

PAUL H. PROCTOR (2657)
Assistant Attorney General
Utah Office of Consumer Services
MARK L. SHURTLEFF (4666)
Attorney General
160 East 300 South
P.O. Box 140857
Salt Lake City, Utah 84114-0857
Telephone (801) 366-0552
pproctor@utah.gov

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' OPENING POST-HEARING BRIEF
--	--

I. INTRODUCTION AND RELIEF REQUESTED.

It is the policy of the State of Utah that basic telecommunications services are to be made available to all residents; service that includes Lifeline and telephone relay assistance as well as access to 911 and E911 emergency services. Utah Code Ann. § 54-8b-1.1 (West 2004), § 54-8b-2 (2) (West Supp. 2009); Utah Admin. Code R. 746-360-2 (C) (2010). Utah and Federal law provide a means by which public funds are used to support the provision of such services to low-income households and households eligible for public assistance. Utah Admin. Code R. 746-341 Lifeline/Link-up (2010). The Federal Communications Commission summarizes the purpose of Lifeline Assistance

and who is eligible for it in FCC Consumer Facts: Lifeline and Link-Up: Affordable Telephone Service for Income-Eligible Consumers. Appendix 1.¹

The Utah Office of Consumer Services believes that the availability of Lifeline Assistance to eligible subscribers of wireless as well as wire-line telephone services extends Lifeline's benefits and is a proper use of Federal and State Universal Service funds. The Office recognizes that wire-line and wireless service each provide benefits that the other may not, but that properly designed with the purpose of Lifeline Assistance in mind, the two types of service can be equivalent. Accordingly, residential and small commercial telephone consumers, the Office's constituents, who provide a large majority of the funding for such programs², as a whole benefit from a more cost-effective and beneficial use of public resources.

For the reasons stated below, based upon the evidence before the Commission, the Office requests that the Commission designate TracFone as an eligible telecommunications carrier (ETC) and approve its Lifeline program, only after TracFone demonstrates that it has complied with the conditions described in pre-filed and hearing testimony. The Office believes that the Commission's determination in this case should define for all telecommunications corporations that wish to offer wireless Lifeline

¹ <http://www.fcc.gov/cgb/consumerfacts/lllu.html>

² As an example, the most recent wireless billing statement for the Assistant Attorney General who represents the Office included the following surcharges: Federal USF \$1.77, Utah Municipal Telecomm License Surcharge \$3.25, Utah State 911 Surcharge \$.08, Utah Emergency Service/ Poison Control Charge \$.07, Utah State USF \$.03, Utah Local E911 Surcharge \$.61.

services,³ the factors the Commission will consider in determining whether ETC designation and the Lifeline proposal is, or is not, in the public interest, and how those factors are to be weighed to arrive at the ultimate conclusion. WWC Holding Co. v. Public Serv. Comm'n of Utah, 2002 UT 23 ¶ 21, 44 P.3d 714, 721. In the Office's opinion, the decision must provide detailed direction for the Lifeline service that will qualify and the procedure for eligibility and verification determinations.

II. DESIGNATING TRACFONE AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER, AS IT HAS APPLIED, IS NOT IN THE PUBLIC INTEREST.

Before designating any applicant as an ETC, the Commission must determine that the proposed use of public funds is consistent with the public interest, convenience, and necessity for Lifeline eligible consumers, other telecommunications carriers, and public telecommunications customers in general. 47 U.S.C. § 214(e)(2) (2010) (granting the Commission the authority and discretion to determine what is in the public interest); WWC Holding Co. ¶ 14, 719. Based upon its application, designating TracFone as an ETC is not 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

³ For example, see In the Matter of Virgin Mobile USA, Docket No. 10-2521-01.

the public telecommunications network. Designating TracFone as an ETC will be in the public interest 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.

- a. TracFone's business model is incompatible with the public interest.

TracFone describes itself as “the leading provider of prepaid wireless service in the United States.” Petition, Part I., Page 2.

