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**BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

In the Matter of Petition of TracFone Wireless, Inc. for Designation as an Eligible Telecommunications Carrier in the State of Utah for the Limited Purpose of Offering Lifeline Service to Qualified Households	Docket No. 09-2511-01 <b>UTAH OFFICE OF CONSUMER SERVICES' REQUEST FOR RECONSIDERATION</b>
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**I. INTRODUCTION AND RELIEF REQUESTED.**

It is the policy of the State of Utah that basic telecommunications services are to be made available to all residents; service that includes Lifeline and telephone relay assistance as well as access to 911 and E911 emergency services. Utah Code Ann. § 54-8b-1.1 (West 2004), § 54-8b-2 (2) (West Supp. 2009); Utah Admin. Code R. 746-360-2 (C) (2010). Utah and Federal law provide a means by which public funds collected from all telecommunications providers are used to support the provision of such services to low-income households and households eligible for public assistance. Utah Code Ann. 54-8b-15 (West 2004); Utah Admin. Code R. 746-341 Lifeline/Link-up (2010). Utah law provides a means by

which public funds collected from all telecommunications providers are used to support emergency telecommunications services. Utah Code Ann. § 69-2-5 (West 2010) (911 emergency telecommunications service), § 69-2-5.5 (poison control), and § 69-2-5.6 (E-911 emergency service).

The Utah Public Service Commission is by statute, the dominant authority to enforce these obligations. However, the Commission's December 1, 2010 Amended Report and Order, and the September 13, 2010 Report and Order erroneously interpret and apply these statutory mandates by agreeing with TracFone's position that pre-paid wireless providers need not comply with Utah law. The errors are extended to any pre-paid wireless provider's retail or Lifeline service. Furthermore, the detrimental effect and implication of these orders extends to all telecommunications consumers.

The Office and other parties dispute TracFone's position and contend that only if TracFone, or any other pre-paid wireless provider seeking ETC designation, complies with pertinent provisions of Utah law is the telecommunications corporation operating in the public interest; a condition precedent to ETC designation. The Commission's resolution of the disputed issues must be reconsidered because the resolution is the result of plainly erroneous statutory interpretation that ignores the reality of TracFone's business.

## **II. SUMMARY OF THE EVIDENCE AND ISSUES FOR RECONSIDERATION.**

TracFone applied for designation as an eligible telecommunications carrier (ETC) in order to access federal universal service funds to provide Lifeline telephone service to low income persons or public assistance recipients.<sup>1</sup> ETC designation is granted or withheld based upon whether the telecommunications provider operates in the public interest, both as a Lifeline provider and as a provider of retail telecommunications services. While TracFone's Lifeline service was initially viewed as inadequate and limited in quality and character, TracFone modified its Lifeline offering. Some but not all parties' reservations about TracFone's terms of Lifeline service were resolved. Generally, designating TracFone as an eligible telecommunications carrier (ETC) providing wireless Lifeline service was not in controversy.

The Utah Office of Consumer Services agrees that the availability of Lifeline Assistance to eligible subscribers of wireless as well as wire-line telephone services extends Lifeline's benefits and is a proper use of Federal and State Universal Service funds. Accordingly, residential and small commercial telephone consumers, the Office's constituents, who provide a large majority of

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<sup>1</sup> An applicant for Lifeline assistance must own and reside in a residential property or rent and reside in a residential property, and meet income guidelines or be eligible for public assistance under specified programs. Utah Admin. Code R 746-341-2 A., E.; Utah Admin. Code R 746-341-3.

the funding for such programs, as a whole benefit from a more cost-effective and beneficial use of universal service funds.

However, the Office and other parties could not agree with designating TracFone as an ETC because TracFone maintained that as a pre-paid wireless service provider, it is not subject to certain statutory obligations enforced upon all other wire-line or wireless providers. TracFone insists that the Office's constituents must not only provide a large majority of Lifeline funding, they must also subsidize TracFone's retail pre-paid wireless business.<sup>2</sup> The Commission agreed.

