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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
)
) TracFone Wireless, Inc.’s
) Opposition to Petitions
) for Reconsideration
)

TracFone Wireless, Inc. (“TracFone”), by its attorneys, hereby submits its opposition to the petitions for reconsideration filed by the Office of Consumer Services (“OCS”) and the Utah Rural Telecom Association (“URTA”) in this matter. As will be explained in this opposition, the Commission’s September 13, 2010 Report and Order and its December 1, 2010 Amended Report and Order and Order on Request for Limited Reconsideration correctly apply applicable Utah law as well as applicable federal law governing designation of Eligible Telecommunications Carriers (“ETCs”). More importantly, the Commission has properly concluded that designation of TracFone as an ETC for the limited purpose of providing Lifeline service to qualified low-income Utah households will bring important and needed benefits to thousands of less fortunate Utah residents and thereby will serve the public interest. Accordingly, the Commission’s well-reasoned orders have reached the correct result for the correct reasons and are amply supported by thorough factual and legal analyses. Therefore, there is no need for reconsideration of the Commission’s prior orders.

Introduction

With more than 15 million customers, TracFone is the nation's leading provider of prepaid wireless telecommunications services. Since 2004, it has been embarked in an effort to become designated as an ETC throughout the United States for the purpose of bringing to low-income households a wireless Lifeline service which would make available to all Americans the benefits of wireless telecommunications, irrespective of income levels, credit history, etc. Since 2008, TracFone has been designated as an ETC in thirty-four states (including the District of Columbia and the Commonwealth of Puerto Rico). In each of those jurisdictions, regulatory authorities have concluded that TracFone meets all ETC designation criteria set forth in the Communications Act of 1934, as amended,¹ as well as all applicable federal and state regulations governing ETC designation, and that designation of TracFone as an ETC would serve the public interest.

TracFone provides its SafeLink Wireless® Lifeline service in most of those states. Currently, more than three million low-income households are receiving Lifeline-supported services from TracFone. During this proceeding, several parties, including OCS and the Salt Lake Community Action Program, criticized the sufficiency of TracFone's initially-proposed Lifeline benefit. TracFone heard those voices as well as others and, in August 2010, TracFone significantly enhanced its Lifeline offerings. As a result, SafeLink Wireless® Lifeline customers in Utah will be able to select from three options. One of those options will provide each enrolled customer with 250 minutes of free wireless airtime per month. Those minutes may be used for local calling, long distance calling (intrastate and interstate) and roaming calls. Those minutes may also be used for sending and receiving SMS text messages. In addition, the service will

¹ 47 U.S.C. § 151 *et seq.* See, especially, 47 U.S.C. § 214(e).

include at no additional charge important features such as call waiting, caller ID, and voice mail.²

TracFone's other Lifeline options will provide fewer minutes but will include other features valued by some customers including, for example, the ability to carry over unused minutes from month-to-month, more favorable rates for SMS text messaging, and in the case of one option, international calling to more than 60 destinations. All TracFone Lifeline customers will receive at no charge E911-compliant wireless handsets. No other wireless ETC operating in Utah or seeking designation as an ETC in Utah offers or proposes to offer a wireless Lifeline service that provides or will provide more free usage and other benefits than will TracFone.

There is broad recognition that TracFone's SafeLink Wireless® program will benefit low-income Utah households. Even those who have sought reconsideration acknowledge that the public interest benefits of designating TracFone as an ETC are not in controversy.³ TracFone is gratified that the Commission has concluded that the public interest would be served by designating TracFone as an ETC, and TracFone looks forward to bringing SafeLink Wireless® Lifeline service to qualified low-income Utah households in the very near future.

I. The Commission Correctly Concluded That Applicable Utah Law Does Not Require TracFone to Collect and Remit Contributions to the State Universal Service Fund or to Collect and Remit 911 and Other Public Safety Fees

OCS and URTA have sought reconsideration on the basis that, in their view, TracFone should be required to contribute to the Utah Universal Public Telecommunications Service Support Fund ("State USF") and to state funds for the support of 911 service, poison control, and services for the hearing/speech-impaired. OCS and URTA fail to acknowledge that the

² Other Utah ETCs, including those ETCs who are members of URTA, impose additional charges for these features -- even on their Lifeline customers. Lifeline customers of those ETCs are charged undiscounted full retail rates for those service features.

³ OCS Request for Reconsideration, at 3.

