

- 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 ) DOCKET NO. 09-2511-01  
Telecommunications Carrier in the State of )  
Utah for the Limited Purpose of Offering ) AMENDED REPORT AND ORDER  
Lifeline Service to Qualified Households ) AND  
) ORDER ON REQUEST FOR LIMITED  
) RECONSIDERATION  
)  
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ISSUED: December 1, 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 grants the requested ETC designation subject to the conditions stated below, and requires TracFone to submit the required eligibility documentation for each Lifeline applicant.

The Commission also issues its Order on TracFone's Request for Limited Reconsideration or Rehearing, amending its September 13, 2010 Order, and making TracFone's ETC designation effective immediately, with the condition that TracFone shall be responsible for paying expenses determined in Docket No. 10-2528-01 or other applicable proceeding in connection with the verification of continuing Lifeline eligibility.

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By The Commission:

This matter is before the Commission on TracFone Wireless, Inc.'s (TracFone) Petition for Designation as an Eligible Telecommunications Carrier (ETC)<sup>1</sup> 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

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

Commission later permitted the Utah Rural Telecom Association (URTA) and the Salt Lake Community Action Program (SLCAP) to intervene. The Commission also received public comments from other individuals in support of the TracFone Petition. The Commission additionally received correspondence from the following legislators: Sen. Chris Butters, 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 Benvegna-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 URTA. Douglas Meredith was URTA'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 that provides that State commissions shall designate common carriers that meet the requirements of Section 214 (e), paragraph (1), as ETCs. Paragraph (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.<sup>2</sup> Section 214(e)(1)(B) requires ETCs to advertise the availability of such services and the charges therefore using media of general distribution.<sup>3</sup>

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<sup>2</sup> 47 U.S.C. § 214(e)(1)(A).

<sup>3</sup> 47 U.S.C. § 214(e)(1)(B).

...

In addition to the ETC designation requirements codified at Section 214(e)(1)(A) and (B), Section 54.101(a) of the FCC's rules<sup>4</sup> 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.

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, however, ample disagreement as to whether TracFone's offering is in the public interest because TracFone asserts its pre-paid services offered through retailers are exempt

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<sup>4</sup> 47 C.F.R. § 54.101(a).

from surcharges and taxes that fund the state USF, the 911 emergency response system and other public interest programs. Additionally, it is uncertain what costs the state will incur to process and annually verify eligibility applications for Lifeline service and how they will be recovered. In the case of other ETCs whose customers contribute to the state USF by paying an end-user surcharge, these costs are borne by the USF. Since TracFone claims its services are exempt from such surcharges, parties assert TracFone should bear the eligibility determination costs.

#### 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 in its post-hearing briefs that it has no plans to request state USF support. *Post-hearing Brief of TracFone, p.9*.

TracFone’s petition provides the Commission its first opportunity to examine ETC status in the context of an entity offering pre-paid, wireless telecommunications services to qualifying Lifeline households, without any support from the state USF. Neither the pertinent state laws nor the Commission’s rules adequately contemplate this type of service offering. Accordingly, while the Commission applies the existing laws and rules to the facts presented, it recognizes rulemaking, and possibly even legislation, is needed to provide petitioners like TracFone and interested parties greater clarity concerning the State’s policies governing ETC designation in this new setting. The Commission recognizes Utah Code Ann. §54-8b-15 *may* obligate TracFone to pay into the state USF fund, even though TracFone seeks no distribution

from the fund. Assuming this interpretation to be correct, however, neither the statute nor the rules governing collection of state USF fund contributions include a method to identify, measure and collect the appropriate contribution where the Lifeline service is associated with pre-paid wireless service.

Although Utah Code Ann. §54-8b-15 may obligate TracFone to pay into the state USF fund, it is not clear we have jurisdiction to collect such charges. Regardless, our rules governing ETC designation, as currently written, do not obligate TracFone to collect and remit state USF surcharges. The statutory collection method—in its current form, does not apply to TracFone’s proposed service model.

*TracFone’s Obligations and Commission Jurisdiction*

Utah Code Ann. §54-8b-15(10)(b) states in relevant part:

- (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) . . .
- (iv) charges associated with being a provider of public telecommunications services shall be in the form of end-user surcharges applied to intrastate retail rates.

Utah Code Ann. §54-8b-15(11) further states: “Nothing in this section shall be construed to enlarge or reduce the commission’s jurisdiction or authority, as provided in other provisions of this title.”