As described elsewhere in this Petition, TracFone's entire business model is predicated on providing easy-to-use, pay-as-you-go, affordable wireless telecommunications service to consumers to whom wireless service would be otherwise unavailable or unaffordable. TracFone offers consumers an opportunity to acquire wireless service using state of the art handsets and such features as caller ID, voice mail, text messaging, and long distance calling without toll charges. Because TracFone's service requires no term contracts, no minimum service periods or volume commitments, no credit checks, and no early termination fees, the service is available to everyone – irrespective of age; irrespective of residency; irrespective of creditworthiness. Moreover, TracFone's prepaid service is unique in that usage information and remaining balance information is stored in the handsets and is thus available to consumers on a “real-time” basis. TracFone's prepaid service offers Lifeline-qualified customers access, quality and price. None of the incumbent providers or those other non-incumbent ETCs serving the areas covered by TracFone in Utah offer service to consumers under comparable conditions. Petition, Part III. B., Page 21.

However, TracFone claims that this business model relieves it from the obligations of a public telecommunications provider. In Utah and in virtually every jurisdiction where it provides service, TracFone maintains no physical business premises, no

telecommunications facilities, engages in no retail transactions, and relies almost exclusively on specialty and mass-market retailers who are not public utilities. TracFone engages in unregulated, wholesale sales to retailers in order to avoid direct transactions with consumers and thereby avoid collecting or paying State taxes, fees and charges upon which the public telecommunications network depends. A carrier from whom TracFone purchases airtime provides actual telephone service. To the extent that a customer's place of use or residence is important, TracFone ignores customer demographic information that may be acquired by simply asking.⁴

Aside from having a TracFone branded handset, the consumer has no connection with TracFone and TracFone has no evident connection to the consumer. Upon this basis, TracFone contends that only wire-line and wireless providers and consumers who have a direct and discernible connection, must pay the taxes, fees and charges to support public telecommunications services such as 911, poison control, services for the hearing and speech impaired, and universal service. However, the public interest cannot be served by, on one hand, granting ETC designation to TracFone because of the attributes of its business model, and on the other hand, relieving it of any responsibility to the public interest because of the attributes of its business model.

⁴ For example, Utah Admin. Code Rule 746-341-5 F. restricts Lifeline telephone service "to the applicant's principal residence" and to "one single residential access line." An applicant for Lifeline service is defined in terms of a residence: "Applicant" -- means the eligible telecommunications customer who owns and resides in a residential property or rents and resides in a residential property." Utah Admin. Code R. 746-341-2 A (2010). TracFone is required to collect this information to comply with the Commission's rules and an applicant can only be certified as eligible for Lifeline service by the responsible state agency if this information is made available.

TracFone’s statement that it has and will comply with all state laws governing telecommunications corporations is belied by the positions taken to evade those laws. TracFone’s Brief on Appeal in Tracfone Wireless, Inc., Appellant, v. Washington Department of Revenue, Respondent, Washington Supreme Court No. 82741-9, illustrates this point.⁵ Claiming that the Washington State E-911 tax is inapplicable to prepaid wireless subscribers, TracFone excludes itself from the tax by claiming it “engages in no financial transactions” with persons using TracFone services; does not provide “subscriber billing statements” in which a line item may be included; that purchasers can use TracFone’s service “in less than a month or over the course of many months” rendering a “per month” flat rate inapplicable; and, that no user of TracFone services has a “primary place of use” in Washington because TracFone airtime and handsets can be purchased at 60,000 nationwide specialty and mass-market retailers, and 30 different nationwide carrier networks provide airtime.⁶ In any event, “even if the statute were deemed to impose tax on prepaid wireless subscribers (retail purchasers),” “TracFone had no duty to collect the tax (and no liability for uncollected tax) on its wholesale sales,” which TracFone claims is “almost all of TracFone’s sales of prepaid

⁵ <http://www.courts.wa.gov/content/Briefs/A08/827419%20%20appellant%20br.pdf>

⁶ Unless an applicant in Utah provides a principal residence address, they are not eligible for Lifeline service. See Footnote 3. Under Utah Code Section 59-12-211 (5) this information establishes a principal place of use. The fact is that TracFone does not want the information because of the implications it has to TracFone’s obligations as a public telecommunications corporation and to its marketing claim that TracFone users do not pay telecommunications taxes, charges and fees.

wireless airtime.” Most important, each of these obstacles to imposing or collecting such fees and charges is self-imposed.

b. TracFone’s proposed wireless Lifeline service is deficient and not consistent with the purpose of Lifeline Assistance under Utah law.

