

**Before the
UTAH PUBLIC SERVICE COMMISSION**

Utah Administrative Code R746-8,
Proposing to Repeal R746-360, T746-341,
and R746-343

)
) Docket No. 17-R008-01
)
)
)

COMMENTS OF TRACFONE WIRELESS, INC.

Pursuant to the Commission’s Request for Comments issued on October 11, 2017, TracFone Wireless, Inc. (“TracFone”) comments on the proposed rules related to the Utah Universal Service Fund (“UUSF”) published in this docket on July 5, 2017.

TracFone’s comments are limited to the proposed requirement that an Eligible Telecommunications Carrier (“ETC”) seeking to participate in the state Lifeline program (*i.e.*, receive UUSF support) must hold a certificate of public convenience and necessity (“CPCN”) from the Commission, as well as be designated as an ETC in accordance with 47 U.S.C. § 214(e). As explained in these comments, requiring wireless ETCs to obtain a CPCN exceeds the Commission’s statutory authority under Utah law and is inconsistent with federal law, specifically, 47 U.S.C. § 332(c)(3)(A), which prohibits states from regulating entry or rates of wireless carriers. Moreover, the Commission sufficiently reviews the qualifications of wireless service providers when it addresses applications for designation as an ETC for purposes of providing Lifeline service to low-income Utah households. By these comments, TracFone also advises the Commission that there is a strong market for a Lifeline product that includes a voice component along with broadband service.

BACKGROUND

TracFone is a reseller of commercial mobile radio service (“CMRS”) throughout the United States, including the State of Utah. TracFone is currently the nation’s leading provider of prepaid wireless telecommunications services, and one of the largest wireless carriers overall, with more than 25 million subscribers nationwide. TracFone provides resold wireless telecommunications service consisting of services obtained from licensed operators of wireless networks. TracFone has provided CMRS throughout the State of Utah continuously for more than fifteen years and has provided Lifeline service to qualifying Utah low-income households for seven years.¹ On June 23, 2017, TracFone filed a petition with the Commission seeking authorization to obtain UUSF funds so that it may provide an enhanced Lifeline service to qualifying low-income Utah households.² That petition has been stayed pending the completion of this rulemaking proceeding.³

The purpose of this proceeding is to adopt rules implementing the Utah State Legislature’s recent amendment of statutory provisions related to the UUSF. The amended statute, codified at Utah Code § 54-8b-15, became effective July 1, 2017. The amendments to Section 54-8b-15 relate

¹ *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 Customers*, Amended Report and Order and Order on Request for Limited Reconsideration, Docket No. 09-2511-01, December 1, 2010, *aff’d on recons.*, Order on Reconsideration, March 9, 2011.

² *In the Matter of the Request of TracFone Wireless, Inc. to Amend its Designation as an Eligible Telecommunications Carrier to Receive Utah Universal Service Fund Support for Lifeline Service*, Petition, Docket No. 17-2511-01, June 23, 2017.

³ *See id.*, Order Staying Petition, June 30, 2017.

to several aspects of the Utah USF, including funding, calculation of a contribution charge, and permitted uses of support. In addition, the amendments provide the following:

A facilities-based or nonfacilities-based wireless telecommunications provider is eligible for distributions from the Universal Telecommunications Service Support Fund under the lifeline program described in Subsection 3(b) for providing lifeline service that is consistent with the Federal Communications Commission's lifeline program for low-income consumers.⁴

Therefore, pursuant to Section 54-8b-15, all wireless telecommunications providers, whether they are facilities-based or resellers, are eligible for distributions from the UUSF to support their Lifeline service. The statute further provides that the Commission “may impose reasonable conditions for providing a distribution to a wireless telecommunications provider under the lifeline program.”⁵ On July 5, 2017, the Commission issued a Notice of Proposed Rulemaking and Request for Comments in this docket. The Commission's proposed rules require wireless providers and broadband-only providers to obtain a CPCN as a condition for participating in the state Lifeline program. As detailed in these comments, this condition is not a “reasonable condition” because it is inconsistent with both Utah and federal laws applicable to wireless service providers.

The Commission's proposed rules also address the minimum service standard for Lifeline services that include voice service. The draft rules, at R746-8-403(2)(a), provide that the amount of UUSF support for Lifeline service may not exceed \$3.50 per month for a service that: (1) meets FCC broadband Lifeline requirements; and (2) allows, at no charge beyond the basic monthly fee,

⁴ Utah Code § 54-8b-15(15)(a) (2017).

