BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45 WC Docket No. 09-197
	)	
Petition for Forbearance	)	
	)	

PETITION FOR FORBEARANCE OF AMERICAN BROADBAND & TELECOMMUNICATIONS

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I. INTRODUCTION

American Broadband & Telecommunications ("American Broadband"), through its undersigned attorneys, requests the Federal Communications Commission ("FCC" or "Commission") to forbear from enforcement of section 214(e)(1)(A) of the Act, which requires eligible telecommunications carriers ("ETC") to use their own facilities to provide services supported by the Universal Service Fund ("USF" or "Fund"). [1]

Pursuant to Section 10 of the Communications Act of 1934, as amended ("Act"),[2] American Broadband seeks forbearance from this requirement so that it may promptly seek approval from the Public Utilities Commission of Ohio to begin providing wireless Lifeline services in Ohio.[3] As discussed in detail below, American Broadband's request meets the forbearance standards of Section 10(a) and is consistent with other recently granted forbearance petitions involving Lifeline services. Grant of this petition will allow American Broadband to

[1] 47 U.S.C. § 214(e)(1)(A).

[2] 47 U.S.C. § 160

[3] American Broadband believes that the owned facilities used to provide service, qualifies American Broadband as a facilities-based wireless service provider. However, in the interest of providing additional competitive wireless service to Lifeline consumers in Ohio as quickly as possible, American Broadband is filing the instant petition requesting forbearance from facilities-based requirement in section 214(e)(1)(A) so as to seek ETC status in Ohio more expeditiously. American Broadband reserves the right to assert its facilities-based status in future proceedings.

increase the availability of reduced cost telecommunications services, which will greatly benefit low-income customers during these difficult economic times. Prompt Commission action will also ensure that American Broadband can quickly seek approval to initiate its wireless Lifeline services to low-income consumers.

II. BACKGROUND

A. American Broadband & Telecommunications

American Broadband provides local and long distance services, high-speed Internet, DISH Network digital television, dedicated IP-broadband services and other information and communications technology services to approximately 25,000 residential, small business and commercial clients in Ohio and Michigan.

American Broadband provides local exchange, exchange access, and broadband services using its own switching and DSL 2+ network facilities and a combination of unbundled network elements ("UNEs") provided by Verizon and AT&T that allows end-to-end delivery of calls. American Broadband also offers wireless services, including phone and data, to its small business customers through a combination of resale arrangements with Sprint and Verizon.

In 2003, the Ohio certified American Broadband as a Competitive Local Exchange Carrier in Case No. 03-1196-TP-ACE. Ohio designated the Company as an ETC for its landline offerings on January 27, 2010 in Case No. 97-632-TP-COI. Since that time, American Broadband has provided both Lifeline and Link-Up services pursuant to its ETC designation to over 15,000 of its landline basic local exchange service customers. American Broadband now seeks to provide prepaid resold wireless Lifeline services to eligible low income consumers in Ohio.

B. Lifeline Program

Section 254 of the Act requires the Commission to ensure that "consumers in all regions of the Nation, including low-income consumers and those in rural, insular and high cost areas, should have access to telecommunications." [4] The Universal Service Fund, and its high-cost, rural, low income and schools and libraries programs, work to fulfill this requirement. The Fund's support of the Lifeline Assistance program provides discounts on basic monthly telephone service to low-income consumers. Since the establishment of the Lifeline program in 1984, telephone service penetration rates have increased from 80.1% to 90.4% in low-income households.[5] While these rates have gone up, the FCC has estimated that only one-third of eligible participants receive Lifeline support.[6] To address this under-utilization, the Commission expanded the qualifying criteria and adopted broader outreach guidelines requiring carriers to advertise and promote these services.

The Act provides that only an ETC shall be eligible to receive funding from the USF, including the Lifeline program. Section 214(e)(1)(A) of the Act requires a carrier designated as an ETC to offer the services supported by the USF using either its own facilities or a combination of its own facilities and the resale of another carrier's services.[7] As discussed below, the FCC has repeatedly determined that it is in the public interest to forbear from enforcement of this regulation and allow pure wireless resellers to request ETC status and receive funds from the Lifeline program.

C. The Commission Has Repeatedly Granted Forbearance From the Facilities-Based Requirement

Congress granted the FCC forbearance authority as part of the Telecommunications Act of 1996. Section 10(a) of the Act provides that "the Commission shall forbear from applying

[4] 47 U.S.C. § 254(b)(3) requires the Commission to determine whether "consumers in all regions of the Nation, including low-income consumers and those-in rural, insular, and high cost areas ... have access to telecommunications [services] ...." 47 U.S.C. § 254(b)(3).

[5] Universal Service Monitoring Report, Prepared by Federal and State Staff for the Federal-State Joint Board on Universal Service in CC Docket No. 98-202, p. 2-1 (2010), *available at*: http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1230/DOC-303886A1.pdf.

