

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of)	
)	
)	
Petition of TracFone Wireless, Inc.)	Docket No. 09-2511-01
for Designation as an Eligible Telecommunications)	
Carrier in the State of Utah for the Limited Purpose)	
of Offering Lifeline Service to Qualified Households)	
)	

REPLY BRIEF OF TRACFONE WIRELESS, INC.

On or about July 15, 2010, initial briefs were filed in this matter. In addition to TracFone Wireless, Inc. (“TracFone”) -- the petitioner for designation as an Eligible Telecommunications Carrier (“ETC”), briefs were filed by the Division of Public Utilities (“DPU”), the Office of Consumer Services (“OCS”), the Utah Rural Telecom Association (“URTA”), and the Salt Lake Community Action Program (“SLCAP”). Also, Mr. Timothy Funk of the Crossroads Urban Center (“Crossroads”) submitted a letter addressing TracFone’s ETC petition.

Introduction

In its brief, TracFone described the many public benefits of its unique SafeLink Wireless® Lifeline program -- free handsets, free wireless airtime, long distance as well as local calling, international calling, text messaging, roaming, enhanced features such as call waiting, caller ID, and voice mail. Most importantly, SafeLink Wireless® will -- for the first time -- provide low-income Utah households with a mobile telecommunications Lifeline-supported option, making the convenience and security of wireless telecommunications available to thousands of low-income Utah households to whom wireless telecommunications was not until now an economically viable option.

The record established in this proceeding is overwhelming: low-income Utah households need and deserve a wireless Lifeline option and the opportunity to receive TracFone's federal Universal Service Fund-supported SafeLink Wireless® service. This demonstrated need in Utah for a wireless Lifeline option is shown by the large number of statements filed in this proceeding in support of making TracFone's SafeLink Wireless® service available in Utah. Those supporting the proposal include such consumer advocacy groups as the Alliance for Generational Equity,¹ and Family Promise® Salt Lake;² state governmental departments, including the Department of Veterans Affairs;³ state legislators;⁴ local government officials;⁵ as well as numerous letters from concerned Utah residents supporting the Commission's prompt designation of TracFone as an ETC so that SafeLink Wireless® may be available to Utah households.

Notwithstanding the aforementioned undisputed public interest benefits, and in disregard of the broad-based expressions of support noted above, several parties to this proceeding either have opposed designation of TracFone as an ETC or supported designation only subject to conditions which would be inequitable, unworkable, discriminatory, and, in some cases, unlawful. Those parties' briefs focus on three primary areas: 1) the amount of TracFone's

¹ Letter from Dave Herman, Alliance for Generational Equity National Spokesman, to Ms. Julie P. Orchard, Commission Administrator, filed June 16, 2010.

² Letter from Jennifer Hare, Executive Director, Family Promise, to Chairman Ted Boyer, filed April 15, 2010.

³ Letter from Terry Schow, Executive Director, State of Utah, Department of Veterans Affairs, to Chairman Ted Boyer, dated April 19, 2010.

⁴ Letter from Senator Ralph Okerlund, Utah State Senate, District 24, to Chairman Boyer, dated March 11, 2010; joint letter from State Senators Chris Buttars, Allen Christensen, and Howard Stephenson, and Representatives Kerry Gibson and Brad Dee, to Chairman Boyer, dated March 11, 2010; and letter from State Senator and Assistant Senate Minority Whip, Karen Mayne, to Chairman Boyer, dated March 11, 2010.

⁵ Letter from Randy Horiuchi, Salt Lake County Council, to Chairman Boyer, dated April 20, 2010, and letter from Gregory L. Schultz, West Township Representative, Salt Lake County, to Chairman Boyer, dated April 20, 2010.

proposed Lifeline benefit; 2) allegations of non-compliance with certain fee and tax requirements; and 3) imposing non-cost-based fees on TracFone for access to the Department of Communications and Culture's ("DCC") data base to verify its Lifeline enrollment applicants' eligibility. In addition, some of those parties have asked the Commission to further delay the availability of a wireless Lifeline option to Utah's neediest households while the Commission conducts proceeding after proceeding to address matters which can be dealt with after TracFone's ETC designation.

