

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Lifeline and Link Up)	WC Docket No. 11-42
Reform and Modernization)	
)	
Lifeline and Link Up)	WC Docket No. 03-109
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	

REPLY COMMENTS OF TRACFONE WIRELESS, INC.

TracFone Wireless, Inc. (“TracFone”) hereby responds to the comments filed with the Commission on March 9, 2012 in response to TracFone’s Emergency Petition for Declaratory Ruling and for Interim Relief. That emergency petition was occasioned by the Puerto Rico Telecommunications Regulatory Board’s (“Board”) unprecedented and unlawful directives to TracFone and to other Eligible Telecommunications Carriers (“ETCs”) providing Lifeline service to low-income consumers in Puerto Rico to de-enroll consumers labeled by the Board as “duplicates” (*i.e.*, customers who were enrolled in multiple ETCs’ Lifeline programs) and to prohibit those de-enrolled “duplicates” from receipt of any Lifeline-supported services for a period not less than four months.¹

Among those commenting on TracFone’s Emergency petition, nearly all commenters shared TracFone’s stated objection to the Board’s mandatory de-enrollment of otherwise qualified Lifeline consumers from all Lifeline-supported services. Those who expressed opposition to the Board’s unilateral demand that qualified Lifeline consumers be deprived of

¹ Pursuant to the letters sent by the Board to TracFone and other ETCs on January 30, 2012 and February 7, 2012, the debarment period was to have been one year. At a meeting on February 17, 2012, the Board reduced that period to four months. The reduction to four months was memorialized by the Board in a Resolution and Order dated March 7, 2012, but not released to the public until March 9, 2012 -- the due date for comments on TracFone’s emergency petition.

Lifeline benefits for any period included several other ETCs -- T-Mobile USA, Inc. and Sprint Nextel Corporation, parent company of Virgin Mobile USA, L.P. d/b/a Assurance Wireless. Perhaps more importantly, the Board's de-enrollment directives were opposed by nationally prominent consumer advocacy groups including the National Association of State Utility Consumer Advocates ("NASUCA") and a broad-based coalition of consumer groups whose signatories include the National Consumer Law Center, Advocates for Basic Legal Equity, the Ohio Poverty Law Center, the Center for Accessible Technology, Community Voice Mail National, Open Access Connections, Virginia Citizens Consumer Council, the Center for Media Justice, Consumer Action, the Pennsylvania Utility Law Project, the Low Income Utility Advocacy Project, Crossroads Urban Center, and the Greenlining Institute ("Joint Consumer Groups").

Those consumer advocacy groups' opposition to the Board's de-enrollment directives is hardly surprising as the Board's mandatory prohibition of Lifeline benefits to qualified low-income consumers for any period based solely on their status as "duplicates" is an affront to the interests of the thousands of low-income Puerto Rico consumers on whose behalf those groups advocate. As noted by the Joint Consumer Groups, the Board's action ". . . broadly suspends a significant number of low-income consumers from their essential voice service and removes them from the network that connects them to emergency service, employers, job opportunities, medical professionals, and the support of friends and family."²

In fact, the only commenter which supported, or even attempted to defend, the Board's directives was (not surprisingly) the Board itself. However, it is apparent that even the Board now has misgivings about the lawfulness of its de-enrollment directives. While its comments go

² Joint Consumer Groups Comments, at 3.

through the motions of defending the lawfulness of its conduct, nowhere does the Board address the fact that its specific action -- prohibiting customers enrolled in multiple Lifeline programs of any Lifeline benefits for any period of time -- was addressed by the Commission and specifically prohibited by its order issued June 21, 2011 and the rules promulgated therein.³ As described by TracFone in its initial comments filed March 9, 2012, in the June 21 Order, the Commission promulgated Section 54.405(e) of its rules which requires ETCs, upon notification from the Universal Service Administrative Company ("USAC") that a Lifeline subscriber is receiving Lifeline service from another ETC (what the Board would call a "duplicate"), the ETC shall de-enroll the subscriber "from participation **in that ETC's** Lifeline program within 5 business days."⁴ Significantly, the Commission's rule requires de-enrollment of duplicates in a manner that such consumers receive one -- and only one -- Lifeline-supported service. Moreover, notwithstanding the Board's suggestion that it may adopt its own requirements which deviate from the Commission's de-enrollment rule, Section 54.405(e) is expressly applicable to ETCs "in any state." "In any state" includes Puerto Rico.

