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

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| In the Matter of | ) | |
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| Telecommunications Carriers Eligible to Receive Universal Service Support | ) ) | WC Docket No. 09-197 |
| | ) | |
| Petition of NTCH, Inc. for Forbearance Pursuant to 47 U.S.C. § 160(c) from 47 U.S.C. § 214(e)(5) and 47 C.F.R. § 54.207 | ) ) ) ) | FILED/ACCEPTED<br>JUN 20 2011<br>Federal Communications Commission<br>Office of the Secretary |

# PETITION FOR FORBEARANCE OF NTCH, INC.

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## Summary

NTCH, Inc. ("NTCH"), on behalf of itself and its affiliated operating entities (collectively, "NTCH"), respectfully submits this Petition for Forbearance from the application of the service area requirement contained in 47 U.S.C. § 214(e)(5) and 47 C.F.R. § 54.207 (collectively, "Section 214(e)(5)"). NTCH requests forbearance from Section 214(e)(5) for the purpose of designation as a Lifeline-only eligible telecommunications carrier ("ETC") in those areas for which it has pending ETC designation petitions as well as those areas for which it may, in the future, seek designation from the Commission or a relevant state authority.

Starting with the *TracFone* order in 2005, the Commission has developed a policy of granting limited, Lifeline-only designation to non-facilities-based wireless resellers, subject to certain conditions.[1] In designating these resellers as ETCs, the Commission has necessarily forborne from enforcing the "own facilities" requirement of Section 214 of the Communications Act of 1934.

The *TracFone* line of cases inevitably raises the question of how to treat *facilities-based* carriers who also seek limited, Lifeline-only designation. Such carriers do not require forbearance from the facilities requirement, but they face a different statutory obstacle to ETC designation. Unlike resellers, facilities-based carriers have limited authorized geographic service areas, the boundaries of which do not coincide with the boundaries of rural study areas. Therefore, it is generally impossible for such carriers to meet the statutory requirement of


[1] *See, e.g., Petition for Forbearance of TracFone Wireless, Inc.*, Order, 20 FCC Rcd 15095 (2005) ("*TracFone Order*"); *Virgin Mobile USA LP Petition for Forbearance and Petition for Designation as and Eligible Telecommunications Carrier*, Order, 24 FCC Rcd 3381 (2009) ("*Virgin Mobile Order*").

Section 214(e)(5) that an ETC-designated service area may not partially overlap a rural study area.

However, the concerns that gave rise to Section 214(e)(5) do not apply to Lifeline-only ETCs. As explained herein, the study area requirement is intended to prevent competitive ETCs from engaging in "cream-skimming" — *i.e.* serving only low-cost areas while receiving support based on higher-cost areas. Cream-skimming can potentially undermine an incumbent's ability to serve its entire study area.[2] To address this concern, Section 214(e)(5) requires a competitive ETC to either provide services throughout the incumbent's study area or to demonstrate, before the Commission and state authorities, that serving a smaller area would not implicate cream-skimming concerns or otherwise harm the public interest.

The Commission has made clear, however, that there is no need to engage in a cream-skimming analysis in the context of Lifeline services.[3] A Lifeline ETC has no ability or incentive to engage in cream-skimming. Quite the contrary, Lifeline ETCs consciously target the low end of the market which has historically been left unserved or underserved by traditional carriers. These customers bear no relation to high or low-cost areas. Accordingly, because NTCH is not seeking High Cost support, enforcement of Section 214(e)(5) by engaging in repeated time-consuming and expensive study area re-definition procedures is unnecessary and would waste Commission, state, and company time and resources.

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[2] *See Virginia Cellular, LLC,* Memorandum Opinion and Order, 19 FCC Rcd 1563 (1996), at ¶ 42.
[3] *See Virgin Mobile Order*, *supra* note 1, at ¶ 38 n.101.

As discussed herein, NTCH's request meets the three prerequisites for forbearance set out in section 10 of the Communications Act of 1934 (the "Act").[4] Application of the Section 214(e)(5) definition of "service area" is not necessary to: 1) ensure that NTCH's charges and practices are just, reasonable, and nondiscriminatory; 2) protect consumers; or 3) be consistent with the public interest.

