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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of Petition of TracFone Wireless, Inc. for Designation as an Eligible Telecommunications Carrier in the State of Utah for the Limited Purpose of Offering Lifeline Service to Qualified Households	Docket No. 09-2511-01 UTAH OFFICE OF CONSUMER SERVICES' REPLY POST-HEARING BRIEF
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I. INTRODUCTION AND RELIEF REQUESTED.

The Office will reply to three issues addressed by TracFone in its opening brief: the offer to increase the airtime minutes allocated to its wireless Lifeline service; TracFone's duty to reimburse the universal service fund (USF) for the costs incurred by the responsible agency for certification, and initial and continued verification of Lifeline enrollment; and, TracFone's rationale for refusing to fund Utah Emergency Telecommunications Services.

As was demonstrated at the hearing and in the Office's opening brief, the Commission must establish basic requirements for wireless Lifeline services that are

derived from State and Federal universal service programs. The fact that TracFone operates on a pre-paid basis does not alter the nature of the Lifeline service to be provided, or TracFone's obligation to contribute, on an equitable and nondiscriminatory basis, to the maintenance and enhancement of public telecommunications services to all Utah residents and businesses.

Designating TracFone as an ETC on the basis of its petition and the evidence before the Commission, is not currently in the public interest because by design TracFone limits the quality and character of its Lifeline and non-Lifeline business so as to evade the obligations of a public telecommunications corporation; TracFone's Lifeline service offering is inadequate; and, TracFone unfairly burdens and will degrade the public safety purpose of the public telecommunications network. Only if the Commission requires substantial revisions to its Lifeline service; requires that TracFone pay for the administration of Lifeline telephone service caused by TracFone; and, requires TracFone to contribute to the costs of the public telecommunications network, can TracFone qualify as an ETC Lifeline provider.

TracFone's opening brief provides further support for the Commission to conclude that wireless Lifeline is an evolving service that must be comprehensively and uniformly specified if the public interest and the interests of Lifeline beneficiaries are to be served. It is plain that the Commission must regulate the nature of Lifeline service to be provided by any pre-paid or post-paid wireless carrier as a condition to ETC designation.

II. TRACFONE’S OFFER OF 200 MINUTES DOES NOT ALTER THE NECESSITY OF THE COMMISSION TO ESTABLISH BASIC REQUIREMENTS FOR WIRELESS LIFELINE SERVICE AND REQUIRE THAT TRACFONE CONFORM TO THOSE REQUIREMENTS.

Having petitioned for ETC designation on August 27, 2009, only after the record was closed and the matter submitted to the Commission for decision did TracFone happen upon the revelation “that many low-income households would benefit from a wireless Lifeline service which would afford them greater quantities of usage.” TracFone Post-Hearing Brief at 8. In discovery and preliminary proceedings, in evidence filed with the Commission and in testimony at the hearing, the Office and the Division of Public Utilities expressed concerns for the adequacy of the airtime minutes offered by TracFone’s Lifeline service.¹ Throughout the proceedings, TracFone was allowed time and opportunity to re-evaluate its proposed Lifeline service in light of those concerns. What then is the significance of TracFone’s new proposal to allow at least 200 airtime minutes upon terms and conditions “still under development?” Id.

TracFone’s revised proposal is an acknowledgment that the Commission must ensure that wireless Lifeline service must duplicate wire-line Lifeline service defined by Utah law, taking into account that wireless has some unique benefits that may be valued

¹ TracFone acknowledged as much in its opening brief: “During the hearing, no issue received more testimony and attention than that involving the “value proposition” of TracFone’s Lifeline service.” TracFone Post-Hearing Brief at 7.

from the Lifeline consumers' perspective.² Also, the Office believes that the Commission should examine most carefully the manner in which TracFone alters its offering, withholds details, and seemingly reserves the right to develop the revised offering independent of the Commission and parties. In particular, to announce a revised offering on one of the core issues in this case, after the case is submitted, with no notice to the parties, is a stratagem that barely qualifies as legitimate.³ The standards for judging the public interest for a wireless ETC designation cannot be relinquished to a case-by-case procedure. The Commission must first establish the standards for ETC designation of a wireless carrier; in particular, a pre-paid wireless carrier operating on a model such as TracFone's.

