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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the 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

Reply Memorandum of the Division of Public Utilities
Docket No. 09-2511-01

The following is the reply memorandum of the Division of Public Utilities (Division or DPU) to the request of TracFone Wireless Inc. to become an Eligible Telecommunications Carrier (ETC) for lifeline services in the State of Utah.

This reply memorandum will address two main issues. First, it will address TracFone's response to its argument that it has no obligations to contribute to the state USF as a telecommunications corporation in Utah. Second, this reply memorandum will address the burden TracFone will place on the state USF and the Department of Community and Culture (DCC) and who should pay for that cost. Finally, the DPU will respond to TracFone's proposal to increase to 200 minutes its lifeline offer in Utah.

In its initial brief, TracFone argues "its ETC designation should not be held hostage to legal disputes over Utah's State USF laws." (TracFone's Initial Brief p. 9). It claims that even though it is imposing a significant burden on the state's USF, it should neither contribute to that fund as other ETCs in the state do, or pay the costs that it is imposing on the fund by receiving an

ETC designation in Utah. TracFone argues that it has no legal obligation to contribute to the USF or to cover the costs it will impose on the state's USF through the verification process with DCC.¹ Instead, TracFone continues to acknowledge that it is acceptable to it as a condition to it receiving an ETC designation in the state for the Commission to require it to pay a reasonable per transaction fee in order for it to access the DCC verification process. However, TracFone's offer is empty because its offer to cover its costs that it will impose on DCC is completely insufficient. Tracfone diverts the Commission's attention away from the \$3.00 per transaction costs on DCC by arguing that no credible evidence of the costs was introduced into the record and was unsupported by the Division. (TracFone Brief. P. 13).

TRACFONE SHOULD EITHER PAY INTO THE STATE USF OR COVER THE COSTS IT IS IMPOSING ON THE STATE USF BY THE GRANT OF ITS ETC DESIGNATION

The Division acknowledges that the State's USF rules found in R746-360 state that the surcharge will be determined annually by the Commission and "billed and collected" by all retail providers. TracFone's position is that, since it does not bill charges to an end user and collect them in a traditional bill like other providers, it has have no obligation under the rules to pay the USF fee. It is the Division's position that the rules may need to be changed, but that the statute that enables the Commission's authority is much broader, and requires TracFone, like all other telecommunications companies providing intrastate service, to contribute to the fund. The statute, 54-8b-15(10), states that all telecommunications providers in the state should contribute to the fund on equitable and non-discriminatory bases.² The statute authorizes the Commission to require all intra-state providers to contribute to the fund through explicit charges determined

¹ TracFone in its Brief still acknowledges that it should be required to pay a reasonable per transaction fee in order to utilize DCC's verification process. (Brief p. 12). However, it is not at all clear what it is offering to pay. During the hearings Mr. Fuentes indicated that Tracfone is willing to pay \$.15 per transaction. However, in its Brief, no mention is made of what fee TracFone is offering the Commission to cover it verification costs. The only reference is to the \$.07 per transaction costs it pays to Lexis to access certain customer information.

² TracFone (Brief p 11) argues that there is no evidence that other pre paid wireless companies contribute to the state USF. That is incorrect. Mr. Coleman testified that Virgin Mobile does pay into the state USF. Further he testified that AT&T and Verizon also pay into the fund but did not know if they were paying for any of their pre-paid wireless business.

by the Commission. The statute states that the fee should be collected in the form of an end user surcharge applied to intra-state rates. Nowhere does the statute mandate that the providers have to issue bills to its customer in order to collect the surcharge. Nowhere does it exempt the type of business plan that TracFone has developed as an exemption to paying this fee. The statute requires all companies to pay the fee on an equitable and non-discriminatory bases. If both companies are granted ETC status, TracFone will be in competition with Virgin Mobile who pays the USF fee. TracFone will be competing with ILECs for lifeline customers. Failure to pay the USF fees will give them a competitive advantage over other providers in the state. The Division, therefore, believes it would be appropriate for the Commission to Order TracFone to pay into the state USF as a condition of the Commission granting it ETC status.

The Division is not holding TracFone hostage over this USF issue since it has proposed an alternative until the Commission, the Courts or the legislature resolve this issue. That alternative is consistent with TracFone's offer to cover the reasonable per transaction costs that it would impose on the state USF by being granted ETC status. The difference is the amount of the costs for which it should be responsible for its use of the DCC verification process.

It is the DPU's position that as a condition of receiving ETC status in Utah that TracFone should pay into the state USF on its intrastate retail revenue. However, if it chooses not to, or if rules need to be written to explicitly address pre-paid wireless providers, then, in the interim, the Commission should determine what a reasonable per transaction fee should be to cover the costs imposed on DCC.