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). The Commission’s Lifeline program is designed to promote the goals of section 254 of the Communications Act of 1934, as amended, that telephone service be affordable to low-income consumers by providing universal service funds to reduce the price consumers pay for basic telephone service.⁷ Lifeline is intended to provide basic telephone service, which is unlimited access to the public switched network, directory assistance, 911, and access to long-distance carriers, but without features. Utah Code Ann. §§ 54-8b-2 (2), (6) (West Supp. 2009). Lifeline service customers are not required to purchase other services from the ETC nor prohibited from doing so. Utah Admin. Code R. 746-341-5 (G) (2010).

Even with the mobility offered by wireless service, Tracfone’s limited offering is not an acceptable substitute for the basic telephone service Lifeline is intended to provide. Adding long distance, texting and other “features” does not make up for the fact

⁷ See 47 U.S.C. § 254(b)(1) (“Quality services should be available at just, reasonable and affordable rates.”). Generally, the Lifeline program provides eligible consumers with a discount on monthly charges for basic local landline or wireless telephone service. See 47 C.F.R. § 54.401.

that TracFone's offered minutes are wholly inadequate for the low-income user whose only phone is from TracFone. It is within common experience that calls to health care providers, prospective employers, government agencies, social service agencies, banks, courts, day care providers (current or prospective), public transportation, or law enforcement, can be an algorithmic maze. At this time, calls to TracFone's customer service are charged against Lifeline minutes, though TracFone claims that it is working on this issue.⁸ There is little a customer can do to control when such calls are made or how long they last. With TracFone's Lifeline offering, calls later in the month could likely end quickly when that month's 67 minutes expire. Or, if such a call occurs early in the month, the minutes expire early and Lifeline becomes no line.⁹

There are a number of issues that until resolved, preclude a finding of substantial evidence that wireless Lifeline services are comparable to unlimited access to the public switched network. For example, the issue of rounding up wireless airtime minutes is a significant factor in maximizing Lifeline service. TracFone acknowledges that in discussions in this case, it stated that it will not round up, and may have publicly made

⁸ It is not acceptable to require the use of Lifeline airtime minutes to resolve customer service issues because without a physical presence in Utah, TracFone provides no other option.

⁹ With limited airtime minutes, wireless Lifeline service necessarily requires purchase of retail minutes. TracFone offers additional airtime minutes in blocks that are beneficial to TracFone revenues, but not necessarily to the low-income consumer.

the same commitment. J. Fuentes, Transcript page (Tr.) 42. line (l.) 1 – 20.¹⁰ The fact is that TracFone treats Lifeline consumers the same as its retail customers: “All of our Tracfone customers in my understanding is – the minute is rounded up, and there is really no difference between the TracFone company and the Safelink customer when it the [sic] comes to the minute usage.” J. Fuentes, Tr. 43, l. 10 – 15. However, when public funds are used to provide telephone service to those who otherwise may not have it, the number of airtime minutes, the cost of additional minutes, and rounding minutes used are all issues pertaining to the public benefit of wireless Lifeline service, TracFone’s or any other carrier’s.

It is the Office’s recommendation that the Commission grant TracFone or any wireless carrier, ETC status only after the Commission establishes the requisites of wireless Lifeline service, considering the unique attributes of wireless mobility, that is comparable to Lifeline’s requirement for unlimited access to the public switched network, and that offsets the total costs of incorporating wireless Lifeline into the regulatory scheme. See below Section II. c. On the basis of TracFone’s application and the record before the Commission, one cannot conclude that TracFone’s wireless Lifeline service provides a public benefit that offsets the detriments in TracFone’s service offering.