The Commission's findings, conclusions and orders erroneously restrict the Commission's jurisdiction of pre-paid wireless providers, are inconsistent with or contrary to law, and by exempting pre-paid wireless providers from the application of important public policies, the orders impede enforcement of Utah law. It is for these reasons that the Utah Office of Consumer Services requests that the Commission reconsider its final order and grant TracFone's application conditionally as described in the Office Opening and Reply Post-Hearing briefs and as supported by the evidence.

The dispute that frames the issues for reconsideration concerns TracFone's position that its non-lifeline pre-paid wireless services are not subject to a public

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<sup>2</sup> When one segment of the telecommunications industry does not pay the taxes and fees established by law upon that industry, all other segments of the industry must pay a greater share. Thus, the customers of telecommunications companies that are public utilities, the Office's constituents, are in effect subsidizing the business for all ETCs allowed not to contribute to these funds.

telecommunications corporation's obligations under Utah law to contribute to the State Universal Public Telecommunications Service Support Fund and to emergency telecommunications services funds. In the alternative, by misapplying and misreading State law, TracFone contends that it should be granted an exemption from those obligations. In addition, the dispute implicates the application of Utah law and the Commission's administrative rules to the mandatory process to certify, verify and re-certify household eligibility for Lifeline assistance.

**III. THE COMMISSION ERRONEOUSLY CONSTRUES AND APPLY'S UTAH LAW TO EXEMPT TRACFONE FROM CONTRIBUTING TO THE PUBLIC TELECOMMUNICATIONS UNIVERSAL SERVICE FUND AND EMERGENCY TELECOMMUNICATIONS SERVICES FUNDS.**

Before designating any applicant as an ETC, the Commission must determine that the proposed use of public funds is consistent with the public interest, convenience, and necessity for Lifeline eligible consumers, other telecommunications carriers, and public telecommunications customers in general. 47 U.S.C. § 214(e)(2) (2010) (granting the Commission the authority and discretion to determine what is in the public interest). In both the September 13, 2010 Report and Order and the December 1, 2010 Amended Report and Order, the Commission compromises the public interest by approving TracFone as an ETC public telecommunications services while permitting TracFone to evade the obligations of a public telecommunications corporation. Most troubling is the fact

that the Commission holds that TracFone's business model is outside of the Commission's jurisdiction.

a. The pre-paid wireless business model is subject to Utah's telecommunications law.

TracFone describes itself as "the leading provider of prepaid wireless service in the United States." Petition, Part I., Page 2.

As described elsewhere in this Petition, TracFone's entire business model is predicated on providing easy-to-use, pay-as-you-go, affordable wireless telecommunications service to consumers to whom wireless service would be otherwise unavailable or unaffordable. TracFone offers consumers an opportunity to acquire wireless service using state of the art handsets and such features as caller ID, voice mail, text messaging, and long distance calling without toll charges. Because TracFone's service requires no term contracts, no minimum service periods or volume commitments, no credit checks, and no early termination fees, the service is available to everyone – irrespective of age; irrespective of residency; irrespective of creditworthiness. Moreover, TracFone's prepaid service is unique in that usage information and remaining balance information is stored in the handsets and is thus available to consumers on a "real-time" basis. Petition, Part III. B., Page 21.

TracFone maintains that its business model bars the application of Utah law that requires all telecommunications corporations to collect and pay State taxes, fees and charges upon which the public telecommunications network depends. TracFone deliberately does not operate telecommunications facilities and re-sells wireless services almost exclusively through specialty and mass-market retailers. To the extent that a customer's place of use or residence is important, TracFone ignores customer demographic information that it must obtain to provide service

or for Lifeline customers, is required by law.<sup>3</sup> Because customers pre-pay for service, TracFone claims that it has no means of collecting from customers the fees and charges that it is permitted to pass on.

Upon this basis, TracFone contends that only wire-line and wireless providers and consumers who have a direct and discernible connection, must pay the taxes, fees and charges to support public telecommunications services such as 911, poison control, services for the hearing and speech impaired, and universal service. However, the public interest cannot be served by, on one hand, granting ETC designation to TracFone because of the attributes of its business model, and on the other hand, relieving it of any responsibility to the public interest because of the attributes of its business model.