THE FAILURE OF THE ADMINISTRATIVE LAW JUDGE TO ADMIT THE DETAILED COST ANALYSIS DONE BY DCC AND THE DIVISION SHOULD NOT DIVERT THE COMMISSION'S ATTENTION AWAY FROM THAT COST ESTIMATE

If the Commission grants TracFone its ETC request, it, along with the Division, will be faced with the fact that DCC will not be capable of handling the increased verifications expected

as a result of TracFone entering the market. Most likely a new contract will need to be negotiated with DCC to pay for their increased costs as a direct result of TracFone's ETC designation. TracFone has acknowledged that they will place a burden on DCC and has agreed that the Commission should require them to pay a reasonable per transaction charge for verifications and other activities that DCC will perform. At least at the hearing, it indicated a willingness to pay \$.15 per transaction.³ In its Brief, TracFone argues that no evidence was admitted that supports the \$3.00 estimate developed by the DPU with the assistance of DCC. However, the fact that the ALJ chose not to allow in the detailed cost estimate produced by the DPU misses the point. The point of presenting the detailed cost estimate, instead of just stating the cost was \$3.00 (which is in evidence), was to be open with TracFone and the Commission as to the DPU estimate of what the impact on the USF could be. One must remember that the DPU is the administrator of the USF and, it along with the Commission, will be required to deal with the increased costs caused by TracFone's being granted ETC status. The DPU requests that, in this order, the Commission address what per transaction charge it will impose on TracFone.

It seems that the Commission has at least two choices. First, it could determine, independently of the hearing process, what additional costs will be imposed on the State USF as a result of TracFone. Once that is determined, the Commission could, in its decision, indicate what obligations will be placed on TracFone for a per transaction charge. TracFone could either decide to accept those obligations and become an ETC or not become an ETC in Utah. A second alternative, which is not the DPU's preference, would be to hold an additional hearing where, after guidance from the Commission, an estimate of the cost for using DCC would be developed.

³ In its Brief no mention is made of the \$.15 per transaction charge. The Brief only refers to the cost of \$.07 per transaction to access the Nexus database. The Commission should recall that the Nexus database only verifies for TracFone the address, telephone number and social security number of the applicant. It does not verify if the applicant is on a program that would qualify them for lifeline or does not verify the applicant's income. In addition only DCC can set up a system to make sure that a lifeline applicant is not also receiving lifeline services from another company.

This is not the DPU's preference because it is not reasonable for TracFone to be able to challenge a contract that will exist between the DPU, the Commission and DCC. Instead, TracFone's interest should be limited to either paying into the State USF or paying the costs of verification that the Commission imposes on them as a result of any new costs to DCC that are to be recovered through the USF.

In conclusion, the DPU urges that the Commission not give TracFone a free ride to neither pay into the state USF or to materially contribute to the costs they will impose on the State USF as a result of it being granted ETC status. If they do not pay into the USF or only pay the \$.07 to \$.15 costs for verification they will impose significant new costs on the state USF. It will give them a competitive advantage over other ILECs who offer lifeline service and a competitive advantage over any other pre paid wireless company who is paying into the state USF and offering lifeline services in competition with TracFone.

THE COMMISSION SHOULD BE CAUTIOUS ABOUT TRACFONE'S OFFER TO INCREASE ITS MINUTES TO 200 WITHOUT A FULL UNDERSTANDING OF WHAT IS BEING OFFERED

In its Brief TracFone indicated that it would increase the number of free minutes to 200. Although this appears positive, it is not clear to the DPU why it did not make this known at the hearing so that a full understanding of what services it would be making available would be known. For example, Tracfone's Brief does not tell us if those 200 minutes a month will roll over, as did the 67 minutes each month. It seems to the DPU that the best way for the Commission to address what its expectations are with respect to such issues as number of minutes or costs of additional minutes is, in its Order, establish certain minimum standards and require TracFone to make a compliance filing detailing the proposed offering that they will make in Utah. This detailed compliance filing could also be used to address a Commission order that

would require Tracfone to pay for some or all costs but that provides Tracfone the option of either paying into USF or paying a per transaction fee.

CONCLUSION

In conclusion the DPU does not believe that it is in the public interest to grant ETC status to TracFone unless the issues revolving around its payments to the USF are addressed or, alternatively, the Commission clearly state what obligations to cover its costs it will impose on the state USF are paid for by TracFone.

Respectfully submitted this _____ day of July, 2010.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief of the Division of Public Utilities was sent by electronic mail, to the following on July ___, 2010.

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