To the contrary, grant of the forbearance request will enable NTCH to provide service under extremely consumer-friendly, reasonable, and nondiscriminatory terms and fixed low monthly rates, promote the public interest by fostering competition and extending the reach of the Lifeline program, and benefit consumers by increasing choice of service providers and plans to include a low cost option on a cutting edge network. Therefore, NTCH's petition fits squarely within the forbearance standard and should be granted without delay.

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[4] 47 U.S.C. § 160.

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**PETITION FOR FORBEARANCE OF NTCH, INC.**

# I. BACKGROUND

## A. NTCH

NTCH, under the brand name Clear Talk, provides wireless voice service on a short-term, low-cost basis. It provides this service over its U.S.-developed, cutting-edge 3G network, which uses a third less power than traditional installations and delivers enhanced signal strength and coverage. Through its innovative network system, NTCH is able to increase reliability as well as capacity to those who need it most. This technology is adaptable and easily upgraded as the industry develops.

The key advantages to NTCH's network technology are: 1) user experience is the same for all users, as compared to individual networks with different requirements patched together; 2) last mile service technology is mobile and middle mile service is based on a technology that can reach out to last mile users almost anywhere, anytime; 3) installations have small, split architecture that is highly energy efficient; and 4) base stations use "software-defined radio" that allows different air interfaces to work through a single radio. These radios are available to extend the networks of the large carriers into these rural areas and are also ready for the next generation 4G standards.[5]

NTCH has been building mobile networks in underserved areas of the country since 1999. In the past eleven years, NTCH has built wireless networks in 17 different markets and constructed or acquired over 400 telecommunication sites. Its markets include or have included Colorado (Grand Junction), Idaho (Pocatello, Twin Falls, Idaho Falls), Tennessee (Jackson, Dyersburg), Alabama (Florence), Arizona (Yuma), California (El Centro), Florida (Jacksonville), Texas and South Carolina (Columbia, Greenville). In just the last three years, NTCH has built over 250 communication sites and is today one of the largest tower owners in the United States. Its network has expanded not only through the growth of its own network but through roaming agreements with larger carriers.

NTCH's basic voice service is currently less than $30 per month, with unlimited local anytime minutes, no credit check, no deposit, and no annual contract. Many of NTCH's customers have come to rely on their cell phone for affordable flat-rate broadband Internet service as well as their primary voice connection. NTCH will continue to identify and reach out to unserved and underserved markets, where affordable service can provide much-needed voice and broadband options for consumers.

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[5] For detailed technical information, please see our technical pdf, "Detailed Technical Information," http://www.cleartalk.net/cleartalk/info/cttech.pdf (last visited May 25, 2011).

## II. THE NEED FOR FORBEARANCE

Forbearance is necessary for NTCH to provide Lifeline service to its customers because, as is the case with most wireless carriers, its Commission-authorized service territory is not congruent with the incumbent LEC's service areas. Commission-designated wireless service areas (CMAs, BTAs, etc.) are an aggregation of county-equivalent areas, whereas rural study areas do not follow county lines (or any other political subdivisions) and are often scattered across a state in several unconnected portions.

Therefore, NTCH cannot comply with Section 214(e)(5) without undergoing the redefinition process. The study area/redefinition requirement is set out in the Act as follows:

> (5) SERVICE AREA DEFINED.—The term "service area" means a geographic area established by a State commission (or the Commission under paragraph (6)) for the purpose of determining universal service obligations and support mechanisms. ***In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c), establish a different definition*** of service area for such company. [Emphasis added].[6]

Since NTCH's service territories overlap with a number of rural study areas that it cannot serve in their entirety, Section 214(e)(5) is clearly implicated. Therefore, for a facilities-based wireless carrier, the only path to ETC designation is the redefinition process, *i.e.* undergoing a cream-skimming analysis at both the Commission and relevant state authority for each state it wishes to serve.

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[6] 47 U.S.C. § 214(e)(5). This definition is adopted nearly word-for-word into the Commission's rules at 47 C.F.R. § 54.207(a),(b).

