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November 22, 2011

VIA ECFS

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

Re: Written Ex Parte Presentation - WC Docket No. 11-42

Dear Ms. Dortch:

The Link Up for America Coalition (“Coalition”), through its attorneys, hereby responds to the November 15, 2011 letter submitted by TracFone Wireless, Inc. (“TracFone”).¹ TracFone’s latest letter poses two questions regarding the eligibility of Coalition members to receive Link Up funding. Based on the Coalition’s filings in this docket, the answers to these questions already should be clear, but the Coalition takes this opportunity to set the record straight.

Question 1: Are Coalition members using their own facilities to provide wireless Lifeline service in the states for which they are claiming Link Up support?

Answer: Yes

Coalition members use a combination of their own facilities and resale of other carriers services to provide wireless Lifeline service in the states for which they are claiming Link Up support. Commission precedent makes clear that in order to be considered facilities-based to receive ETC status, a carrier can provide service using a combination of its own facilities and the resale of another carrier’s services.² Section 54.201(d) of the

¹ See Ex Parte Presentation of TracFone Wireless, LLC, WC Docket No. 11-42 et al. (Oct. 15, 2011).

² 47 U.S.C. § 214(e)(1)(A); see also 47 C.F.R. § 54.201(d)(1).

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Commission's rules requires ETCs to offer the services that are supported by federal universal service support mechanisms under Section 54.101. There are nine supported services, however, the Commission has specifically determined that an ETC does not have to use its own facilities to provide each of the nine designated services.³ Rather a carrier must use its own facilities to provide at least one of the supported services.⁴ In addition, the facilities do not have to be located in the relevant service area – they need only be used to provide the supported services in the service area established by the state commission.⁵

At least fourteen state public utility commissions (including Puerto Rico) have analyzed the mix of facilities and resold services that Coalition members use to provide wireless Lifeline service and made the determination to grant ETC status based on those facts. These decisions of more than a dozen state public utility commissions are not anomalous. They were based on diligent fact-gathering and sound legal analysis regarding the services offered by Coalition members and their facilities used to provide those services. Further, the decisions were made pursuant to requirements of the Commission's rules. Section 54.201(b) of the rules requires that a "state commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (d) of this section as an eligible telecommunications carrier for a service area designated by the state commission."⁶ The states have faithfully executed this directive and have reasonably concluded that Coalition members meet the Commission's facilities requirements for ETC status.

Notwithstanding the fact that neither this Commission's rules and precedents regarding the facilities requirements for ETCs, nor state commission ETC designation precedents implementing those requirements, are under review in this rulemaking proceeding, the Coalition respectfully submits that this response should put to rest any challenge by TracFone or others to Commission and state commission precedents regarding the facilities requirement for ETCs.

³ See *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 169 (1997) ("1997 USF Order").

⁴ *Id.*

⁵ See 47 C.F.R. § 54.201(g).

⁶ 47 C.F.R. § 54.201(b).

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Question 2: Are Coalition members 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)?

Answer: Yes

Coalition members use 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).

Commission precedent makes clear that this requirement is met by providing mobile wireless service.⁷ While TracFone does not have a customary charge, each member of the Coalition does and Link Up funding is used to reduce up to \$30 of that charge for Lifeline-eligible low income consumers.

Notwithstanding the fact that this Commission's precedent regarding the eligibility of wireless Lifeline services for Link Up is not under review in this rulemaking proceeding, the Coalition respectfully submits that this response should put to rest any challenge by TracFone that would favor its business model over that of wireless ETCs eligible for Link Up subsidies or that would otherwise put such ETCs at a disadvantage based on the technology used to provide Lifeline services.⁸

With respect to the definition of customary charge that has been teed-up in this proceeding, the Coalition agrees that such charges are the stated charges ordinarily imposed to initiate service in a state and that such charges are not imposed only on Lifeline/Link Up customers. We respectfully submit that the Commission should refrain from engaging in line drawing that could disadvantage ETCs that have developed business models to focus predominantly on increasing participation in the Lifeline program or otherwise favor providers with significant bases of non-Lifeline customers. As we have stated previously, we also

⁷ See Reply Comments of the Link Up for America Coalition, WC Docket No. 11-42 et al. at 10-11 (filed Sept. 2, 2011) (citing *Federal-State Joint Board on Universal Service*, Twenty-Fifth Order on Reconsideration, Report and Order, Order and Further Notice of Proposed Rulemaking, FCC 03-115, ¶ 18 (2003) (“*non-wireline* carriers remain eligible to receive Link Up support for the ‘customary charge for commencing telecommunications service,’ as defined in section 54.411 of the Commission’s rules, *including wireless activation fees.*”) (emphasis added).

