

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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

ISSUED: September 13, 2010

SYNOPSIS

The Commission reviewed TracFone's Petition, comments submitted by the public, evidence and testimony received at the hearing, and reviewed post-hearing briefs submitted by the parties. Based on the evidence before the Commission, the Commission finds the ETC designation should be granted, but subject first to a determination of the costs to DCC for determining eligibility for Lifeline applicants.

By The Commission:

This matter is before the Commission on TracFone Wireless, Inc.'s (TracFone) Petition for Designation as an Eligible Telecommunications Carrier (ETC)¹ in the State of Utah for the Limited Purpose of Offering Lifeline Service to Qualified Households. The Petition was filed August 27, 2009. TracFone provided some information to the parties previous to a technical conference held on November 24, 2009. A technical conference was held where TracFone appeared telephonically to answer questions of the attendees, including representatives of the Division of Public Utilities (Division) and the Office of Consumer Services (OCS). The Commission later permitted the Utah Rural Telecom Association (URTA) and the Salt Lake Community Action Program (SLCAP) to intervene. The Commission also received public

¹ TracFone only seeks Lifeline support from the low-income program and not high-cost support. *See Petition of TracFone for ETC Designation, p.1.*

comments from other individuals in support of the TracFone Petition. The Commission additionally received correspondence from the following legislators: Sen. Chris Buttars, Sen. Allen Christensen, Sen. Gene Davis, Sen. Karen Mayne, Sen. Ralph Okerlund, Sen. Howard Stephenson, Rep. Jackie Biskupski, Rep. Brad Dee, Rep. Kerry Gibson, and Rep. Carol Spackman Moss. It also received correspondence from the following entities: National Consumers League and the Alliance for Generational Equity. The parties conducted discovery and submitted pre-filed direct and rebuttal testimony previous to the hearing. The administrative law judge of the Commission conducted a hearing on June 7, 2010. Mitchell Brecher and Gary Dodge were counsel for TracFone. Jose Fuentes, director of governmental relations for TracFone was TracFone's witness. Michael Ginsberg, assistant attorney general, was counsel for the Division. Shauna Benvegnu-Springer was the Division's witness. Paul Proctor, assistant attorney general, was counsel for the OCS. Cheryl Murray was the OCS's witness. Stephen Mecham was counsel for intervenor URITA. Douglas Meredith was URITA's witness. Sonya Martinez was SLCAP's witness and was aided in part by Mr. Proctor, the OCS' counsel. The parties submitted initial post-hearing briefs on July 15, 2010 and reply briefs on July 29, 2010.

On August 15, 2010, TracFone submitted what it termed a Notice of Expanded Lifeline Offering. TracFone notified the Commission that it would give its lifeline customers in all states three monthly plan options as follows: 1) 250 free monthly minutes, with no carry-over if unused, with texting available at one text per airtime minute; 2) 125 free monthly minutes, with carry-over if unused, with texting available at one text per airtime minute; or 3) 68 free minutes each month, with carry over if unused, with texting available at three text per airtime minute, plus international long distance calling to over 60 destinations.

On August 18, 2010, the URTA asked if it needed to reply to the Notice of Expanded Lifeline Offering, but ultimately offered no other comment after TracFone responded electronically to URTA's inquiry. The OCS and Division both commented on the Notice in their post-hearing reply briefs. On August 24, 2010, Timothy Funk of the Crossroad Urban Center (who also testified as a public witness at the hearing) commented on the Notice of Expanded Lifeline Offering.

JURISDICTION AND REQUIREMENTS FOR ETC DESIGNATION

The Commission has jurisdiction to designate TracFone as an ETC pursuant to Section 214(e)(2) of the Communications Act. TracFone noted the requirements for ETC designation:

Section 214(e)(2) of the Communications Act² provides that State commissions shall designate common carriers that meet the requirements of paragraph (1) as ETCs. Section 214(e)(1) contains two requirements for ETC designation: Section 214(e)(1)(A) requires ETCs to offer the services supported by Federal universal service support mechanisms using their own facilities or a combination of their own facilities and the resale of other carriers' services.³ Section 214(e)(1)(B) requires ETCs to advertise the availability of such services and the charges therefore using media of general distribution.⁴

