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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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| 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 | <p style="text-align: center;"><u>Docket No. 09-2511-01</u></p> <p>Initial Post-Hearing Brief of the Utah Rural Telecom Association and Association Members</p> |
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In accordance with the June 14, 2010 Supplemental Scheduling Order issued by the Public Service Commission (“Commission”) in this proceeding, the Utah Rural Telecom Association (“URTA”), submits the following initial post-hearing brief:

I. INTRODUCTION

On August 27, 2009, TracFone Wireless, Inc. (“TracFone”) petitioned the Commission for designation as an eligible telecommunications carrier (“ETC”) pursuant to Section 214(e)(2) of the Communications Act of 1934 for the sole purpose of providing Lifeline service to qualifying customers throughout the state. In order for TracFone to be eligible to receive support from the federal Universal Service Fund (“USF”), the Commission must designate TracFone an ETC. TracFone is not seeking support from the federal USF to serve high cost areas¹ or from the state USF.²

¹ See TracFone petition at 1.

² Tr. at 58, lines 24-25; 59, lines 1-3.

TracFone submitted an order³ from the Federal Communications Commission (“FCC”) with its petition in this proceeding in which the FCC permitted TracFone to receive federal USF support to provide Lifeline service even though TracFone is only a reseller of telecommunications services and not a facilities-based carrier.⁴ The FCC did, however, impose conditions in granting TracFone’s petition and required, among other things, that for the importance of public safety TracFone provide 911 and E911 service to its customers.⁵ In subsequent orders the FCC issued on behalf of states lacking authority to designate TracFone an ETC, the FCC emphasized the importance of this condition and imposed it again when it designated TracFone an ETC.⁶

Though TracFone must provide 911 and E911 service, it is seeking designation as an ETC by this Commission without the obligation to collect the surcharge imposed by Utah Code Ann. § 69-2-5 to pay for the service.⁷ TracFone asked that the Commission address the payment of the 911 surcharge in a separate docket and not allow this issue to delay its designation as an ETC.⁸

URTA petitioned to intervene in this proceeding December 1, 2009 and the Commission

³ FCC 05-165 released September 8, 2005 in CC Docket No. 96-45 referred to as the “Forbearance Order.”

⁴ Section 214(e)(1)(A) of the Communications Act requires that an ETC provide service “...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.)”

⁵ Forbearance Order at ¶¶ 6, 16, 22.

⁶ Later TracFone attempted to get out from under this requirement, but the FCC refused to rescind the condition in FCC order DA 10-753 released May 3, 2010 in CC Docket No. 96-45 of which the Commission took administrative notice during the hearing in this proceeding. Tr. at 62, lines 17-25; 63, lines 1-4. A copy of this FCC order is attached.

⁷ See TracFone Exhibit 2 at 3-9. In addition, there is no provision for TracFone to collect and pay the state USF surcharge, the relay surcharge, or the Poison Control surcharge.

⁸ See TracFone Exhibit 2 at 5-6.

granted the petition December 21, 2009. URTA is concerned about the impact granting TracFone ETC status could have on URTA members if TracFone is not required to collect and pay for the 911 program and the other public interest programs.

In addition to TracFone and URTA, other parties to the proceeding included the Division of Public Utilities, the Office of Consumer Services, and the Salt Lake Community Action Program. Following direct and rebuttal rounds of testimony, this matter was heard by Commission Administrative Law Judge Reuben Arredondo on June 7, 2010.

II. ARGUMENT

A. TracFone Fails to Meet the Public Interest Test that the Commission Must Find to Grant TracFone ETC Status in an Area Served by a Rural Telephone Company

Section 214(e)(2) of the Communications Act requires that “[b]efore 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.” TracFone’s petition for designation as an ETC fails to meet the public interest test for at least two reasons: 1) under the petition, TracFone does not support 911, E911 or the other state public interest programs; and, 2) permitting TracFone to provide Lifeline service without paying for the public interest programs for which URTA members must pay is competitively unfair.

The harm granting TracFone ETC status can cause to these public interest programs and to other service providers cannot be outweighed by any benefit TracFone claims its service will provide to low-income customers. Additionally, if the Commission grants TracFone ETC status before these issues are resolved, it will not be the Commission that resolves them. If they are resolved, it will be left to TracFone and the state legislature to resolve them which is an unnecessary cession of Commission jurisdiction. These issues should be addressed by the

Commission, and if necessary, by the legislature, before the Commission considers granting TracFone ETC status.