The study area redefinition process can be time-consuming even when it should be a relatively ministerial task. Redefinition requires approval by the Commission followed by as many as two to three years at the state level. Until the study area is redefined, the benefits to the consumer of Lifeline support cannot be realized. NTCH has confronted situations where the redefinition process dragged on for *years*, even causing permanent damage to its ability to compete in a market. For example, from 2003-2005, while the Commission and the Colorado Public Utilities Commission processed its redefinition request, NTCH suffered losses of approximately $15,000 per month in revenues, $20,000 in legal fees, and the ultimate loss of a foothold in the market.[7]

This despite the fact that the Commission has determined that the cream-skimming analysis at the core of the redefinition process is unnecessary in a Lifeline context.[8] For a carrier proposing to offer only Lifeline services, no rational purpose is served by jumping through all the redefinition hoops or making the intended low-income public beneficiaries suffer while that sometimes lengthy process is completed.

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[7] NTCH submitted an application for ETC designation in Colorado in March, 2003. *NTCH-Colorado, Inc., Doing Business as Clear Talk, for Designation as an Eligible Telecommunications Carrier*, Recommended Decision, Decision No. R03-1464, Docket No. 03A-095T (2003) (before the Public Utilities Commission of the State of Colorado), ¶ 1. NTCH's designation was suspending pending FCC consideration of a redefinition request submitted by the Colorado Public Utilities Commission. *Id.* ¶¶ 30, 42. This request was submitted in September, 2002, and approved by the FCC in May, 2005. During this time NTCH lost a key roaming contract, forcing it to divest its Colorado operations. This process was already underway by the time the FCC redefinition was finally approved. The end result for NTCH was a loss of approximately $15,000 per month while its redefinition application was pending, about $20,000 in legal fees, and the loss of a foothold in the market. For Colorado customers, the result was delay or complete blockage of the services of a low-cost competitive local carrier.

[8] *Virgin Mobile Order*, *supra* note 1, at ¶ 38 n.101 ("In addition, we need not perform a creamskimming analysis because Virgin Mobile is seeking eligibility for Lifeline support only.").

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Neither redefinition nor service to entire study area — as already permitted without waiver or redefinition — provide any benefit or protection to the rural incumbent against Lifeline competitors. Rather, the primary competitive benefit to rural incumbents in the Lifeline context lies in the delay and expense caused by redefinition, not in redefinition itself. This is not a legitimate application of the redefinition rule and goes against the primary statutory goal of making Lifeline-supported service available to eligible consumers. In short, the redefinition requirement has demonstrable and immediate adverse consequences to consumers with no public interest benefit whatsoever. Particularly for a service called "Lifeline," the notion that service or support to deserving recipients should be delayed for no good reason should be rejected.

## III. FORBEARANCE STANDARD

Section 10(a) of the Act provides that the Commission shall forbear from applying any regulation or provision of this Act to a telecommunications carrier if the Commission determines that three conditions are satisfied:

> (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.[9]

In making the public interest determination required by section 10(a)(3), the Commission must consider "whether forbearance . . . will promote competitive market conditions."[10] A finding that forbearance will promote competition among providers of telecommunications

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[9] 47 U.S.C. § 160(a).
[10] 47 U.S.C. § 160(b).

services may be the basis for forbearance. Forbearance is required when all three factors of the analysis are met.[11] We discuss each in turn below.

## IV. DISCUSSION

### A. Enforcement of Section 214(e)(5) Is Not Necessary to Ensure that NTCH's Rates, Terms, and Conditions are Just, Reasonable, and Non-Discriminatory.

Section 10(a)(1) requires the Commission to consider whether enforcement of the service area definition of Section 214(e)(5) for a Lifeline-only carrier is "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 not unjustly or unreasonably discriminatory."[12]

Section 214(e)(5) is not necessary to ensure that NTCH's rates, terms, and conditions are just, reasonable, and non-discriminatory. The study area requirement is intended to prevent carriers from engaging in anti-competitive behavior by gaming the high cost support system (and to spare rural telephone companies from having to calculate embedded costs for fractions of their study areas).[13] It does not have any bearing on a carrier's relationship with its customers. Furthermore, as a competitive carrier, NTCH is by definition subject to competition, which serves to ensure that its rates are just and reasonable and not unjustly or unreasonably discriminatory.[14] In fact, forbearance here would help to ensure that the rates and terms of other carriers are kept reasonable through healthy, unsubsidized competition. Therefore, enforcement

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[11] *Id.*
[12] 47 U.S.C. § 160(a).
[13] *See Federal-State Joint Board on Universal Service*, Recommended Decision, 12 FCC Rcd 87 (1996), ¶ 172.
[14] *Virgin Mobile Order*, *supra* note 1, ¶ 19 n.60.

of Section 214(e)(5) is clearly not necessary to ensure that a NTCH's rates, terms, and conditions are just, reasonable, and non-discriminatory.