Implicitly acknowledging the dubious lawfulness of its mandatory de-enrollment directives, the Board now has apparently changed its mind -- at least in part. However, its "cure" is no more in the public interest and no more lawful than the disease it created by its January 30 and February 7 de-enrollment directives. Attached to the Board's comments is another resolution and order dated March 7 but not released to the public until March 9 -- the same date as the Board's comments. According to that report and order, the Board will now allow already de-enrolled duplicates to re-enroll in a Lifeline program. However, de-enrolled consumers may

³ Lifeline and Link Up Reform and Modernization, et al, 26 FCC Rcd 9022 (2011) ("June 21 Order").

⁴ 47 C.F.R § 54.405(e) (emphasis added).

only re-enroll in the Lifeline program of the provider “to which the subsidy was applied first.” Moreover, the Board announced that it is the only entity that may inform consumers of that newly-created right to re-enroll in the Lifeline program of the provider who received the subsidy first.⁵ Apparently, the Board believes that it has the power to prohibit ETCs from communicating with their former Lifeline customers, particularly those who were de-enrolled as commanded by the Board. Not surprisingly, the Board cites to no legal authority for its ordered prohibition of ETCs communicating with customers or former customers.

Ironically, the Board bases this post-de-enrollment “about face,” on the 1996 Puerto Rico Telecommunications Act, which it describes as charging the Board with “protecting the residents of Puerto Rico and ensuring a pro-competitive telecommunications market.”⁶ Nothing in that act supports or justifies this latest Board action. First, allowing de-enrolled Lifeline consumers to re-enroll in one Lifeline program after they have already been de-enrolled and deprived of service hardly protects those consumers. They already have been deprived of service and connectivity to the public network. At most, this policy change is about damage control, not protecting consumers.

Second, it is difficult to conjure up any scheme more antithetical to a pro-competitive telecommunications market than limiting such consumers to the Lifeline program of the ETC which provided Lifeline to those consumers first. In virtually all cases, the ETC which provided Lifeline to the consumer first is the incumbent wireline local exchange carrier. In Puerto Rico as

⁵ In Re: Universal Service Fund Lifeline/LinkUp, Case No.: JRT-2001-SU-0003, 20120307 RO (attached to Board’s comments as Exhibit C) (“March 7 R&O”). The Board’s implementation of the March 7 R&O is demonstrated by a March 14, 2012 letter sent by the Board’s Finance Director, Angel M. Oquendo, to TracFone directing TracFone to de-enroll by May 1, 2012 additional “duplicates.” According to that letter (a copy of which is attached to these reply comments), “the beneficiary can remain with the service of the first one to which the subsidy was applied.”

⁶ L.P.R.A. § 265 *et seq.*, as quoted at Board Comments, at 4.

in other states, from the Lifeline program's inception in 1987 until 2009/2010, Lifeline service was provided only by wireline ILECs. Few, if any, non-ILECs in general and wireless ETCs in particular existed until that time.⁷ Thus, by modifying its mandatory de-enrollment directive so as to allow de-enrolled Lifeline customers to re-enroll, but only in the Lifeline program of the ETC which served the customer first, the Board is 1) rewarding incumbency; and 2) denying consumer choice. Neither ensures nor promotes a competitive telecommunications market. Consumers who chose TracFone's or any other ETC's Lifeline program should have the opportunity to re-enroll in their preferred provider's program, without regard to which Lifeline program they were enrolled in first, so long as, consistent with 47 C.F.R. § 54.405(e), they receive Lifeline benefits from only one ETC. The choice of which ETC's Lifeline program in which to enroll or to re-enroll should be made by the consumer, not by the Board for the consumer.

There are several problems with the Board's legal analysis as set forth in its comments. The primary infirmity is that its analysis seems to be based on the premise that the Board's authority to administer Lifeline in Puerto Rico is derived solely from Puerto Rico statutory law. For example, at page 1 of its comments, the Board refers to its statutory mandate from the Puerto Rico General Assembly to "preserve and advance universal service through predictable, specific and sufficient support mechanisms" and that there are "penalties 'established in those cases in which citizens attempt to receive benefits to which they are not entitled.'" Further, the Board

⁷ When TracFone was designated as an ETC by the Board in 2010, it was the first wireless ETC with a non-billed service model so designated.

