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

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Provide Universal Service Lifeline Support for Payphone Line Service	)	CC Docket No. 96-45
	)	WC Docket No. 03-109
Emergency Petition for Interim Relief	)	RM No. _____
	)	
To Prevent the Disappearance of Payphones	)	

Reply Comments of the American Public Communications Council

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Reply Comments of the American Public Communications Council

The American Public Communications Council ("APCC") hereby submits its Reply Comments to the comments filed in the above captioned proceedings.[1] While several commenting parties opposed the petitions, arguing that granting the relief APCC seeks would violate the Communications Act and various Commission rules and policies, as we demonstrate below, none of the arguments has merit. APCC's affirmative showing and the lack of any valid basis for not proceeding vindicates the relief APCC requests.

Moreover, although some of the comments opposed APCC on the underlying authority and wisdom of proceeding, none contested the authority of the Commission to grant or the need

[1] Six comments were filed: Initial Comments of the Florida Public Telecommunications Association, Inc. ("FPTA"); Comments of Rosebud Telephone, LLC on Emergency Petition for Interim Relief to Prevent the Disappearance of Payphones and Petition for Rulemaking to Provide Lifeline Support to Payphone Line Service ("Rosebud"); Comments of Sprint Nextel Corporation ("Sprint"); Comments of TracFone Wireless, Inc. ("TracFone"); Comments of the United States Telecom Association ("USTA") and Opposition of Verizon and Verizon Wireless to Petitions to Provide Universal Service Lifeline Support for Payphone Service ("Verizon").

APCC filed the two petitions captioned above. The Wireline Competition Bureau ("Bureau") put both out for public comment in a single Public Notice. *Wireline Competition Bureau seeks Comment On American Public Communications Council Petitions Regarding Universal Service and Payphone Issues,* DA 10-2360 (Rel. December 16, 2010). Most of the comments were captioned only with regard to the petition for rulemaking and most addressed only the petition for rulemaking issues of whether payphone lines should be or are eligible for Lifeline support. These Reply Comments of the American Public Communications Council respond to all the comments.

for interim relief while the Commission proceeds with a rulemaking. Accordingly, the Commission should grant APCC's request for interim relief.

Discussion

APCC's petitions[2] seek to extend Lifeline support to payphone line service. APCC does not seek to undo any decisions the Commission has made about existing support for services. Rather, as APCC demonstrated, an unintended consequence of the Commission's decision to extend Lifeline support to non-facilities based wireless carriers, on the basis of forbearance and waivers, has created an imbalance that is resulting in the removal of payphones and depriving many low income users of available access to the most basic of telecommunications capabilities. It is this dire situation that the *RM Petition* and the *Emergency Petition* seek to address.

I. The Communications Act Authorized Lifeline Support for Payphone Lines

A major objection to the *RM Petition* is predicated on a complete misreading of the relief being requested. In the *RM Petition*,[3] APCC explained why providing Lifeline support to *payphone lines* is authorized by the Act. TracFone spends several pages arguing that payphone service providers ("PSPs") are not Eligible Telecommunications Carriers ("ETC"s) and therefore not eligible to receive USF funding under Section 214(e) of the Act.[4] Of course, APCC did not ask for payments to PSPs; the petitions seek support for *payphone line service;* payments would be made to the ETC providing the service, a point TracFone finally acknowledges.[5] TracFone goes on to argue that providing Lifeline support for payphone line service is indirectly providing support for the benefit of PSPs.[6] But supporting any line service ultimately provides indirect benefits to service providers who provide goods or services ancillary to the use of the line. For example, Lifeline support to low income consumers provides indirect benefits to the

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[2] APCC's Petition for Rulemaking to Provide Lifeline Support to Payphone Line Service is cited as *RM Petition*. APCC's Emergency Petition For Interim Relief To Prevent The Disappearance of Payphones is cited as *Emergency Petition.*

[3] *RM Petition* at 23-32.

[4] TracFone at 3-5.

[5] *Id.* at 5.