TracFone is a telecommunications corporation as defined in Utah Code Ann. § 54-8b-2(18). There is no dispute that TracFone provides intrastate public telecommunications

service. Given these two facts Utah Code Ann. §54-8b-15(10)(b)(i) seemingly requires TracFone to “contribute to the fund on an equitable and nondiscriminatory basis.” This conclusion is re-enforced by subsection (10)(b)(ii) which states that 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 . . . .”

The Division points to Utah Code Ann. §54-8b-15(10) to argue 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 also 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 TracFone is able to identify intrastate usage, and because it is a telecommunications corporation, it should be required to pay the USF surcharge assessment.

As TracFone notes, however, Utah Code Ann. § 54-8b-15(10)(a)(iv) states charges to generate USF funds “shall be in the form of end-user surcharges applied to intrastate retail rates.” It seems clear from this language, as TracFone asserts, that surcharge amounts are to be paid by end users on the basis of their individual intrastate usage. TracFone contends that “as a prepaid provider, it has no ‘billed intrastate retail rates’ upon which to collect and remit state USF surcharges.” *Post-hearing Brief of TracFone*, p.10.

Reviewing §54-8b-15(10)(b)(i) and (ii), it would appear that TracFone has the obligation to pay into the USF fund and the Commission has the jurisdiction to order it to do so. However, when viewing the language of §54-8b-15(10)(b)(iv) (“charges . . . shall be in the form

of end-user surcharges”) in light of TracFone’s business model, it is not clear the Commission has jurisdiction to implement a mechanism to collect charges from end-users. In the case of telecommunications carriers (non-prepaid wireless) currently contributing to the state USF fund, a customer typically enters into an agreement to purchase service from the carrier. Then, the carrier bills the customer for monthly service and itemizes the USF surcharge by applying the appropriate percentage to the intrastate retail rates. The carrier thereby collects the surcharge for the state. The Commission has jurisdiction over these carriers and has the authority not only to dictate the payment of the surcharge but also how they will remit the collected surcharges to the Commission.

TracFone’s business model is different, however. TracFone customers have two options for purchasing prepaid minutes. One option is for the customer to buy additional minutes online directly from TracFone. *See Reply Post-hearing Brief of TracFone*, p.8, fn.13. In such an instance, TracFone does collect and remit USF payments. But relatively few customers purchase service in this manner. The majority of TracFone customers buy their pre-paid services from a third-party retailer like Walmart or Target, *see Transcript*, pp. 54-56. In such a case, there may be no way for TracFone to predict the intrastate revenue that will ultimately be produced via the pre-paid services and calculate the appropriate surcharge, nor is there an existing mechanism to bill the end-user for the USF surcharge at the point of sale. Moreover, it is beyond the Commission’s jurisdiction to fashion a mechanism that deviates from the statutory language specifying that charges “shall be in the form of end-user surcharges

applied to intrastate retail rates.” Utah Code Ann. §54-8b-15(10)(a)(iv).<sup>5</sup> So 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—in contravention of §54-8b-15(10)(b)(i), but the Commission questions if such an action would not be a taking.

Additionally, a second barrier also exists to the Commission imposing the state USF end-user surcharge on pre-paid services. While the Commission has authority to regulate the actions of telecommunications corporations offering pre-paid services, the Commission has no jurisdiction over the third-party retailers who typically collect payment for minutes sold to their customers. Consequently, even if the Commission did determine a lawful way for TracFone to calculate an appropriate surcharge amount, the Commission would have no authority over the third-party retailers who would collect and remit those charges. *See Utah Code Ann. 54-8b-15(11)*; *see also Hi-Country Estates Homeowners Ass’n v. Bagley and 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 . . . . [and] any reasonable doubt of the existence of any power must be resolved against the exercise thereof”).

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<sup>5</sup> These limitations are not unique to TracFone but affect 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.

The Commission lacks jurisdiction to fashion a new mechanism at this point and order TracFone to contribute into the state USF. There may be many valid public policy reasons for requiring TracFone 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 currently does not have the authority to order TracFone to contribute into the state USF fund via third-party retailers.

*Applying the Current Administrative Rules to Pre-paid Services*

The administrative rules that implement UCA § 54-8b-15 also constrain the Commission’s present ability to require TracFone to contribute to the state USF. Whatever our statutes may require, currently our Rules do not require TracFone contribute to the state USF as a requirement for ETC designation. 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 argues because it does not issue a bill to customers, it cannot “bill and collect” a USF surcharge from its customers. The Commission agrees with TracFone that the collection method specified in the current rule necessarily exempts telecommunications services for which no bill is rendered by the provider. The term “billed and collected” necessitates the issuance of a bill to a customer, whereby the customer then remits payment to the state. TracFone notes: .

“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.

