

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
TracFone Wireless, Inc.) CC Docket No. 96-45
Petition for Modification of Condition Imposed)
On TracFone upon Designation as an Eligible)
Telecommunications Carrier)

ORDER

Adopted: January 11, 2011

Released: January 11, 2011

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we deny a petition for waiver filed by TracFone Wireless, Inc. (TracFone) seeking to modify the compliance plan condition that it require each of its Lifeline customers to self-certify annually that they are the head of their household and receive Lifeline-supported service only from TracFone.1 TracFone requests that it instead be allowed to contact only a statistically-valid sample of its customers to comply with this condition.2 We find that TracFone has not demonstrated good cause and that a waiver is not in the public interest.

II. BACKGROUND

2. TracFone is a pre-paid wireless provider currently offering Lifeline service to low-income consumers. In 2005, the Commission conditionally granted a petition for forbearance filed by TracFone allowing TracFone to seek designation as a limited eligible telecommunications carrier (ETC) for the purpose of providing only universal service Lifeline service.3 Specifically, TracFone sought forbearance from the statutory requirement that a carrier provide services "either using its own facilities or a combination of its own facilities and resale of another carrier's services" to be considered an ETC.4 As a

1 Petition for Modification of Annual Verification Condition, CC Docket No. 96-45 (filed Apr. 27, 2009) (TracFone Petition); see also Supplement to Petition for Modification of Annual Verification Condition, CC Docket No. 96-45 (filed Jun. 1, 2009) (TracFone Supplement). On June 5, 2009, the Commission released a Public Notice seeking comment on TracFone's petition. Comment Sought on TracFone Request for Modification Condition Adopted in Commission Order Granting TracFone Forbearance from Eligible Telecommunications Carrier Requirements, CC Docket No. 96-45, Public Notice, 24 FCC Rcd 7694 (2009).

2 See TracFone Petition at 3; see also 47 C.F.R. § 54.410(c)(2).

3 See 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), CC Docket No. 96-45, Order, 20 FCC Rcd 15095, 15098, para. 6 (2005) (Forbearance Order).

4 47 U.S.C. § 214(e)(1)(A). See TracFone Wireless, Inc. Petition for Forbearance, CC Docket No. 96-45 (filed June 8, 2004).

condition of the grant of forbearance, among other requirements, the Commission ordered TracFone to require each of its Lifeline customers to self-certify at the time of service activation and annually thereafter that the customer is the head of household and receives Lifeline-supported service only from TracFone.⁵ The Commission imposed this condition because of concerns with customers receiving duplicate Lifeline support.⁶ The Commission also required that TracFone file a compliance plan explaining how TracFone would implement the conditions imposed.⁷ TracFone subsequently filed its compliance plan.⁸ In 2008, the Commission issued an order designating TracFone as a Lifeline-only ETC in certain states and re-affirming the *Forbearance Order* condition explained above.⁹

3. A year after the *ETC Designation Order*, TracFone filed the instant petition for a waiver.¹⁰ TracFone requests that instead of annually confirming each of its Lifeline customer's status as the head of household and a recipient of Lifeline-supported service only from TracFone, TracFone be allowed to survey a statistically-valid sample of its customers.¹¹ TracFone argues that the condition is overly burdensome and without justification as compared to the annual Lifeline eligibility verification requirements imposed on all ETCs operating in federal default states.¹² TracFone further argues that its methods for contacting its Lifeline customers for this condition could force it to de-enroll a large percentage of those customers due to poor response rates.¹³

III. DISCUSSION

4. We conclude that TracFone has not demonstrated good cause to justify a modification of the *Forbearance Order* condition and that waiver of the condition is not in the public interest. The Commission may waive any provision of its rules for good cause shown.¹⁴ Good cause may be shown through particular facts that make strict compliance inconsistent with the public interest.¹⁵ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation

⁵ *Forbearance Order*, 20 FCC Rcd at 15103, para. 18.