TracFone describes its business model as one that insulates it from responsibility under state telecommunications and tax law. TracFone's Brief on Appeal in Tracfone Wireless, Inc., Appellant, v. Washington Department of Revenue, Respondent, Washington Supreme Court No. 82741-9, illustrates this point.<sup>4</sup> Claiming that the Washington State E-911 tax is inapplicable to prepaid

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<sup>3</sup> For example, Utah Admin. Code Rule 746-341-5 F. restricts Lifeline telephone service "to the applicant's principal residence" and to "one single residential access line." An applicant for Lifeline service is defined in terms of a residence: "Applicant" -- means the eligible telecommunications customer who owns and resides in a residential property or rents and resides in a residential property." Utah Admin. Code R. 746-341-2 A (2010). An applicant for Lifeline assistance must meet income guidelines or be eligible for public assistance under specified programs. Utah Admin. Code R 746-341-2 E (2010).; Utah Admin. Code R 746-341-3 (2010). TracFone is required to collect this information to comply with the Commission's rules and an applicant can only be certified as eligible for Lifeline service by the responsible state agency if this information is made available.

<sup>4</sup> <http://www.courts.wa.gov/content/Briefs/A08/827419%20%20appellant%20br.pdf>

wireless subscribers, TracFone excludes itself from the tax by claiming it “engages in no financial transactions” with persons using TracFone services; does not provide “subscriber billing statements” in which a line item may be included; that purchasers can use TracFone’s service “in less than a month or over the course of many months” rendering a “per month” flat rate inapplicable; and, that no user of TracFone services has a “primary place of use” in Washington because TracFone airtime and handsets can be purchased at 60,000 nationwide specialty and mass-market retailers, and 30 different nationwide carrier networks provide airtime.<sup>5</sup> In any event, “even if the statute were deemed to impose tax on prepaid wireless subscribers (retail purchasers),” “TracFone had no duty to collect the tax (and no liability for uncollected tax) on its wholesale sales,” which TracFone claims is “almost all of TracFone’s sales of prepaid wireless airtime.” Most important, each of these obstacles to imposing or collecting such fees and charges is self-imposed.<sup>6</sup>

The Washington Supreme Court rejected these arguments in its October 28, 2010 opinion in *Tracfone Wireless, Inc. v. Washington Department of Revenue*, No. 82741-9. A copy of the majority opinion and dissent are attached and

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<sup>5</sup> Unless an applicant in Utah provides a principal residence address, they are not eligible for Lifeline service. See Footnote 3. Under Utah Code Section 59-12-211 (5) this information establishes a principal place of use. The fact is that TracFone does not want the information because of the implications it has to TracFone’s obligations as a public telecommunications corporation and to its marketing claim that TracFone users do not pay telecommunications taxes, charges and fees.

<sup>6</sup> The Commission recognizes that Tracfone’s self imposed barriers to collecting taxes and fees are fabricated when it states: “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.” Amended Report and Order Page 22, ¶ 2e.



incorporated herein. As it does before the Commission, Tracfone insisted that Washington statutes were not applicable because fees and taxes could only be collected through a billing statement. In summary, the Court held that whether telecommunications taxes and fees are owed does not depend upon how a carrier decides to market and charge for its service; the public utility's regulatory obligations are not depending upon the utility's business model.<sup>7</sup> The Washington Supreme Court reject Tracfone's request for exemption from taxes and fees that are generally applicable to all telecommunications providers.<sup>8</sup>

b. The pre-paid wireless business model is subject to the Commission's jurisdiction.

Both the September and December Report and Order conclude that the Commission does not have jurisdiction over specific parties or agencies to justify not exercising its statutory jurisdiction over a public telecommunications corporation. The Commission concludes that Utah Code Ann. § 54-8b-15 may obligate TracFone to contribute to the State universal service fund. But, the Commission refuses to exercise its jurisdiction to define the obligation in the context of a pre-paid wireless business model designed to avoid such

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<sup>7</sup> There are significant similarities between Washington's and Utah's regulatory scheme for telecommunications.

<sup>8</sup> The Washington Supreme Court also rejected the "competitive disadvantage" argument that the Commission cites to protect Tracfone from a "taking", and also rejects Tracfone's argument that the retailer not the telecommunications service provider is liable for the taxes and fees.

contributions. The Commission permits the applicant to define the scope of regulation.

