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

In the Matter of

Lifeline and Link-up

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

WC Docket No. 03-109

COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES ON TRACFONE'S PETITION FOR WAIVER[1]

On May 20, 2009, TracFone Wireless, Inc. ("TracFone") filed a Petition with the Federal Communications Commission ("FCC" or "Commission") requesting a waiver of 47 C.F.R. § 54.403(a)(1). 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. TracFone says it seeks to "maximize the Lifeline benefit for TracFone's Lifeline-eligible households by allowing TracFone to receive the maximum available Tier One Lifeline support of $6.50 per month in all service areas, provided that it pass[es] through to its Lifeline customers the full amount of Lifeline support it receives from the federal Universal Service Fund ("USF") and that it provide its Lifeline customers with an additional monthly Lifeline benefit of not less than $3.50."[2]

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[1] These Comments are also being submitted as an ex parte communication regarding TracFone's "Petition for Rulemaking to Revise Universal Service Support Available to Eligible Telecommunications Carriers," which was filed on March 5, 2009 in CC Docket No. 96-45, and on which comment was sought pursuant to Public Notice (Report 2885) in RM-11256 released on March 30, 2009.

[2] Petition for Waiver at 1.

Pursuant to the Commission's Public Notice,[3] the National Association of State Utility Consumer Advocates ("NASUCA")[4] files these comments on TracFone's Petition. Although NASUCA fully supports ensuring that Lifeline-eligible consumers receive all of the federal USF benefits to which they are entitled, TracFone's Petition is procedurally unavailing and substantively questionable. It should be denied.

The rule from which TracFone seeks a waiver is 47 C.F.R, § 54.403(a)(1). The rule states,

> (a) The Federal Lifeline support amount for all eligible telecommunications carriers shall equal:
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> (1) *Tier One.* The tariffed rate in effect for the primary residential End User Common Line charge of the incumbent local exchange carrier serving the area in which the qualifying low-income consumer receives service, as determined in accordance with § 69.104 or §§ 69.152(d)(1) and 69.152(q) of this chapter, whichever is applicable;

It should be clear that a waiver of this rule will not permit TracFone to receive $6.50 a month in USF support wherever it provides service. A waiver of this rule would, in fact, **deny** TracFone the support that would be represented by the End User Common Line charge ("EUCL," also referred to as the subscriber line charge, or "SLC") of the incumbent local exchange carrier ("ILEC') in whose territory TracFone operates. A waiver of this provision would not make TracFone's Tier One support equal to $6.50; a waiver would render the Tier One support non-existent.

[3] DA 09-1271 (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.

The waiver of a rule cannot replace that rule with another substantive provision, i.e., to give all ETCs (and, ostensibly, their customers) a specific USF benefit of $6.50, which is the current cap on the EUCL.[5] The Commission has addressed this principle in the forbearance context, where carriers have requested the Commission to forbear from statutes or rules in order to substitute another regulatory directive. This is not what happens with forbearance **or** waiver.

In response to a petition from Iowa Telecommunications Services ("ITSI") to forbear from provisions of the rural high-cost rules, the Commission stated,

> Forbearance from the rules identified by Petitioner would not result in it receiving high-cost support under the non-rural mechanism. Section 54.305 provides that a carrier acquiring exchanges from an unaffiliated carrier shall receive the same per-line levels of high-cost universal service support for which the acquired exchanges were eligible prior to their transfer. Since GTE did not receive high-cost support in Iowa at the time of the acquisition, Iowa Telecom is similarly not eligible for support, consistent with this rule. Forbearance from section 54.305, however, would not provide Petitioner with high-cost loop support as long as its costs remain too low to qualify under the rural support mechanism, nor would it move Iowa Telecom from the rural support mechanism to the non-rural support mechanism. Sections 36.601-36.631 of the Commission's rules specify the method for calculating high-cost loop support for rural carriers. Forbearing from these rules would not provide Iowa Telecom with high-cost support under the non-rural mechanism, which is calculated and distributed pursuant to section 54.309, and from which Iowa Telecom also asks us to forbear. ….Sections 54.313 and 54.314 require states that want non-rural and rural carriers, respectively, to receive support to certify that support provided to carriers within their jurisdiction will be used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Forbearing from these sections would allow Iowa Telecom to receive support without state certification, but would have no effect on what type of support, rural or non-rural, Iowa Telecom would be