⁵ *Id.* § 54-8b-15(15)(b).

unlimited texting and at least 750 voice minutes per month.⁶ In the July 5, 2017 Notice of Proposed Rulemaking the Commission noted that the Federal Communications Commission (“FCC”) plans to phase out the requirement that a Lifeline offering include voice service and recognized that it would be operating outside of the FCC’s regulatory framework for Lifeline if it permitted UUSF support to be used for a voice-only service or authorized a higher level of UUSF support for a bundled voice and broadband service. The Commission invited comment as to whether there is a market for a Lifeline product that includes only voice service or that includes voice service along with broadband service. TracFone explains in these comments that there is a strong market for Lifeline voice services.

I. The Commission Lacks Authority to Require Wireless Carriers Service Providers to Obtain a CPCN.

The Commission’s proposed rules condition receipt of UUSF support on holding a CPCN. Although on its face this proposed condition would be applicable to all carriers seeking UUSF support, the additional burden of complying with this condition would fall solely on wireless carriers, which, unlike wireline carriers, are not otherwise required by Utah law to obtain a CPCN. Section 54-4-25 of the Utah Code states that several types of public utilities, including a “telephone corporation”:

May not establish or begin construction or operation of a line, route, plant, or system or of any extension of a line, route, plant, or system, without having first obtained from the commission a certificate that present or future public convenience and necessity does or will require the construction.

Only those entities listed in Section 54-4-25 are required to obtain a CPCN. Corporations providing commercial mobile radio service, as defined in 47 U.S.C. § 332, however, are

⁶ The draft rules provide that the amount of UUSF Lifeline support may not exceed \$2.00 per month for a service that meets the FCC broadband Lifeline requirements and does not include a voice component. *See* Utah Admin. Code Draft R746-8-403(2)(b).

specifically excluded from the statutory definition of telephone corporation. Section 54-2-1(31)(b)(i) of the Utah Code provides that “telephone corporation” does not mean a “corporation providing: “intrastate telephone service offered by a provider of cellular, personal communication systems (PCS), or other commercial mobile radio service as defined in 47 U.S.C. Sec. 332 that has been issued a covering license by the Federal Communications Commission.”

CMRS providers, such as TracFone, are not telephone corporations, and may not be subjected to laws that are not applicable to CMRS providers.⁷

The Utah Legislature authorized the Commission, in Section 54-8b-15(15)(b), to impose “reasonable conditions” on the distribution of UUSF support to wireless telecommunications providers. However, such conditions may not be inconsistent with Utah law, which only requires public utilities, such as telephone corporations (which exclude wireless providers), to obtain a CPCN. Indeed, in Section 54-8b-15(12) the Utah Legislature included an express direction to the Commission that “[nothing] in this section shall be construed to enlarge or reduce the commission’s jurisdiction or authority, as provided in other provisions of this title. There is no provision in Title 54 that empowers the Commission to require wireless providers to obtain CPCNs. As explained above, Section 54-4-25 only requires public utilities, which include telephone corporations, to obtain CPCNs; wireless service providers are not telephone corporations under Utah statutory law and therefore are not subject to the CPCN requirement.

⁷ CMRS resellers are also included within the definition of “telephone corporation” because such corporations provide (*i.e.*, resell) to consumers intrastate telephone service offered by a provider of CMRS that has been issued a license by the Federal Communications Commission. Moreover, resellers are providers of commercial mobile service as defined in 47 U.S.C. § 332(d)(1) (defining commercial radio service as a mobile service that is provided for profit and makes interconnected service available to the public).

The only other section of the Utah Code regarding the Commission’s authority to issue CPCNs to telecommunications corporations similarly is inapplicable to wireless service providers. Section 54-8b-2.1(1), which is titled “Competitive entry,” permits the Commission to “issue a certificate to a telecommunications corporation authorizing it to compete in providing local exchange services or other public telecommunications services in all or part of the service territory of an incumbent telephone corporation”⁸ In the situation contemplated in the proposed rules, wireless service providers would not be seeking authorization to compete in providing telecommunications services in the territory of an incumbent telephone corporation. Rather, wireless service providers would only be seeking to offer enhanced Lifeline service benefits supported by the UUSF in areas of Utah for which the Commission has already authorized them to provide Lifeline service supported by the federal USF. As such, wireless service providers would not need CPCNs to provide Lifeline service in Utah as a designated ETC. More importantly, under federal law, the Commission may not impose any entry requirements on wireless service providers because such regulation is explicitly preempted by 47 U.S.C. § 332(c)(3)(A) (“ . . . no State or local government shall have any authority to regulate the entry of or rates charged by any commercial mobile service”). Requiring a wireless service provider to obtain a CPCN as a condition for providing wireless Lifeline service is precisely the type of entry regulation prohibited by Section 332.

