

Stephen F. Mecham (Bar No. 4089)  
Callister Nebeker & McCullough  
10 East South Temple, Suite 900  
Salt Lake City, Utah 84133  
Telephone: 801 530-7300  
Facsimile: 801 364-9127  
Email: sfmecham@cnmlaw.com

**BEFORE PUBLIC SERVICE COMMISSION OF UTAH**

In the Matter 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.	<b>DOCKET NO. 09-2511-01</b> Petition of the Utah Rural Telecom Association for Reconsideration, Review or Rehearing
---	---

The Utah Rural Telecom Association (“URTA”), pursuant to Utah Code Ann. § 63G-4-301, Utah Code Ann. § 54-7-15, and Utah Admin Code Rule R746-100-11 F, hereby petitions the Public Service Commission (“Commission”) to reconsider the September 13, 2010 order (“Initial Order”) and the December 1, 2010 order (“Order”) issued in this proceeding and review and rehear the issues enumerated below.

**I. INTRODUCTION**

On June 7, 2010, the Commission heard this matter to determine whether TracFone Wireless, Inc. (“TracFone”) qualified for designation as an eligible telecommunications carrier (“ETC”) for the limited purpose of providing Lifeline service in Utah. The Utah Rural Telecom Association (“URTA”) argued that in order for TracFone’s application to be in the public

interest, TracFone must contribute to the public interest programs<sup>1</sup> to which all telecommunications corporations are required to contribute.

In the Initial Order and the Order the Commission misinterpreted state law and incorrectly concluded that it does not have jurisdiction to require TracFone to collect and remit surcharges for the public interest programs. The Commission's decision encourages service providers like TracFone to establish business models to circumvent clear language of the statute which cannot be sustained because it will harm the public interest programs.

In addition to the Commission's misinterpretation and misapplication of the law, the Commission failed to find that granting TracFone's application is in the public interest, a general requirement for all Commission action and a specific requirement for rural areas established in 47 U.S.C. § 214 (e)(2).<sup>2</sup> Failure to make such a finding violates federal and state law. The benefits of the service TracFone will offer will not outweigh the harm granting TracFone's application will cause to the public interest programs and is therefore not in the public interest. For these reasons URITA seeks reconsideration and requests that the Commission reverse its decision designating TracFone an ETC.

## **II. ARGUMENT**

In the Initial Order and the Order, the Commission concluded that its jurisdiction to collect the charges for the public interest programs is not clear and that the Commission's rules

---

<sup>1</sup> Public interest programs identified in testimony and at hearing are 911 emergency services, the state Universal Service Fund, Poison Control, and the Hearing Impaired Fund.

<sup>2</sup> This section states in part: "Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest." The Commission recognized this requirement in the Order at 4.

do not obligate TracFone to bill and remit charges for the public interest programs.<sup>3</sup> URITA respectfully disagrees.

**A. Utah Code Ann. § 54-8b-15(10) Gives the Commission Explicit Authority to Impose a Surcharge on TracFone for Universal Service and Mandates that TracFone Pay the Surcharge**

Utah Code Ann. § 54-8b-15(10)(a) states in part: “(i) **each telecommunications corporation** that provides intrastate public telecommunications 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 telecommunications services in this state to contribute monies to the fund through explicit charges determined by the commission....” (Emphasis added.)

These provisions leave no doubt with respect to the Commission’s jurisdiction to require TracFone to pay into the state universal service fund and TracFone’s obligation to pay. The Commission has the authority to impose a surcharge under Utah Code Ann. § 54-8b-15(10)(a)(ii) and TracFone must contribute to the fund as a telecommunications corporation providing telecommunications service in Utah under Utah Code Ann. § 54-8b-15(10)(a)(i). That subsection (iv) of the statute requires that the charge be in the form of an end-user surcharge to intrastate rates does not change the Commission’s jurisdiction or TracFone’s obligation.<sup>4</sup> There is no exemption from payment for prepaid wireless providers like TracFone. If prepaid wireless were exempt, the legislature would have provided a specific exemption in the statute.

---

<sup>3</sup> Order at 6 and 8.

<sup>4</sup> The Commission acknowledged in the Order at 22 that a surcharge could be built into TracFone’s pricing structure.