[5] 47 C.F.R. § 69.104(n)(ii)(C); 47 C.F.R. § 69.152(d)(ii)(D).

> eligible to receive. In sum, forbearing from these rules would simply create a vacuum rather than enabling Iowa Telecom to receive support under the non-rural mechanism.[6]

Similarly, granting TracFone a waiver of the rule that gives ETCs support based on the ILEC's EUCL would not set TracFone's support at $6.50. Instead it would create a "vacuum" for this support.

Indeed, the request is further complicated by the condition that TracFone would impose on itself: that of providing its Lifeline customers with an additional $3.50 Lifeline benefit.[7] TracFone points to no principle that would allow such a conditional waiver of the rules.

Substantively, TracFone asserts that granting the waiver will "greatly benefit Lifeline-eligible consumers by allowing TracFone to offer them the maximum Lifeline benefit. Currently, that maximum benefit is 68 minutes of free airtime per month."[8]

Yet just recently in Ohio, TracFone requested and was granted ETC status based on a commitment to give Lifeline customers 68 free minutes a month.[9] That commitment applies throughout the state, regardless of whether the SLC of the underlying ILEC is at the $6.50 cap.

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[6] See *Iowa Telecom Petition for Forbearance Under 47 U.S.C. § 160(c) from the Universal Service High-Cost Loop Support Mechanism*, WC Docket No. 05-337, Order (rel. August 6, 2007). In a separate filing ITSI also requested a waiver of the same rules. NASUCA opposed the. waiver, inter alia, ,because it would not grant ITSI the relief it sought; the ITSI waiver petition remains pending. See NASUCA ex parte (May 7, 2008). See also *Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service,* WC Docket No. 05-261, Memorandum Opinion and Order, 21 FCC Rcd 11125, 11130, para. 9 (2006) (The Commission denied forbearance because "[f]orbearing from the rule . . . would simply create a vacuum rather than confer any rights upon requesting carriers or obligations upon incumbent LECs.").

[7] The other proviso proposed by TracFone, that it pass through to its customers the full amount of support it receives from the USF, is inherent in both Tiers One and Two of the Lifeline rules.

[8] TracFone Petition at 2-3.

[9] *In the Matter of Universal Service Discounts,* PUCO Case No. 97-632-TP-COI, Supplemental Finding and Order (May 21, 2009).

On the other hand, in the State of Delaware, TracFone offers only 41 minutes, despite the SLC being at $6.45.[10]

Indeed, without knowing TracFone's cost structure, it is difficult to say what amount of free minutes ought to match the support received from the federal Lifeline program. In a recent article on TracFone's service, an analyst asserted that TracFone's cost of providing the service for which it receives $10 in federal funding is $3.[11]

Similarly, even though TracFone says that its waiver should be "conditioned on it providing an additional $3.50 in monthly Lifeline benefit,"[12] nowhere does TracFone specify how that "additional monthly Lifeline benefit" can be quantified. Indeed, TracFone asserts that in the District of Columbia with its $3.86 SLC[13] it would "only be able to provide a monthly benefit to its customers of 55 minutes of free airtime per month,"[14] implying that the cost (or value?) of 13 minutes (i.e., 68 minutes minus 55 minutes) is $2.64 (i.e., $6.50 minus $3.86), or more than 20 cents per minute. But 55 minutes at $3.86 equals just over seven cents a minute. Simply put, this makes little sense.

