

**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
)
Petition of TracFone Wireless, Inc. for)
Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47)
C.F.R. § 54.201(i))

**EMERGENCY PETITION FOR REMOVAL OF
FORBEARANCE CONDITION AND FOR INTERIM RELIEF**

TracFone Wireless, Inc. (“TracFone”), by its attorneys, hereby petitions the Commission to remove a condition included in the order granting TracFone forbearance from application of the facilities-based requirement for designation as an Eligible Telecommunications Carrier (“ETC”).¹ Specifically, TracFone requests the Commission to terminate the condition that “TracFone deal directly with the customer to certify and verify the customer’s Lifeline eligibility.”² This requirement, if left in place by the Commission, will preclude TracFone from utilizing the assistance of retail vendors of its services to perform an initial certification of Lifeline eligibility of applicants for its Lifeline-supported service. The relief requested herein is made necessary by the Commission’s revised Lifeline rules which require ETCs, commencing on June 1, 2012, to review documentation of each applicant’s eligibility. Moreover, allowing other ETCs, but not TracFone, to have the required initial certification of eligibility determinations made at retail locations violates the federal policy of competitive neutrality and

¹ Federal-State Joint Board on Universal Service Petition of TracFone Wireless, Inc. for Forbearance from 47 USC §214(e)(1)(A) and 47 CFR §54.201(i), 20 FCC Rcd 15095 (2005) (“TracFone Forbearance Order”) (granting forbearance of 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(d)(1) and (i)).

² Id. ¶ 19.

subjects TracFone to an unfair competitive disadvantage. Given the imminent nature of the effective date for the Commission's revised rules, TracFone respectfully asks the Commission to consider this petition on an emergency basis and to order such interim relief as necessary and appropriate to enable TracFone to enroll qualified low-income households in the Lifeline program using the same processes available to other ETCs.

BACKGROUND

Section 214(e)(1)(A) of the Communications Act (47 U.S.C. § 214(e)(1)(A)) and 47 C.F.R. § 54.201(d)(1) provide that ETCs shall offer services, at least in part, over their own facilities and 47 C.F.R. §54.201(i) prohibits state commissions from designating as an ETC a telecommunications carrier that offers services exclusively through the resale of another carrier's services. In 2004, TracFone, as a wireless reseller, filed with the Commission a petition requesting that the Commission exercise its forbearance authority under Section 10 of the Communications Act (47 U.S.C. § 160) with respect to the facilities-based service requirement.³ By order issued September 6, 2005, the Commission granted TracFone's petition for forbearance, concluding that a wireless prepaid service for Lifeline-eligible low-income households like that proposed by TracFone would serve the public interest.⁴ The Commission imposed several conditions on TracFone in the TracFone Forbearance Order, including that "TracFone distribute its Lifeline service directly to its Lifeline customers."⁵ The Commission explicitly rejected the use of point of sale procedures which would allow applicants for TracFone's Lifeline service to submit their qualifying information to retail vendors. As

³ See TracFone Wireless, Inc. Petition for Forbearance, CC Docket No. 96-45, filed June 8, 2004.

⁴ See generally, TracFone Forbearance Order.

⁵ Id. ¶ 19.

explained by the Commission, “TracFone must have direct contact with the customer, whether by telephone, fax, Internet, in-person consultation or otherwise, when establishing initial and continued eligibility.”⁶

On February 6, 2012, the Commission issued its Lifeline Reform Order, in which it adopted a series of reforms related to the Lifeline program funded by the Universal Service Fund.⁷ Those reforms included the establishment of a process for expedited forbearance from the “own facilities” requirements in 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(d)(1). Under the blanket forbearance process, carriers without their own facilities that seek to provide Lifeline-only service may obtain forbearance from the facilities requirement by filing a compliance plan with the Commission detailing how they meet certain conditions set forth in the Lifeline Reform Order. The Commission recognized that some ETCs, including TracFone, had already obtained forbearance from the facilities requirement. The Commission noted the following regarding the impact of its new rules on the conditions set forth in previously issued forbearance orders:

To the extent that any of the conditions in the carrier-specific forbearance orders and compliance plans are inconsistent with the rules adopted herein, the newly adopted rules established in this proceeding shall prevail. However, the conditions and rules adopted in this Order set forth the minimum obligations with which a carrier must comply for forbearance from the facilities requirement, and any carrier whose grant of forbearance was conditioned on more stringent compliance plans must comply with those additional obligations as well as the conditions adopted herein.⁸

⁶ Id.