[6] *Id.*

manufacturer of the customer premises equipment that must be purchased to use the line.[7] Thus, it is clear that since APCC seeks support for ETC providers of services, the restriction limiting funding to ETCs is not a bar to relief.[8]

Sprint complains that Section 254(c)(1)(B) of the Act is also not met because a majority of residential subscribers have not subscribed to payphone services. Sprint contends that because the statute says the Commission "shall" consider this factor, the condition must be met. Sprint is wrong. The statute directs the Commission to consider the extent to which the condition is met; it does not mandate that every criterion in the statute must be met.[9] As APCC pointed out in the *RM Petition*,[10] this provision need only be "considered" by the Commission but it is not mandatory that a service meet that criterion to be eligible for universal support.[11]

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[7] As we discuss below, this last point in the text also responds to TracFone's argument that Lifeline support for payphone lines is akin to support for obsolescent technologies. Moreover, since the value of the network to any subscriber increases as the number of people with access to the network increases, under TracFone's notion that there can be no indirect benefits to non-ETCs the Commission would be stymied in its efforts to promote universal service through universal services support programs.

[8] TracFone also makes a convoluted argument that by providing a subsidy for payphone line service and paying it to the ETC, there would somehow be some form of "'double dipping'", and waste, fraud, and abuse, since the ETC would receive payment for meeting its requirements (providing the nine enumerated functionalities listed in 47 CFR § 54.101(a)) and the payphone line service would be discounted to the customer buying the payphone line service. TracFone at 4-5. The argument is utterly unintelligible. There would be only one $10 payment to the ETC. Indeed rather than being double dipping, there is a "double bang for the buck," as there would be for the entirety of the Lifeline support for payphone lines. The ETC has been compensated for its services *and* multiple low income (and perhaps other) consumers would be using service otherwise not available.

[9] Sprint at 3-4. *See also* Verizon at 3-4 (referring to the Joint Board findings). Sprint also erroneously contends that payphone line service meets none of the criteria enumerated in Section 254(c). Payphone line service is essential to public health or safety as prescribed in Section 254(c)(1)(A), as discussed in the *RM Petition* at 7-8 and in the text following note 10, *infra*. Payphone line service also is deployed in public telecommunications networks by telecommunications carriers as specified in Section 254(c)(1)(C). *RM Petition* at 31.

[10] *RM Petition* at 31-32.

[11] Sprint cites *MCI v. FCC,* 765 F.2d 1186 (D.C. Cir. 1985) for the proposition that "shall" is language of command, requiring the Commission to meet a condition. Sprint, however, cites that case completely out of context. At issue in *MCI* was Section 203(a) of the Act and its directive that every common carrier "shall designate, file with the Commission and print and keep open for public inspection" tariffs. The question was whether the Commission had the authority, in light of the shall in the statute, to relieve carriers of tariff-related obligations. In holding that the Commission did not, the court found that the Commission could not excuse a carrier from an obligation imposed by Congress. That holding has absolutely no bearing on Sprint's assertion that the directive in Section 254(c)(1) that the Commission

Verizon contends that APCC has not shown that payphone line service meets the requirements of Section 254(c)(1)(A), that the service is essential to public health or safety. Verizon states that given the ubiquity of wireless phones, most emergency calling is easily made on those phones.[12] But one of *the major thrusts of the RM Petition* was to demonstrate that wireless phones have not mooted the need for payphones, and that there are millions of poor Americans who rely *solely* on payphones for access to the network and tens of millions of other people without their cell phones or whose cell phones have failed who use payphones to make almost a billion calls a year. As APCC pointed out[13] and as FPTA spells out,[14] mobile phones are available *except when they are not*, or when they fail, or when wireless networks overload - which is when emergency and urgent calling is most needed by the most people, as on 9/11, as in the case of numerous blackouts, as in the case of hurricanes and other severe weather, all times when payphone line service remained up and providing services to long lines of people while wireless services failed, often for extended periods.