The premise of TracFone's petition, that 68 minutes of free wireless calling is a reasonable "maximum" Lifeline benefit should not be accepted. It should be recalled that, in the *Hurricane Katrina Order*, the FCC established a model wireless plan for the relief of low-

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[10] See http://www.allbusiness.com/society-social/families-children-family/12271130-1.html.

[11] A recent article in the New York Times indicated that carriers like TracFone "receive up to $10 a month in government subsidies, sufficient to cover what amounts to about $3 in service." Matt Richtel, "Providing Cellphones for the Poor," New York Times (June 15, 2009), accessible at http://www.nytimes.com/2009/06/15/technology/15cell.html?_r=1.

[12] TracFone Petition at 7.

[13] Id. at 8.

[14] Id. at 9.

income households displaced by the natural disaster.[15] The FCC offered $130 of annual federal universal support "for a free wireless handset and a package of *at least* 300 minutes of use…"[16] The FCC noted that such wireless Lifeline offers might include additional minutes as part of the wireless carrier's business plan.[17] And TracFone's competitor Virgin Mobile offers 120 free minutes a month (with a refurbished handset).[18] At this point, it is not clear that providing TracFone with additional Lifeline reimbursement so that TracFone might offer all Lifeline consumers 68 minutes of wireless calling is in the public interest.

Generally, ETCs give a discount off their retail rates to Lifeline customers, and are reimbursed from the federal USF in the amount of the discount. When TracFone's petitions for designation as an ETC in certain states were pending before the FCC, TracFone proposed that Lifeline customers would have a choice of a discount applied to its TracFone or Net10 service.[19]

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[15] *Federal-State Joint Board on Universal Service*, 20 FCC Rcd. 16883 (2005)("*Hurricane Katrina Order*") at ¶ 12.

[16] *Hurricane Katrina Order*, ¶¶ 11, 19.

[17] Id., fn. 26, 29.

[18] See *Virgin Mobile USA Petitions for Designation as an ETC*, CC Docket No. 96-45, Virgin Mobile ex parte (Oct. 24, 2008) at 14.

[19] See e.g., *TracFone Wireless, Inc. Petition for Designation as an ETC in Delaware*, CC Docket No. 96-45 (filed Nov. 28, 2007). TracFone proposed to offer two Lifeline plans, which would offer 50 or 100 free minutes, depending on the plan. The TracFone Lifeline plan would be equivalent to TracFone's retail Value Plan which cost $9.99 per month for 50 minutes of airtime. Additional TracFone Lifeline minutes would cost $0.20 per minute. Id. at 18. Lifeline customers opting for the other plan, the so-called NET10-Pay-As-You-Go plan, would receive 100 minutes per month free. TracFone explained that NET10 service cost $0.10 per minute, so 100 minutes equaled $10. Lifeline customers choosing the NET10 plan would be able to purchase additional minutes at $0.10 per minute. With NET10 service, Lifeline customers would have to purchase a handset, at a cost of $30 or more. Id. at 18-19.

In January 2008, NASUCA and Public Utility Law Project (PULP) filed Comments in response to Petitions for ETC Designation filed with the FCC by both TracFone and Virginia Mobile. NASUCA/PULP noted that TracFone had proposed two wireless Lifeline service plans and expressed concern that "Lifeline customers should not be limited to any specific wireless program." *TracFone Wireless, Inc. Petitions for Designation as an ETC*, CC Docket No. 96-45, NASUCA/PULP Comments (January 14, 2008) at 6-7. NASUCA/PULP asserted that the FCC "should ensure that the rates charged for Lifeline service reflect the Lifeline discount." Id.

In reply comments, TracFone explained:

> TracFone currently offers prepaid airtime through two brand names: TracFone and NETl10. In developing its proposed Lifeline programs, TracFone has used both brands so as to provide maximum choice to qualified

Now that TracFone is actually offering prepaid wireless service with federal Lifeline support, TracFone offers one product which it has branded as "SafeLink."[20] TracFone's separation of Lifeline service from its other retail offerings makes it difficult to determine how the Lifeline dollars it receives are applied.

