and properly advertise the supported services, with no review required of the technology used to deliver the services.[30]

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[29] Whether that is actually the case will, in any given situation, be a matter for state law. The mere fact that a state may have enacted legislation to parallel Section 332(c) – that is, forswearing rate or entry regulation over wireless providers – does not mean that the state has also forsworn general – and technologically neutral – authority over the ETC designation process. In Nexus' view, some states have mistakenly read state law prohibitions on *regulating* wireless services as somehow prohibiting the state commission from conducting the review required under 214(e).

[30] Of course, a state will normally wish to keep itself informed with regard to the manner in which ETCs it designates are fulfilling their responsibilities. But a requirement that the entity designated as an ETC provide information regarding the manner in which it is providing the supported services, the extent of its advertising of

If a state will not assume jurisdiction to process an ETC application – even if its failure to do so arises from limitations on its authority over wireless carriers – that does not convert the ETC designation process into something that is technology-specific. It simply transfers responsibility for the *technology-neutral* ETC designation process to the FCC, under Section 214(e)(6). ETC designation – whether granted by a state or by the FCC – confers ETC status on an *entity,* not on a technology. As long as the *certificated entity* provides the supported services (which are also technology-agnostic), at least in part over its own facilities, and properly advertises them, this is the end of the analysis. Nowhere in the statute, regulations, or Commission orders is designation conditioned on the carrier using a particular technology or refraining from changing or adding new technologies.[31] Moreover, the state commission's analysis is conducted under the authority specifically delegated to it by federal law. The state is bound to the process as defined under federal law and clarified by the Commission, and therefore, it may not inject a technology-specific limitation purportedly based on state law. The federal law contains no such limitation, and therefore, the state review must be technology-neutral.

There is similar confusion about the requirement that the carrier provide the services, at least in part, over its own facilities. PUCO, in fact, has asked the Commission for guidance on

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those services, etc., is a far cry from a requirement that the entity obtain separate certification for each distinctive technology it chooses to deploy to meet its responsibilities as an ETC.

[31] A good example of this is contained in 47 C.F.R. § 54.101(a)(7), describing the supported service "access to interexchange services." Probably because of the long industry history associated "exchange access" with wireline services offered by ILECs, the FCC was at pains to ensure that its description of this supported service could not be misconstrued as being limited in that way. Thus, that service is described as follows:

> ''Access to interexchange service'' is defined as the use of the loop, as well as that portion of the switch that is paid for by the end user, *or the functional equivalent of these network elements in the case of a wireless carrier*, necessary to access an interexchange carrier's network

(Emphasis added.) If the very definition of the supported services includes both landline and wireless technology – and yet nothing in the statute or the regulations suggests that separate certifications are required depending on which technology is used – the only reasonable conclusion is that no such separate certifications are contemplated by, or are even permissible under, the statute. *See also* 47 C.F.R. § 54.5 (definition of "telecommunications channel"); 47 C.F.R. § 54.101(b)(4) (definition of "single party service or its functional equivalent").

what constitutes "wireless facilities."[32] Again, there is nothing in the governing law that requires or even authorizes a commission considering an ETC application to review the applicant's fulfillment of the facilities requirement through a technology-specific lens. The relevant inquiry under federal law—and therefore, under the state's review—is simply whether the carrier will utilize its own "facilities" for the transmission or routing of at least one of the supported services.[33] It does not matter what technology is employed, as long as the supported services (including "access" to them) are provided.

Aside from the total lack of technology-specific conditions on ETC designations, the questions raised by the commenters are also based on factual inaccuracies and/or a complete misinterpretation of the legal requirements. For example, AT&T suggests that if TracFone's characterization of the situation surrounding Nexus' Tennessee designation is accurate—which it is not—then the Commission should investigate the situation in a separate proceeding. Neither AT&T nor TracFone fully investigated the facts, however. *See* footnote 27, *supra*. In any event, the designation process is the purview of the reviewing commission. It appears that TracFone's sole motivation for discussing the Tennessee proceeding – which has little, if anything, to do with the substantive issues raised in its petition – was simply to attack Nexus, rather than a serious attempt to seek "clarification" of the Commission's rules. If TracFone had been concerned with seeking clarification, it might have better researched its facts and contacted the state commission involved in that particular proceeding.

With respect to the second point (misinterpretations of the legal requirements), PUCO's comments include the unsubstantiated assertion that a carrier may not use "wireline" facilities to provide wireless services or vice versa. No other commenter adheres to this kind of artificial,

[32] PUCO Comments at 9-10.
[33] 1997 Universal Service Order at ¶¶ 151, 169.

"silo" view of modern communication networks, which increasingly mix technologies to deliver services to end users.[34] This proposal simply is out of touch with current trends in telecommunications and network technologies, and lacks foundation in relevant law or Commission orders, and reflects a legally unsupported preference for ILEC services and business models. For example, while it states that an ETC employing wireless technology should be required to receive approval "prior to modifying its Lifeline service offering in any way," PUCO does not make the same suggestion for ILECs serving these same customers. If there is a legitimate basis for concern that low income consumers might not be receiving the services they should be, it is much more likely that an ILEC would modify its legacy (and ever-diminishing) plain-old-telephone landline service in a way that harms a low-priority segment of the ILEC's customer base, than it is that an entity focused on that group and providing wireless services would modify its service offering in a harmful manner.[35] Moreover, wireless telephony is not a novel service reserved for the privileged few. To the contrary, wireless is now the dominant form of communication in the nation, and, as is clear, increasingly the preferred mode for low income consumers. According to a Commission study, 90% of Americans have a mobile device, and the availability of this technology is virtually universal: 99.6% of Americans live and work in areas that are covered by one or more mobile voice providers.[36] Low Income Americans should not be relegated to second-class citizens, and this now ubiquitous technology should not be viewed with suspicion by state regulators.

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[34] Nexus notes that AT&T even goes so far as to say that it believes it may serve a certain portion of end users in a particular state *entirely* through resold services – as long as other customers were served in part using its physical facilities – and also, that such resold services could be provided irrespective of technology. AT&T Comments at 5. Nexus does not fundamentally disagree with this aspect of AT&T's comments.

[35] PUCO Comments at 8.

[36] *In Re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, FCC 10-81 (FCC rel. May 20, 2010), p.5, 7

## III. CONCLUSION

Although it disguises its filing as a request for "clarification," TracFone is really asking the Commission to add a new layer of restrictions on competitive, Low Income ETCs that has no basis in the statute, regulations, or Commission policy, and would create an anti-competitive bias that will hurt competitors focusing on the low income market. TracFone is aiming particularly at its own competitors, ETCs like Nexus that have established their own facilities and offer services using both wireline and wireless technologies. The majority of commenters have recognized this, and even AT&T agrees that TracFone's requests would be more appropriately considered in the context of a rulemaking proceeding. PUCO, the only state agency to submit comments, has such a clear anti-competitive bias in favor of ILEC wireline services that its comments only serve to underscore the urgent need for this Commission to affirmatively reject efforts to introduce technology-specific and pro-ILEC limitations into the program rules. In sum, the Commission should deny the TracFone petition in its entirety. In the alternative, if it does determine that any of the issues raised in this proceeding warrant further consideration, it should only consider such issues in the context of a rulemaking proceeding.

Respectfully submitted,

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