TracFone's revised proposal may impact whether its Lifeline service offering is adequate under Utah law and regulation. However, without evidence of the new proposal's terms and conditions that is subjected to scrutiny in a formal adjudicative proceeding, the Commission cannot rely upon it to designate TracFone as an ETC. The Commission may, however, reopen the record, require TracFone to supplement its

² Under Utah law, Lifeline telephone service "shall consist of dial tone line, usage charges or their equivalent, and any Extended Area Service (EAS) charges." Utah Admin. Code R. 746-341-5 (A) (2010).

³ Throughout the proceeding, TracFone possessed all of the information from which TracFone now concludes that low-income consumers need more than the token airtime minutes offered in the petition. It should trouble the Commission and every party that TracFone only recognizes this at this point in time.

evidence and afford parties time to examine the proposal in a manner that is consistent with the Commission's rules and due process.⁴

Finally, until TracFone or any wireless ETC applicant demonstrates that customer service calls will not be charged against Lifeline minutes, ETC designation should be withheld.⁵

III. THERE IS NO LEGAL DISPUTE THAT TRACFONE MUST REIMBURSE THE STATE USF FOR THE LIFELINE CERTIFICATION/VERIFICATION CONTRACT BETWEEN THE COMMISSION, DIVISION AND THE RESPONSIBLE AGENCY.

In its opening brief, the Office described the connection between the State USF and the certification and verification process upon which TracFone must rely to enroll Lifeline consumers. Office Opening Post-Hearing Brief Part II c. at 10 – 12. TracFone insists that State USF laws and regulations do not apply to service providers that do not derive any intrastate revenues from customer billings. Also, TracFone insists that

⁴ This is, in fact, the only fair procedure. At the present, there is no evidence whatsoever pertaining to this proposal and the parties have been given no opportunity to conduct discovery or cross-examine a witness for TracFone. Consequently, TracFone's petition as filed, offering 67 minutes, is the only proposal before the Commission. Otherwise, consistent application of the evidentiary rulings in this case requires striking all references to the revised offer of 200 airtime minutes in TracFone's post-hearing brief.

⁵ TracFone is in the process of addressing this issue. However, there is no evidence of a tangible and specific system to which TracFone will commit or even target. See TracFone Post-Hearing Brief at 9, ft. note 16. "Use wire line phones" is not an acceptable solution, even temporary, unless there is evidence of a system in production upon which the Commission may rely.

without “a single shred of admissible evidence” to document the actual cost of verifying Lifeline eligibility, per transaction verification fees are burdensome, discriminatory and not competitively neutral.⁶ As a consequence, TracFone denies any obligation to pay for eligibility verification.

TracFone’s statement that there is no evidence relies, of course, upon the Administrative Law Judge’s exclusion of the Division’s evidence pertaining to the \$3.00 to \$4.00 actual cost for the responsible agency to verify an applicant’s Lifeline eligibility. The Office will not restate here in this pleading, the reasons the Office disagrees with the ruling.⁷ More importantly, TracFone erroneously interprets Utah law and regulations pertaining to Lifeline and the State USF. The State USF surcharge may be billed and collected up front. The rate is a percentage of billed interstate rates, which for TracFone is a per minute rate, billed when the customer selects the blocks for purchase and collected by the retail provider. Furthermore, the rate is determined, the rate is reviewed and the provider must then bill and collect it. There is no limit on how or when it is billed and collected. The law does not say the State USF surcharge is determined by the amount of a monthly paper or electronic bill.

⁶ TracFone’s theory of competitive neutrality appears to be that all telecommunications providers and customers must pay for the public telecommunications network and public safety systems except those such as TracFone that operate a business model to evade such fees.

⁷ The Office’s argument on the issue is found at Tr. 127, l. 18 to 128, l. 12.

In any event, the obligation of a pre-paid wireless ETC to either contribute to the State USF or to reimburse the State USF for the costs of eligibility verification is a question of first impression that the Commission must determine before it can find TracFone or any ETC petitioner as a Lifeline provider that will serve the public interest. An integral part of this proceeding will be to determine the cost of such verification based upon evidence.