claims that it balances the need to eliminate waste, fraud and abuse and its statutory obligation to ensure the residents of Puerto Rico are not deprived of service.⁸

While the Board relies extensively on Puerto Rico statutory law, it wholly ignores the fact that state authority to designate ETCs and to administer Lifeline programs is derived also from federal law, specifically Sections 214(e) and 254(f) of the Communications Act, and the Commission's rules implementing those provisions of the Act. Section 214(e)(2) provides state commissions with authority to designate ETCs, subject to the criteria set forth at Section 214(e)(1). Section 254(f) specifically empowers states to adopt regulations to preserve and advance universal service, provided that such regulations "are not inconsistent with the Commission's rules."⁹

The facially-discriminatory re-enrollment policy announced by the Board in the March 7 R&O is not the only infirmity with that order. According to that order, any ETC that has "inter-company duplicates will be exposed to an automatic fine of ten thousand (\$10,000) dollars per duplication."¹⁰ In short, the Board has ordered that if a consumer is enrolled in two ETCs' Lifeline programs, each of those ETCs will be subject to a \$10,000 fine without regard to whether there was any wrongdoing by either ETC. To understand how this latest Board order will destroy Lifeline in Puerto Rico, one need only do the math. Pursuant to the Commission's Lifeline Reform Order,¹¹ Lifeline support will be capped at \$9.25 per enrolled customer per month -- \$111 per year. No ETC can be expected to bear the risk of a \$10,000 fine for a

⁸ Board Comments, at 2. Nowhere has the Board attempted to explain how its directives to deprive consumers of Lifeline service ensure that the residents of Puerto Rico are not deprived of service.

⁹ 47 U.S.C. § 254(f).

¹⁰ March 7 R & O, at 3.

¹¹ Lifeline and Link Up Reform and Modernization (Report and Order and Further Notice of Proposed Rulemaking), FCC 12-11, released February 6, 2012 ("Lifeline Reform Order")

duplicate enrollment not the result of any misconduct by it in return for \$111 in annual Universal Service Fund support. Faced with potential \$10,000 fines for every duplicate enrollment without regard to fault, the risk and reward are so far out of balance as to destroy any incentive by any ETC to offer Lifeline service in Puerto Rico.¹² As noted in these reply comments as well as in TracFone's petition and its initial comments, the Board's directives that ETCs de-enroll "duplicates" from all Lifeline programs and that such de-enrolled consumers remain deprived of Lifeline service for four months is facially violative of 47 C.F.R. § 54.405(e).¹³

Several other aspects of the Board's comments warrant brief response. The Board attempts to defend its mandatory de-enrollment directive by noting that de-enrolled customers have a 20 day period to appeal their denial to the Board.¹⁴ Later, the Board asserts without support that "[h]undreds of residents have already invoked this process."¹⁵ Nowhere does the Board state how many, if any, of those "hundreds" of appeals have been acted on by the Board. Nor does it indicate whether any de-enrolled customers have been re-enrolled; how long it took

¹² TracFone and its counsel have heard rumors that the term "inter-company duplicates" as used in the March 7 R&O submitted with the Board's comments was a typographical error, and that the Board intended to limit the fines to "intra-company duplicates." However, to date, TracFone has seen nothing from the Board which modifies the March 7 R&O as filed with the Commission. Accordingly, these reply comments are based on the understanding that the version of the March 7 R&O filed with the Board's comments is an accurate representation of what the Board has ordered. If the Board confirms that the fines are to be applicable only to "intra-company duplicates," TracFone would not object and would concur with the Board that such intra-company duplicates should be subject to fines since ETCs should be able to prevent and control duplicate enrollment within their own Lifeline programs.

¹³ The Board's assertion that its authority to administer universal service programs in Puerto Rico solely based on state law is especially misplaced with respect to TracFone which has never sought nor received a single dime of support from the Puerto Rico Universal Service Fund. TracFone's Lifeline program is funded entirely by the federal USF and by TracFone. Nonetheless, the Board's de-enrollment directive resulted in TracFone de-enrolling more than 40,000 qualified low-income consumers from its Lifeline program on March 1.

¹⁴ Board Comments, at 2.