As described in its initial brief, TracFone has listened to those parties who have criticized the value of TracFone's proposed Lifeline benefit and it has committed to significantly enhance that benefit in response to those concerns. Those who have asserted that TracFone should be required to pay certain state surcharges and fees relating to TracFone's prepaid wireless service have disregarded applicable state law. Those who have demanded that TracFone pay burdensome fees to access the DCC data base have failed to produce any admissible evidence to justify the outrageous per transaction fees which they have proposed.

The time to bring to low-income Utah households a wireless Lifeline service which they have long needed and long deserved is now. Whatever regulations, practices and procedures may be necessary and appropriate in light of the changing Lifeline landscape in Utah should be addressed by the Commission in subsequent proceedings, as well as by the Federal Communications Commission ("FCC"). The FCC, in conjunction with the Federal-State Joint Board on Universal Service, currently is undertaking a comprehensive review of Lifeline

eligibility certification, verification and outreach requirements and procedures.⁶ There would be no public interest benefit in denying Utah's neediest families the convenience, safety and security of an affordable mobile telecommunications service option funded by the federal Universal Service Fund. Millions of low income households in about one-half of the states are enjoying this service today. So too should residents of Utah.

I. TracFone's Revised and Improved SafeLink Wireless® Utah Proposal Alleviates Concerns About the Value of TracFone's Lifeline Benefit

OCS, SLCAP and Crossroads all criticized the "limited" SafeLink Wireless® offering. Those criticisms are based on the plan set forth in TracFone's ETC petition. Under that plan, TracFone's Utah Lifeline customers would have received 67 minutes of airtime per month. While TracFone does not necessarily agree with those parties' comments on that plan, they certainly had every right to address in their briefs the plan which was before the Commission at the time of the hearing.

As explained in TracFone's initial brief, following the hearing, TracFone thought further about the criticisms of its Lifeline plan which had been raised during the hearing. For example, SLCAP stated its position that TracFone should offer Utah Lifeline customers at minimum, the highest number of free minutes it is offering in other states.⁷ TracFone responded to those criticisms by substantially improving its SafeLink Wireless® offer for Utah. TracFone used its initial brief in this proceeding to announce that it will provide Utah Lifeline customers with at

⁶ Federal-State Joint Board on Universal Service, Lifeline and Link Up, 25 FCC Rcd 5079 (2010). Initial comments in that proceeding were filed on or before July 15, 2010. None of the intervenors in this proceeding submitted comments. Reply comments are due July 30. If those intervenors truly are concerned about the Lifeline enrollment eligibility certification and verification issues which they addressed in their briefs, TracFone encourages them to share those views with the Joint Board and with the FCC.

⁷ SLCAP Brief at 2.

least 200 minutes of wireless airtime per month.⁸ Those minutes -- at least 200 per month -- will be able to be used for local calls, long distance calls, roaming calls, international calls to more than 60 destinations, as well as for text messaging (with each text message decremented at the rate of 0.3 minutes). In addition, TracFone further considered the concerns of several parties about the practice of charging for calls to customer service. TracFone currently is developing solutions which will enable calls to customer service using the 611 dialing code not to be subject to charges. TracFone expects that those solutions will be implemented not later than fourth quarter 2010.

With these important changes, TracFone's Lifeline program will offer even greater benefits to qualified Lifeline customers in Utah than had initially been proposed, and TracFone will provide those customers with a very substantial amount of wireless telecommunications usage in addition to the other program benefits. This is the most generous SafeLink Wireless® offering available anywhere and therefore will satisfy, and, in fact, will exceed, SLCAP's request that TracFone provide its Utah Lifeline customers with the highest number of minutes it is offering in any state. In fact, no wireless ETC operating in any state offers more free minutes of use than TracFone will provide in Utah. No other ETC includes international calling in its offering; no other ETC includes text messaging as part of its Lifeline benefit. In short, with the enhancements announced in its initial brief, the Lifeline benefit which TracFone will provide to SafeLink Wireless® customers in Utah will exceed that of any other Lifeline service available to Utah households which qualify for Lifeline assistance. Accordingly, TracFone's revised and enhanced Lifeline offering will satisfy the articulated concerns of those parties to this proceeding