¹⁰The public statement is reported at <http://www.news-gazette.com/news/business/economy/2010-01-24/safelink-offers-low-minute-cells-low-income-residents.html>.

c. TracFone must pay the costs to determine eligibility for Lifeline Assistance.

Whether to grant or deny ETC status is a process governed by rules for public support in providing public telecommunications services to customers of commission-approved Lifeline programs. Utah Code Ann. § 54-8b-15 (7) (a) (West 2004). The cost of providing Lifeline telephone service, including the ETC's administrative costs and the costs incurred by the responsible agency¹¹, to the extent not funded by Federal USF or federal jurisdictional revenues, are funded by the State USF. Utah Code Ann. § 54-8b-15 (7) (West 2004); Utah Admin. Code R. 746-341-8 (2010). In any circumstance, when a wireless telecommunications corporation accesses or benefits from operation of the State USF, it should contribute to the fund on an equitable and nondiscriminatory basis with other carriers, whether wireless, wire-line, VOIP, or other. Utah Code Ann. § 54-8b-15 (10) (2004).

Tracfone's receipt of Federal Universal Service Funds for providing Lifeline service is conditioned upon Tracfone's compliance with Federal and state eligibility requirements. The Commission has appointed the Department of Community and Culture's Energy Assistance and Lifeline Office (DCC) as the gatekeeper for the Utah Telephone Assistance Program, including Lifeline. Appendix 2, Utah Telephone

¹¹ The "responsible agency" is "the state government agency that administers the certification, verification, and continued verification of Lifeline enrollment." Utah Admin. Code R. 746-341-2 (B) (2010). The Utah Department of Community and Culture's State Energy Assistance & Lifeline program is the responsible agency under contract with the Commission and the Division of Public Utilities.

Assistance (Lifeline) Program Policy & Procedures Manual. Tracfone admits that it must rely upon DCC to determine whether Tracfone's prospective customer is eligible for Lifeline Assistance under state and Federal guidelines. J. Fuentes, Tr. 39, l. 12 – 20. All parties acknowledge that the process of qualifying persons for Lifeline Assistance, like any publicly sponsored and funded utility and energy assistance, is necessary and requires the expenditure of public funds.¹² J. Fuentes, Tr. 38, l. 15 – 21. In Utah, DCC's costs to provide such services are reimbursed by the State Universal Service Fund only; a fund into which Tracfone insists it is not obligated to pay. J. Fuentes, Tr. 29, l. 25 to Tr. 32, l. 1. The Division of Public Utilities calculation cited by the Office quantified DCC's cost as approximately \$3.00 to \$4.00 per Lifeline applicant. C. Murray, Tr. 145, l. 1 – 16.

Tracfone acknowledges that there is a cost to qualifying persons for its Lifeline service, which in Utah is a function of DCC. J. Fuentes, Tr. 38, l. 15 – 20. TracFone contends that \$.15 per customer is adequate compensation for this service because that is Tracfone's approximate cost to confirm a name and address for a retail or Lifeline consumer through a nationwide data base.¹³ J. Fuentes, Tr. 36 – 37. Tracfone admits that \$.15 cents will not obtain the information that is required by law to qualify a person for Lifeline assistance. J. Fuentes, Tr. 38, l. 10 – 14.

¹² Whether natural gas, electric or telephone utility service, ratepayers pay surcharges to permit the Commission and the utility to provide HEAT, HELP, or Lifeline assistance, and to administer the program, including contracts with government agencies to certify eligibility.

¹³ TracFone stated its willingness to reimburse \$.15 to the State Universal Service Fund from which the Commission's contract with DCC is paid. However, TracFone pays the national database \$.07 per inquiry. J. Fuentes, Tr. 37, l. 5 – 7.