Another issue would arise if TracFone were granted the ability to receive the maximum reimbursement allowed under federal rules – whether or not as part of a waiver. Given that its request is for TracFone alone, this would appear to violate the Commission's universal service principle of competitive neutrality. The designation by the FCC and states of competitive ETCs already provide Lifeline-eligible consumers with a choice of providers and service with federal universal service support. Providing TracFone with a greater level of reimbursement per Lifeline

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> low income households. The TracFone Pay-As-You-Go Wireless Lifeline Plan and the NET10 Pay-As-You-Go Wireless Lifeline Plan, both of which are described in TracFone's ETC Petitions, provide up to $10.00 worth of service for free each month. TracFone decided to base its Lifeline offerings on $10.00 of free service because the Lifeline program contemplates discounted monthly rates, and the maximum amount of federal Lifeline support available in the majority of states is $10.00 per month. Under TracFone's Lifeline program, all qualified low income consumers participating will receive the full amount of the USF support received by TracFone in the form of free wireless airtime.

Id., TracFone Reply Comments (January 29, 2008) at 2 Regarding NASUCA/PULP's concern that Lifeline customers have a choice of TracFone's offerings with the Lifeline discount, TracFone replied:

> TracFone's customers who qualify for Lifeline service will have the ability to determine whether the TracFone brand service or the NET10 brand service best meets their needs. As explained in the ETC Petitions, Lifeline customers with lower volume calling requirements will likely select the TracFone Pay-As-You-Go plan because it also includes a larger handset subsidy than does the NET10 plan, thereby reducing the Lifeline customer's out-of-pocket cost for the handset. Lifeline customers with higher volume calling requirements would likely prefer the NET10 Pay-As-You-Go plan. Handsets sold to NET10 Lifeline customers will be priced higher than those sold to TracFone Pay-As-You-Go Lifeline customers. However, the NET10 plan will include a lower per minute rate. TracFone is offering Lifeline customers the same choices that it offers all customers. However, unlike customers who do not qualify for Lifeline, customers who qualify for Lifeline will receive up to $10.00 worth of wireless service at no charge each month. Thus, there is no question that under both of TracFone's Lifeline plans, the entirety of the USF support will be provided to consumers in the form of wireless usage at no charge to the customer.

Id. at 3-4.

NASUCA observes that the Net10 plan appears to have disappeared; at least it was not mentioned in TracFone's application in Ohio. See http://www.tracfone.com/includes/content/questions/Lifeline.jsp?a=1241977418299. Equally importantly, the Ohio application contained no comparison to TracFone's "non-Lifeline" service offerings. This only reinforces the difficulty of assessing either the value or the cost of TracFone's discounts to its Lifeline service.

[20] https://www.safelinkwireless.com/EnrollmentPublic/about_us.aspx

customer than another ETC in the same market does not appear fair or neutral. And unless there were a demonstrable benefit to consumers from the violation – which TracFone has not shown – it is hard to see that relief for TracFone alone would be in the public interest.

Which brings us to TracFone's earlier-filed Petition for Rulemaking. (A new rule, rather than the waiver of a current rule, could give TracFone the additional support it seeks.) In the rulemaking petition, TracFone did ask for a generic rule similar to that it seeks in the current petition for waiver, that would allow all ETCs to receive the maximum Tier One support of $6.50 in all service areas. Like the waiver, the new rule would be conditioned on the ETC's commitment to pass through to their Lifeline customers the full amount of Lifeline support they receive from the federal USF, and that they provide their Lifeline customers with an additional amount of not less than $3.50 a month in the form of a Lifeline benefit.[21]

Although NASUCA generally supports measures that make Lifeline service more affordable, TracFone's proposal – centered as it is on TracFone's specific business model – raises more questions than it answers. The primary question is how TracFone can show how it is providing its Lifeline customers with the "additional" Lifeline benefit of $3.50. Certainly nothing in either its Petition for Waiver or for Rulemaking demonstrates this.