II. The ETC Designation Process Subjects Wireless Carriers to Sufficient Scrutiny Regarding Their Ability to Provide Lifeline Service in Utah.

In addition to being inconsistent with federal and Utah law, the Commission’s proposal to require wireless service providers seeking UUSF support to obtain a CPCN is not necessary. The

⁸ Utah Code, § 54-8b-2.1(1).

ETC designation process ensures that such providers are qualified to provide Lifeline service to Utah's residents. As such, there is no reason for a participant in the state Lifeline program to be designated as an ETC by the Commission in accordance with 47 U.S.C. § 214(e) and to hold a CPCN.

The ETC designation process enables the Commission to thoroughly examine whether a wireless service provider meets the federal requirements for receipt of federal USF support.⁹ Federal law includes a requirement that a telecommunications carrier seeking ETC designation have the ability to offer services supported by the federal USF and that designation be in the public interest.¹⁰ An ETC designation proceeding gives interested parties ample opportunity to seek information from the applicant, requires the applicant to submit testimonial and other evidence of its qualifications to provide Lifeline service, and enables the Commission to conduct a hearing and make a decision based on the record. That same opportunity would exist in any ETC designation process involving ETC designation to receive UUSF support.

The Commission has provided no basis for requiring a wireless carrier that has been designated as an ETC to also obtain a CPCN. An applicant for a CPCN must provide "testimony and exhibits in support of the company's technical, financial, and managerial abilities to provide the telecommunications services applied for and a showing that grant of the certificate is in the public interest."¹¹ The Commission's rules further provide that a CPCN applicant must: provide various details of the services to be offered; describe the education and professional experience of relevant managers; demonstrate financial ability through disclosure of certain statements; prove

⁹ The Commission's rules do not set forth any additional requirements for designation as an ETC beyond the federal requirements.

¹⁰ See 47 U.S.C. § 214(e)(1) and (2).

¹¹ Utah Admin. Code R746-349-3.

managerial and technical ability by producing CPCNs from other jurisdictions; and submit a statement regarding complaints or investigations of unauthorized switching of service providers or other illegal activities.¹² These requirements are justified when a wireline service provider subject to the Commission's jurisdiction is seeking to enter the Utah market to compete with incumbent carriers. However, as discussed above, wireless service providers are permitted by federal law to provide service in Utah and are not subject to the Commission's authority for purposes of determining whether such carriers may enter the Utah market. The Commission has offered no reason for subjecting wireless service providers that are already authorized to provide service in Utah and that have been designated as an ETC to market entry requirements.

Finally, TracFone would not oppose an amendment to the Commission's rules consistent with 47 C.F.R. § 54.202 to determine whether a wireless service provider is qualified to receive UUSF support for Lifeline service. Section 54.202, applicable to FCC ETC designations pursuant to 47 U.S.C. 214(e)(6), directs a carrier to: (1) certify that it will comply with the service requirements applicable to the support that it receives; (2) demonstrate its ability to remain functional in emergency situations; (3) demonstrate that it will satisfy applicable consumer protection and service quality standards; (4) demonstrate that it is financially and technically capable of providing the Lifeline service; and (5) submit information describing the terms and conditions of any service plans offered to Lifeline subscribers. The requirements in Section 54.202 address many of the subjects set forth in the CPCN rules, such as service descriptions and financial and technical capability to provide service. Amending the Commission's rules regarding participation in the state Lifeline program to include the showings required by Section 54.202 of the FCC's rules would provide the Commission with additional assurance that a wireless service

¹² See generally, Utah Admin. Code R746-349-3(1)-(18).

provider can capably offer Lifeline service while not violating Utah or federal law prohibitions on regulating market entry of wireless carriers.

