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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Consideration of the Costs to the Department of Community and Culture for Determining Eligibility for Lifeline Applicants.	Docket No. 10-2528-01 UTAH OFFICE OF CONSUMER SERVICES' RESPONSE TO THE SEPTEMBER 21, 2010 AMENDED NOTICE OF SCHEDULING CONFERENCE
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Pursuant to Utah Code Section 54-10a-301 and Utah Admin. Code R. 746-100-5, as requested by the September 21, 2010 Amended Notice of Scheduling Conference, the Utah Office of Consumer Services files the following comments and recommendations concerning “the issues that need to be addressed in this docket, and to establish an expeditious schedule for discovery, the distribution of pre-filed testimony, and hearings.” The Utah Office of Consumer Services will participate in the docket on behalf of residential and small commercial telephone consumers.

The origin of this docket is the Commission’s September 13, 2010 Report and Order addressing the certification, verification, and continued verification of Lifeline enrollment for TracFone’s Lifeline offering. The Report and Order states at pages 14 and 15:

VERIFICATION BY THE DEPARTMENT OF COMMUNITY AND
CULTURE (DCC)

As a condition to ETC designation, there is no dispute that TracFone “should be required to pay a reasonable per transaction fee to utilize the DCC eligibility verification database.” *Post-hearing Brief of TracFone*, p.13. Utah Admin. Code R746-341 contains specific provisions for determining eligibility, and the DCC is the agency responsible for assisting with determination of eligibility. *See Utah Admin. Code R746-341-3, -4*. Although TracFone and the Division proposed what they thought were reasonable per transaction costs, no party provided the Commission with reliable information on what those costs would actually be, or how the DCC should verify Lifelines eligibility given the propensity for abuse. There is no dispute that the high number of additional Lifeline applicants will place a heavier burden on the DCC, *see Transcript*, p.23, ll.4-21, p.25, ll.18-24, with TracFone itself estimating an increases [*sic*] could be “anywhere between 1,000 [to] 2,000” per week. *Id.*, p.26, ll.9-13. Such a burden would bear not only on the DCC’s ability to verify eligibility for Lifeline applicants—including those not applying through TracFone, but also bear on DCC’s ability to qualify applicants for other life-sustaining energy assistance programs, e.g. HEAT programs, etc. Without knowing the costs such a burden will impose on the DCC, and without knowing how DCC will be able to meet its duties given an expected increase in Lifeline applicants, the Commission cannot grant the ETC designation at this time as it would not be in the public interest. *Therefore, it is appropriate that the Commission commence a proceeding where the Commission may determine the costs and processes whereby the DCC will verify Lifeline applicant qualifications.* [Emphasis added.]

The Commission conditionally granted TracFone's application, "but subject first to the final determination of 'the reasonable per transaction fee to utilize the DCC eligibility verification database'".

ISSUES

ISSUE: Has the Commission properly designated the nature and scope of the docket?

This proceeding is incorrectly described as a consideration of the Department of Community and Culture's costs to determine Lifeline eligibility. DCC is not a proper party, and an investigation into its budget, and fiscal, administrative and management policies and practices is not within the Commission's authority. The Utah Department of Community and Culture is a state agency comprised of several divisions, one of which is the Division of Housing and Community Development. The Housing Division contains the State Energy Assistance and Lifeline Office (collectively referred to as DCC). The DCC is charged by statute with distributing and administering home energy cost assistance for low-income consumers. Utah Code Ann. §9-12-102 (West 2004). The DCC also administers the seasonal moratorium for involuntary termination of utility services. Utah Code Ann. §9-12-201 (West Supp. 2010). The Energy Assistance Office performs these functions under its own administrative rules. Utah Admin. Code R. 195-1 to R. 195-8 (2010).

