

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

In the Matter of)
)
Lifeline and Link-up) WC Docket No. 03-109

TracFone Wireless, Inc.'s)
Petition for Waiver of 47 C.F.R.)
§ 54.403(a)(1))

In the Matter of)
)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service)

TracFone's Petition for)
Modification of Annual)
Verification Condition)

**REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES
ON TRACFONE'S PETITIONS FOR WAIVER
AND FOR MODIFICATION OF ANNUAL VERIFICATION CONDITION**

On April 27, 2009, TracFone Wireless, Inc. ("TracFone") filed a Petition with the Federal Communications Commission ("FCC" or "Commission") asking for modification of the condition placed on it by the FCC requiring annual verification that each TracFone Lifeline customer is a head of household and receives Lifeline service only from TracFone.¹ And on

¹ TracFone Petition for Modification (April 27, 2009). The condition was imposed *In the Matter of Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, 20 FCC Rcd 15095, 15098-99 (2005) ("*First TracFone Forbearance Order*"). The FCC imposed the same annual verification obligation on Virgin Mobile as a condition of grant of forbearance. *In the Matter of Virgin Mobile USA, L.P. Petition for Forbearance from 47 U.S.C. § 214(e)(1)(A)*, CC Docket No. 96-45, Order, FCC 09-18 (rel. Mar. 5, 2009), ¶¶ 12, 25 ("*Virgin Mobile Forbearance Order*"). Virgin Mobile has committed to abide by the annual verification requirement, in addition to the separate verification requirement imposed by 47 C.F.R. § 54.410(c). See CC Docket No. 96-45, Virgin Mobile Compliance Plan (filed Apr. 3, 2009), at 9-10

May 20, 2009, TracFone filed a Petition requesting a waiver of 47 C.F.R. § 54.403(a)(1).² The rule from which waiver is sought defines the level of federal universal service fund (“USF”) received by eligible telecommunications carriers (“ETCs”) providing Tier One Lifeline service.

The Commission placed both Petitions out for public comment on identical timeframes.³ The National Association of State Utility Consumer Advocates (“NASUCA”)⁴ filed comments on the petition for waiver, opposing the petition. The Pennsylvania Public Utility Commission (“Pa PUC”) and Sprint Nextel Corporation (“Sprint”) each filed combined comments opposing both petitions. The Public Service Commission of the District of Columbia (“DC PSC”) filed comments opposing the petition for modification. And the Oregon Public Utility Commission (“Or PUC”) and the Independent Telephone and Telecommunications Alliance (“ITTA”) each filed comments opposing the petition for waiver. Thus the opposition to TracFone’s petitions is unanimous. Clearly, the petitions should be denied.

With regard to the petition for waiver, none of the commenters raise the central point identified by NASUCA: A waiver of this rule will not give TracFone the relief it wants.⁵ Sprint notes that “[w]aiver of a rule requires that the petitioner demonstrate the special circumstances that would justify special treatment for it, and that deviation from the rule is in the public

² TracFone Petition for Waiver (May 20, 2009).

³ DA 09-1272 and 09-1271, respectively (rel. June 5, 2009).

⁴ NASUCA is a voluntary, national association of consumer advocates in more than 40 states and the District of Columbia, organized in 1979. NASUCA’s members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. *See, e.g.*, Ohio Rev. Code Chapter 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. Ann. Subdiv. 6; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions, as advocates primarily for residential ratepayers.

⁵ NASUCA Comments at 2-4.

interest....” and asserts that “TracFone’s waiver request fails on every count.”⁶ NASUCA agrees.

The Or PUC warns against the impact of TracFone’s Lifeline program on the universal service fund.⁷ If the TracFone Lifeline service provided significant benefit to eligible consumers, that is sufficient to justify the funding. The FCC took steps to increase Lifeline participation by granting TracFone and Virgin Mobile forbearance, opening the door for the offering of different wireless Lifeline services. In the *First TracFone Forbearance Order*, the Commission reasoned that competition between and among wireline and wireless ETCs “will spur innovation amongst carriers in their Lifeline offerings, expanding the choice of Lifeline products for eligible consumers.”⁸ The FCC correctly expected consumers would benefit from creative application of available Lifeline support. But that is the whole point here: As the Or PUC points out, the value of TracFone’s service is questionable, given the likely cost to customers of additional minutes, and the availability of other alternatives.⁹ Indeed, TracFone scaled back its Lifeline offerings from two when its petition for forbearance was pending to just one today. This demonstrates the unreasonableness of granting a waiver to give TracFone more money without a certainty of benefit to consumers.¹⁰

⁶ Sprint Comments at 4 (citation omitted).