TracFone also contends that the language of Section 276, which requires the Commission to adopt rules and regulations to ensure the widespread deployment of payphones is also no support for APCC's proposal, and actually a bar to Lifeline support, because Section 276 also

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"shall" consider each of four enumerated factors means they must all be met. In fact, in other contexts the courts have held directly to the contrary. For example, in a case addressing the sentencing factors set out in 18 U.S.C. § 3553(a), the Seventh Circuit held that the statutory language mandating that courts "shall consider" the enumerated factors requires only that courts consider each of the factors. Indeed, as discussed in the *RM Petition,* the Commission has explicitly held that while Section 254(c)(1) requires it to address each of the factors, a service can be designated as eligible to receive USF where all four factors are not met. *See Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 61 (1997) ("We . . . adopt the Joint Board's analysis and finding that all four criteria enumerated in section 254(c)(1) must be considered, but not each necessarily met, before a service may be included within the general definition of universal service").

[12] Verizon at 4. *See also* Sprint-Nextel at 4, contending that even people who do not have wireless phones since given the ubiquity of mobile phones, there is always a mobile phone around that can be borrowed in case of emergencies.

[13] *RM Petition* at 14-16.

[14] FPTA at 3-4.

says that one of the purposes of widespread deployment of payphones is to promote competition, and Lifeline support "would be the antithesis of promoting competition."[15]

At the outset, we observe that Section 276 at most mandates competition between PSPs. Providing Lifeline subsidies to PSPs will not diminish competition among PSPs, Indeed TracFone's argument is astounding coming from TracFone. TracFone's argument would mean that its receipt of USF funding is diminishing competition between wireless providers for the business of consumers qualifying for Lifeline service. TracFone's argument is belied by what is going on in the marketplace, where wireless providers like TracFone have only been able to come into the market because of Commission forbearance and waivers and are vigorously competing with other non-facilities based wireline carriers *and* facilities based wireless providers for the business of Lifeline eligible consumers. As this experience demonstrates, it is not the presence of subsidy that stifles or prevents competition; it is the presence of subsidy for one competitor but not for other competitors or potential entrants,[16] a point to which we shall return below.[17]

Finally with regard to statutory authority, TracFone argues that Section 276(b)(2) provides for public interest payphones where payphones may be needed but would otherwise not be deployed.[18] APCC addressed this point in the *RM Petition.*[19] As the Commission and the Joint Board found, public interest payphone programs have not operated to get payphones deployed, and indeed as far as APCC is aware, there are no public interest payphone programs,

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[15] TracFone at 5-6. *See also* Sprint-Nextel at 5, Verizon at 3. TracFone accuses APCC of a "strategic omission" in not including this language.

[16] Indeed from anecdotal evidence, it appears that this is what happened in the sub-market for low income wireless services. So long as TracFone was the only wireless carrier active in this market, its rates were higher than they are now. But as the Commission has provided for additional wireless carriers to get access to USF funding and as facilities based carriers have entered this sub-market, the price of the Lifeline service, the price of extra minutes, etc. has decreased.

[17] Indeed having created a competitive imbalance, as discussed below, it would be an abuse of discretion and a violation of the statute and the Commission's own regulations to fail to provide Lifeline subsidy to payphone line service.

[18] TracFone at 6-7. *See also* Verizon at 3, USTA at 4.

[19] *RM Petition* at 17-19.

much less public interest payphones, in place. Moreover, as explained in the *RM Petition,*[20] and discussed further below, needs based programs are not feasible and won't address the issues.

II. The Commission's Rules Are, By Definition, Not A Bar To Adoption of Lifeline Support for Payphone Lines Service

Several of the parties commenting make the incongruous argument that the proposal for Lifeline support for payphone line service is inconsistent with various provisions of the Commission's Rules.[21] The answer to these contentions is that to the extent existing rules are inconsistent, that objection will be overcome by the fact that APCC has requested a rule making, the purpose of which is to amend the rules. The issue is whether the public policies underlying those rules should yield to the public policies supporting adoption of Lifeline support for payphone line service.[22] We address the public policy concerns raised by the comments in the next section.