The DCC's only link to the Commission is contractual; a Memorandum of Agreement to provide services in connection with the Commission's Utah Lifeline Telephone Assistance Program. A copy of the MOA is Attachment 1.¹ Of particular importance to this proceeding is the fact that the Commission only contracts with DCC for a service, reserving in all respects its authority over the Utah Lifeline Telephone Assistance Program. Together with the Utah Division of Public Utilities, the Commission is the "responsible agency" that administers the certification, verification, and continued verification of Lifeline enrollment. Utah Admin. Code R. 746-341-2 (B.) (2010).

ISSUE: Has the Commission correctly stated the purpose of this docket and the questions to be decided?

This proceeding is incorrectly described as one to determine either "the costs and processes whereby the DCC will verify Lifeline applicant qualifications," or "the reasonable per transaction fee to utilize the DCC eligibility verification database." The costs and processes to verify Lifeline applicant qualifications for prepaid wireless carriers are not determined or determinable by the DCC's budget, and fiscal, administrative and management policies and practices. These costs cannot be determined from the current Commission MOA with the DCC. The MOA provides that the Commission and Division will reimburse the DCC "for actual costs for

¹ The parties to the MOA are the DCC Division of Housing and Community Development, the Commission and the Utah Division of Public Utilities.

services rendered in behalf of the Utah Telephone Assistance (Lifeline) Program . . . ,” up to \$193,200 per year, funded by the Utah State Universal Public Telecommunications Service Support Fund. The actual costs for those services result from the DCC’s ability to perform the Lifeline certification process as an adjunct to its primary energy assistance certification processes. By contracting with DCC, the Commission gains the benefit of the DCC’s resources and database. However, the reimbursement amount under the MOA is not probative of the per transaction fee that must be charged prepaid wireless ETC’s.²

This proceeding as it is now described may have the effect of excluding evidence about resources available to assist the Commission in its duties as the responsible agency. The Office is aware that TracFone has been soliciting the Utah Department of Workforces Services as an alternative for determining Lifeline eligibility. The Office supports examining all options, but it also believes that the Commission in a plainly and broadly defined adjudicative proceeding should do such an examination. The purpose of the proceeding should be described in such a fashion to allow and encourage the examination of all reasonable options.

² The issue is not what a vendor may charge the Commission to perform the Commission’s certification function, but what should the prepaid wireless provider pay to the Commission as a condition to the ETC status. In this docket as currently described, it is not at all clear that the Commission is examining the full cost of the service and may be unjustifiably requiring DCC to justify the cost to perform its independent statutory duties. The fact is that in Utah the rules governing certification and verification of Lifeline eligibility are the same for any ETC; prepaid wireless, other wireless or wireline.

Furthermore, any additional service to be provided to the Commission by DCC or any state agency is subject to mutually acceptable contract terms. As the Commission has recognized, the current MOA may not absorb TracFone's demands let alone all prepaid wireless Lifeline eligibility certifications.

There is no dispute that the high number of additional Lifeline applicants will place a heavier burden on the DCC, *see Transcript*, p.23, ll.4-21, p.25, ll.18-24, with TracFone itself estimating an increase [sic] could be “anywhere between 1,000 [to] 2,000” per week. *Id.*, p.26, ll.9-13. Such a burden would bear not only on the DCC's ability to verify eligibility for Lifeline applicants—including those not applying through TracFone, but also bear on DCC's ability to qualify applicants for other life-sustaining energy assistance programs, e.g. HEAT programs, etc.³

ISSUE: Does the Commission intend the order in this docket to apply to only TracFone, the three pending prepaid wireless ETC applications, to all wireless ETCs, or to all ETCs?

It is by no means clear how broadly or narrowly the Commission intends this docket to apply. See Report and Order footnote 11, and September 21, 2010 Amended Notice of Scheduling Conference. Only an adjudicative proceeding that is commenced, filed and served according to Utah Code Ann. Section 63G-4-201 (West Supp. 2010), can command an appearance or a knowing waiver of the right to appear, and result in a binding final order. Utah Code Ann. §63G-4-102 (1) (a) (2009).

³ If the Commission presumes that the DCC will or has agreed to incorporate prepaid wireless Lifeline certifications, verifications and continued verification into the current MOA then the Commission should disclose this in a notice of agency action under Utah Code Ann. Section 63G-4-201 (West Supp. 2010).

