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

The following is the brief of the Division of Public Utilities (DPU or Division) in response to the Application of TracFone Wireless Inc. (TracFone) to be an Eligible Telecommunications Carrier (ETC) for Lifeline services in Utah.

INTRODUCTION AND SUMMARY

TracFone is requesting that the Commission grant it ETC status in all areas of the state where its underlying carriers offer service. This not only includes Qwest exchanges, but also the exchanges of many rural LECs in the state. TracFone is only requesting ETC status in order to provide Lifeline service to qualifying customers. TracFone is not requesting any direct Utah USF support. The entire lifeline support will come from the Federal government's Universal Service Fund.

In order to obtain designation by this Commission as an ETC TracFone must meet the requirements of 47 USC Section 214(e). Relevant to this Brief that Section provides:

(1) Eligible telecommunications carriers

> A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received.
>
> (A) offer the services that are supported by Federal universal service support mechanism under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and
>
> (B) advertise the availability of such services and the charges therefore using media of general distribution.
>
> (2) Designation of eligible telecommunications carriers
>
> A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

It is the Division's position that TracFone does meet the requirements of paragraph 1 of Section 214(e). TracFone would be offering the required services necessary in order to receive Federal USF support. They intend to offer those services throughout the designated service area and have adequately demonstrated that they would advertise those services. However, it is also the Division's position that currently TracFone does not meet the public interest standard of Section 214(e)(2) and the

Commission should not approve this Application until certain issues revolving around the costs TracFone will impose on the state's Universal Service Fund are resolved.[1] Specifically, until TracFone either pays into the State's Universal Service fund, or works out an agreeable alternative with the Commission to cover the significant increase in costs to the state USF caused by TracFone, the Commission should not approve this Application. Other issues the DPU believes are important as conditions to approval are as follows:

1. TracFone will receive no state USF support based on this Order. In order to receive state USF support TracFone will need to file an Application with the Commission. TracFone agrees with this condition. (TR 15)
2. Service complaints other than rates are subject to the PSC's Complaint process and TracFone should provide all necessary information to the Division in order for it to be able to handle customer complaints. TracFone indicated that it believes the PSC has jurisdiction over these complaints. (TR 15)
3. Department of Community and Culture (DCC) is the designated state agency to verify eligibility for initial lifeline support applications and conduct the annual verification under R746-341-4. TracFone has agreed to follow the current state practice that all other ETCs use for their lifeline program. The Commission should condition approval on TracFone following the same process as other current ILEC use for lifeline verification and annual review.
4. TracFone should not be able to start advertising for its lifeline program until DCC is prepared to handle the additional applications expected when TracFone begins offering service. TracFone has indicated that there will be a significant increase in Applications for lifeline service of approximately 1,000 to 2,000 per week, which will potentially double the number of individuals receiving lifeline support in Utah. (TR 23-26)
5. TracFone should pay into the state USF fund. However, until that issue is resolved TracFone should cover its incremental costs it will impose on the State USF fund. TracFone has offered to pay .15 cents per Application to the State USF recognizing the increased burden it will be placing on DCC. Fifteen cents is inadequate to cover the increased costs to DCC. The Commission should resolve this issue before ETC status is granted.

[1] TracFone will be offering service not only in Qwest exchanges but also the exchanges of many rural carriers. In order to obtain an ETC designation the Application must be consistent with the public interest, connivance and necessity. In addition before designating a second ETC in a rural area the Commission must find that the designation is in the public interest.

6. The Division recognizes that paying into the State 911 fund cannot be solved in this Docket and that ETC approval should not be delayed until 911 issues are addressed. We agree with the recommendation of the Office that 911 issues be addressed elsewhere. (TR 139)
7. By the existence of a second ETC the possibility of fraud can occur. TracFone recognizes this issue. The DPU agrees with the Office's proposal that this issue be addressed in a timely manner and that DCC develop the necessary systems to address this issue. The estimated costs were $100,000 and the Office recommended that this cost be borne by the State USF.
8. Although the Division did not believe it to be necessary to impose conditions on the number of minutes or the costs of additional minutes or other service related conditions it does not object to these proposals if the Commission believes them necessary in order for this program to be in the public interest. Some of these proposals include: more minutes than 67, reducing the costs of additional minutes to $ .10 per minute, free minutes to call customer service etc.[2]

TRACFONE SHOULD BE REQUIRED TO USE THE DEPARTMENT OF COMMUNITY AND CULTURE FOR VERIFICATION OF ELEGIBILITY

TracFone indicated both at the hearing and in its rebuttal testimony (p. 9) that it will follow the same procedures as other ETCs in Utah to verify eligibility to receive lifeline support. The DPU believes this should be a specific condition to it receiving ETC approval in Utah. The process other ETCs use in Utah is that all applications for eligibility for lifeline services are processed and approved by DCC under a contract with the Commission and DPU. In addition DCC also conducts an annual audit of continued eligibility. During the hearings TracFone implied, through questions asked Mr. Coleman, that self-certification without going to DCC was acceptable under the Commission's rules. (TR 104-105, 114). Self-Certification is not the process other ETCs use for verification of lifeline applications, and it is the DPU position that it is not authorized by either the rules or by current practice. In order to assure that TracFone will follow the

[2] In a number of states TracFone has either agreed to or offered enhancements to the offering in Utah that either increase the number of minutes offered or reduce the costs per minute to purchase additional minutes.

same procedures as other ETCs, the DPU recommends that it be a specific condition to approval.