The Commission improperly concedes that the pre-paid wireless model chosen by TracFone has no billed intrastate retail rates and therefore, again, TracFone defines the scope and meaning of equitable and nondiscriminatory contribution to the State USF. The Commission's conclusion is that "TracFone's business model is different, however." The Commission commits the same error by concluding that because TracFone provides telecommunications services through unregulated third-party retailers, TracFone cannot be regulated.

The error in the Commission's findings and orders in part stems from its holding that administrative rules may condition or negate statutory language and the legislative intent. See December 1, 2010 Amended Report and Order, page 10 to 11. Another example of the Commission's error is its refusal to apply 911 charges to a pre-paid wireless provider. However, the statute defining the provider's obligation certainly allows for such providers. Utah's Emergency Telephone Service Law, Utah Code Title 69, Chapter 2, plainly and broadly applies to telecommunications services and providers. Utah Code Ann. Section 69-2-5 (3)(a), states:

(3) (a) Except as provided in Subsection (3)(b) and subject to the other provisions of this Subsection (3) a county, city, or town within which 911 emergency telecommunications service is provided may levy monthly an emergency services telecommunications charge on:

- (i) each local exchange service switched access line within the boundaries of the county, city, or town;

- (ii) each revenue producing radio communications access line with a billing address within the boundaries of the county, city, or town; and
- (iii) **any other service**, including voice over Internet protocol, provided to a user within the boundaries of the county, city, or town that allows the user to make calls to and receive calls from the public switched telecommunications network, including commercial mobile radio service networks. [Emphasis added.]

There is no dispute that a pre-paid wireless provider supplies an access line within certain boundaries, even though there may be no billing address. And (iii) requires only service within boundaries recognizing that some services are mobile but nevertheless identifiable within a particular entity; zip codes are quite accurate. In its post hearing briefs, the Office cited to other instances where pre-paid wireless services are expressly and certainly implicitly required to contribute telecommunications related charges and fees. Ignoring statutory precedent, the Commission's refusal to craft a reasoned and authorized regulatory scheme is plain error.

#### **IV. THE COMMISSION'S ORDERS PERTAINING TO PRE-PAID WIRELESS PROVIDERS AND THE UTAH UNIVERSAL SERVICE FUND AND LIFELINE CERTIFICATION ARE CONTRARY TO UTAH LAW.**

Section 54-8b-15 Utah Code Ann. (West 2004) compels the Commission to collect and Tracfone to pay the funds necessary for providing public telecommunications services to qualified Lifeline customers. The Universal Public Telecommunications Service Support Fund is to be operated in a nondiscriminatory and competitively and technologically neutral manner, both collecting funds and distributing them. The Commission may not favor one

technology, pre-paid wireless, by exempting it from the obligation to contribute. The primary obligation to contribute is upon “each telecommunications corporation that provides intrastate public telecommunication service.” While the charges associated with the provider telecommunications services are in the form of end-user surcharges, the provider who chooses not to collect is still liable and the provider may not claim that its chosen business model exempts it from complying

The Commission erroneously interprets Utah law and regulations pertaining to Lifeline and the State USF. The State USF surcharge may be billed and collected up front. The rate is a percentage of billed interstate rates, which for TracFone is a per minute rate, billed when the customer selects the blocks for purchase and collected by the retail provider. Furthermore, once the rate is determined, the provider must then bill and collect it. There is no limit on how or when it is billed and collected. The law does not say the State USF surcharge is determined by the amount of a monthly paper or electronic bill. .

The Commission’s administrative rules that reference billing and collecting by retail providers must be interpreted or applied consistently with the statute. Certainly, the Commission may not as it has, determine that the statute may allow the collection from TracFone of State USF contribution, but apply its administrative rules to exempt pre-paid wireless from this and other obligations to support public telecommunications services.