Commission carefully and thoroughly addressed whether State USF contribution requirements and the public safety surcharge requirements are applicable to TracFone, not once, but twice -- first in the September 15 Report and Order, and then again, in the December 1 Amended Report and Order and Order on Request for Limited Reconsideration. In both orders, the Commission had before it an extensive record, including briefs filed by OCS and URTA, which asserted the same legal issues raised by them once again in their reconsideration petitions. The Commission already has considered and rejected those arguments on two separate occasions.

The Commission's analyses of the relevant provisions of the Utah Code and the Commission's administrative regulations are extensive, carefully-researched and well reasoned. The Commission "got it right" in September 2010; it "got it right" again in December 2010, and there is no reason why its legal conclusions are any less correct now than they were then.

OCS asserts in its reconsideration petition that TracFone should be afforded ETC designation only if it "complies with pertinent provisions of Utah law."⁴ TracFone fully intends to comply with all applicable provisions of Utah law. Contrary to OCS's assertion, the question is not about compliance with Utah law; it is about applicability of Utah law, *i.e.*, whether the statutes and regulations governing State USF contributions and public safety surcharges are applicable to TracFone. They are not applicable to TracFone for reasons which the Commission has twice correctly and thoroughly articulated.

With particular respect to the State USF, the question is not whether requiring TracFone and other providers of prepaid wireless service to contribute is a good idea. Perhaps it is. The question is whether the laws as enacted, and the regulations promulgated by the Commission to implement those laws, impose such a requirement. As the Commission itself twice concluded,

⁴ OCS Petition, at 2.

its rules governing ETC designation, as currently written, do not require TracFone to collect and remit State USF surcharges.⁵

As the Commission notes, Utah Code Ann. § 54-8b-15(10)(b) generally requires each telecommunications corporation that provides intrastate public telecommunications service to contribute to the State USF. However, the Commission notes further that the requirement is limited by § 54-8b-15(10)(b)(iv) of the Code which requires that “charges associated with being a provider of public telecommunications services shall be in the form of end-user surcharges applied to intrastate retail rates.” (emphasis added). Neither OCS nor URTA properly recognize this important legislatively-imposed condition on the State USF contribution obligation. Nonetheless, as the Commission correctly concluded, there is no existing mechanism by which TracFone could bill the surcharge to its end users. The Commission properly recognizes that it lacks jurisdiction to mandate a collection mechanism which deviates from the statutory language, no matter how much OCS and URTA would like to the Commission to do so.⁶

The Commission correctly determined that the term “billed and collected” within the ambit of Utah Admin. Code R746-360-4⁷ “implies the issuance of a bill to a customer, whereby the customer remits payment to the state.”⁸ Given the absence of such a billing mechanism for collection of the State USF surcharge, OCS and URTA demand that TracFone be required to self-fund the assessments (*i.e.*, to pay the surcharges itself on behalf of its customers). As recognized by the Commission, such self-funding is not contemplated by the statute, would place

⁵ Amended Report and Order, at 6.

⁶ *Id.*, at 8.

⁷ R746-360-4(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.”) (emphasis added).

⁸ Report and Order, at 6.

TracFone at a significant competitive disadvantage, and might even be an unconstitutional taking.⁹

Curiously, URTA suggests to the Commission that TracFone could have the surcharges collected by those independent retail vendors which sell TracFone services. According to URTA -- which apparently believes that it knows more about TracFone's business relationships with those retail vendors than does TracFone -- those retail vendors are TracFone's agents and they should collect the surcharges "under the terms of a simple contract."¹⁰ So far as TracFone is aware, URTA is not privy to any of the agreements between TracFone and the independent retail vendors who sell TracFone services. Nothing in the record indicates that such agreements establish a principal/agent relationship or that those independent retail vendors can be compelled by TracFone to collect State USF or other surcharges from retail consumers. In fact, they cannot be so compelled. It is for that reason that fourteen states have enacted point-of-sale collection laws. State legislatures can compel retail vendors to collect surcharges; the Commission and TracFone cannot do so.