.....
In addition to the ETC designation requirements codified at Section 214(e)(1)(A) and (B), Section 54.101(a) of the FCC's rules⁵ requires ETCs to provide the following service functionalities as a condition of receiving Universal Service Fund support: 1) voice grade access to the public switched network; 2) local usage; 3) dual-tone multifrequency signaling or its functional equivalent; 4) single-party service or its functional equivalent; 5) access to emergency services; 6) access to operator services; 7) access to interexchange services; 8) access to directory assistance; and 9) toll-limitation for qualifying low-income consumers.

Post-hearing Brief of TracFone, pp.6-7.

² 47 U.S.C. § 214(e)(2).

³ 47 U.S.C. § 214(e)(1)(A).

⁴ 47 U.S.C. § 214(e)(1)(B).

⁵ 47 C.F.R. § 54.101(a).

Additionally, because TracFone is seeking ETC designation in areas served by rural telephone companies the Commission must determine if such designation is in the public interest. *47 USC § 214(e)(2)*.

Regarding the first requirement that TracFone use its own facilities or a portion of its facilities, the Federal Communications Commission (FCC) exercised its forbearance authority under Section 10 of the Communications Act and granted TracFone's petition to forbear the facilities-based requirement. *See Petition of TracFone for ETC Designation*, pp. 4-5. Therefore this requirement is not applicable here.

Regarding the requirement that TracFone "advertise the availability of such services", there is no dispute that TracFone has plans to aggressively market its service offerings.

Regarding the requirement TracFone provide the nine functionalities listed previously, there is no dispute that it will provide those functionalities to its customers if granted ETC designation. *See Petition of TracFone for ETC Designation*, pp. 9-14.

There is more dispute as to whether the TracFone's offering is in the public interest and that will be analyzed below along with the other considerations raised by the parties.

Many parties raised issues of TracFone's obligation to contribute to the state USF, its obligation to pay the 911 tax and contribute to other public interest programs, other aspects of its offerings, and the costs for the Department of Community and Culture (DCC) to certify qualified applicants for Lifeline service. The Commission discusses these below.

STATE USF CONTRIBUTIONS

The Commission notes that there is no dispute that TracFone is seeking ETC designation solely to obtain federal USF, not state USF. TracFone stated that it would not "seek

support from the Utah USF” and that it has never sought support from a state USF in any” jurisdiction where it has been designated an ETC. *TracFone’s Rebuttal Testimony and Exhibits*, p.18, ll.15-18. TracFone reaffirmed that in its post-hearing briefs that it has no plans to request state USF support. *Post-hearing Brief of TracFone*, p.9. Therefore, the Commission agrees with TracFone that any attempt to condition its ETC designation which will allow for federal USF support, based on its contributions to state USF would likely be improper.

Regardless, however, the Commission finds that our laws and rules governing ETC designation, as currently written, do not obligate TracFone to collect and remit state USF surcharges. As TracFone pointed out, Utah Admin Code R746-360-4 states:

B. Surcharge Based on a Uniform Percentage of Retail Rates -- The retail surcharge shall be a uniform percentage rate, determined and reviewed annually by the Commission and billed and collected by all retail providers.

TracFone argued that only those charges “billed and collected” are subject to the state USF surcharge assessments. It states that it does not issue a bill to customers and therefore that assessment cannot be “billed and collected.” *Post-hearing Brief of TracFone*, p.10.

The Division admits that the Rule does not state the surcharge assessment applies to billed intrastate rates, *Post-hearing Brief of the Division*, p.5, but points to Utah Code Ann. §54-8b-15(10) to show that the statute is “much broader and supports the premise that all telecommunications providers that offer intrastate service should pay their equitable share into the state USF” *Id.*, and “says nothing about issuing a bill to customers.” It noted that TracFone’s witness admitted it could segregate its intrastate usage from other types of usage.

See Transcript, p.71, ll.4-8. The Division argues that because it is able to identify intrastate usage, it should be ordered to pay the USF surcharge assessment.