The Division argues that “neither the Commission’s Rules nor the statute[s] clearly address prepaid wireless or other telecommunications services that exist today [because they] may not have existed when either the rules were written or the statute passed.” *Post-hearing Brief of the Division*, p.7. In essence, the Division suggests that since the current rules inadvertently exempt TracFone from paying into the state USF, we should remedy that omission by requiring TracFone to pay into the fund as a condition of ETC status. But whether or not that would be sound public policy, requiring TracFone to pay into the state USF despite the plain language of the rules would be to engage in improper (retroactive) rulemaking in violation of Utah Code Ann. §63G-3-301; *see also Lane v. Board of Review*, 727 P.2d 206 (1986) (holding that an agency’s rules are not valid unless the agency complies with the rulemaking procedures prescribed in §63G-3-301). Again, absent any current Rule, or other explicit or clearly implied authority, conditioning the TracFone’s ETC designation on such a basis would be improper.

#### 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, and 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 interest<sup>6</sup> 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 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."). Some TracFone users will likely 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

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<sup>6</sup> 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.

*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 from the legislature, 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 current 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) order<sup>7</sup> 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 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.<sup>8</sup>

Second, the Commission does not now have jurisdiction to expand the ETC designation requirements as some suggest, because of public interest concerns or out of “fairness” as valid as those reasons may be. For example, the OCS encourages the Commission to apply laws normally interpreted and applied by the Utah State Tax Commission in this ETC designation proceeding. The OCS analyzes more thoroughly Utah Code Ann. § 69-2-1 *et seq.*

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<sup>7</sup> *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.

<sup>8</sup> 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.*

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 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. "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).

URTA complains this outcome is unfair. That may be, but the Rule explicitly requires URTA members to bill and collect the surcharges for the public interest programs. It does not require such where, as in the case of TracFone, the service is not usually billed directly. Our statutes and Rules categorically allow the Commission to order URTA's members to collect and remit the charges. 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 now 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 currently 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*.<sup>9</sup> 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 OF INITIAL AND ONGOING ELIGIBILITY

Utah Code Ann. §54-8b-15 established the Universal Public Telecommunications Service Support Fund. Administrative Rules R746-341-3 and R746-341-4 govern the process

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<sup>9</sup> 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.

for determining initial eligibility for Lifeline service and continuing eligibility.

*Initial Application and Eligibility*

Initial eligibility is achieved through self certification under penalty of perjury either through concurrent participation in specified public assistance programs or meeting income-based criteria and documenting qualifying annual household income.

R746-341-3 states in relevant part:

. . . The ETCs shall provide lifeline telephone service to any applicant who self-certifies, under penalty of perjury, his household is eligible for public assistance under one of the follow or its successor programs . . . .

. . . The ETCs shall provide lifelines telephone service to any applicant who certifies via supporting documentation, under the penalty of perjury, his household income to be at or below 135 percent of the then applicable Federal Poverty Guidelines.

This Rule allows applicants to initially qualify for Lifeline service through a process of self-certification, subject to penalty of perjury. Therefore, the Commission amends its September 2010 Order to provide that qualified applicants for Lifeline service may receive such service initially based on their own self-certification. This initial application will not require any other verification except that outlined in R746-341-3. TracFone may either use the Commission-provided application form or provide its own application form that complies with R746-341-2.C. Documentation for initial applications will be maintained by the Commission or responsible agency as determined by the Commission.

*Continuing Eligibility*

Utah Admin. Code R746-341-4 governs continuing eligibility. The Rule states in relevant part:

- A. Annual Verification-The continuing eligibility of customers on the Lifeline service rate shall be verified annually

- B. Verification Responsibilities-At least annually, the responsible agency shall provide the ETCs with information identifying customers who are eligible for Lifelines service or Link-up American Plan participation.

The rules require the responsible agency to verify continuing eligibility annually. Currently, the Commission oversees the determination of initial and continuing eligibility through a contract with the Department of Community and Culture (“DCC”)<sup>10</sup>. Currently, this is the only method in place whereby continuing eligibility is verified.

Pre-paid wireless ETCs present some unique challenges for the Commission. First, even though there is currently one method of verifying continuing eligibility—the contract with the DCC, the monies used to fund the contract come from state USF funds. Because TracFone will not be paying into the state USF, the continuing eligibility of TracFone Lifeline applicants may not be verified using the current mechanism. To do so would benefit TracFone customers indirectly as their continuing eligibility is verified, without any concomitant obligations by TracFone to bear the increased costs such a process will impose on the state USF. *See Utah Code Ann. § 54-8b-15(10)(b)(i)*. Simply put, because TracFone customers are not paying into the state USF when purchasing the TracFone service, they should not receive any benefits from the state USF.