⁷ See Lifeline and Link Up Reform and Modernization et al., Report and Order and Further Notice of Proposed Rulemaking, WC Dkt. Nos. 11-42 *et al.*, CC Dkt. No. 96-45, FCC 12-11 (rel. Feb. 6, 2012) (“Lifeline Reform Order”).

⁸ Id., ¶ 383.

The requirement that TracFone have direct contact with its customers when establishing initial Lifeline eligibility is an additional obligation with which TracFone must comply absent an order from this Commission.

In the Lifeline Reform Order, the Commission also adopted a major reform concerning the ETCs' certification of consumers' initial eligibility to receive Lifeline benefits. The Commission concluded that using automated databases, specifically a national program-based eligibility database, for verifying consumers' initial and ongoing Lifeline eligibility is the ultimate solution to ensure that only qualified low-income households receive Lifeline benefits. The Commission further directed the Wireline Competition Bureau and USAC "to take all necessary actions so that, as soon as possible and no later than the end of 2013, there will be an automated means to determine Lifeline eligibility for, at a minimum, the three most common programs through which consumers qualify for Lifeline."⁹ However, until an automated database is available on a nationwide basis or in a particular state in which an ETC operates, commencing June 1, 2012, ETCs must obtain documentation from each Lifeline applicant evidencing the applicant's program-based eligibility.¹⁰ This documentation requirement, commonly referred to as "full certification," is an extremely burdensome requirement that unduly complicates the enrollment process, discourages low-income consumers from completing the enrollment process necessary to receive the Lifeline benefits to which they are entitled and

⁹ Id., ¶ 97.

¹⁰ 47 C.F.R. § 54.410(c)(1)(i)(B); see Lifeline Reform Order, ¶ 515. Prior to the Lifeline Reform Order, consumers who relied on participation in a Lifeline-qualifying program as the basis for eligibility to receive Lifeline benefits were required to self-certify under penalty of perjury that they participated in the relevant program.

which they need to have affordable access to public telecommunications networks available, and reduces Lifeline participation by qualified low-income households.

The Commission, when it adopted a full certification requirement, noted: “Additionally, some ETCs enroll consumers using a variety of methods, including at retail stores (*i.e.*, in person). We encourage ETCs to provide consumers with multiple options for presenting documentation of eligibility, including in-person and by mail.”¹¹ The Commission explicitly relied upon the fact that ETCs could utilize retail vendors to assist in reviewing program-based eligibility documentation notwithstanding the fact that one ETC -- TracFone -- has been specifically barred since 2005 from utilizing retail vendors for that purpose. TracFone, because it does not operate its own retail outlets and because it is subject to the forbearance condition requiring it to have direct contact with all customers, is not allowed to utilize retail vendors to receive and review documentation of program-based eligibility.

TracFone filed a Petition for Reconsideration with the Commission on April 2, 2012, in which it explained in detail why the Commission should reconsider, or at a minimum, postpone for one year, the full certification of initial Lifeline eligibility for all situations in which an eligibility database is unavailable. On May 11, 2012, TracFone filed a Request for Postponement in which it requested the Commission to postpone the effective date of Commission Rule 54.410(c)(1)(i)(B) for a period of not less than one year to afford ETCs such as itself and others a reasonable period to work with state departments and agencies which administer program eligibility databases to establish arrangements that would allow ETCs access

¹¹ Lifeline Reform Order, ¶ 107.

to those databases to verify Lifeline program-based eligibility.¹² Given the imminent effective date of the Commission's rule requiring full certification of all Lifeline applicants when a program database is not otherwise available, and the fact that the Commission has not yet acted on TracFone's petition for reconsideration nor its request for postponement, TracFone files this emergency petition to request the immediate removal of the forbearance condition that it must have direct contact with the customer when establishing initial eligibility. Immediate relief is necessary so that TracFone, like other ETCs, may -- as suggested by the Commission -- use retail vendors of its services to review documentation of program-based eligibility.