Many public policy reasons may exist for requiring prepaid wireless companies to pay into the state USF. However, whatever those reasons may be, without “explicit or clearly implied statutory authority” from the legislature, *Utah Dep’t of Business Regulation v. Public Serv. Comm’n*, 720 P.2d 420, 423 (Utah 1986), the Commission cannot make the paying of the state USF surcharge assessment a requirement for ETC designation. Concerning TracFone’s Petition, the Commission agrees with TracFone that our current laws and rules do not require TracFone to pay the state USF assessment. The term “billed and collected” implies the issuance of a bill to a customer, whereby the customer then remits payment to the state. TracFone points to Utah Code Ann. § 54-8b-15(10)(a)(iv), which states the USF assessment “shall be in the form of end-user surcharges”, and also to R746-360-4.A, which states the source of USF funds shall be from “end-user surcharges”, in arguing that the laws and Rules “memorialize in Utah law a key aspect of their state USF requirement—surcharge amounts are to be paid by consumers through their retail billings.” *Id.* TracFone is correct when it states that “as a prepaid provider, TracFone has no “billed intrastate retail rates” upon which to collect and remit state USF surcharges.” *Post-hearing Brief of TracFone*, p.10.

Also, as a practical matter, there is no mechanism by which TracFone, or other prepaid wireless providers can directly bill the customer for the USF surcharge assessment. A non-prepaid wireless carrier typically directly bills the customer, with the bill including the USF surcharge. That carrier thereby collects the surcharge for the state. With prepaid

providers, like TracFone, however, there is no mechanism⁶ to collect the surcharge at the point of sale when the customer buys directly from a third-party retailer like Walmart or Target, *see Transcript*, pp. 54-56, as is most commonly the case. This issue is not unique to TracFone but affects other prepaid wireless providers. The Division's witness stated that he did not know if other providers of prepaid wireless pay the state USF surcharge on the prepaid portion of their service offerings. *See Transcript*, p.107, ll.5-25, p.108, ll.1-25, p.109, ll.1-10. Also, the OCS's witness stated that other prepaid wireless companies may not be paying state USF surcharges. *See Transcript*, p.136, ll.24-25. Assuming, *arguendo*, the Commission finds TracFone could segregate its intrastate usage, and then were to impose a requirement for TracFone to pay on that usage, without the third-party retailer having collected the USF surcharge at the point of sale, TracFone is correct in arguing that it would have to "self-fund" those assessments from its own resources. Not only would this place TracFone at a competitive disadvantage as TracFone argues, but the Commission questions if such an action would not be a taking.

The Commission conclusion that TracFone is not obligated to pay into the state USF is consistent with the positions of the parties and evidence presented at the hearing. For example, the Division admitted that "neither the Commission's Rules nor the statute[s] clearly address prepaid wireless or other telecommunications services that exist today and may not have existed when either the rules were written or the statute passed." *Post-hearing Brief of the Division*, p.7. Again, absent any explicit or clearly implied authority, conditioning the TracFone's ETC designation on such a basis would be improper.

⁶ Besides the limited situation where the customer buys additional minutes online directly from TracFone. *See ReplyPost-hearing Brief of TracFone*, p.8, fn.13.

911 and other Public Interest Programs

Both the OCS and URTA specifically ask the Commission to condition TracFone's ETC designation on the requirement that TracFone contribute to such public interest programs as the 911 tax, poison control, services for the hearing/speech impaired, etc. URTA contends that its members—rural telephone companies, are obligated by law to “collect and remit the 911 tax, state USF, relay, and Poison Control surcharges.” It further contends that granting the ETC designation would give TracFone a competitive edge over URTA's members, and also that relieving TracFone's customers from the obligations to pay those taxes and surcharges would not be in the public interest⁷ when they enjoy the benefits of such programs. The OCS contends that TracFone is subject to the requirement to “bill and collect emergency services telecommunications charges”, *Post-hearing Brief of the OCS*, p.14, regardless if it sends a bill. It contends that the Commission has an obligation to grant ETC designation “only if the provider serves the public interest in all of its operations authorized and regulated by the Commission” and that the Commission should require “demonstrated compliance with Utah emergency service funding law” as a prerequisite for any ETC designation in the state. *Id.* at 15.