⁸ The details of TracFone's revised SafeLink Wireless® plan are still under development, and will be announced soon. However, TracFone has committed that SafeLink Wireless® customers in Utah will receive not less than 200 minutes of wireless airtime per month.

which have asserted that more free minutes should be offered.⁹ It is difficult for even TracFone's most vocal critics to credibly assert that TracFone's Utah Lifeline offering -- the most beneficial wireless Lifeline program offered anywhere -- is not in the public interest.

II. TracFone Has Not Been Shown to be in Violation of State Law Obligations to Contribute to the State Universal Service Fund or To Collect 911 and Other Public Safety Fees. Moreover, Questions About State USF and 911 Fee Compliance Are Not Relevant to The Issues Before the Commission in this ETC Proceeding

TracFone fully accepts its responsibility to comply with all Utah laws and regulations which are applicable to its activities in the state. As explained in TracFone's initial brief, under currently-applicable Utah laws and regulations, there is no legal obligation for providers of telecommunications services to contribute to the Utah Public Telecommunications Service Support Fund ("State USF") on their non-billed services, including, *e.g.*, prepaid wireless services like those provided by TracFone.¹⁰ As enacted, the State USF is funded exclusively through surcharges to end-user telecommunications service consumers that are "billed and collected by all retail providers." Several parties to this proceeding, including DPU, OCS, and

⁹ Mr. Funk asserts in his letter (at page 3) that TracFone's Lifeline service will not be available to homeless persons in Utah who do not have an independent address. That is incorrect. Despite the challenges to serving the homeless imposed by the FCC's "one-per-household" rule which limits Lifeline-supported service to one per residential address, TracFone believes that the availability of wireless Lifeline service to persons with no permanent residences is one of the most important advantages of wireless Lifeline programs. For that reason, TracFone has been working with the FCC to implement a system which enables it to provide SafeLink Wireless® service to residents of homeless shelters. This system involves the operators of homeless shelters signing documents which confirm that Lifeline applicants reside at the shelters and that they are not in the same household as other shelter residents. In addition, TracFone has asked the FCC to clarify that non-related residents of homeless shelters and other group living facilities may qualify for Lifeline service. The FCC solicited public comment on TracFone's proposal and the comments received were overwhelmingly in support of making Lifeline service available to such persons. See Public Notice - Comment Sought on TracFone Request for Clarification of Universal Service Lifeline Program "One-Per-Household" Rule as Applied to Group Living Facilities, WC Docket No. 03-109, DA 09-2257, released by the FCC, October 21, 2009.

¹⁰ TracFone Brief at 9-12.

URTA, assert that, notwithstanding the language of the applicable statutes and Commission regulations, TracFone should somehow be compelled to make payments to the State USF (presumably from its own funds since it does not have a mechanism for billing and collecting surcharges from end-user consumers) or that it should be denied ETC designation (and Utah low-income households denied the availability of an important and valuable wireless Lifeline option) until TracFone agrees to make voluntarily payments to the State USF, notwithstanding the lack of any legal requirement that it do so.

Even those parties have expressed doubts about the existence of any legal obligation for TracFone to collect and remit payments to the State USF. For example, DPU candidly recognizes that “neither the Commission’s Rules nor the statute clearly address prepaid wireless or other telecommunications services that exist today and may not have existed when the rules were written or the statute passed.”¹¹ DPU also has acknowledged that rule changes may be necessary.¹² DPU is correct. Neither the statute nor the Commission’s regulations contemplate collection and remittance of State USF fees on non-billed services.

If it is deemed necessary and appropriate to extend the applicability of the State USF contribution requirements to encompass non-billed services, then changes to the regulations, and perhaps the statute, will be needed. TracFone has stated repeatedly its commitment to participate in any such processes, including legislative or rule changes, or even a separate docket or investigation to address the issues and identify possible solutions. Alternatively, to the extent that there is a belief that current Utah laws and regulations are applicable to non-billed services, enforcement actions by appropriate State agencies with enforcement authority are the appropriate responses. Under no circumstances is it lawful, in the public interest, or otherwise appropriate to

¹¹ DPU Brief at 7.