TRACFONE SHOULD EITHER PAY INTO THE STATE USF FUND AS OTHER TELECOMMUNICATION COMPANIES DO OR UNTIL THAT ISSUE IS RESOLVED COVER AN APPROPIATE AMOUNT OF ITS COSTS THAT IT WILL IMPOSE ON THE STATE USF FUND

TracFone in its rebuttal testimony indicated that it does not believe it is required to pay into the State USF fund since "TracFone, as a pre paid wireless service provider, does not issue bills to its customers. Therefore, it does not have any billed intrastate rates and does not have any revenues subject to the surcharge. (TracFone Rebuttal testimony p. 3). TracFone relies on R746-360-4 as support that it does not have to pay into the State USF fund since it does not bill customers. Mr. Fuentes quotes the section of the rule that states the surcharge shall equal .25% of billed intra state retail rates.

Admittedly, the rule does state that the surcharge will apply to billed intrastate rates, however, the statute that the rule is based on is much broader and supports the premise that all telecommunications providers that offer intra state service should pay their equitable share into the state USF fund unless they are exempt by the statute. Specifically, 54-8b-15(10) provides:

> (10)(a) Subject to Subsection (10)(b):
> (i) each telecommunications corporation that provides intrastate public telecommunication service shall contribute to the fund on an equitable and nondiscriminatory basis;
> (ii) for purposes of funding the fund, the commission shall have the authority to require all corporations that provide intrastate telecommunication services in this state to contribute monies to the fund through explicit charges determined by the commission;
> (iii) any charge described in Subsection (10)(a)(ii) may not apply to wholesale services, including access and interconnection; and
> (iv) charges associated with being a provider of public telecommunications service shall be in the form of end-user surcharges applied in intrastate retail rates.

> (b) A telecommunications corporation that provides mobile telecommunications service shall contribute to the fund only to the extent permitted by the Mobile Telecommunications Sourcing Act, 4 U.S.C. Sec. 116 et seq.

The statute says nothing about issuing a bill to customers. Instead, the statute creates a clear intent that all telecommunications companies that provide intrastate telecommunications service should contribute on an equitable and non-discriminatory basis through explicit charges determined by the Commission. Certain services are exempted. These include wholesale services including access and interconnection services. The only restriction on mobile providers is that the charge must be consistent with what is permitted by the Mobile Telecommunications Sourcing Act. The fact that the statute states that the charge should be in the form of an end user surcharge applied to intra state retail rates does not appear to exempt TracFone.

TracFone acknowledged that they know what amount of their minutes are intra states and what percent of their minutes are interstate. They pay into the Federal USF an appropriate amount based on interstate revenues. (TR 68). The amount of minutes not interstate is intrastate. They appear to be in no different position then any other wireless provider where a specific charge occurs that covers a certain amount of minutes. Some of the minutes are for interstate calls and some of the use is for intrastate calls. They should pay into the state fund for its usage that is intrastate. This issue becomes particularly relevant, today, since TracFone wishes to become an ETC and receive public funds both from the Federal USF and indirectly from the state USF.

Mr. Coleman testified that at least one other pre paid wireless company pays into the state USF. (TR 107-108). This company, Virgin Mobile, is also requesting that it be granted ETC status to provide lifeline service in Utah similar to the request being made by TracFone. Mr. Coleman also indicated that AT&T and Verizon, along with other wireless companies, pay into the state USF. However, Mr. Coleman did not know if those payments included payments on their pre paid wireless operations. In any event some companies have figured out a way to pay into the state USF while TracFone asserts it has no obligation to make such payments.

The Division recognizes that neither the Commission's Rules nor the statute t clearly address pre paid wireless or other telecommunication services that exist today and may not have existed when either the rules were written or the statute passed. Rule changes may be necessary and TracFone has indicated that from its perspective the statute needs to be changed to collect this fee and others at the point of sale. They have assured the Commission of its support for these changes and do not feel that they are trying to evade payment of the USF fee or others such as the 911 fee.

Until these issues are resolved or TracFone begins to pay into the USF the Division believes that they should not be able to evade responsibility for costs they impose on the state USF by becoming an ETC. The Division, therefore, strongly recommends that the Commission require them to pay into the State USF fund or require them to pay their fair share of the costs they will impose on the state USF.

TRACFONE RECOGNIZES THAT IT WILL IMPOSE A SIGNIFCIANT BURDEN ON DCC AND IS WILLING TO PAY AN APPROPIATE AMOUNT INTO THE STATE USF TO COVER ITS COSTS OF CERTIFICATION

DCC costs for verification of Lifeline eligibility are paid out of the state USF. DCC is not funded by the state's general fund for this service, but instead all other telecommunication providers, many of which, are current ETCs fund DCC. Many of these companies will be in direct competition with TracFone for lifeline customers.