As stated previously, the Commission cannot condition ETC designation on requirements outside of those explicitly or clearly implied in the law or Rules governing such designation. *See Utah Dep't of Business Regulation v. Public Serv. Comm'n*, at 423; *see also Mountain States Tel. & Tel. Co. v. Public Serv. Comm'n*, 754 P.2d 928, 933 (Utah 1988) (stating

⁷ Because TracFone seeks ETC designation in areas served by rural telephone companies, *see Petition of TracFone for ETC Designation*, p.17, the Commission must determine if such designation is in the public interest. 47 USC § 214(e)(2); *see also WWC Holding Co., Inc. v. Public Serv. Comm'n*, 2002 UT 23, ¶¶ 3,9.

that “although desirable, public policy goals standing alone cannot support the Commission’s pooling order. Without clear statutory authority, the Commission cannot pursue even worthy objectives for the public good.”). There is no doubt that TracFone users will receive the benefit of at least some of the public interest programs such as 911, poison control, services for the hearing/speech impaired, etc. There is no dispute that there will be costs to provide such users with those services. There may be several public interest/policy reasons why prepaid wireless providers *should* “bill and collect” for the emergency telecommunications charge and for other surcharges supporting public interest programs. But such reasons alone, without explicit or clearly implied statutory authority, cannot provide a basis for the Commission to condition ETC designation on the collection of such taxes and surcharges.

First, there is no explicit requirement in laws or Rules governing ETC designation that TracFone pay the 911 tax and other public interest surcharges. URTA points to the language in a Federal Communications Commission (FCC) order⁸ regarding TracFone’s petition to rescind the 911/E911 compliance requirement. *See Post-hearing Brief of URTA*, p.4. URTA uses that order to argue that TracFone is required to “pay for 911 service.” *Id.* at 4. However, that order, as URTA itself points out, merely deals with TracFone’s obligations to provide 911 and E911 service to its Lifeline customers to qualify for federal USF support, and is only applicable to the “eleven jurisdictions for which the FCC designated TracFone as an ETC pursuant to Section

⁸ *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.

214(e)(6)” *Reply Post-hearing Brief of TracFone*, p.12. It does not mandate that TracFone pay the 911 tax or other public interest programs surcharges in any state.⁹

Second, the Commission does not have jurisdiction to expand the ETC designation requirement as some suggest simply because of public interest concerns. For example, the OCS encourages the Commission to apply laws normally interpreted and applied by the Utah State Tax Commission as it implements state tax policy, in this ETC designation proceeding. The OCS analyzes more thoroughly Utah Code Ann. § 69-2-1 *et seq.* and the reasons why TracFone has an obligation to pay the 911 surcharge in support of its argument. It points to provisions dealing with sales and use tax and Publications mentioning the prepaid wireless providers obligation to pay sales and use tax. But there is no specific citation to a law or Rule governing ETC designation that requires TracFone bill for and remit the 911 tax to the state. The plain meaning of *Utah Code Ann. § 69-2-1 et seq.* does not require TracFone to pay the 911 surcharge. The phrase “billed and collected” language of Section 69-2-5(3)(f) implies the provider bill the person for the 911 tax. In TracFone's case, it normally does not do that billing, but that billing occurs at a third-party retailers point of sale. No law or Rule explicitly or clearly implies authority for the Commission to make the payment of such a requirement for ETC designation. Section 69-2-1 “It needs no citation of authorities that where a specific power is conferred by statute upon a tribunal, board, or commission with limited powers, the powers are limited to such as are specifically mentioned.” *Bamberger E. R. Co. v. Public Utils. Comm’n*, 204 P. 314, 320 (Utah 1922); *see also Cf. Hi-Country Estates Homeowners Ass’n v. Bagley and*

⁹ The Commission notes the language relating to TracFone's “support of such service” but the Commission does not conclude that this generalized language can overcome the lack of any explicit language obligating TracFone to pay the 911 surcharge in any statute or Rule governing ETC designation and given the plain language of *Utah Code Ann. § 69-2-1 et seq.*