III. Public Policies Support Providing Lifeline Support To Payphone Line Service

APCC advanced a number of public interest arguments and public policies that support Lifeline support for payphone line service. Several of the comments attempt to refute these policies with unavailing arguments.

At the outset of this discussion, it should be clear that APCC did not present or attempt to present the Commission with a choice between continuing subsidy for wireless providers and payphone line service. APCC was clear that it is not questioning the Commission's decisions to

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[20] *RM Petition* at 30-31

[21] *See, e.g.*, TracFone at 7; Sprint-Nextel at 2-3.

[22] Apart from the fact, as discussed in the text, that the rules themselves would be amended so there would be no rule violation, some of the arguments pointing out particular Commission rules that would be violated are frivolous. For example, TracFone, at 7, seems to argue that the one to a household rule would be violated because more than one person from a household could use the payphone. But of course when a phone is in a house, more than one person in the household can use the phone without violating the rule or eroding its policies. And it would not violate the rule or the underlying policy for more than one household to share a Lifeline supported phone; no more so is it a violation of the rule or the policy for the Lifeline support to go to a payphone. Apart from its frivolity, this argument devolves into another form of the argument that the payphone line service is not subscribed to by residential users.

provide support to wireless services.[23] Nor is APCC seeking to divert Lifeline support from any other service that the Commission has declared eligible for Lifeline support. What APCC did point out is that Lifeline support for payphone line service is a necessary complement to support for wireless services in order to ensure that many of the neediest of low income consumers are not to be left out of having any access at all to the public network.[24] Moreover, in many cases, Lifeline support for payphones is a much more efficient means of reaching many low income consumers than the subsidies to multiple low income consumers that would be required to reach that same group.[25] For example, under the Commission's one to a household rule, if the person who has the subscription to the Lifeline supported wireless service is unavailable, the other household members, in the absence of the availability of a payphone, are totally without service. APCC also observed that an unintended consequence of the subsidies to the wireless industry was to erode the base of low income users of payphones just sufficiently to make some payphones no longer economically viable, causing their removal and thus relegating many low income users dependent on those payphones to be without any service at all.[26]

Several commenting parties argue that APCCs proposal sweeps too broadly because it would encompass payphones in malls in upper income neighborhoods or areas, or might provide support to some payphones that would remain even if there is no Lifeline support to those payphones.

These fears are groundless, and to the extent they have any validity, the risks are low. APCC directly addressed them in the *RM Petition* and explained why a "needs-based" program was not feasible.[27] None of the comments addressed the arguments. Instead, they raise the bogeymen of a payphone in expensive malls and payphones in "prestigious social clubs."[28] By

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[23] *See RM Petition* at 21 (lauding increased access to telecommunications resulting from USF support for wireless services).

[24] *Id.*

[25] *See RM Petition* at 16.

[26] *See RM Petition* at 20-22.

[27] *RM Petition* at 30-31.

[28] TracFone at 9-10. TracFone is concerned that PSPs will be induced by a $10 month subsidy to place otherwise unprofitable payphones in places like "high end" restaurants, "elegant" malls and stores, like

definition and by the logic of the comments that raise these very arguments, upper and middle class shoppers and clients who frequent these premises *will not* be the ones using the payphones there, if there is a payphone there. Those shoppers and clients will be using their mobile phones. The users of the payphones will be the patrons who otherwise are without mobile service—either for temporary reasons (like battery failure) or because they cannot afford service—and the low income workers who provide the services to those shoppers and who are the low income people at whom universal service is directed. It is the line cook at the "prestigious social club" being paid minimum wage who will use the payphone on her break to check in with her husband or the domestic worker who is stuck at the bus stop in Bethesda, MD who will be using those phones to get word to the child care center. Similarly, it is the relatively low income traveler at the airport who can't afford mobile service who will be using those payphones but who will have no means of communicating when those phone booths are replaced with charging stations, as even casual observation makes clear is happening.