IV. TRACFONE IS REQUIRED TO COLLECT AND REMIT CHARGES FOR EMERGENCY TELECOMMUNICATIONS SERVICES.

In its analysis of Utah's Emergency Telephone Service Law, Utah Code Title 69, Chapter 2, TracFone misreads and erroneously applies the one sub-part phrase it isolates for discussion. The statute, Utah Code Ann. Section 69-2-5 (3)(a), actually states:

(3) (a) Except as provided in Subsection (3)(b) and subject to the other provisions of this Subsection (3) a county, city, or town within which 911 emergency telecommunications service is provided may levy monthly an emergency services telecommunications charge on:

- (i) each local exchange service switched access line within the boundaries of the county, city, or town;
- (ii) each revenue producing radio communications access line with a billing address within the boundaries of the county, city, or town; and
- (iii) any other service, including voice over Internet protocol, provided to a user within the boundaries of the county, city, or town that allows the user to make calls to and receive calls from the public switched telecommunications network, including commercial mobile radio service networks.

This statute does nothing more than allow local government entities to levy emergency services telecommunications charges on all forms of telecommunications within the boundaries of the entity. Section 69-2-5 (3) further clarifies the statute's

purpose in (3)(c), allowing the governmental entity to determine the rate which may not exceed 61 cents per month, and in (3)(d)(iii) addressing where the service address is different than the location of the access line, or in the case of mobile telecommunications service, where the place of primary use is different than the billing address. Utah Code Ann. § 69-2-5 (3)(d)(iii) (West Supp. 2009).

After the local government entity determines the emergency services rate and levies it by appropriate ordinance, the telecommunications carrier “shall” bill and collect the levied charge. Utah Code Ann. § 69-2-5 (3)(f) (West Supp. 2009). As with the State USF surcharge, the requirement that TracFone bill and collect the emergency services charge is plain and unconditional, nor does it depend upon the carrier’s business model. Furthermore, as a matter of course, through credit or debit card information, or information necessary to assign a telephone number, or by simply asking, TracFone has or can readily acquire a service address or place of primary use.

Finally, TracFone insists that: “If the Commission has questions as to whether the [Emergency Telephone Services Law] is applicable, then the Commission may seek legal advice and guidance on that question from the State Tax Commission – the state agency responsible for interpretation and enforcement of that law.” TracFone Post-Hearing Brief at 18. The State Tax Commission has already answered those questions. The Tax Commission’s Publication 62, Sales Tax Information for Telecommunications Service Providers, Appendix 3 to the Office’s Post-Hearing Opening Brief, informs

telecommunications providers that “Amounts paid for prepaid wireless calling service are subject to sales and use tax and are sourced to the sale location.” The Tax Commission also states: “An E911 and a Poison Control Center emergency services charge is levied on each landline, cellular line and other service line, such as VOIP.” The Tax Commission uses ZIP+4 to identify taxing jurisdictions.

Publication 62 summarizes the taxes and charges to which prepaid service is subject: Emergency Services under Utah Code Ann. Section 69-2-5, Municipal Telecom taxes under Utah Code Ann. Section 10-1-404 and Sales and Use Taxes under Utah Code Ann. Section 59-12-103. The Commission should order that any applicant for ETC designation demonstrate payment as a condition to the designation.

V. CONCLUSION.

In its Post-Hearing Brief, at least with respect to the airtime minutes that must be allowed if ETC designation is in the public interest, TracFone admits that its initial petition does not serve the public convenience and necessity. However, TracFone’s intransigence with respect to the balance of issues is not persuasive that its Lifeline service will provide low-income customers and those dependent upon public assistance programs with the basic requirements for wireless Lifeline services that are required by Utah law and regulation. Only if the Commission enforces prepaid wireless carriers’ obligations to contribute, on an equitable and nondiscriminatory basis, to the maintenance

and enhancement of public telecommunications services to all Utah residents and businesses, is the ETC designation in the public interest.

Dated this 29th day of July 2010.

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CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing Brief of Utah Office of Consumer Services were served upon the following by electronic mail on July 29, 2010:

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