Co., 901 P.2d 1017 (Utah 1995) (holding that the Public Service Commission has no “inherent regulatory powers and can only assert those which are expressly granted or clearly implied as necessary to the discharge of the duties and responsibilities imposed upon it [and] any reasonable doubt of the existence of any power must be resolved against the exercise thereof”). URTA complains this outcome is unfair. Even though that may be, the law explicitly requires URTA members to bill and collect the surcharges for the public interest programs. The rural telephone companies collect the surcharges for public agencies that assess the emergency service telecommunications charges on their “radio communications access line with a billing address” *Utah Code Ann. § 69-2-5(3)(ii)*. Therefore URTA members must collect the charge since they do issue a bill to a customer’s address. The Commission agrees with TracFone’s interpretation that a “billing address” is simply where customers’ bills are delivered. *See Post-hearing Brief of TracFone*, pp.15-16. No one disputes here that TracFone does not send any bill to customers as the prepaid wireless service is normally purchased from a third-party retailer. Therefore, the language governing the 911 tax explicitly requires URTA members to bill, collect, and remit the tax, but does not require it of prepaid wireless providers. If there is unfairness , as URTA contends, that unfairness needs to be remedied by the legislature, not the Commission. *See Cf. Mountain States Tel. & Tel. Co*, 754 P.2d at 933 (stating that “the Commission cannot pursue even worthy objectives for the public good” such as implementing pooling to sustain the Lifeline program, without legislative authority, and further explaining that if “the Lifeline program is in fact not feasible in the absence of pooling, the appeal to save the program must be made to the state legislature. The legislature can act to preserve Lifeline by statutorily granting the Commission the power to order multicompany pooling.”) The Commission cannot make the

payment of the 911 tax and other public interest service surcharges a requirement of ETC designation.

TracFone's Offerings

Much of the hearing, and many of the initial post-hearing briefs criticized TracFone's offering of 67 minutes as inadequate. Some parties raised the service offering of another applicant seeking ETC designation, i.e. Virgin Mobile USA, L.P, in Docket No. 10-2521-01, who apparently is offering 200 minutes as part of its service offering, as being a more adequate offering for an ETC. Several parties stated that TracFone's initial offering of 67 minutes was so inadequate, that the Commission should deny the ETC designation, even with the other features offered by TracFone but not offered by wireline providers of Lifeline services. About two months after the hearing, on August 15, 2010, TracFone notified the Commission of its expanded selection of offerings as stated above, e.g. 250, 125, or 68 minute options. The OCS stated the Commission should examine the various aspects of the newest offering, including the possibility that the Commission reopen the record, allowing TracFone to present additional evidence concerning its newest offering and allow other parties to test that evidence. The Division stated that all the details of the new offering were not clear. Mr. Funk responded to the Notice asking the Commission to begin the ETC designation proceedings again so as to determine the impact such offerings would have on Lifeline service.

Many parties, including the OCS, Mr. Funk, and SLCAP raised concerns about the need of several low-income Utahns for an increased amount of minutes, and criticized the low amount of minutes TracFone initially offered. Besides the fact the law and Rules governing ETC designation do not mandate any particular number of minutes, to a great extent, these

parties suggest the Commission regulate consumer choices instead of allowing the market to facilitate wider consumer choice. Our legislature has explicitly declared that “it is the policy of this state to: . . . facilitate access to high quality, affordable public telecommunications services to all residents and businesses in the state; . . . encourage the development of competition as a means of providing wider customer choices for public telecommunications services throughout the state; . . . allow flexible and reduced regulation for telecommunications services throughout the state . . .” *Utah Code Ann. § 54-8b-1.1 (2)-(4)*. The criticisms raised against the number of minutes offered, whether they be 67 or 200 minutes, must be viewed in light of the many comments raised supporting of TracFone's Petition. To agree with parties opposing the Petition based merely on an alleged lack of minutes allowed, would mean ignoring the supportive comments. Although, they were largely form letters of approval, they were submitted nonetheless by Utahans interested in the benefits TracFone's offerings would provide. Competitive choice allows a consumer anywhere in the state (including rural areas) to choose between a plan with a limited amount of monthly minutes, but including other “extras” at no extra charge (e.g. mobility, text messaging, international calling, long-distance calling, voice mail, etc.) and a plan that might include unlimited local minutes, but with none of the “extras” without an additional fee. One of the Commission’s main concerns with allowing the market to dictate consumer choice would be that the consumer has adequate and reliable information to make the well-informed choices. However, in this case, TracFone has been open to working with interested parties and the responsible agencies, i.e. the Division and the OCS, and cooperated with those agencies and intervenors in drafting a “Utah-specific consumer information sheet to potential Lifeline customers which contains certain information about the