[6] *See Virgin Mobile USA, L.P. Petition for Forbearance*, Order, 24 FCC Rcd 3381, ¶ 30 (2009) ("*Virgin Mobile Order*").

[7] *See* 47 U.S.C. § 214(e)(1)(A).

any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service" if it finds that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[8]

The Commission has previously exercised its authority to forbear from enforcement of statutory and regulatory provisions that cause obstacles to competition. Specifically, the Commission has repeatedly granted forbearance of the facilities-based requirement for ETCs to provide Lifeline services.

Beginning in 2005, with the FCC's grant of the Tracfone Wireless, Inc.'s ("Tracfone") forbearance request,[9] the Commission has granted numerous petitions requesting forbearance from the section 214(e)(1)(A) facility-based requirement. In addition to Tracfone, Virgin Mobile USA, L.P. ("Virgin Mobile"),[10] Head Start Telecom, Inc. ("Head Start"),[11] Consumer Cellular, Inc. ("Consumer Cellular")[12] and Line Up, LLC ("Line Up")[13] (collectively, "Wireless Carriers") have all been granted similar forbearance in the last six years. In approving those forbearance petitions, the Commission found that all of these companies had met the three elements of the

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[8] 47 U.S.C. § 160(a).

[9] *See In the Matter of Federal-State Joint Board on Universal Service, Petition of Tracfone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i),* Order, 20 FCC Rcd 15059 (2005) ("*Tracfone Order*").

[10] *See Virgin Mobile Order.*

[11] *See In the Matter of Head Start Petition for Forbearance, Consumer Cellular Petition for Forbearance, Midwestern Telecommunications Inc., Petition for Forbearance, and Line UP, LLC Petition for Forbearance,* Order, 51 CR 4, FCC 10-134 (2010) ("*Head Start/Consumer Cellular/Line Up Order*").

[12] *Id*.

[13] *Id*.

forbearance standard and concluded that the section 214(e)(1)(A) facilities-based requirement impaired the ability of a wireless reseller to provide services supported by Lifeline.[14]

First, the Commission found that the facilities-based requirement was not necessary to ensure that the charges, practices, and classifications used by these Wireless Carriers remained just, reasonable and non-discriminatory. Specifically, the Commission determined that prior concerns with pure resellers realizing double support from the Fund did not apply to wireless resellers receiving Lifeline support since they do not resell supported services. In addition, since Lifeline support is funded on a per-customer basis, and is based on the price paid by the customer, the Commission found that the underlying carrier did not receive support for these customers which could be passed on to the reseller.[15]

The Wireless Carriers' forbearance requests were also found to have met the second and third sections of the forbearance analysis and the FCC concluded that forbearance was not necessary to protect consumers and was inconsistent with the public interest. Instead, the Commission concluded that forbearance from the facilities-based requirement would *benefit* consumers by increasing consumer choices of providers and would further the Commission's goals of increasing deployment of telecommunications services to low-income customers.[16]

Finally, the Wireless Carriers agreed to conditions set forth by the Commission as part of its grant of forbearance. American Broadband agrees to comply with the same conditions imposed upon the Wireless Carriers. Specifically, in the *Head Start/Consumer Cellular/Line Up Order*, those carriers agreed to "(1) provide its Lifeline customers with 911 and enhanced 911 (E911) access regardless of the activation status and availability of minutes; (2) provide its Lifeline customers with E911-compliant handsets and replace, at no additional charge to the customer, noncompliant handsets of existing customers who obtain Lifeline-supported services;

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[14] *Tracfone Order* at 15100; *Virgin Mobile Order* at ¶ 29; *Head Start/Consumer Cellular/Line Up Order* at ¶ 20.

[15] *Tracfone Order* at 15100; *Virgin Mobile Order* at ¶ 18; *Head Start/Consumer Cellular/Line Up Order* at ¶ 15.

[16] *Tracfone Order* at 15104-05; *Virgin Mobile Order* at ¶ 30; *Head Start/Consumer Cellular/Line Up Order* at ¶¶ 10, 15.

(3) comply with conditions (1) and (2) as of the date it provides Lifeline service; (4) obtain a certification from each public-safety answering point (PSAP) where the carrier provides Lifeline service confirming that the carrier provides its customers with 911 and E911 access or self-certify that it does so if certain conditions are met; (5) require each customer to self-certify at the time of service activation and annually thereafter that he or she is the head of household and receives Lifeline-supported service only from that carrier; (6) establish safeguards to prevent its customers from receiving multiple Lifeline subsidies from that carrier at the same address; (7) deal directly with the customer to certify and verify the customer's Lifeline eligibility; and (8) submit to the Wireline Competition Bureau a compliance plan outlining the measures the carrier will take to implement these conditions."[17]

III. AMERICAN BROADBAND SATISFIES THE FORBEARANCE STANDARD AND FORBEARANCE IS IN THE PUBLIC INTEREST

A. Enforcement is Not Necessary to Ensure Just and Reasonable Rates

The Commission must first determine if enforcement of the facilities-based requirement is "not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory."[18] Since the first forbearance order of this type was granted, the wireless market has expanded and competition remains vibrant. With the strong competitive nature of wireless industry, enforcement of section 214(e)(1)(A) is unnecessary to ensure that American Broadband's rates are just and reasonable. As the Commission has previously found in granting forbearance to the Wireless Carriers, vigorous competition in the wireless market will ensure that American Broadband's rates are just and reasonable and not unjustly or unreasonable discriminatory.[19]

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17 *Head Start/Consumer Cellular/Line Up Order*, at ¶ 4, n.11.