1. Granting ETC Status to TracFone Before TracFone is Equipped to Pay for Public Interest Programs is not in the Public Interest

The FCC found that for public safety purposes, it is essential that TracFone provide 911 and E911 service to its Lifeline customers to qualify for support from the federal USF. This program is imbued with the public interest. When TracFone attempted to persuade the FCC to rescind this obligation the FCC stated:

TracFone's limited ETC designation is subject to, among other things, the condition that TracFone certify that it is in full compliance with state-level 911 and enhanced 911 (E911) obligations, including obligations relating to the provision **and support of such service**, before receiving Lifeline universal service support in a state. Given the importance of ensuring that all consumers, including low-income consumers, have access to emergency services and consistent with the Commission's previous holding that **TracFone must comply with state obligations relating to access to those services**, we find that TracFone has not demonstrated sufficient cause to justify rescission of the state 911/E911 compliance requirement imposed in the *TracFone ETC Designation Order*.⁹ (Emphasis added.)

Granting TracFone ETC status without requiring it to pay for 911 service is *per se* failure to meet the public interest test. The 911 service is an essential public interest program. Under the circumstances of TracFone's petition, if customers leave an existing service provider that collects and pays the 911 surcharge and subscribe to TracFone's service, 911 revenues will decline thereby reducing the emergency services budget and jeopardizing the 911 service.

In addition to 911 service, the state legislature has deemed the state USF, the relay service, and Poison Control to be important public interest programs by enabling the imposition of surcharges for them on customers' telephone bills. Like 911, revenues for these services will erode if TracFone is not required to support them and is successful in taking customers from

⁹ FCC order DA 10-753 at 2.

providers that do. This is not in the public interest and should be addressed and resolved before the Commission considers granting TracFone ETC status.

2. Granting TracFone ETC Status Without Requiring Support for Public Interest Programs is Anticompetitive and Not in the Public Interest

TracFone claims that one of the principal public interest benefits it will bring to Utah if the Commission designates TracFone an ETC is a competitive option for Lifeline service.¹⁰ If the Commission grants TracFone's petition without first requiring it to support all of the public interest programs, however, the Commission will be giving TracFone a competitive advantage which would in fact be anticompetitive and not in the public interest. The existing service providers that lose customers will also be left with stranded costs which will place increasing pressure on the state USF.

URTA members are obligated to collect and remit the 911, state USF, relay, and Poison Control surcharges. Not having to support these programs, but still enjoying the benefits of each of them, is unfair because it gives TracFone a competitive edge before the competition even begins.

The Commission can address this unfairness either by relieving URTA members of having to support these programs or requiring TracFone to support them. URTA does not believe the first option is in the public interest so it advocates the second. To grant TracFone's petition without requiring support is not in the public interest. The FCC expected states to impose requirements to support public interest programs as a condition of being designated an ETC. That should be the outcome in this docket and that is what URTA urges the Commission to do.

¹⁰ TracFone Exhibit 1 at 11 lines 13-23; 12.

III. CONCLUSION

TracFone's petition to the Commission for ETC status is not in the public interest as long as TracFone is able to compete to provide Lifeline service without supporting Utah's public interest programs. This will harm the programs by eroding their revenues and still having to provide the services. In addition, TracFone should not benefit from public interest programs it does not support. Nor should TracFone be given an unfair competitive advantage at the expense of URTA members, their customers, and other service providers.

URTA urges the Commission to exercise its jurisdiction and condition any ETC designation on TracFone supporting all of the public interest programs or denying TracFone's petition. Granting TracFone's petition and addressing these issues following the ETC grant cedes jurisdiction to TracFone and the state legislature without any assurance that they will be addressed.

Respectfully submitted this 15th day of July, 2010.

CALLISTER NEBEKER & MCCULLOUGH

Stephen F. Mecham

Certificate of Service

I hereby certify that on July 15, 2010 I caused a true and correct copy of the Initial Post-hearing Brief of the Utah Rural Telecom Association and Association Members filed in Docket No. 09-2511-01 to be emailed to the following:

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