⁶ *Id.*

⁷ *Forbearance Order*, 20 FCC Rcd at 15098-99, para. 6.

⁸ TracFone Wireless, Inc. Compliance Plan, CC Docket No. 96-45 (filed Oct. 11, 2005).

⁹ *Federal-State Joint Board on Universal Service, TracFone Wireless, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of New York, et al.*, CC Docket No. 96-45, Order, 23 FCC Rcd 6206, 6214-15, para. 21 (2008) (*ETC Designation Order*).

¹⁰ *See supra* note 1.

¹¹ TracFone Petition at 3.

¹² TracFone Petition at 3-4. *See* 47 C.F.R. §§ 54.409, 54.410. ETCs operating in federal default states (those states without their own Lifeline programs) are required to implement procedures to verify annually the continued eligibility of a statistically-valid random sample of their Lifeline consumers and provide results of that sample to USAC. 47 C.F.R. § 54.410(c)(2). However, the Commission's rules require ETCs in states that have their own Lifeline programs to comply with state verification procedures. 47 C.F.R. § 54.410(c)(1).

¹³ TracFone Supplement at 3. *See also* Letter from Mitchell F. Brecher, Counsel for TracFone, to Marlene H. Dortch, FCC, CC Docket 96-45, filed July 31, 2009 (TracFone Letter) (arguing the ineffectiveness of using direct mail in fulfillment of the *Forbearance Order* condition).

¹⁴ 47 C.F.R. § 1.3.

¹⁵ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

of overall policy on an individual basis.¹⁶ In sum, waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.¹⁷

5. We find that TracFone has failed to demonstrate that modification of the condition would be in the public interest. TracFone contends that the condition, which requires it to contact annually each of its Lifeline customers, is overly burdensome and not justified, particularly compared to a requirement the Commission imposed on ETCs that permits them to conduct annual verification of Lifeline consumers' eligibility using only statistically valid customer samples.¹⁸ While the verification requirement serves an important function in ensuring Lifeline customers maintain their eligibility, the Commission has recognized that the *Forbearance Order* condition imposed on TracFone and similarly situated ETCs is essential to protecting the program from waste.¹⁹ TracFone and other similarly-situated ETCs typically provide their Lifeline-supported service for free and do not invoice their Lifeline consumers. We believe this may increase the risk for more duplicate claims for Lifeline-supported service than is likely with traditional ETCs which bill their customers monthly. First, some enrolled low-income consumers of pre-paid wireless service may not understand that their service is supported by the Lifeline program because, lacking a monthly bill, they do not see a Lifeline discount noted on a bill. Second, some consumers may understand that TracFone and similarly-situated carriers are offering Lifeline-supported service, but these consumers may still sign up for a second Lifeline-supported phone through a pre-paid wireless carrier because of the free nature of the service. In fact, as noted above, the Commission imposed additional requirements on carriers such as TracFone because of concerns with double recovery of Lifeline support by consumers.²⁰ TracFone is obligated "to establish certain administrative procedures to safeguard against waste, fraud, and abuse."²¹ TracFone's specific duty to survey annually each of its Lifeline customers as to whether TracFone is the sole Lifeline provider to the customer's household helps prevent duplication of Lifeline service and is intended to guard against waste in the program. Granting this petition would result in TracFone contacting far fewer customers to determine if they are receiving duplicate Lifeline support. By contacting each of its Lifeline customers annually, TracFone will have to monitor and, if necessary, de-enroll many more ineligible consumers than it would through contacting a statistically-valid sample of its Lifeline customers.

6. We also find that TracFone has not shown good cause justifying a modification of its annual verification condition. TracFone has not presented in its petition, supplement, or subsequent letter any new or special circumstances that warrant a waiver. TracFone instead argues that the condition is overly burdensome, and it should be permitted to contact only a subset of its customers to comply with this obligation.²² Notably, TracFone did not claim any change in its circumstances from the time the

¹⁶ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

¹⁷ *Northeast Cellular*, 897 F.2d at 1166; *accord NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008).