⁸ See 1997 USF Order, ¶ 364 (“we adopt the principle of ‘competitive neutrality’ and conclude that universal service support mechanisms and rules should not unfairly advantage one provider, nor favor one technology”).

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encourage the Commission to refrain from adopting a definition of customary charge, or from otherwise taking action, designed to hobble ETCs' ability to waive or credit such charges or otherwise extend a greater discount to Lifeline customers. The voluntary extension of greater discounts to Lifeline customers by wireless ETCs is not "waste, fraud and abuse" and any new regulations adopted by the Commission should not discourage ETCs from offering such benefits to Lifeline customers.

Finally, the Coalition responds to TracFone's November 21, 2011 late-filed *ex parte* letter by noting that most of what TracFone says requires no response, as TracFone simply repeats what it has said earlier or deliberately obfuscates Coalition statements and Commission requirements.⁹ A few brief responses, however, are warranted. First, TracFone's suggestion that wireless activation fees are not general industry practice falls flat in the face of the names of the carriers that impose such charges.¹⁰ When carriers that control the overwhelming majority of the wireless market charge an activation fee, it is clear that such charges are indeed the general industry practice. Further, TracFone's attempt to define what is industry standard by looking to SafeLink and Assurance Wireless ETC Lifeline offerings cannot be squared with the Commission's proposal to define customary charge as a charge that ordinarily applies to all customers and not only to Lifeline customers.

Second, TracFone's assertion that wireless ETCs who impose activation charges do not do so to cover their costs is fact-free lawyering without foundation or merit.¹¹ Much like its decision to provide service as a pure reseller, TracFone's decision not to impose activation charges is a business model decision TracFone has made for itself. While these decisions have been copied by others, the Commission should not pick a winning business model by imposing the same choices on other wireless ETCs.

Third, TracFone's assertions regarding when a customary charge no longer becomes customary underscores the difficulty in such line drawing.¹² Consistent with the

⁹ See *Ex Parte* Presentation of TracFone Wireless, LLC, WC Docket No. 11-42 et al. (Nov. 21, 2011) ("TracFone November 21st *Ex Parte*"). This *ex parte* letter relates to a discussion that TracFone's counsel had with Commission staff on November 15, 2011. Therefore, pursuant to the Commission's *ex parte* rules, the notice of *ex parte* presentation should have been filed by November 17, 2011. See 47 C.F.R. § 1.1206(b)(2)(iii).

¹⁰ See Notice of Oral *Ex Parte* Presentation of the Link Up for America Coalition, WC Docket No. 11-42 at 3-4 (Nov. 14, 2011) and TracFone November 21st *Ex Parte* at 3.

¹¹ See TracFone November 21st *Ex Parte* at 4.

¹² While TracFone assumes that activation charges are typically waived on a promotional basis, some might assume that the promotional fee waiver represents more of an exception to ordinary practice.

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discussion of customary charges set forth above, the Coalition respectfully maintains that the Commission should decline TracFone's anticompetitive invitation to engage in micro-regulation designed to create uncertainty and additional burdens for Coalition members and other facilities-based ETCs.

Fourth, TracFone's assertion that its business model does not incorporate a cream skimming strategy appears to be little more than window dressing.¹³ The Coalition provided data to support its assertion back in August.¹⁴ TracFone has never explained why the data do not support the Coalition's assertion nor has it responded in any other substantive way. Contrary to TracFone's oft-repeated assertion, providing Link Up support to eligible wireless ETCs is not "waste, fraud and abuse." Rather, it has contributed as intended to recent Lifeline subscribership growth¹⁵ and to the Commission's recently adopted universal service goal of providing ubiquitous mobile coverage.¹⁶

In accordance with the Commission's rules, this letter is being filed electronically for inclusion in the public record of the above-referenced proceedings. Please feel free to contact the undersigned with any questions.

Respectfully submitted,



John J. Heitmann
Joshua T. Guyan

cc: Sharon Gillett
Carol Matthey
Trent Harkrader
Kim Scardino
Divya Shenoy

¹³ See TracFone November 21st *Ex Parte* at 5.

¹⁴ See Comments of the Link Up for America Coalition, WC Docket No. 11-42 et al. at 12-19 (filed Aug. 26, 2011).

¹⁵ See Notice of Oral *Ex Parte* of the Link Up for America Coalition, WC Docket No. 11-42 et al at 2 (Oct. 6, 2011).

¹⁶ See *Connect America Fund*, WC Docket No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, ¶ 295 (rel. Nov. 18, 2011) ("Given the important benefits of and the strong consumer demand for mobile services, ubiquitous mobile coverage must be a national priority.")