III. Voice Service Is an Essential Component of Lifeline Service for Many Low-Income Households.

Under the FCC's current rules, Lifeline support for most standalone wireline voice telecommunications services and all standalone wireless voice services will be gradually eliminated by December 1, 2021. During the phased elimination of Lifeline-supported voice service, the amount of Lifeline support available for voice service (whether provided on a standalone basis or as a voice service bundled with broadband service that does not meet the FCC's minimum service standards for broadband) decreases until it is no longer available. After December 1, 2021, federal Lifeline support will only be available to ETCs offering service that includes broadband service that meets the FCC's minimum service standards.¹³ The Commission correctly recognizes that making UUSF support available for Lifeline voice services would not be consistent with the federal Lifeline rules. However, as explained below, low-income individuals should have the option and opportunity to receive voice services supported by the Lifeline program.

TracFone was disappointed with the FCC's decision to terminate Lifeline support for voice services because there are low-income individuals for whom the most essential telecommunications service is the ability to make a phone call or receive a phone call, without regard to whether those persons can afford a bundled Lifeline service which includes both voice and broadband service.¹⁴ While the growing importance of broadband as an essential component

¹³ See 47 C.F.R. § 43.403(b)(1)-(2).

¹⁴ As a way to address Lifeline customers' demand for voice service, TracFone has asked the FCC to clarify that its rules allow Lifeline providers to meet the minimum service standards for Lifeline through a "units" proposal. Specifically, TracFone has proposed to provide each of its Lifeline

of 21st Century life cannot be disputed, having access to the Internet at broadband speed is more critical for some consumers than for others. In TracFone’s experience, many existing Lifeline customers may not perceive a want or a need for broadband Internet access, but rely upon available and affordable voice telephone service – to keep in contact with family members, to reach and be reached by employers, to communicate with health care providers, and to report emergencies, including life-threatening situations. Importantly, Lifeline customers rely on voice telecommunications service to access emergency 911 services and critical state, city and community services which rely on N11 numbers, including, for example, 211 (United Way); 311 (Municipal Governments non-emergency services); 511 (traffic or police non-emergency services); 711 (TDD and relay services); and 811 (underground public utility location services). At this time, these public safety and essential community services are not consistently and reliably available using broadband services. Given the importance of voice service to Utah Lifeline customers and the fact that federal Lifeline support for voice service will be eliminated within the next few years, the Commission should make UUSF support available for voice services offered under the Lifeline program.

customers with 1,000 units per month, with each unit equating either to one minute of wireless voice service or 1MB of mobile broadband data service. Providing Lifeline customers with units of service that could be used for voice or data service would allow each customer to decide how to use the Lifeline service depending on his or her current needs and preferences. The FCC recently indicated its plan to invite comment on the units proposal, but a final decision is not expected for at least several months. *See Bridging the Digital Divide for Low-Income Consumers, et al.* (Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry), ¶ 75, released on October 25, 2017 as a draft for tentative consideration at the FCC’s meeting on November 16, 2017.

CONCLUSION

TracFone respectfully requests that the Commission consider TracFone's views and recommendations set forth in these comments as it determines how to revise its rules governing the UUSF.

Respectfully submitted,



Gary A. Dodge, #0897
Phillip R. Russell, #10445
HATCH, JAMES & DODGE
10 West Broadway, Suite 400
Salt Lake City, UT 84101
Telephone: (801) 363-6363
Facsimile: (801) 363-6666
Email: gdodge@hjdllaw.com
prussell@hdjllaw.om

Mitchell F. Brecher
Debra McGuire Mercer
GREENBERG TRAUERIG, LLP
2101 L Street, NW, Suite 1000
Washington, D.C. 20037
(202) 331-3100
Fax: (202) 331-3101
brecherm@gtlaw.com
mercerdm@gtlaw.com

Counsel for TracFone Wireless, Inc.

November 16, 2017

CERTIFICATE OF SERVICE

I certify that on November 16, 2017, a true and correct copy of the foregoing Comments of TracFone Wireless, Inc. was served by email on the following:

Bob Kraut (bob@atcnet.net)
Albion Telephone Company, Inc.

Jenny Prescott (jenny.prescott@allwest.com)
All West Utah, Inc.

Janet McFarland (j.mcfarland@centracom.com)
Bear Lake Communications

Bryan Scott (bscott@beehive.net)
Beehive Telecom, Inc.

Brock Johansen (bjohansen@emerytelecom.com)
Carbon-Emery Telecom Inc.