TracFone would be, essentially, the only ETC not covering the costs of DCC. The Division believes that it would be patently unfair and anti competitive for TracFone competitors to pay DCC costs through their contributions to the USF and allow TracFone to escape that responsibility. In its testimony (Rebuttal p 18) they imply that they would object to helping support DCC if other ETCs do not also pay their costs to DCC. Other providers such as the rural ILEC's or Qwest cover their costs to DCC by paying into the State USF fund. Only TracFone is choosing not to cover its costs by either paying into the state USF or by covering its appropriate incremental costs it imposes on the state USF.

The impact of a TracFone ETC approval on DCC and the state USF is not insubstantial. Currently there are approximately 29,000 lifeline customers in Utah. TracFone believes that the potential number of lifeline subscribers possible in Utah is 146,000. (TR 23). After approval they estimate a significant spike in the number of applications to DCC for approval. TracFone believes it could be in the 1,000 to 2,000 applications per week which could continue at that rate for a significant period of time. It is possible that the number of lifeline subscribers could double within one year of TracFone receiving ETC approval. Such as increase in the number of people receiving lifeline support is clearly in the public interest. However, the amount of work being placed on DCC and on the state fund to cover those increased costs should be borne by TracFone and not other ETC's who are in competition with TracFone.

TracFone has offered to pay to the state USF $0.15 per application. They indicated that their current costs to use LexisNexus are $0.07 per application. However, they only receive limited information from Lexis. If the applicant's information is on in

Lexis they can verify the applicant's name, date of birth, address and social security number. (TR 37). However, they cannot verify if the applicant is on any social service program or the applicant's income. Only DCC can access those databases and make the verification necessary to determine if they are eligible for Lifeline.

The Administrative Law Judge struck the entire testimony and exhibit of the Division presented through Shauna Benvegnu-Springer. Her testimony was to present a cost estimate, developed by the Division in coordination with DCC, of the impact TracFone might have on the DCC and on the state USF. The Division continues to believe that the ALJ's decision to not allow the testimony was incorrect. The Division is the administrator of the USF. It is the Division's responsibility with the PSC being required to address the additional costs to the USF if this application is granted. One way or the other the Division and PSC must develop a detailed cost estimate of the impact of the ETC being granted to TracFone. The purpose of the testimony was to provide the Commission the magnitude of the costs TracFone might impose on DCC and the state fund. The estimated costs to the state fund were allowed in evidence both through TracFone itself and through other witnesses. The difference is that the DPU testimony provided details on how the $3.00 costs per Application were calculated. Those details were not allowed in the record, however, the Commission in this record is aware of the potential costs to DCC and the State USF by the increased number of applications expected when TracFone receives ETC approval.

The Division believes that the Commission should reach a decision on what contributions to the state USF are expected from TracFone in the absence of them paying into the state fund, in order to cover the incremental costs to DCC for processing their applications. With those guidelines, the parties might be able to negotiate an agreement that would meet the PSC guidelines and submit that agreement to the Commission for approval. Alternatively, the Commission could make a decision as to what is expected from TracFone and let them decide if they will continue to request ETC approval in Utah. What is important at this point is that this issue be addressed, and that a company who does not pay into the USF be able to obtain federal and state public funds without covering the costs it imposes on the state to obtain those funds.

REGARDLESS OF HOW THE COMMISSION DECIDE THE COSTS ISSUE TRACFONE SHOULD NOT BE ABLE TO START PROVIDING SERVICE UNTIL DCC IS PREPARED TO HANDLE THE ADDITIONAL APPLICATIONS

As was stated previously, a significant number of applications are expected to occur when TracFone begins advertising and making its lifeline program available. It is not in anyone's interest that applications that are submitted to DCC are delayed because of its inability to handle the increased number of applications. DCC's needs will need to be addressed by both the PSC and Division. A new contract may need to be negotiated with DCC to address the significant increase in applications. Processes will need to be put in place to handle the communications between TracFone and DCC. Therefore, if TracFone decides after the PSC decision to proceed in Utah it should not be able to proceed until compliance filings are made that show that the issues with DCC have been resolved both with TracFone and with the DPU as administrator of the fund.

Another issue with DCC that the DPU believes needs to be addressed at some point, when there are multiple ETC's competing for customers, is the issue of double dipping or fraud. Currently DCC has no ability to determine if the household who is receiving lifeline support from one company is also receiving lifeline support from a second ETC. Such practice should not happen. A process should be put in place for DCC to determine if double dipping is taking place. This is not a TracFone issue alone, but comes to the forefront because of TracFone and others becoming second and maybe third ETCs in a particular service area. The Division recommends that a process be established to resolve this issue and invite other ETC, DCC and other interested parties to address this issue develop a resolution for this issue and present that resolution and its estimated costs to the Commission.

CONCLUSION

The Division believes that the increased number of qualifying individuals taking lifeline service is in the public interest. TracFone has met the criteria for becoming an ETC in Section 214(e). However, until the issues surrounding payments into the state USF are resolved, the Division does not believe it is in the public interest for them to proceed in Utah at this time.

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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