18 47 U.S.C. § 160(a)(1).

19 *Tracfone Order* at 15101; *Virgin Mobile Order* at ¶ 19; *Head Start/Consumer Cellular/Line Up Order* at ¶ 9.

American Broadband has no market power in the wireless market and will compete against many other wireless carriers, including those previously granted forbearance of the facilities-based requirement by the Commission and other prepaid and postpaid providers. Based on these facts, the Commission should find that there is significant competition in the wireless market which ensures that enforcement of section 214(e)(1)(A) is unnecessary to ensure that American Broadband's rates are just and reasonable and not discriminatory.

B. <u>Enforcement is Not Necessary to Protect Consumers</u>

Application of section 214(e)(1)(A)'s facilities-based requirement to American Broadband is not necessary to protect consumers. This request for forbearance must be examined in light of the Act's goals of providing low-income consumers with access to telecommunications services.

The primary purpose of universal service is to ensure that consumers—especially low-income consumers—receive affordable and comparable telecommunications services. Given this goal, granting forbearance to American Broadband will benefit consumers, especially since it intends to start offering its Lifeline services in Ohio, which has faced significant economic hardship during the recent recession.[20] Furthermore, American Broadband's participation in the Lifeline program will increase opportunities for the company to provide these customers with affordable service options. As the Commission stated in its most recent order on these issues, "this competition will spur innovation among carriers in their Lifeline offerings, [and] expanding the choice of Lifeline products for eligible consumers."[21] As such, the Commission should find that enforcement of section 214(e)(1)(A)'s facilities-based requirement is not necessary to protect consumers and that forbearance of such enforcement will benefit consumers.

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20 *See* Ohio Selected Economic Characteristic, 2008, U.S. Census Bureau, *available at*: http://fastfacts.census.gov/servlet/ADPTable?_bm=y&-qr_name=ACS_2008_1YR_G00_DP3&-geo_id=04000US39&-ds_name=ACS_2008_1YR_G00_&-_lang=en&-redoLog=false (showing 13.4% poverty rate in 2008); s*ee also* William Hershey, "New Century Ushers in Economic Gloom to Ohio," Middletown Journal, May 12, 2010 (reviewing recent economic analysis showing that the significant lose of manufacturing jobs in Ohio harmed the economy and that Ohio is still struggling to recover).

21 *Head Start/Consumer Cellular/Line Up Order* at ¶ 9.

C. Forbearance is Consistent with the Public Interest

Forbearance from the facilities-based requirement is in the public interest. One of the primary goals of the Act, as amended by the Telecommunications Act of 1996, is "to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies" to all consumers without regard to location or income.[22] Grant of this petition will further the public interest by increasing competition and access to new services at lower prices, especially low-income Lifeline consumers, many of whom have been unable to benefit from increased competition due to financial limitations, little or no credit history or unemployment.

Failure by the Commission to forbear from enforcement of the facilities-based requirement, however, could potentially harm low-income consumers by precluding the further deployment of innovative wireless services. Just as the Commission previously found that "more can be done to further expand participation to those subscribers that qualify [for Lifeline] and thus further the statutory goal of section 254(b)" when it granted the Tracfone petition, the addition of more Lifeline-supported wireless providers will further increase the availability of quality services and competition.[23]

In addition, American Broadband's request will not unduly burden the Fund or otherwise reduce the amount of funding available to other ETCs. The secondary role of Lifeline support with respect to overall USF expenditures is well established, and the Commission has previously found that such forbearance would not "significantly burden the universal service fund and thus negatively affect consumers through increased pass-through charges of the carriers' [USF] contribution obligations."[24]

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[22] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

[23] *Tracfone Order* at 15105.

[24] *Id*. at 15103.

IV. <u>CONCLUSION</u>

American Broadband's request for forbearance satisfies the requirements of section 10(a) of the Act since it seeks forbearance from the requirements of section 214(e)(1)(A) only for purposes of applying to participate in the USF's Lifeline program. Grant of forbearance would enable American Broadband to advance the deployment of discounted telecommunications services to its low-income customers. Finally, prompt Commission action also will ensure that American Broadband can quickly initiate its Lifeline services to low-income consumers.

Respectfully submitted,

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