For example, Utah's Emergency Telephone Service Law, Utah Code Title 69, Chapter 2, plainly and broadly applies to telecommunications services and providers. Utah Code Ann. Section 69-2-5 (3)(a), states:

(3) (a) Except as provided in Subsection (3)(b) and subject to the other provisions of this Subsection (3) a county, city, or town within which 911 emergency telecommunications service is provided may levy monthly an emergency services telecommunications charge on:

- (iv) each local exchange service switched access line within the boundaries of the county, city, or town;
- (v) each revenue producing radio communications access line with a billing address within the boundaries of the county, city, or town; and
- (vi) any other service, including voice over Internet protocol, provided to a user within the boundaries of the county, city, or town that allows the user to make calls to and receive calls from the public switched telecommunications network, including commercial mobile radio service networks.

This statute does nothing more than allow local government entities to levy emergency services telecommunications charges on all forms of telecommunications within the boundaries of the entity. Section 69-2-5 (3) further clarifies the statute's purpose in (3)(c), allowing the governmental entity to determine the rate which may not exceed 61 cents per month, and in (3)(d)(iii) addressing where the service address is different than the location of the access line, or in the case of mobile telecommunications service, where the place of primary use is different than the billing address. Utah Code Ann. § 69-2-5 (3)(d)(iii) (West Supp. 2009).

After the local government entity determines the emergency services rate and levies it by appropriate ordinance, the telecommunications carrier "shall" bill and collect the levied charge. Utah Code Ann. § 69-2-5 (3)(f) (West Supp. 2009).

As with the State USF surcharge, the requirement that TracFone bill and collect the emergency services charge is plain and unconditional, nor does it depend upon the carrier's business model. Furthermore, as a matter of course, through credit or debit card information, or information necessary to assign a telephone number, or by simply asking, TracFone has or can readily acquire a service address or place of primary use.

**V. THE COMMISSION'S SEPTEMBER AND DECEMBER REPORT AND ORDER ARE BASED UPON EVIDENTIARY ERRORS AND IMPROPER CITATION TO UNSWORN STATEMENTS THAT ARE NOT HARMLESS.**

In part the Commission's Report and Orders pertaining to the cost of certifying a Lifeline applicant relies upon the Administrative Law Judge's exclusion of the Division of Public Utilities' evidence pertaining to the \$3.00 to \$4.00 actual cost for the responsible agency to verify an applicant's Lifeline eligibility. The Office will not restate here in this pleading, the reasons the Office disagrees with the ruling.<sup>9</sup> The Office requests that the Commission reconsider the evidentiary rulings pertaining to certification costs as the Office believes that excluding this evidence contributed to the erroneous conclusion that the Commission could not impose upon TracFone, the obligation to comply with Utah

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<sup>9</sup> The Office's argument on the issue is found at Tr. 127, l. 18 to 128, l. 12.

law and administrative rules. See December 1, 2010 Amended Report and Order, page 17 to 20.

Finally, the Office requests reconsideration because the initial and amended Report and Order impermissibly rely upon “the many comments raised supporting of [sic] TracFone’s Petition.” These were unsworn form letters written by TracFone for which there is no foundation of the context and information provided when signatures were solicited. The parties were never given an opportunity to ask, for example, whether the letter would have been signed had the person known that TracFone refuses to contribute to the emergency telecommunications services funds.

## **V. CONCLUSION.**

In summary, the Commission’s September 13, 2010 Report and Order and December 1, 2010 Amended Report and Order approved TracFone’s petition by narrowly focusing upon Lifeline assistance from pre-paid wireless providers without considering and in fact excluding consideration of whether a provider such as TracFone is serving the public interest. Consequently, the Commission’s orders are not supported by substantial evidence and are based upon erroneous statutory interpretation and application.

As stated above, no pre-paid wireless provider, or any telecommunications provider, may be designated as an ETC unless the provider demonstrates compliance with pertinent provisions of Utah law and is operating in the public interest. This proof is the provider’s burden and a condition precedent to ETC

designation. The Commission's resolution of the disputed issues must be reconsidered because the resolution is the result of plainly erroneous statutory interpretation that ignores the reality of TracFone's business.

Dated this 30<sup>th</sup> day of December 2010.

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## CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing Brief of Utah Office of Consumer Services were served upon the following by electronic mail on December 30, 2010:

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