¹² *Id.*

deny or further delay designation of TracFone as an ETC and its resulting opportunity to provide an important wireless Lifeline option to low-income Utah households.

The carrier billing process works well to collect fees, including State USF fees as well as 911 and other public safety fees, from consumers of billed telecommunications services. The billing process is where the financial transaction between the consumer (*i.e.*, the person obligated to contribute) and the service provider (as the collection agent for the State) occurs. For non-billed services like prepaid wireless, there typically is not a financial transaction directly between the consumer and the service provider.¹³ The financial transaction instead takes place between the consumer and the entity that sells the prepaid service to the consumer -- often, an independent retail vendor. Since the money exchange is between the consumer and the retail vendor -- not between the consumer and the service provider -- the most efficient, equitable, and competitively neutral manner to collect such fees from consumers of those services as the law envisions is to have the fees collected by the recipient of the consumer's money -- the retail vendor. To date, no fewer than thirteen states and the District of Columbia have enacted point-of-sale fee collection laws and TracFone as well as others from the wireless telecommunications industry have participated actively in each of those states' legislative processes. In addition, such point-of-sale legislation is pending in at least five other states.¹⁴

¹³ One exception is where consumers purchase prepaid services directly from service providers, *e.g.*, by making purchases of prepaid service through the service providers' websites. TracFone collects fees and surcharges from those customers who make direct purchases through its website (www.tracfone.com) and remits the collected amounts to the applicable state funds.

¹⁴ States which have enacted point of sale fee collection legislation to date include West Virginia, Maine, Louisiana, Texas, Indiana, South Carolina, Virginia, Tennessee, Oklahoma, Mississippi, Colorado, Wisconsin, Rhode Island, and the District of Columbia. Similar legislation is pending in Pennsylvania, California, New York, Illinois, and Massachusetts.

Some parties have advocated denying TracFone ETC designation unless TracFone agrees to make payments to the State USF. Such denial would be inappropriate and unlawful. The Commission should not -- indeed may not -- condition approval of an ETC petition upon the petitioner's willingness to pay fees and surcharges that it is not required to pay under existing law.

OCS went so far in its brief as to claim without citation to any facts that TracFone established its business model "in order to avoid direct transactions with consumer and thereby avoid collecting or paying State taxes, fees and charges" ¹⁵ That assertion is offensive, unsupported and insupportable. TracFone has been providing pay-as-you-go prepaid wireless services marketed through a distribution network of independent retail vendors since the company's inception in 1996. Sale of prepaid services through retail establishments is a common business model in the United States, and throughout the world. Availability of prepaid services through retail vendors makes the services convenient for consumers to purchase. This business model is used by TracFone -- and by virtually all other providers of prepaid wireless services -- because it works. Contrary to the unsupported and speculative suggestion of OCS, the model was not developed in order to avoid Utah's State USF and 911 fee requirements.

Whatever the legislature and the Commission may have known about prepaid services when the statutes and regulations were enacted, they certainly are now aware of the explosive growth of the prepaid segment of the wireless industry. If there is a concern that the current statutes and regulations do not cover prepaid services, the way to rectify that concern is to modify the statutes and regulations, not to deny Lifeline-supported wireless service to Utah's

¹⁵ OCS Brief at 5.

low-income households by denying an unquestionably qualified provider's petition for ETC designation.

Also, without factual basis, OCS accuses TracFone of “evad[ing]” other states' laws. In support of that assertion, OCS cites to TracFone's brief on appeal in TracFone Wireless, Inc. v. Washington Department of Revenue, Washington Supreme Court No. 82741-9.¹⁶ It is correct that TracFone has appealed to the State of Washington Supreme Court an adverse ruling of the state's Department of Revenue regarding that state's 911 fee law. However, seeking judicial review of government agency decisions is a right guaranteed under the United States Constitution. Indeed, for more than two centuries, the concept of judicial review of governmental actions is one of the bedrock principles of our system of democratic government.¹⁷ There is a fundamental difference between appealing an agency ruling to the appellate courts to secure a judicial determination of a law, on the one hand, and “evading” a law, as alleged by OCS, on the other hand. TracFone's appeal of the Washington Department of Revenue ruling was argued before the Washington Supreme Court in 2008 and remains pending. TracFone will, of course, comply with the decision of the Washington Supreme Court when it is issued.