### B. Enforcement of Section 214(e)(5) Is Not Necessary to Protect Consumers

Section 10(a)(2) requires the Commission to consider whether the application of Section 214(e)(5) to a Lifeline-only carrier is necessary for the protection of consumers. As noted above, this provision does not govern the carrier-consumer relationship; rather, it seeks to ensure the fair administration of the High Cost program. Forbearance in a Lifeline context will neither harm consumers nor introduce any possibility of program arbitrage. In fact, it will benefit consumers by introducing a competitive Lifeline provider into the designated service areas.

In particular, NTCH's service offerings are beneficial to consumers because they provide an alternative to credit checks, long-term contracts, and potentially unexpected charges. NTCH provides a technologically advanced, reliable service at a low cost. Its plans enable consumers to receive service for which they might not otherwise qualify, as well as allowing them to plan and budget according to a fixed monthly fee with no fear of high over-limit charges or early termination fees. NTCH offers low income customers the same high quality and reliable service that it offers across the board on its innovative 3G network. As a result of this innovative business model, a large percentage of NTCH's customers have come to rely on their cell phone for affordable flat-rate broadband Internet service as well as their primary voice connection. Designating NTCH as an ETC would improve its ability to reach these Americans and continue to expand its network of affordable, quality service into areas that need it most.

Furthermore, NTCH does not seek forbearance from any of the consumer protection provisions of sections 54.101 and 54.201, such as access to emergency services, access to operator services, directory assistance, toll limitation, and applicable consumer protection and service quality standards. NTCH's commitment to these provisions is described fully in the concurrent Petition for Designation as an Eligible Telecommunications Carrier, including its adoption of the CTIA Consumer Code for Wireless Service.[15] NTCH places great emphasis on public safety and the quality of service to its customers.

### C. Public Interest

Section 10(a)(3) requires the Commission to consider whether enforcement of Section 214(e)(5) for a wireless carrier that seeks only Lifeline support is in the public interest. In this case, forbearance from Section 214(e)(5). Here, forbearance from the enforcement of Section 214(e)(5) would strongly promote the public interest.

First, forbearance of the study area requirement and designation of NTCH as an ETC would provide timely additional access to telecommunications service for low-income consumers. Universal service has been a fundamental goal of U.S. telecommunications policy for more than seventy-five years.[16] Pursuant to section 254 of the Act,[17] the Commission established the Low Income program to ensure access to telecommunications services for all consumers, including low income consumers.[18] The Lifeline program, a component of the Low Income program, is designed to reduce the monthly cost of telecommunications services by providing qualifying low income consumers with service discounts.[19] Noting that the Low

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[15] http://files.ctia.org/pdf/The_Code.pdf.
[16] 47 U.S.C. § 151 ("to make available, so far as possible, *to all people* of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and communication service with adequate facilities at reasonable rates") (emphasis added).
[17] 47 U.S.C. § 254(b).
[18] 47 U.S.C. § 254(b)(3) (requiring the Commission and the Joint Board to base universal service policies in part on access to telecommunications services by low income consumers).
[19] *See* 47 C.F.R. §54.400 *et seq.* (Subpart E).

Income program remains underutilized, the Commission has made it a priority to increase participation in the program.[20]

Yet the Lifeline program remains underutilized. In recent years, only about one-third of households eligible for low-income assistance subscribed to the program.[21] The Commission has noted that "there is more we can do to make telephone service affordable for more low-income households" and to expand Lifeline participation in particular.[22] In pursuit of this goal, the Commission has adopted expanded eligibility criteria and outreach guidelines for federal default states in an effort to increase participation.[23] It has also sought comment on "how best to provide support through the Lifeline and Link-Up programs to more low-income individuals and families."[24]