service.” *Post-hearing Brief of TracFone*, p.6. There was no dispute that TracFone agreed to the information sheet submitted that was acceptable to all. *Transcript*, p.153-154; *see also OCS Surrebuttal Exhibit 1*.¹⁰ Therefore, given the comments in favor of ETC designation, the laws and Rules governing ETC designation, and the policy enunciated by the legislature, the Commission finds that the number of monthly minutes should not serve as a bar to ETC designation—so long as the ETC meets all other qualifications.

VERIFICATION BY THE DEPARTMENT OF COMMUNITY AND CULTURE (DCC)

As a condition to ETC designation, there is no dispute that TracFone “should be required to pay a reasonable per transaction fee to utilize the DCC eligibility verification database.” *Post-hearing Brief of TracFone*, p.13. Utah Admin. Code R746-341 contains specific provisions for determining eligibility, and the DCC is the agency responsible for assisting with determination of eligibility. *See Utah Admin. Code R746-341-3, -4*. Although TracFone and the Division proposed what they thought were reasonable per transaction costs, no party provided the Commission with reliable information on what those costs would actually be, or how the DCC should verify Lifelines eligibility given the propensity for abuse. There is no dispute that the high number of additional Lifeline applicants will place a heavier burden on the DCC, *see Transcript*, p.23, ll.4-21, p.25, ll.18-24, with TracFone itself estimating an increases could be “anywhere between 1,000 [to] 2,000” per week. *Id.*, p.26, ll.9-13. Such a burden would bear not only on the DCC’s ability to verify eligibility for Lifeline applicants—including

¹⁰ Obviously TracFone must comply with the notice on the information sheet representing that TracFone will notify customers of any increase in monthly minutes, as reflected in the second bulleted point.

those not applying through TracFone¹¹, but also bear on DCC's ability to qualify applicants for other life-sustaining energy assistance programs, e.g. HEAT programs, etc. Without knowing the costs such a burden will impose on the DCC, and without knowing how DCC will be able to meet its duties given an expected increase in Lifeline applicants, the Commission cannot grant the ETC designation at this time as it would not be in the public interest. Therefore, it is appropriate that the Commission commence a proceeding where the Commission may determine the costs and processes whereby the DCC will verify Lifeline applicant qualifications.

FINDINGS AND ORDERS

1. the Commission finds that TracFone's Petition should be granted, but subject first to the final determination of "the reasonable per transaction fee to utilize the DCC eligibility verification database";
2. This matter is stayed pending that final determination;
3. The Commission shall determine that fee in Docket No. 10-2528-01, *In the Matter of the Consideration of the Costs to the Department of Community and Culture (DCC) for Determining Eligibility for Lifeline Applicants*;
4. Tracfone shall have a right to intervene in that docket;

Once that fee is determined, the Commission will issue a final order on

TracFone's Petition for ETC designation.

¹¹ There are two other pending petitions for ETC designation: 1) *In the Matter of the Virgin Mobile USA, L.P. Petition for Limited Designation as an Eligible Telecommunications Carrier*, Docket No. 10-2521-01; 2) *In the Matter of the Petition of i-wireless, LLC 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. 10-2526-01.

DOCKET NO. 09-2511-01

- 16 -

DATED at Salt Lake City, Utah, this 13th day of September, 2010.

/s/ Ruben H. Arredondo
Administrative Law Judge

Approved and confirmed this 13th day of September, 2010, as the Report and
Order of the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#68549