One of the more curious and unsupported assertions in the initial briefs is URITA's claim that TracFone would somehow enjoy a competitive advantage if TracFone were designated as an ETC without having to remit 911, State USF, telecommunications relay and Poison Control

¹⁶ *Id.*, at 6.

¹⁷ Marbury v. Madison, 5 U.S. 1 (1803).

surcharges.¹⁸ Implicit in that claim, of course, is the presumption that the fee collection and remittance requirements are applicable to TracFone -- a presumption which, as explained in TracFone's initial brief, is not correct. Moreover, the reality is that imposition of those fee and surcharge requirements on TracFone would subject it to a significant competitive disadvantage *vis-à-vis* competing providers of Lifeline services, including those URTA members who provide Lifeline. As URTA itself candidly states, "URTA members are obligated to **collect and remit** . . . surcharges."¹⁹

While URTA members may collect and remit surcharges, prepaid providers like TracFone who do not render bills have no mechanism to collect and remit. If the law were expanded so as to impose those fees and surcharges on TracFone, TracFone would be required to make the payments from its own resources. Whereas the URTA members would collect the surcharges from their customers through the billing process and remit those amounts (only the collected amounts), TracFone would have to self-fund its contributions. Clearly, TracFone, not the URTA members, would be placed at a significant competitive disadvantage.

URTA also misstates the FCC order referenced in its brief. At p. 4 of its brief, URTA references In the Matter of Federal-State Joint Board on Universal Service, TracFone Wireless, Inc. Petition to Rescind State 911/E911 Condition, DA 10-753, released May 3, 2010. In that order, the FCC denied a TracFone request to rescind a condition imposed by the FCC in its 2008

¹⁸ URTA Brief at 5. Implicit in the URTA assertion that TracFone would have a competitive advantage over URTA members is the notion that the URTA companies "compete" in the provision of Lifeline service. According to data compiled by USAC, the total amount of Lifeline support received by all fourteen URTA members in 2009 was approximately \$295,000 (about \$21,000 per member company). These amounts suggest that those companies are providing Lifeline service to relatively few customers.

¹⁹ *Id.* (emphasis added).

order designating TracFone as an ETC in ten states and the District of Columbia.²⁰ That condition requires TracFone to self-certify that it is in compliance with applicable state 911/E911 obligations, including obligations relating to the support of 911 and E911 service. That FCC-imposed condition was specifically applicable to the eleven jurisdictions for which the FCC designated TracFone as an ETC pursuant to Section 214(e)(6) of the Communications Act. It is not a condition of regulatory forbearance and it is not applicable to any states where TracFone has been designated as an ETC or will be designated as an ETC by any state commission pursuant to Section 214(e)(2) of that act.

Inaccurate and unsupported accusations set forth in certain parties' initial briefs provide no reasonable, lawful or public interest basis upon which to deny or condition TracFone's ETC petition. Indeed, such a result would disserve the interests of thousands of low-income Utah households which (like millions of similarly-situated households in other states) would benefit from the availability of TracFone's SafeLink Wireless® Lifeline service, while doing absolutely nothing to resolve the underlying issues regarding applicability of state fee and surcharge laws to non-billed services. Those issues must be addressed and resolved in the proper forums, such as rulemakings, legislative, or enforcement actions, rather than in the instant ETC designation proceeding. The only issues properly before the Commission in this ETC petition matter are i) whether TracFone complies with the requirements of 47 U.S.C. § 214(e)(A) and § 214(e)(1)(B) of the Communications Act; ii) whether TracFone's Lifeline service will include all services and functionalities required by the FCC's rules; and iii) whether designation of TracFone as an ETC

²⁰ Federal-State Joint Board on Universal Service; TracFone Wireless, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of New York, et al, 23 FCC Rcd 6206 (2008).

for the limited purpose of providing Lifeline service to low-income Utah households will serve the public interest.