Approving NTCH for the Lifeline program would promote the public interest by enabling more consumers to participate in the program through service offerings that are tailored to meet the specific needs and situation of low income customers. As discussed above in Section C, NTCH's service plans have a range of features and benefits that fill an important gap in the cellular market: in particular, offering service terms that make cell phone service feasible for those whose budget or credit history would otherwise disqualify them from obtaining service at all. Furthermore, because Lifeline customers can choose from among NTCH's service plans, forbearance in this case will facilitate access to broadband Internet access as well as mobile

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[20] *See Lifeline and Link-Up*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 8302, 8305 (2004) ("*Lifeline and Link-Up Order*").
[21] *Virgin Mobile Order*, *supra* note 1, ¶ 30.
[22] *Lifeline and Link-Up*, *supra* note 19, ¶ 1.
[23] *Lifeline and Link-Up Order*, *supra* note 12, ¶ 1.
[24] *The Wireline Competition Bureau Seeks to Refresh the Record on Lifeline and Link-Up*, Public Notice, 22 FCC Rcd 4872 (Mar. 12, 2007); *See also Lifeline and Link-up Order*, *supra* note 19.

phone service. Finally, NTCH offers these services over its own facilities, thereby increasing physical network capacity and penetration in areas of the country that need it most.

Section 10 also requires the Commission to consider whether forbearance will promote competitive market conditions.[25] A finding that forbearance will promote competition among carriers may be the basis for forbearance. Here, such a finding is easy to make. In forbearing to apply Section 214(e)(5) to NTCH, the Commission would allow a new Lifeline provider to enter the market in the designated areas, which would then compete with the incumbent and existing competitive carriers. In this Petition we have described how NTCH's services and facilities differ from those of other carriers, and the valuable services that it can provide low income consumers. This competition will further the public interest by "spur[ring] innovation amongst carriers in their Lifeline offerings, expanding the choice of Lifeline products for eligible consumers."[26] As a spokesperson for AT&T Wireless commented upon NTCH's entry to the Jacksonville, Florida, market: "Customers always win when they have a choice in their wireless providers. Wireless is growing as an industry, and you have to look after everyone's needs."[27]

This enhanced competition also has the potential benefit of helping to control Fund size. To the extent that Low Income customers migrate from subsidized High Cost LECs and CLECs to carriers that can pay for their own expansion into rural areas, like NTCH, it will proportionately decrease High Cost line counts — and therefore disbursements. Eligible customers for financially-independent carriers will still receive Lifeline support, but the carrier

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[25] 47 U.S.C. § 160(b).
[26] *TracFone Order*, *supra* note 1, ¶ 19.
[27] *See* Urvaksh Karkaria, *Option to Prepaid Cell Arrives*, THE FLORIDA TIMES-UNION, Aug. 21, 2007, http://jacksonville.com/tu-online/stories/082107/bus_193024365.shtml (last visited May 25, 2011).

itself will not receive much higher High Cost support, thus potentially reducing size of the High Cost program as well as increasing consumer choice and encouraging all carriers to operate more efficiently.

Conversely, enforcement of Section 214(e)(5) in this context would require even Lifeline-only carriers to spend futile years caught up in the redefinition process, frustrating the Commission's goal of ensuring that all citizens — including low-income consumers — have access to telecommunications services. Forbearance from Section 214(e)(5) would promote the statutory goals of the Universal Service Fund in general and the Lifeline Program in particular by expediting NTCH's ability to provide discounted service to the public, without affecting the function and purpose of Section 214(e)(5).

## V. ANTI-DRUG ABUSE CERTIFICATION

NTCH certifies that no party to this Petition is subject to denial of federal benefits, including FCC benefits, pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 862.

## VI. CONCLUSION

As NTCH has demonstrated above, grant of this Petition for Forbearance from Section 214(e)(5) for ETC designation as a Lifeline-only carrier is consistent with the Act, Commission rules, and the public interest. Accordingly, NTCH respectfully requests that the Commission grant this Petition expeditiously.

Respectfully submitted,

NTCH, INC.

By________________________
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June 20, 2011

## Certification of Glenn Ishihara

I, Glenn Ishihara, do hereby certify, on behalf of NTCH, Inc. and its subsidiaries, that I have reviewed the above Petition for Forbearance and that the facts stated therein, of which I have personal knowledge, are true and correct to the best of my knowledge and belief.

Executed this 15th day of June, 2011.

Glenn Ishihara
President and CEO of NTCH, Inc.