With an ETC application from any wireless carrier, the Commission must determine what costs will be reimbursed or what contribution will be made to the State USF. Also, with the advent of wireless Lifeline providers, upgrades to the eligibility verification process will be necessary to ensure compliance with Utah Admin. Code R. 746-341-5 F. Making this determination now for TracFone, and applicable to other wireless carriers, is required by Utah law. Only by conditioning TracFone's ETC status can the Commission assure that Lifeline providers, whether wire-line or wireless, are neither competitively advantaged or disadvantaged by the minimum acceptable Lifeline services that the public interest requires, or by the imposition of costs upon telecommunications providers. See Utah Code Ann. § 54-8b-15 (5) (West 2004).

Since Tracfone has not provided substantial evidence, or any evidence, of the actual costs for the Commission's responsible agency, ETC status must be denied until such time as the Commission determines that cost and equitably allocates it to TracFone. The Office's recommendation is for the Commission to evaluate these issues, as well as wireless ETC reporting requirements, prior to moving forward on designating any wireless carrier as an ETC or approving a Lifeline Assistance offering.¹⁴

¹⁴ In the alternative, the Commission could estimate the per-customer cost that DCC and the Division of Public Utilities calculated to estimate TracFone's obligation to reimburse the State USF. However, it is in the Office's judgment, far more effective to determine not only the actual cost to qualify a wireless Lifeline consumer but also to evaluate whether the current contract with DCC is the most effective to accomplish the primary purposes of qualifications, one of which is to protect against a consumer having both a wire-line and wireless Lifeline benefit.

III. TRACFONE SHOULD BE REQUIRED TO FUND UTAH'S EMERGENCY TELECOMMUNICATIONS SERVICES.

Utah citizens are provided with rapid direct access to public emergency operation centers by the 911 emergency telephone service. The objective is to reduce the response time to situations requiring fire fighting, law enforcement, ambulance, medical and other emergency services. Utah Code Ann. § 69-2-2 (1) (West 2004).¹⁵ This crucial part of the public safety system is funded by monthly emergency services telephone charges on local exchange service switched access lines, revenue producing radio communications access lines, and any other service, including voice over Internet protocol that allows the user to make calls to and receive calls from the public switched telecommunications network, including mobile radio service networks. Utah Code Ann. § 69-2-5 (3)(a) (West Supp. 2009). Prepaid wireless calling services are telecommunications services and explicitly subject to sales and use taxes, municipal telecommunications taxes, and emergency services charges. Utah Code Ann. § 59-12-102 (113)(b) (West Supp. 2009).

For mobile telecommunications service, the user's primary place of use is important to the amount and collection of the charge. Utah Code Ann. §69-2-5 (3)(d)(iii) (West Supp. 2009). It is this factor that TracFone misstates and exploits to evade its obligations and shield its retail customers' from contributing to the 911 network upon which all of Utah depends. The Utah State Tax Commission collects, enforces, and

¹⁵ An emergency services telecommunications charge funds the University of Utah Poison Control Center, which is an emergency response service available statewide. Utah Code Ann. § 69-2-5.5 (West Supp. 2009).

administers emergency telecommunications charges. Utah Code Ann. § 69-2-5 (3)(i) (West Supp. 2009). The charges are levied upon the telecommunications provider under Section 69-2-5 (3)(f) as follows:

Subject to Subsection (3) (g), an emergency services telecommunications charge levied under this section shall:

- (i) be billed and collected by the person that provides the:
 - (A) local exchange service switched access line services; or
 - (B) radio communications access line services; and
- (ii) except for costs retained under Subsection (3)(h), remitted to the State Tax Commission.¹⁶

The legal requirement is that TracFone bill and collect emergency services telecommunications charges. The statute does not state that the charges are only collected if TracFone sends a bill.