With respect to the 911 tax and the other public safety surcharges, the Commission correctly concluded that the applicable statute, Utah Ann. Code § 69-2-1 *et seq.*, including, specifically, the "billed and collected" language of § 69-2-5(3)(f), excludes TracFone from any obligation to pay the surcharge since, as pointed out by the Commission, TracFone does no billing. Consumers of such services pay for those services at the third party retailers' point of

⁹ Amended Report and Order, at 9. The Commission's conclusion that requiring TracFone to self-fund the State USF contributions when other providers collect the contributions through end user surcharges would discriminate against TracFone refutes the unsupported and unsupportable claim of URTA that TracFone would somehow have a "competitive advantage" over those URTA members who do not self-fund their State USF contributions. URTA Petition for Reconsideration, at 4.

¹⁰ URTA Petition, at 5.

sale.¹¹ If, as URTA alleges, not requiring a provider to pay a tax that it cannot bill is somehow “unfair,” then that is a matter for the legislature, not for the Commission.¹²

Not only has the Commission correctly concluded twice that Utah statutes and regulations as currently enacted do not require providers of prepaid wireless services either to collect or remit contributions to the State USF or the 911 and other public safety surcharges, such payments also may not be imposed on TracFone as a condition of ETC designation.

OCS attempts to connect the ETC designation process to 911 fee payments by reference to a recent decision of the Washington Supreme Court.¹³ That court, in October 2010, held that Washington’s 911 surcharge requirement was applicable to TracFone.¹⁴ That case involved a judicial examination of Washington’s 911 fee law, not 911 fee payment obligations in general, and certainly not Utah’s law. More importantly, that case had nothing to do with the ETC designation process or whether designation of TracFone as an ETC would serve the public interest. Rather, it involved an appeal by TracFone of an adverse ruling by the Washington Department of Revenue. In Washington, the 911 fee and its enforcement are subject to the

¹¹ *Id.*, at 14. The Commission’s observation that the financial transaction occurs at the third party retail vendor’s location is correct. It is for that reason that, to date, no fewer than fourteen states have enacted laws which require that 911 fees or other public safety fees on the sale of prepaid wireless services be collected at the point of retail sale. Several other states are considering such legislation. In states where such laws have been enacted, they have worked well. All users of prepaid wireless services contribute to the support of emergency services, and disputes between service providers and state governments regarding the applicability of taxes and fees to non-billed services are avoided. Though beyond the scope of this proceeding, TracFone encourages Utah to consider enactment of such point-of-sale legislation and is prepared to work with legislators and other stakeholders in Utah as it has done in other states to craft such legislation.

¹² *Id.*, at 15 (“If there is unfairness, as URTA contends, that unfairness needs to be remedied by the legislature, not the Commission.”).

¹³ OCS Petition, at 7-8.

¹⁴ TracFone Wireless, Inc. v. Washington Department of Revenue, No. 82741, decided October 28, 2010.

jurisdiction of the Department of Revenue, not the state regulatory commission.¹⁵ In Utah, administration of the 911 emergency telephone system is the responsibility of the public agency establishing 911 service.¹⁶ Administration and enforcement of the 911 fee law is not within the jurisdiction of this Commission. Contrary to the unsupported claim of OCS, no Utah statute confers upon the Commission any authority -- let alone, “dominant authority” -- to enforce the state’s 911 fee laws.¹⁷

Significantly, notwithstanding the pendency of a judicial proceeding between TracFone and the Washington Department of Revenue regarding the 911 fee, the Washington Utilities and Transportation Commission determined that designation of TracFone as an ETC would serve the public interest and granted TracFone’s ETC petition. The Washington Commission, like this Commission twice, concluded that the public interest would be served if that state’s low-income consumers had the benefits of TracFone’s SafeLink Wireless® Lifeline program available to them, despite differences of opinion regarding the applicability of 911 fees.¹⁸

URTA’s claim that the Commission should either condition ETC designation on payment of 911 and other public safety fees which TracFone has no opportunity to bill or collect, or to deny TracFone’s ETC petition suggests that enforcement of the 911 and other public safety fees is a matter within the Commission’s jurisdictional authority. It is not. Utah Ann. Code § 69-2-5(3)(i)(i) provides that the State Tax Commission shall “collect, enforce, and administer the charge imposed under this Subsection (3) [the 911 surcharge] using the same procedures used in

¹⁵ In Washington, telecommunications and other utility services are subject to regulation by the Washington Utilities and Transportation Commission.

¹⁶ Utah Code Ann. § 69-2-4.

¹⁷ OCS Petition, at 2.