III. No Evidence Supports Imposition of a Fee to Access to DCC Data Base Above the Levels Proposed by TracFone

DPU and OCS continue to assert without any evidentiary support whatsoever that TracFone should be required to pay \$3.00 per Lifeline applicant to DCC for verification of Lifeline applicants' Lifeline eligibility through enrollment in qualifying assistance programs. Neither TracFone nor any other party to this proceeding disputes that TracFone should pay a reasonable amount to verify customer eligibility. Indeed, TracFone has expressly offered to pay a reasonable amount for verification. Specifically, it has proposed to pay \$0.15 per transaction -- more than double the amount it pays for verification in any other state. That proposal is the only proposal before the Commission in this proceeding which is supported by any admissible evidence.

What is conspicuously absent from the evidentiary record of this proceeding is even a scintilla of evidence to cost justify DPU's inherently questionable assertion that the "cost" of DCC verification is \$3.00 per customer. What is on the record of this proceeding is the cost which TracFone incurs in all other jurisdictions to verify customer eligibility. No other state imposes any verification fee on TracFone. Moreover, as testified to by TracFone witness, Jose Fuentes, a nationally-respected private vendor, Lexis-Nexis verifies Lifeline applicant name, address, and Social Security number data for \$0.07 per transaction. While there may be some slight additional cost to determine whether those same applicants are enrolled in a qualifying program, there is nothing on the record upon which the Commission could base a conclusion that it would cost an additional \$2.93 per customer to make that determination.

DPU and OCS claim that TracFone should be required to pay \$3.00 per transaction, notwithstanding the total absence of evidentiary cost support for that amount, on the basis that other ETCs contribute to the State USF which funds DCC's verification operations. That may be so. However, TracFone has demonstrated in this proceeding that it is not legally obligated under current law to collect and remit State USF payments. Even if other ETCs are contributing to the State USF and even if some portion of those other ETCs' State USF contributions are funding the DCC data base, no one has even alleged -- let alone introduced admissible evidence -- that DCC incurs \$3.00 per transaction to verify those other ETCs' Lifeline applicants. Neither has it been shown that any ETCs operating in Utah are required to pay the equivalent of the \$3.00 per transaction verification charge, as proposed, but unsupported, by DPU.

The proponents of the \$3.00 verification fee bear the burden of proof that the cost of providing such verification actually is \$3.00 per transaction. Those proponents have utterly failed to meet that burden. As a result, nothing before the Commission provides any justification for imposition on TracFone of a Lifeline eligibility verification fee above the \$0.15 per transaction amount offered by TracFone. That amount is more than double the amount which TracFone pays to its current verification provider, and is more than TracFone pays to verify Lifeline applicant eligibility in any other state.

Conclusion

TracFone is ready, willing and able to bring to Utah the state's first wireless Lifeline program and the first Lifeline program which will provide qualified low-income Utah households, including homeless residents, with free handsets and free service. Moreover, TracFone listened to the concerns of those parties to this proceeding who represent the consumers most in need of Lifeline support and, in response to those concerns, it has committed

to increase the amount of free monthly usage to at least 200 minutes per month. SafeLink Wireless® will provide an invaluable telecommunications service benefit to Utah's neediest households. Indeed, the portability of wireless service and TracFone's ability to work with the FCC and others has enabled it to provide SafeLink Wireless® service to people who need assistance the most -- homeless persons with no permanent addresses who reside in homeless shelters. Today, more than three million households in more than 25 states are receiving Lifeline service from TracFone. That number will continue to grow as TracFone expands service to the additional states where it has been designated as an ETC. TracFone respectfully urges the Commission to promptly approve its pending ETC designation petition so that Utah households may soon enjoy those benefits.

Respectfully submitted,

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July 29, 2010

CERTIFICATE OF SERVICE

This is to certify that I have duly served TracFone Wireless, Inc. 's Reply Brief on the following, this 29th day of July, 2010, by electronic mail addressed as follows:

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