¹⁵ *Id.*, at 3.

to complete the appeal and re-enrollment process, or how long those customers (all of whom lost their Lifeline service on March 1 per the Board's directive) went without any Lifeline-supported service, notwithstanding the explicit requirement of 47 C.F.R. § 54.405(e) that Lifeline customers may be enrolled in one -- and only one -- Lifeline-supported service.¹⁶ The fact is that de-enrolled Lifeline customers are, by definition, low-income consumers. Many reside in rural locations in Puerto Rico, far from the Board's headquarters in San Juan. Most will no longer have telephones since they have lost their Lifeline-supported service. The notion that these customers are likely to pursue the Board's appeals process or that they even have the resources to do so is unrealistic.

Much of the Board's comments are directed at TracFone. For example, at page 3, the Board accuses TracFone of not working with the Board to achieve the goals of the Lifeline program. At page 4, the Board asserts without any factual support that TracFone's concern about loss of service by Puerto Rico consumers is a "transparent attempt to preserve its own economic model." At page 10, the Board states that at the February 17 meeting, all ETCs in attendance except TracFone reached agreement with the Board.

These derogatory and defamatory comments are wholly irrelevant to the legal and public interest issues raised in TracFone's Emergency Petition and warrant little response. However, the Commission should be aware that TracFone has attempted to work cooperatively with the Board, its staff and its consultant since being designated as an ETC in 2010. It has attended numerous meetings with the Board and corresponded regularly. Indeed, as recently as March 15,

¹⁶ At page 5 of its Comments, the Board boasts that it has "advocated on behalf of the telecommunications consumers of Puerto Rico." No doubt, those thousands of consumers who lost their Lifeline service on March 1 are grateful for the Board's "advocacy" on their behalf. It further boasts that it has conducted proceedings "related to the protection of a competitive environment in Puerto Rico," but nowhere explains how limiting re-enrollment to the Lifeline programs of the incumbent provider contributes to a competitive environment.

TracFone representatives met with the Board staff and its consultant to discuss operational and procedural issues regarding the Lifeline enrollment and data reporting processes.¹⁷ While TracFone did not reach any agreement with the Board on February 17, it has complied with all that the Board directed it to do at that meeting. It sent de-enrollment letters to its “duplicate” customers notwithstanding its profound disagreement with that directive both from a legal and from a public policy perspective; it has submitted required reports to the Board in the format required by the Board. It has never violated any Board order or regulation, notwithstanding its disagreement and disappointment with certain of those requirements. What TracFone has done which seems to have offended the Board was to petition the Commission to preempt Board directives which are in facial conflict with Section 254 of the Communications Act, Section 54.405 of the Commission’s rules, and the policies set forth in both the June 21 Order and the Lifeline Reform Order.

Conclusion

For the reasons explained herein as well as those set forth in TracFone’s petition and its initial comments, the Board’s directives that ETCs de-enroll from all Lifeline programs those customers deemed by the Board to be “duplicates” and that such de-enrolled consumers remain unable to obtain Lifeline benefits for four months or any specified period of time violates Section 254 of the Communications Act, Section 54.405 of the Commission’s rules as well as the policies set forth in the Commission’s June 21 Order and its Lifeline Reform Order. Moreover, those legal infirmities are not cured by the Board’s post-de-enrollment decision to allow de-

¹⁷ As noted in TracFone’s Comments, at 6-7, its meeting with the Board and the Board’s consultant which had been scheduled for February 27 was canceled by the Board one business day before that meeting based on TracFone’s alleged non-compliance with the “agreement” reached during the February 17 meeting. That meeting was later rescheduled and was held on March 15.

enrolled “duplicates” to re-enroll only in the Lifeline program of the ETC from whom it obtained Lifeline service first. Accordingly, TracFone reiterates its request that the Commission declare the Board’s actions to be violative of the Act and the Commission’s rules, and therefore, preempted.

Respectfully submitted,

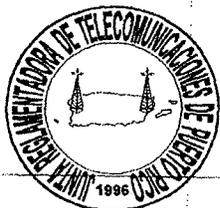
TRACFONE WIRELESS, INC.



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March 19, 2012

Attachment



ESTADO LIBRE ASOCIADO DE PUERTO RICO
JUNTA REGLAMENTADORA DE TELECOMUNICACIONES
DE PUERTO RICO

Oficina de Finanzas

March 14, 2012

Ms. Janet Morejón
Director
Safelink Compliance & Acctg.
9700 NW 112TH ST
Miami, FL 3317

Dear Mr. Ferreira:

On March 7, 2012, the Telecommunications Regulatory Board of Puerto Rico emitted a *Resolution and Order*, by which it left the applicable rule to those persons identified as duplicates because of their social security number of Regulation #8093, *Provisional Amendment to the Universal Service Regulation*, suspended (*abeyance*), in view of the preliminary findings made by this Board. Consequently, should the person desire, the beneficiary can remain with the service of the first one to which the subsidy was applied.