¹⁸ TracFone Petition at 4. Section 54.410(c)(2) of the Commission's rules requires all ETCs in federal default states, including TracFone, to verify the continued eligibility of a statistically-valid sample of their Lifeline customers. See 47 C.F.R. § 54.410(c)(2). See *supra* note 12

¹⁹ See, e.g., *Petition for Designation as an Eligible Telecommunications Carrier in the States of New York, North Carolina, Pennsylvania, Tennessee and Virginia*, CC Docket No. 96-45, Order, 24 FCC Rcd 13413 (2009) (Virgin Mobile, as a prepaid wireless reseller, is also subject to the condition for which TracFone seeks a waiver).

²⁰ See e.g., *Forbearance Order*, 20 FCC Rcd at 15103, para. 18; see also *ETC Designation Order*, 23 FCC Rcd at 6214-6215, para. 21.

²¹ See *ETC Designation Order* at 6214, para. 20.

²² TracFone Petition at 3.

Commission granted it forbearance and designated it as an ETC that would support its claim that the continued imposition of this condition creates a new burden on the company. Commenters expressed unanimous opposition to TracFone's petition, arguing, among other things, that TracFone has failed to show its need for a waiver for just this reason.²³ As Sprint Nextel Corporation points out, TracFone's petition argues only that the "use of a statistically valid sample would be more convenient for TracFone."²⁴ Among other reasons, we conclude that TracFone's failure to support its petition with new facts warrants a denial of its petition.

7. Further, we are not sympathetic to TracFone's argument that continued imposition of this condition will cause it to de-enroll a large percentage of its Lifeline subscribers because of poor response rates from its customers.²⁵ We believe that the possibility of de-enrolling a large percentage of non-responsive consumers, even those that may be eligible, is outweighed by the significant protections afforded to the program by continued imposition of the *Forbearance Order* condition on TracFone – namely, that such a condition will protect the program against waste, fraud, and abuse. We note that in the event that eligible TracFone Lifeline consumers are de-enrolled due to their lack of a response, these customers are free to sign up with TracFone again if they are able to prove their eligibility and otherwise meet all program requirements.

8. In conclusion, TracFone has not demonstrated good cause to justify a modification of this condition or that waiver of the condition is in the public interest. Given TracFone's consent to the obligation at hand, our ongoing responsibility to protect against waste, fraud, and abuse in the program, and the dearth of new facts presented by TracFone to justify modification of the condition, we deny TracFone's petition to modify the compliance plan condition that it require each of its Lifeline customers to annually self-certify that they are the head of their household and receive Lifeline-supported service only from TracFone.

IV. ORDERING CLAUSES

9. ACCORDINGLY, IT IS ORDERED, pursuant to the authority contained in sections 1-4 and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154 and 254, and sections 0.91 and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91 and 1.3, that the petition for modification filed by TracFone Wireless, Inc. IS DENIED.

10. IT IS FURTHER ORDERED that, pursuant to section 408 of the Communications Act of 1934, as amended, 47 U.S.C. § 408, this Order SHALL BE EFFECTIVE upon release.

²³ Sprint Comments at 3; NASUCA Reply Comments at 4; *see also* Pa PUC Comments and Reply Comments.

²⁴ Sprint Comments at 3.

²⁵ TracFone Supplement at 3; *see also* TracFone Letter.

FEDERAL COMMUNICATIONS COMMISSION

Sharon Gillett
Chief
Wireline Competition Bureau

APPENDIX

List of Commenters

Commenter

Pennsylvania Public Utility Commission
Public Service Commission of the District of Columbia
Sprint Nextel, Corp.

Abbreviation

Pa PUC
DC PSC
Sprint

Reply Commenter

National Association of State Utility Consumer Advocates
Pennsylvania Public Utility Commission
TracFone Wireless, Inc.

Abbreviation

NASUCA
Pa PUC
TracFone