¹⁸ Order 03, Docket UT-093012, In the Matter of Petition of TracFone Wireless, Inc., adopted June 24, 2010.

the administration, collection, and enforcement of the state sales and use taxes” Similarly, Utah Ann. Code § 69-2-5.5(5)(b) provides that the State Tax Commission may make rules to administer, collect, and enforce the emergency services telecommunications charges [to fund the Poison Control Center]” In short, enforcement of the 911 and other public safety surcharge requirements is the responsibility of the State Tax Commission, not the Public Service Commission.

II. TracFone Will Comply with All Applicable Lifeline Enrollment Requirements, Including the Requirement That It Obtain Each Lifeline Applicant’s Residential Address

OCS asserts that TracFone does not obtain Lifeline customers’ address information as required by applicable Commission rules.¹⁹ Conspicuously absent from OCS’s petition is any reference to any portion of the record which supports that accusation. The assertion that TracFone does not collect residential address information for each of its Lifeline customers in every state where it operates as an ETC is categorically false! In its petition for ETC designation, and in its testimony in this proceeding, TracFone explained that it obtains residential address information for each Lifeline customer, that it uses the service of a third party vendor -- Lexis-Nexis -- to confirm customer address information, and that it will do so in Utah upon designation as an ETC and commencement of Lifeline service in Utah. Moreover, at no time during this proceeding has either OCS or any other party alleged that TracFone will not obtain residential address information for its Utah Lifeline customers as it does in each of the thirty-four states where it currently provides Lifeline service, in full conformance with federal Lifeline enrollment requirements as well as applicable Utah Lifeline regulations. Accordingly, OCS’s

¹⁹ OCS Petition, at 6-7 (“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.”).

allegation that TracFone does not obtain customer address information is unexplained and unexplainable and should be readily dismissed by the Commission.

III. The Record Established in the Proceeding Fully Supports the Commission’s Conclusion That Designation of TracFone As an ETC and the Availability of SafeLink Wireless® Service to Low-Income Utah Households Will Serve the Public Interest

Incredibly and without explanation, URTA complains that the Commission failed to conclude that designation of TracFone as an ETC will serve the public interest. To the contrary, in concluding that TracFone should be designated as an ETC, the Commission determined, as it understood that it must,²⁰ that designating TracFone as an ETC would serve the public interest.

The essence of URTA’s public interest whine is an unsupported claim that designation of TracFone as an ETC for the limited purpose of providing Lifeline service to Utah’s neediest households will cause URTA members to be left with “stranded investment.”²¹

Nowhere does URTA describe what, if any, of its members’ investments will be stranded or how TracFone’s provision of Lifeline service to low-income Utah households will cause URTA members to suffer “stranded investment.” Nowhere on the record or in its petition or testimony does URTA describe what, if any, of its members’ investments will be stranded or how TracFone’s provision of Lifeline service to low-income Utah households will cause URTA members to suffer “stranded investment.” What is known and what is on the record of this proceeding is that in Utah Lifeline service is underutilized. According to FCC data, only 12.4 percent of Utah Lifeline-qualified low income households are receiving Lifeline benefits.²²

What this means is that in the nearly quarter century since the FCC established Lifeline in the

²⁰ Amended Report and Order, at 12, n. 6.

²¹ URTA Petition, at 7.

²² Lifeline and Link Up (Report and Order and Further Notice of Proposed Rulemaking), 19 FCC Rcd 8302 (2004), at Appendix K - Section 1: Baseline Information Table 1.A. Baseline Lifeline Subscription Information (Year 2002).

mid-1980s, Utah's current ETCs -- including those local exchange carriers who are URTA members and who are now presenting to the Commission speculative and unsupported claims about potential stranded investment -- have failed to enroll more than 85 percent of Utah's low-income households who are the intended beneficiaries of Lifeline.

Based upon TracFone's success in reaching out to low income consumers in other states and, by doing so, materially increasing the levels of Lifeline participation, combined with the August 2010 enhancements to TracFone Lifeline plan, the Commission's public interest determination is well-supported and should not be modified on reconsideration.

Conclusion

Neither OCS nor URTA has provided any factual or legal basis to justify reconsideration of the Commission's Report and Order or its Amended Report and Order. Its prior conclusions that TracFone meets all federal and state requirements for ETC designation and that designation of TracFone as an ETC will serve the public interest should not be reconsidered.

DATED this 14th day of January, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by email this 14th day of January, 2011, on the following:

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