TracFone's business model is not controlling, the law is controlling and under the law, wireless providers are required to pay the surcharge.<sup>5</sup>

The Commission's explanation that it cannot require TracFone to pay into the fund because the rule implementing the statute does not require prepaid service providers to collect the surcharge is incorrect. Rules cannot supersede a statute and the Commission can change the rule at any time. In fact if the rule conflicts with the law, it must be changed, and based on the Commission's interpretation, there is a conflict. Amending the rule is not tantamount to engaging "... in improper (retroactive) rulemaking in violation of Utah Code Ann. § 63G-3-301" as the Commission maintains.<sup>6</sup> Any amendment would only apply prospectively.<sup>7</sup> If the rule is in conflict with the law, the proper approach is to change the rule and then address the petition for designation as an ETC, not the reverse.<sup>8</sup>

The Commission's decision gives TracFone a competitive advantage over URTA members in violation of Utah Code Ann. § 54-8b-15(5) and (10). Collection for and contributions to the fund are to be non-discriminatory and competitively neutral. The Commission's decision allows TracFone to operate contrary to the law to the detriment of the public interest.

---

<sup>5</sup> Utah Code Ann. § 54-8b-15(10)(b).

<sup>6</sup> Order at 11. Amending the rule would not violate Utah Code Ann. § 63G-3-301 or be inconsistent with *Lane v. Board of Review*, 727 P.2d 206 (Utah 1986) which the Commission cites. In *Lane* the Board of Review applied a pending rule that had not taken effect to events that had occurred. Here, TracFone is seeking designation as an ETC prospectively; it has not begun operating as an ETC. The Commission is in a position to apply the law and require TracFone to contribute to the universal fund. Neither the rule nor an amendment would be applied retroactively.

<sup>7</sup> If the Commission's interpretation of its rule is correct the rule is in violation of state law and could be amended pursuant to the emergency provision of the Rulemaking Act, Utah Code Ann. § 63G-3-304, to take effect immediately.

<sup>8</sup> The Commission partially followed this approach in the Initial Order when it required that a transaction fee be established to process TracFone's applications before TracFone was allowed to operate as an ETC. The Commission reversed itself in response to TracFone's petition for reconsideration.

Finally, the Commission's concern that it cannot force a third-party retailer to collect the surcharge for TracFone is without merit. The Commission may not have jurisdiction over the retailer, but it does have jurisdiction over TracFone and can compel compliance with the law. The retailer is TracFone's agent and can collect the surcharge for TracFone under the terms of a simple contract.

Under state law, TracFone must contribute to the universal service fund. The Order and the Initial Order give TracFone a competitive advantage over all other providers and jeopardize the fund. Although TracFone is not seeking state universal service funds, if it is successful in attracting customers, it will leave URTA members with stranded costs which will increase the demands on the fund and negatively affect all telecommunications customers throughout the state. This is not in the public interest. URTA therefore urges the Commission to reconsider and reverse its decision.

**B. Utah Code Ann. § 69-2-5 Requires TracFone to Pay a Surcharge to Fund the 911 Emergency Telecommunications Service and the Poison Control Center**

In the Order and the Initial Order, the Commission accepted TracFone's argument that TracFone is not obligated to collect and remit the 911 surcharge for emergency services or the surcharge for the Poison Control Center, but that position cannot be reconciled with the law. TracFone contends that under Utah Code Ann. § 69-2-5(3)(a)(ii), TracFone has no obligation to impose, collect and remit either surcharge because TracFone's customers are not billed and have no billing address.<sup>9</sup> Again, TracFone's business model does not control the law. Under Utah Code Ann. § 69-2-5(3)(f), TracFone is obligated to bill, collect and remit the surcharges.

Even if TracFone were correct and it had no obligation for the surcharges under § 69-2-5(3)(a)(ii), § 69-2-5(3)(a)(iii) is a catchall that encompasses "any other service, including voice

---

<sup>9</sup> The customer's address is available through the process of qualifying for Lifeline service in accordance with Utah Admin. Code § 746-341-5 F.1.

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 provision includes all other services to which the other subsections of the statute may not apply and makes clear that no service using the public switched network like TracFone does is exempt from billing, collecting, and remitting the surcharges. If prepaid wireless is not captured by subsection (ii) it is by subsection (iii). TracFone’s argument therefore fails and the Commission’s decision based on it should be reversed. It is a misinterpretation and misapplication of the law.