Blake Madsen (bmad@cut.net)
Central Utah Telephone

Torry Somers (Torry.R.Somers@centurylink.com)
James Farr (James.Farr@centurylink.com)
CenturyLink

Ted Hankins (ted.hankins@centurytel.com)
CenturyTel of Eagle, Inc.

Kirk Lee (kirk.lee@ftr.com)
Citizens Telecommunications Company of Utah

Sharon Bertelsen (bertelsens@ballardspahr.com)
Jerry Oldroyd (oldroydj@ballardspahr.com)
Comcast

Matthew DeTura (mdetura@ctia.org)
Benjamin J. Aron (baron@ctia.org)
CTIA

Diane (diane@directcom.com)
Direct Communications Cedar Valley, LLC

J. Frandsen (jfrandsen@emerytelcom.com)
Emery Telephone

Douglas G. Pace (dpace@ftitel.net)
Farmers Telephone Company, Inc.

Kent Sanders (kent@gtelco.net)
Gunnison Telephone Company

D. Woolsey (dwoolsey@emerytelcom.com)
Hanksville Telecom, Inc.

Lance Brimhall (lbrimhall@jive.com)
Jive Communications, Inc.

Dallas Cox (dallasc@mail.manti.com)
Manti Telephone Company

Barbara Saunders (west.consumer.relations@czn.com)
Navajo Communications Company, Inc.

Blake Madsen (bmad@cut.net)
Skyline Telecom

Alan Torgersen (alant@socen.com)
South Central Utah Telephone Association, Inc.

Bruce Todd (btodd@stratanetworks.com)
UBTA-UBET Communications, Inc.

John Woody (jowoody@union-tel.com)
James Woody (jwoody@union-tel.com)
Union Telephone Company

Brett N. Anderson (bretta@blackburn-stoll.com)

Vicki Baldwin (vbaldwin@parsonsbehle.com)

Sharon Bertelsen (bertelsens@ballardspahr.com)

Larry Bowman (larry.bowman@charter.com)

Brian W. Burnett (bburnett@kmclaw.com)

cflregulatory@chartercom.com

Eddie L. Cox (ecox@cut.net)

Carl Erhart (carl.erhart@ftr.com)

William J. Evans (bevans@parsonsbehle.com)

Amy Gross (agross@tminc.com)

Alan Haslem (ahaslem@mleainc.com)
Ray Hendershot (ray.hendershot@beehive.net)
William Huber (william.huber@questar.com)
Bill Hunt (williamp.hunt@dish.com)
David R. Irvine (drirvine@aol.com)
Kristin L. Jacobson (Kristin.l.jacobson@sprint.com)
Brock Johansen (bjohansen@emerytelcom.com)
Dawn Kubota (kubotad@ballardspahr.com)
Jasen Lee (jlee@desnews.com)
Shirley Malouf (srmalouf@stoel.com)
Jennifer H. Martin (jhmartin@stoel.com)
Steve Mecham (sfmecham@gmail.com)
Roger Moffitt (roger.moffitt@att.com)
Gregory Monson (gbmonson@stoel.com)
Sharon Mullin (slmullin@att.com)
Thorvald Nelson (tnelson@hollandhart.com)
Janice Ono (Janice.ono@att.com)
Sheila Page (spage@utah.gov)
Mike Peterson (mpeterson@utahcooperatives.org)
Pam Pittenger (pam.pittenger@ftr.com)
Jenny Prescott (jenny.prescott@allwest.com)
Bruce Rigby (bruce@ucmc-usa.com)
Gary Sackett (gsackett@joneswaldo.com)
Kira Slawson (kiram@blackburn-stoll.com)
Alan L. Smith (alanakaed@aol.com)
Ted D. Smith (tsmithlaw@earthlink.net)

Kendra Thomas (kthomas@kfrservices.com)

Bruce H. Todd (btodd@stratanetworks.com)

Jake Warner (jakew@beehive.net)

Patricia Schmid (pschmid@agutah.gov)

Justin Jetter (jjetter@agutah.gov)

Steven Snarr (stevensnarr@agutah.gov)

Robert Moore (rmoore@agutah.gov)

Assistant Utah Attorneys General

Bill Duncan (wduncan@utah.gov)

Chris Parker (cparker@utah.gov)

Erika Tedder (etedder@utah.gov)

Division of Public Utilities

Michele Beck (mbeck@utah.gov)

Cheryl Murray (cmurray@utah.gov)

Office of Consumer Services

/s/ Lauren Mckan