Furthermore, the September 21, 2010 Amended Notice of Scheduling Conference does not adequately provide notice of the questions to be decided, the legal authority and jurisdiction under which the proceeding will be maintained, nor does it provide adequate notice to parties whose rights, duties, privileges, immunities or legal interests will be determined or notice of the requirement that an interested party who does not appear will be bound by the final agency action. Utah Code Ann. §63G-4-201 (2) (West Supp. 2010). For example, Attachment 2 to this pleading evidences that Sprint, a wireless ETC, is actively promoting a Lifeline service. The Office is informed that Sprint determines Lifeline eligibility based upon an interpretation of the requirements that may be inconsistent with the TracFone Report and Order and the order that may come from this proceeding.

As stated earlier, in Utah the rules governing certification and verification of Lifeline eligibility are the same for any ETC: prepaid wireless, other wireless or wire line. The Commission's purpose for the adjudicative proceeding and the questions to be decided should be comprehensive as to any ETC so that standards for certification and verification of Lifeline eligibility are the same or consistent for all ETCs and any differences are justified by substantial evidence.

ISSUE: Has the Commission correctly stated the purpose of this docket and the questions to be decided in relation to the source of funding for certifying Lifeline eligibility?

As the “responsible agency” that administers the certification, verification, and continued verification of Lifeline enrollment, Utah Admin. Code R. 746-341-2 (B.) (2010), the Commission must use a separate system of accounts for the collection and distribution of the fees charged prepaid wireless ETCs in order to operate the State USF in a manner that is “nondiscriminatory and competitively and technologically neutral.” Utah Admin. Code R. 746-341-8 (A.) (2010) states: The total cost of providing Lifeline telephone service, including the administrative costs of the ETCs and the costs incurred by the responsible agency, shall be recovered and funded as provided in [Utah Code] 54-8b-15.” Utah Code Ann. Section 54-8b-15 (7) states that to the extent not funded by a federal universal service fund or other federal jurisdictional revenues, the State USF shall be used to defray the costs, as determined by the commission, of any ETC in providing commission-approved lifeline services. The balance of Section 54-8b-15 provides that all ETCs must contribute to the fund.

In the case of any carrier that does not pay its full share of State USF, it would be discriminatory and competitively and technologically biased against all contributors to the State USF for the Commission to grant those carriers access to the existing Lifeline administration and data base under terms that mirror those in the Commission/DCC MOA, violating Utah Code Ann. Section 54-8b-15 (5). To calculate the fee that the Commission will charge an ETC for eligibility certification or verification using the process and resources of the MOA will cause those wire line

and wireless carriers that contribute to the State USF, and their customers, a large majority of whom are the Office's constituents, to subsidize prepaid wireless carriers' access to State USF funded programs.⁴

RECOMMENDATIONS

The Office recommends that the Commission commence a formal adjudicative proceeding pursuant to Utah Code Ann. Section 63G-4-201(West Supp. 2010).

All references to the DCC in the caption, in the statement of the purpose of the proceeding and in the questions to be decided, should be deleted.

A protective order should be issued that all data requests concerning the MOA, including but not limited to budget and fiscal conditions, audits, time studies, invoices and payments, are to be directed to the Division. The protective order should preclude any data requests to the DCC.

The Commission should identify and serve or give notice to all telecommunications corporations who it intends to be bound by the outcome of the proceeding.

DATED this 30th day of September 2010.

⁴ The competitive advantage awarded TracFone is particularly evident when one considers that prepaid wireless carriers choose to provide telecommunications services via third parties. The effect is that "With prepaid providers, like TracFone, however, there is no mechanism to collect the surcharge at the point of sale when the customer buys directly from a third-party retailer like Walmart or Target, *see Transcript*, pp. 54-56, as is most commonly the case." Report and Order Page 7. TracFone's business model places collection of funds for Lifeline administration and eligibility determinations out of reach.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was served upon the following by electronic mail or U.S. Mail sent September 30, 2010:

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