Further, NASUCA notes that the matching of Tier One support to the ILEC's EUCL provides an important protection to Lifeline consumers. Increases to an ILEC's EUCL are automatically matched by a change in the Lifeline Tier One support. ILECs are by statute the default ETC. While the FCC has promoted designation of CETCs, there is no certainty that all Lifeline-eligible consumers have a choice of Lifeline ETCs.

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[21] TracFone Petition for Rulemaking at 1.

TracFone also refers to the \$3.50 being "borne by the ETC."[22] Yet that is not the way the current Lifeline program is structured.[23] In most states, the Tier Three benefit is picked up by an intrastate universal service fund or has otherwise been ordered, i.e., the "state-mandated" support referred to in 47 C.F.R. §54.403(a)(3). Other states, like Ohio, have achieved the maximum benefit through a quid pro quo of allowing pricing freedom in exchange for an enhanced Lifeline benefit, also "state-mandated" support. Under those circumstances, it is not clear that the enhanced benefit is truly being "borne by" the ETC, rather than by the ETC's customers. TracFone's proposal would apparently be "Lifeline support otherwise provided by the carrier," as referred to in §54.403(a)(3).[24]

NASUCA is not aware of instances where such additional support is currently voluntarily being provided by other carriers. Although it is not inappropriate to ascribe charitable motives to carriers, it appears that only where the carrier envisioned benefits to itself greater than the amount of the additional \$3.50 contribution would it make such a contribution.[25]

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[22] Id. at 2.

[23] FCC rules provide three levels of Lifeline support. Tier One consists of waiver of the SLC. 47 C.F.R. § 54.403(a)(1). (In the rule, the SLC is referred to as the End User Common Line charge.) Tier Two federal support gives an additional \$1.75 in support to the carrier if the carrier passes through that amount to the customer. 47 C.F.R. § 54.403(a)(2). Finally, Tier Three support provides "[a]dditional federal Lifeline support in an amount equal to one-half the amount of any state-mandated Lifeline support or Lifeline support otherwise provided by the carrier, up to a maximum of \$1.75 per month in federal support, will be made available to the carrier providing Lifeline service to a qualifying low-income consumer if the carrier certifies to the Administrator that it will pass through the full amount of Tier-Three support to its qualifying low-income consumers and that it has received any non-federal regulatory approvals necessary to implement the required rate reduction." 47 C.F.R. § 54.403(a)(3). There is a fourth level, available only for Tribal lands, that is not relevant here. 47 C.F.R. § 54.403(a)(4).

[24] Section 54.403(b) addresses how ETCs which do not charge a SLC should pass through the Lifeline discount: Other eligible telecommunications carriers shall apply the Tier-One federal Lifeline support amount, plus any additional support amount, to reduce their lowest tariffed (or otherwise generally available) residential rate for the services enumerated in Sec. 54.101(a)(1) through (a)(9), and charge Lifeline consumers the resulting amount." TracFone does not use its support to reduce its "otherwise generally available" residential rate.

[25] Such as the greater pricing freedom for other services allowed in Ohio.

NASUCA recommends that the FCC deny TracFone's petition for waiver. Waiver of Section 54.403(a)(1) would not permit TracFone to receive $6.50 as Tier One support, regardless of TracFone's offer to provide $3.50 in additional service. Even if waiver could accomplish TracFone's goal, NASUCA is unable to determine the value -- and so benefit to Lifeline customers and the public -- of the additional Lifeline service which TracFone alone would offer.

It also appears that the rule modification sought by TracFone will have limited impact; perhaps only TracFone would be able or willing to utilize the changed rule. Likewise, only TracFone would benefit from the waiver request it makes. Again, the request for waiver should be denied.

Respectfully submitted,

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