

November 15, 2011

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WC Docket No. 11-42 - Lifeline and Link Up Reform and Modernization
NOTICE OF EX PARTE PRESENTATION

Dear Ms. Dortch:

On November 4, 2011 and October 25, 2011, the Link Up for America Coalition (“Coalition”) submitted two ex parte letters. While TracFone does not wish to prolong the continuing debate between itself and the Coalition as to whether wireless resellers (including those who self-servingly call themselves “facilities-based resellers”) should have their advertising, marketing and regulatory compliance costs subsidized by the federal Universal Service Fund, several aspects of these latest Coalition letters warrant brief response.

In its November 4 letter, the Coalition proposes the establishment of what it calls a “safe harbor” which would allow for reduced subsidies of “customary charges” ETCs forgo in initiating service to low-income consumers. Charges above that safe harbor would be subject to audit by the Universal Service Administrative Company (“USAC”). Under the Coalition’s proposal, ETCs seeking Link Up reimbursement above that safe harbor would be required to provide “cost support” to USAC. USAC would then have thirty days either to accept the ETC’s cost support for its “customary charges” or challenge that support.

Leaving aside the question of whether **any** charges which are not routinely imposed on and paid by all customers -- Lifeline and non-Lifeline -- can be “customary charges,” this proposal does not appear to be either workable or contemplated by the Commission’s rules. There are several glaring omissions from this latest Coalition proposal. First, the proposal contains no details as to how the safe harbor would be determined, what factors would be considered in making those determinations, and who would make those determinations. Second, nowhere does the Coalition indicate whether it has discussed this proposal with USAC and received any indication whether USAC would be willing to take on this additional role. USAC’s functions and responsibilities are codified at Section 54.702 of the Commission’s rules (47 C.F.R. § 54.702). Nowhere in those enumerated functions and responsibilities is anything which states or even implies that USAC is empowered to “regulate” the costs of ETCs. Asking USAC to review and approve ETC cost support would put USAC in the wholly inappropriate position of acting as a cost of service regulator. That is well beyond USAC’s powers conferred upon it by the Commission and, in all likelihood, not within the scope of its expertise.

Even if the Commission were prepared to commence a notice and comment rulemaking to consider amending its rules to expand USAC's functions to include regulatory review of ETCs' costs of commencing service, and their "customary charges" therefor, USAC would need to obtain additional resources, including hiring additional employees and possibly consultants to undertake those additional responsibilities. Presumably, the Coalition would have those additional USAC activities and additional personnel/consultants funded by the USF. Imposing such additional responsibilities on USAC would increase USAC's operating costs, thereby placing further upward pressure on the USF during a period when the Commission actively is pursuing ways to limit growth of the Fund in general and growth of the low income portion of the USF in particular.

In the Coalition's October 25 letter, it persists in characterizing its members as "facilities-based resellers" (a term not defined in the Communications Act or in the Commission's rules). Then, it offers the following incorrect statement of the law: "The Coalition further referred TracFone to the Commission's rules stating that an ETC **may provide service** using its own facilities and resale of another carrier's services." (October 25 letter at 2, emphasis added). Contrary to that statement, neither the Communications Act nor the Commission's rules state that ETCs may provide service using their own facilities or a combination of their own facilities and resale of other carriers' services.

Section 214(e)(1)(A) of the Act states that a carrier designated as an ETC shall be eligible to receive universal service support if it:

- (A) offer[s] the services **that are supported by federal universal service support mechanisms** under Section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier's services

Similarly, Section 201(i) of the Commission's rules states as follows:

- (i) a state commission shall not designate as an eligible telecommunications carrier a telecommunications carrier that offers the **services supported by universal service support mechanisms** exclusively through the resale of another carrier's services.

The underscored words of § 214(e)(1)(A) and 47 C.F.R. § 201(i) are critical. Contrary to the assertion of the Coalition, it is not sufficient that a carrier provide any services using its own facilities and resale of other carriers' services. Rather, to be an ETC the carrier must provide services supported by the universal service support mechanisms using its own facilities and resale of other carriers' facilities. It is possible that some of the Coalition members may be certificated as competitive local exchange carriers in certain states and that they may obtain unbundled network elements pursuant to approved interconnection agreements. However, that alone does not entitle those Coalition members to receive universal service support unless they use their own facilities (such as unbundled network elements) to provide those services which are supported by the federal universal service support mechanisms. Unless those companies are

using their own facilities, at least in part, to provide wireless Lifeline service in the states where they are operating as ETCs, they are doing so in violation of Section 214(e)(1)(A) of the Act and Section 54.201(i) of the Commission's rules.

In determining whether those companies are entitled under current rules to receive Link Up support, two questions must be answered:

1. Are those companies using their own facilities to provide wireless Lifeline service in the states for which they are claiming Link Up support?

2. Are those companies using Link Up support to reduce their customary charges for commencing telecommunications service for a single telecommunications connection at the consumer's principal place of residence, as required by 47 C.F.R. § 54.411(a)?

Unless both of those questions can be answered in the affirmative, then those companies claiming to be facilities-based resellers are not entitled to Link Up support under the existing requirements of the Act and the Commission's rules.

Pursuant to Section 1.1206(b) of the Commission's rules, this letter is being filed electronically. If there are questions, please communicate directly with undersigned counsel for TracFone.

Sincerely,



Mitchell F. Brecher

cc: Ms. Kimberly Scardino