**C. The Commission Failed to Find that TracFone’s Service is in the Public Interest**

The Commission failed to find that granting TracFone’s petition for designation as an ETC is in the public interest. The Commission is under general obligation to consider and address the public interest in every case. *See e.g., Bradshaw v. Wilkinson Water Co.*, 94 P.3d 242, 249 (Utah 2004), (“The principle that stipulations are binding must therefore yield to the Commission’s statutory mandate to consider the interests of parties outside of the proceeding, such as a utility’s customers and the public interest generally.”)

In this proceeding, the Commission has a specific mandate under 47 U.S.C. § 214 (e)(2) to determine that granting ETC status to an additional provider in rural Utah is in the public interest and it has not done so.<sup>10</sup> Instead, the Commission defaulted and said that “...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

---

<sup>10</sup> See Footnote 2. The Commission applied the public interest standard to deny designation of a second ETC in a rural area in *WWC Holding Co., Inc. v. Public Service Com’n of Utah*, 44 P.3d 714, (Utah 2002).

may be.”<sup>11</sup> Addressing and resolving public interest concerns is not an expansion of the designation requirements, it is the one of the requirements.

URTA has argued that designating TracFone an ETC without requiring TracFone to collect and remit the surcharges supporting the public interest programs is by definition not in the public interest and violates the law. Nowhere in the Order or the Initial Order does the Commission find that granting TracFone ETC status offsets the erosion and harm that will cause to the public programs.<sup>12</sup> Nor does the Commission find that the damage TracFone’s operations will do to the state universal service fund and telecommunications customers in Utah is offset or is in any way beneficial if TracFone succeeds and URTA members are left with stranded investment. These issues must be addressed and resolved before the Commission’s Order can be sustained and URTA therefore petitions the Commission to reconsider and reverse the Initial Order and the Order.

### III. CONCLUSION

Under the law, TracFone is obligated to collect, remit and support the public interest programs. Allowing TracFone to operate without doing so is the result of a misinterpretation of the law. The Commission’s Order and Initial Order permit TracFone to operate in rural Utah without finding that doing so is in the public interest. That is an essential part of designating an ETC under the federal law. In this proceeding, the evidence of harm TracFone’s petition does to

---

<sup>11</sup> Order at 13.

<sup>12</sup> In the Initial Order at 9, the Commission acknowledges there are unwarranted benefits and unrecovered costs: 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.

the public interest far outweighs any benefit. Based on all of the foregoing, URTA strongly urges the Commission to grant this petition to reconsider and reverse its decisions in the Initial Order and the Order.

Respectfully submitted this 30<sup>th</sup> day of December, 2010.

CALLISTER NEBEKER & MCCULLOUGH

---

Stephen F. Mecham



**Certificate of Service**

I hereby certify that on December 30, 2010, I caused a true and correct copy of the foregoing Petition for Reconsideration of the Utah Rural Telecom Association in Docket No. 09-2511-01 to be emailed to the following:

Patricia Schmid  
Felise Thorpe Moll  
Assistant Attorneys General  
160 East 300 South, Fifth Floor  
Salt Lake City, Utah 84111  
pschmid@utah.gov  
fthorpemoll@utah.gov

Bill Duncan  
Division of Public Utilities  
160 East 300 South, Fourth Floor  
Salt Lake City, Utah 84111  
wduncan@utah.gov

Mitchell F. Brecher  
Debra McGuire Mercer  
GREENBERG TRAURIG, LLP  
2101 L Street, NW  
Suite 1000  
Washington, D.C. 20037  
mailto:brecherm@gtlaw.com  
mailto:mercerdm@gtlaw.com

Sonya L. Martinez  
Salt Lake Community Action Program  
764 South 200 West  
Salt Lake City, Utah 84101  
smartinez@slcap.org

Paul Proctor  
Assistant Attorney General  
160 East 300 South, Fifth Floor  
Salt Lake City, Utah 84111  
pproctor@utah.gov

Gary A. Dodge  
HATCH, JAMES & DODGE  
10 West Broadway, Suite 400  
Salt Lake City, Utah 84101  
gdodge@hjdllaw.com