The second challenge is the prospect of verifying large volumes of new recipients of TracFone’s Lifeline pre-paid services. TracFone itself estimates the increase could be “anywhere between 1,000 [to] 2,000” Lifeline applications per week.

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<sup>10</sup> The DCC is a sister agency, and as such, the Commission does not have jurisdiction over the DCC.

*Id.*, p.26, ll.9-13. This does not include the applicants from other potential ETCs currently applying for ETC designation, e.g. *iwireless*, *Docket No. 10-2526-01*, *Virgin Mobile, USA*, *Docket No. 10-2521-01*. At that rate the duty to verify continuing eligibility could potentially generate significant additional Lifeline administration costs and consume greater regulatory resources, without the resources currently in place to bear those costs and provide the resources.

Additionally, because of the unique nature of pre-paid wireless services, the verification process for Lifeline customers of such services like TracFone may differ from the current process administered by DCC. Consequently, the Commission must identify one or more appropriate means of satisfying its responsibilities to assure Lifeline eligibility is properly administered in this new context. The Commission must especially ensure that the process for verifying continuing eligibility makes certain applicants are actually qualified for the Lifeline service and that there is no “double-dipping” among recipients. For this reason, the Commission will require that the verification of *continuing eligibility* occur *as soon as possible* after the Lifeline applicant self-certifies and is given Lifeline service. This will mean that the first verification of continuing eligibility may occur less than a year from the issuance of this order. Also, continuing eligibility shall be verified at least annually thereafter. While it is undisputed TracFone should bear the costs of determining continuing eligibility, the record is not adequate for the Commission to reach a conclusion on suitable processes or the attendant costs. Accordingly, the Commission must condition TracFone’s ETC designation on its commitment to bear such costs once they are determined, or to bear such costs in another

fashion approved by the Commission. Therefore, it is appropriate that the Commission has commenced a proceeding where the Commission may investigate a variety of appropriate processes and their respective costs, whereby continuing Lifeline applicant qualifications may be verified. (*See Docket No. 10-2528-01*).

ORDER

1. TracFone's Petition for ETC designation is granted. The Commission amends the September 2010 Order to provide that qualified applicants for Lifeline service may receive such service initially based on their own self-certification.
  - a. This initial application shall not require any other certification except that outlined in R746-341-3;
  - b. TracFone may either use the Commission-provided self-certification application form or provide its own form that complies with R746-341-3.C;
  - c. Initial self-certification applications, including supporting documents will be maintained by the Commission or responsible agency.
2. TracFone's ETC designation is subject to the following conditions:
  - a. TracFone shall receive no state USF support. If it desires state USF, it shall submit a new application requesting such support;
  - b. the verification of *continuing eligibility* for each applicant shall occur *as soon as practicable* after the Lifeline applicant self-certifies and is given Lifeline service;
  - c. continuing eligibility shall be verified at least annually thereafter for each applicant;

- d. until another process is identified that will ensure continuing eligibility is verified, TracFone shall be required to use the DCC for verification of continuing eligibility, subject to DCC's willingness to provide the service and TracFone's payment of incremental costs to the DCC for verification. Processes and costs shall be determined in Docket No. 10-2528-01 or other applicable proceeding;
  - e. Alternatively, to avoid the problem of TracFone receiving benefit from the state USF fund to which is not currently contributing, TracFone may contribute to the state USF in a manner approved by the Commission and have its continuing eligibility verifications paid from the state USF fund. The cost of the state USF contribution could be built into TracFone's pricing structure and paid by the customer at the point of sale.
3. TracFone shall be prepared to submit to the Commission for review an alternative method for accomplishing the annual eligibility verification specified in Utah Admin. Code R746-341-4 and related statutes, should DCC decline to provide continuing eligibility verification.
  4. This is a final order.
  5. Pursuant to Sections 63G-4-301 and 54-7-15 of the Utah Code, an aggrieved party may request agency review or rehearing of this Order by filing a written request with the Commission within 30 days after the issuance of this Order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission does not grant a request for review or rehearing within 20 days after the filing of the request, it is deemed denied. Judicial review of the

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Commission's final agency action may be obtained by filing a petition for review with the Utah Supreme Court within 30 days after final agency action. Any petition for review must comply with the requirements of Sections 63G-4-401 and 63G-4-403 of the Utah Code and Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 1<sup>st</sup> day of December, 2010.

/s/ Ruben H. Arredondo  
Administrative Law Judge

Approved and confirmed this 1<sup>st</sup> day of December, 2010, as the Amended 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#69902