⁷ Or PUC Comments at 1-2.

⁸ *First TracFone Forbearance Order*, ¶ 12.

⁹ Or PUC Comments at 2-3.

¹⁰ See NASUCA Comments at 4-7.

ITTA points out that TracFone's waiver petition, in contrast to its earlier petition for rulemaking, would inure to TracFone's sole benefit.¹¹ NASUCA raised this same point.¹² ITTA recommends that the Commission address these issues in a generic rulemaking.¹³ NASUCA agrees.

With regard to the petition for modification of the annual verification requirement, Sprint correctly states,

When the Commission issued the *First TracFone Forbearance Order* in 2005, it deliberately included the annual self-certification condition, and TracFone accepted this requirement as a condition for receiving Lifeline USF subsidies. TracFone does not cite any change in circumstance which would warrant modification of this condition, or an inability to comply for reasons beyond its control. Instead, it argues that use of a statistically valid sample would be more convenient for TracFone (it would be able to "comply with the entirety of its annual verification obligations through a combined process"). This does not constitute adequate justification for modification of a condition which it had previously accepted.¹⁴

In the *First TracFone Forbearance Order*, the FCC stated,

We further safeguard the fund by imposing additional conditions on this grant of forbearance. Specifically, as a further condition of this grant of forbearance and in addition to all other required certifications under the program, we require that TracFone require its Lifeline customers to self-certify under penalty of perjury upon service activation and then annually thereafter that they are the head of household and only receive Lifeline-supported service from TracFone. The penalties for perjury must be clearly stated on the certification form. Additionally, in order to further strengthen the head of household requirement, we require that TracFone track its Lifeline customer's primary residential address and prohibit more than one supported TracFone service at each residential address. These conditions are consistent with TracFone's representations in the record. In light of these safeguards, we are not dissuaded from granting forbearance by

¹¹ ITTA Comments at 2-3.

¹² NASUCA Comments at 9-10.

¹³ ITTA Comments at 3; see *id.* at 4-5 for some of the relevant issues.

¹⁴ Sprint Comments at 3 (footnotes omitted).

concerns of double recovery relating to customers receiving Lifeline support for more than one service.¹⁵

These measures to “safeguard the fund” were viewed as a package, that TracFone accepted.¹⁶ As the DC PSC states, “[T]he very flexibility which TracFone offers is a possible opportunity for abuse of the Lifeline program by people who ‘double dip’ by receiving more than one Lifeline subsidy per household....”¹⁷

The DC PSC also states that “it is worth pointing out that TracFone has not yet even once complied with the Commission's requirements for annual verification because barely a year has passed since it was granted federal ETC status, which preceded state certification and the initiation of service.”¹⁸ The lack of actual experience is another basis to deny the modification of this condition. The DC PSC suggests an alternative method – text messaging – for TracFone to contact its customers for the annual verification requirement.¹⁹

The Pa PUC asserts, as to both TracFone petitions, “These latest requests for special accommodations to facilitate TracFone securing funding from the Lifeline program reiterates the need for the FCC to comprehensively reexamine the regulatory treatment of TracFone, beginning with the 2005 Forbearance decision.”²⁰ NASUCA is aware of the long-running disputes between Pennsylvania authorities and TracFone -- centering around compliance with 911 funding²¹ -- but disagrees that the fundamental decision to allow a wireless reseller to be a Lifeline ETC needs to

¹⁵ *First TracFone Forbearance Order*, ¶ 18 (footnotes omitted).

¹⁶ See DC PSC Comments at 2.

¹⁷ *Id.* at 6.

¹⁸ *Id.*

¹⁹ *Id.* at 8.

²⁰ Pa PUC Comments at [2].

²¹ *Id.* at [2-3].

be reexamined. A better solution is to ensure that such ETCs provide real benefits to Lifeline customers, while complying with all relevant regulatory policies. Granting TracFone's instant petitions will not meet that goal.

For the reasons set forth herein and in NASUCA's initial comments on the petition for waiver, both of TracFone's petitions should be denied.

Respectfully submitted,

David C. Bergmann
Assistant Consumers' Counsel
Chair, NASUCA Telecommunications Committee
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
614.466.8574

NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
301.589.6313

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