Along with this letter is a compact disc (CD) that contains the beneficiaries information of those which should be withdrawn by your company for having obtained a second subsidy; according to the data corresponding to January 2012 submitted by the Eligible Telecommunications Company (ETC).

Additionally, we are remitting the format and content of the *Notification for Duplicates by Social Security* to be used by each ETC in order to notify the clients with duplicate benefits of the ceasing of the second subsidy which will terminate May 1, 2012.

This "Lifeline" benefit termination date solely applies to those beneficiaries on this CD.

We expect full compliance with these instructions and appreciate your cooperation to this respect.

Please do not hesitate in contacting me, should you have any questions or require additional information.

Cordially,

Angel M. Oquendo Figueroa
Director
Finance Department

Enclosures



Notificación para Duplicados por Seguro Social

INFORMACIÓN IMPORTANTE SOBRE LA CANCELACIÓN DEL BENEFICIO DUPLICADO LIFELINE

[FECHA]

Nombre Apellido Paterno Apellido Materno
Dirección postal de record
Ciudad, Estado Código Postal

Estimado(a) (Nombre) (Apellido):

Cuenta del cliente #

El 7 de marzo de 2012, la Junta Reglamentadora de Telecomunicaciones de Puerto Rico emitió una *Resolución y Orden*, mediante la cual dejó la regla aplicable a las personas identificadas como duplicados por razón de su seguro social del Reglamento Número 8093, *Enmiendas Provisionales al Reglamento sobre Servicio Universal*, en suspenso (*abeyance*), a raíz de los hallazgos preliminares encontrados por esta Junta. En consecuencia, el beneficiario puede quedarse con el servicio al cual primero se le aplicó el subsidio, de éste quererlo.

Sirva la presente para notificarle que se ha determinado su inelegibilidad para seguir obteniendo el beneficio del subsidio duplicado de esta proveedora, como resultado de un proceso de depuración de data y la aplicación de la anterior regla. Su beneficio duplicado cesará a partir del 1 de mayo de 2012.

De no estar conforme con la terminación de su beneficio duplicado, podrá acudir a la Junta Reglamentadora de Telecomunicaciones de Puerto Rico para radicar una reclamación, dentro de veinte (20) días, a partir de la fecha que surja del matasellos del sobre en el cual se envía la presente notificación. Dicha reclamación podrá radicarse, mediante visita personal a la Junta, a su dirección Avenida Roberto H. Todd 500, San Juan, Puerto Rico 00966 o a través de su portal electrónico: www.jrtpr.gobierno.pr o llamando al 787-722-8606 o 787-756-0804 ext. 7010.

Le advertimos que según las *Enmiendas Provisionales al Reglamento sobre Servicio Universal, Reglamento 8093* de la Junta Reglamentadora de Telecomunicaciones de Puerto Rico, una nueva duplicidad conllevaría una multa administrativa, acorde con la Sección 14.3 del mencionado Reglamento.

Ésta dispone:

14.3 Penalidades:

Todo ciudadano que intente recibir beneficios del programa *Lifeline* mediante certificaciones falsas o fraudes similares o que obtenga el subsidio *Lifeline* para más de (1) línea alambica o de servicio inalámbrico por unidad familiar, podrá estar sujeto a una multa administrativa de hasta mil dólares (\$1,000.00). Además, toda CTE que actúe de forma negligente en el trámite de suscripción al programa *Lifeline* o incluya abonados no elegibles dentro del programa, o incurra en alguna otra violación a las disposiciones de esta Sección 14, podrá ser sancionada, según se dispone en la Sección 13 de este reglamento.

CERTIFICATE OF SERVICE

I, Raymond Lee, a Legal Secretary with the law firm of Greenberg Traurig, LLP, hereby certify that on March 19, 2012, a true and correct copy of the foregoing Comments of TracFone Wireless, Inc. was sent via electronic mail and overnight delivery to the following unless stated otherwise:

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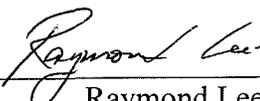
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