In a related vein, several comments refer to USF funds being used to subsidize "obsolete" services,[29] or shield payphones from competition or marketplace forces.[30] The contrary is true. That payphones are an obsolete service is a false predicate. As APCC carefully documented in the *RM Petition*, payphones remain the only access to the public network for millions of people, and are, and will remain, a critical backup to wireless services in times of crisis when wireless networks fail or are overwhelmed. As all acknowledge, the major competitor of payphones for the patronage of people in transit is wireless service. It is only because of the availability of USF support that wireless providers like TracFone, who have no facilities of their own, are able to compete at all for the business of low income consumers.

In this regard, it is particularly unseemly for TracFone to argue that it would erode competition for the Commission to provide Lifeline support for payphone line service. While it is accurate that Lifeline support should not be used to support obsolete technologies, the

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Bal Harbour Mall and Nieman-Marcus. *But see RM Petition* at n.62, explaining that support provided by Lifeline is not sufficient to overcome the up front costs of deploying new payphones.

[29] Sprint at 5-6; Verizon at 6. Sprint states that the Commission anticipated competition for payphones and said that it would not shield payphones from competition. That is entirely different from the Commission now subsidizing the competition. *See also Note 29, infra.*

[30] Sprint at 5; TracFone at 9-10; Verizon at 5-6.

Commission has recognized that USF support must be technologically neutral.[31] The Commission is not to pick winners and losers. Having given one competitor for the patronage of low income consumers and one technology the benefit of Lifeline support, the Commission must provide it to payphone line service as well.

Some comments note that the Commission should be concentrating on shifting USF support to broadband, and/or that the Commission should get on with its omnibus rulemaking to address major reforms in the USF program.[32] The Commission is scheduled to take up universal service reform within a week after these comments are filed.[33] As APCC made clear in the *RM Petition*,[34] APCC is not in any way seeking to hinder the Commission from moving ahead with universal service reform or the transition to the ubiquity of broadband capability. But in going ahead to address that critical infrastructure need, the Commission should not overlook the existing mandate to provide basic dial tone and critical basic public infrastructure for the neediest and in times of emergency. The relatively modest cost of the latter should not deter the Commission as it moves ahead.[35]

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[31] *See* 47 C.F.R. § 54.701; *Comprehensive Review of Universal Service Fund Management, Administration, and Oversight*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 20 FCC Rcd 11308 (2005) ("The Commission's rules apply a number of requirements . . .[to] ensure[] that support is made available on a technologically neutral basis to eligible service providers.").

[32] USTA at 2-3; Verizon at 1.

[33] News Release, *FCC Announces Tentative Agenda for February 8th Open Meeting* (Rel. Jan. 18,2011).

[34] *RM Petition* at 2.

[35] Several parties assert that the addition of the costs of Lifeline support do not outweigh the benefits. *E.g.,* Sprint Nextel at 4. But in contrast to APCC's showing that Lifeline support for payphone line service could actually lead to the need for less support for other services by reducing the demand for those services and serving more users more efficiently and that Lifeline support for payphone line service has a relatively modest cost as compared to these other services, these parties make only generalized arguments. Verizon goes a little further by arguing that the courts have stated that overburdening the USF system could be a violation of the statute and an abuse of discretion. *See* Verizon at 2-3 and cases cited therein. But Verizon does not say why the decision to provide Lifeline support for payphone line service would be the straw to break the proverbial camel's back as compared to say Lifeline support for Verizon's wireless services. Moreover, as the cases cited by Verizon make clear, while overburdening the USF system as a result of excessive funding may be among the factors that the Commission should consider in making USF funding decisions, the Commission has the overarching obligation of ensuring that funding is sufficient to meet the goals of the universal service program. *See Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1102-04 (D.C. Cir. 2009).

Conclusion

For the reasons set forth above and in the *RM Petition,* the Commission should immediately grant the *Emergency Petition* by declaring payphone line service eligible for Lifeline support on an interim basis pending completion of a rulemaking at the level in the Payphone Service Tier as proposed in the *RM Petition*, grant the *RM Petition* and initiate a rule making proceeding.

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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2011, I caused a copy of the foregoing Reply Comments of the American Public Communications to be served on the following parties listed either electronically or via first-class mail:

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