For sales and use tax purposes, the Utah State Tax Commission establishes the location of a sale of a prepaid wireless calling service as an address obtained during a transaction, the address of a purchaser's payment instrument, or if sufficient information is not available, the address from which electronically delivered or transferred product is first available for transmission by the seller, i.e. where TracFone's customer activates the handset or the airtime. Utah Code Ann. § 59-12-215 (4)(d) (West Supp. 2009) referring

¹⁶ Subsection (3) (g) states: "An emergency services telecommunications charge on a mobile telecommunications service may be levied, billed, and collected only to the extent permitted by the Mobile Telecommunications Sourcing Act, 4 U.S.C. Sec. 116 et seq." Under the MTSA, a place of primary use is a street address where mobile service primarily occurs. This is readily acquired by simply asking; something that TracFone must do to determine eligibility for Lifeline Assistance, and something that can readily be done when a retail consumer purchases a handset and/or minutes.

to Utah Code Ann. § 59-12-211 (West 2008).¹⁷ Most importantly, “for a service that is subject to taxation under this chapter” which prepaid wireless calling is, the location of the transaction or the place of primary use is where the service is provided. Utah Code Ann. § 59-12-211 (6)(c) (West 2008).

Of course, the Commission does not set State tax policy nor establish and enforce tax collection procedures. The Commission does however, have a duty to designate a telecommunications provider as an ETC only if the provider serves the public interest in all of its operations authorized and regulated by the Commission. The Utah State Tax Commission in Publication 62, Sales Tax Information for Telecommunications Service Providers, plainly defines the telecommunications provider’s obligations to collect taxes and fees imposed upon the provider or the provider’s customers. Appendix 3.¹⁸ The Commission should determine that demonstrated compliance with Utah emergency service funding law is a prerequisite for TracFone and any pre or post-paid wireless carrier that is applying for ETC designation.¹⁹

¹⁷ Section 59-12-211 uses ZIP codes to determine which of two or more local charges is the lower. To determine a primary place of use for prepaid wireless services, nothing more than a ZIP code is necessary. Then, the prepaid wireless company simply deducts airtime minutes equal to the amount of the charge and remits the amount to the Tax Commission.

¹⁸ <http://tax.utah.gov/forms/pubs/pub-62.pdf>

¹⁹ The California Public Utilities Commission has taken this approach to TracFone and all pre-paid wireless applicants for ETC status. On May 6, 2010, the California PUC vacated, without prejudice, Resolution T-17235, which on December 17, 2009, denied TracFone ETC designation as not in the public interest. C. Murray Direct Testimony, Page 11, l. 224 – 229, OCS Exhibit 1. Recognizing the importance of determining a pre-paid wireless carriers obligations to support State universal service funding and other public purpose program surcharges and fees, the

IV. CONCLUSION.

TracFone's application for ETC designation proposes a wireless alternative to traditional wire-line Lifeline Assistance. Providing low-income customers and those dependent upon public assistance programs access to mobile telecommunications is consistent with the public policy stated in Section 54-8b-1.1. Flexible regulation as new services and technology are introduced is part of that public policy. In considering TracFone's application, however, 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.

Dated this 15th day of July 2010.

Paul H. Proctor
Assistant Attorney General
Attorney for the Utah Office of Consumer
Services

California PUC in the May 6, 2010 Order determined to expand its investigation of TracFone in Docket I.09-12-016. Appendix 4 defines the investigation.
http://docs.cpuc.ca.gov/word_pdf/FINAL_DECISION/111616.pdf

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 15, 2010:

Mitchell F. Brecher
Debra McGuire Mercer
GREENBERG TRAURIG, LLP
2101 L Street, NW
Suite 1000
Washington, D.C. 20037
<mailto:brecher@gtlaw.com>
<mailto:mercerdm@gtlaw.com>

Stephen F. Mecham
Callister Nebeker & McCullough
10 East South Temple, Suite 900
Salt Lake City, UT 84133
sfmecham@cnmlaw.com

Michael L. Ginsberg
Assistant Attorney General
160 East 300 South 5th Floor
Heber Wells Building
Salt Lake City, UT 84111
mginberg@utah.gov

Gary A. Dodge
HATCH, JAMES & DODGE
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Email: gdodge@hjdllaw.com

Sonya L. Martinez
Salt Lake Community Action Program
764 South 200 West
Salt Lake City, Utah 84101
smartinez@slcap.org

Paul H. Proctor
Assistant Attorney General