ARGUMENT

TracFone requests the Commission to remove its forbearance condition that TracFone have direct contact with Lifeline customers when it certifies initial eligibility for Lifeline because the condition places TracFone at an unfair competitive disadvantage compared to other ETCs that are not subject to that same condition. Moreover, by treating TracFone differently from other ETCs, the universal service principal of competitive neutrality is violated.

Pursuant to Section 254(b)(7) of the Communications Act (47 U.S.C. § 254(b)(7)), which empowers the Commission to adopt universal service principles as are necessary and appropriate for the protection of the public interest, convenience, and necessity, the Commission established competitive neutrality as a principle upon which it bases policies for the preservation and

¹² TracFone noted in its petition for reconsideration and request for postponement that in its experience, full certification is extremely burdensome to applicants who often do not have the required documentation of program-based eligibility readily available, and when available, many applicants lack any effective means to deliver such documentation to their chosen ETC in a timely manner.

advancement of universal service.¹³ “[C]ompetitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.”¹⁴

Allowing ETCs to certify initial eligibility of Lifeline applicants in a retail setting while prohibiting one ETC -- TracFone -- from utilizing that same process to determine consumer eligibility for Lifeline subjects TracFone to unfair discriminatory treatment under the rules governing the Lifeline program. ETCs subject to full certification that are able to certify Lifeline eligibility of applicants at a retail location can enroll low-income consumers at that location. In contrast, a low-income consumer seeking to enroll in TracFone’s Lifeline service will need to send TracFone documentation proving participation in a Lifeline-qualifying program, a process that is frequently daunting for low-income consumers who do not have ready access a means of transmission. Subjecting potential TracFone Lifeline applicants to a more onerous enrollment process than that applicable to other ETCs’ Lifeline applicants places TracFone at an unfair competitive disadvantage in the provision of Lifeline service. The Commission’s prompt grant of TracFone’s petition to remove the forbearance condition requiring TracFone to have direct contact with customers to establish initial Lifeline eligibility would treat all ETCs in a competitively neutral manner. Moreover, the Commission’s grant of this petition would allow TracFone to use the precise method suggested by the Commission in the Lifeline Reform Order as a means to reduce the burden of full certification on ETCs, *i.e.*, performing initial certification of eligibility at retail stores.

¹³ See Federal-State Joint Board on Universal Service, First Report and Order, 12 FCC Rcd 8776, ¶ 46 (1997).

¹⁴ Id. ¶ 47.

Finally, allowing TracFone to rely on its retail vendors to perform the initial certification of Lifeline eligibility is consistent with the Lifeline Reform Order. In rejecting a commenter's recommendation that the Commission require carriers themselves, rather than their agents or representatives, to review all documentation of eligibility, the Commission stated the following:

We do not find it necessary to adopt such a rule at this time. The Commission has consistently found that “[l]icensees and other Commission regulatees are responsible for the acts and omissions of their employees and independent contractors,” and has held the regulated party responsible for violations of the Commission’s rules committed by agents. Thus, ETCs may permit agents or representatives to review documentation of consumer program eligibility for Lifeline. However, the ETC remains liable for ensuring the agent or representative’s compliance with the Lifeline program rules.¹⁵

As noted by the Commission, ETCs may rely on agents or representatives to review documentation of Lifeline eligibility because the ETCs remain liable for ensuring compliance with the Commission’s rules governing Lifeline. Similarly, TracFone should be able to rely on its retail vendors as its agents or representatives to review documentation provided by Lifeline applicants and to certify applicants’ initial eligibility for Lifeline benefits. There is no basis for distinguishing TracFone’s retail vendors from any other ETC’s agents or representatives, many of whom are themselves retail vendors who are explicitly permitted by the Commission to review documentation of eligibility.

CONCLUSION

By this emergency petition, TracFone respectfully requests that the Commission promptly terminate the requirement in the TracFone Forbearance Order that TracFone have direct contact with the customer when establishing initial Lifeline eligibility and which prohibits the use of retail vendors to assist in the Lifeline enrollment process. Given the impending

¹⁵ Lifeline Reform Order, ¶ 110 (quotations and citations omitted).

effective date of the full certification requirement, TracFone requests that the Commission grant this petition no later than June 1, 2012, or in the alternative, grant TracFone immediate interim relief while the Commission considers this petition.

Respectfully submitted,

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May 30, 2012