

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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

ISSUED: March 9, 2011

By The Commission:

This matter is before us on Utah Rural Telecom Association's (URTA) Petition for Reconsideration, Review, and Rehearing, and the Office of Consumer Services' (OCS) Request for Reconsideration.

STATE USF CONTRIBUTIONS

As we stated previously, 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. Our Rules do not adequately contemplate this type of service offering. As we stated previously, while we apply existing laws and Rules to this matter, we recognize that additional rulemaking, and other and further proceedings are needed to provide petitioners like TracFone and interested parties greater clarity concerning the State's policies governing ETC designation in the current environment.

We conclude Utah Code Ann. §54-8b-15 obligates TracFone to pay into the state USF fund, even though TracFone seeks no distribution from the fund. Neither the statute nor the Rules governing state USF fund contributions, however, detail a method to identify, measure and collect the appropriate contribution where the Lifeline service is associated with pre-paid

wireless service. Nevertheless, we conclude we have jurisdiction and the duty to assure such charges are collected. As we noted in our *Amended Report and Order and Order on Request for Limited Reconsideration*, Utah Code Ann. §54-8b-15(10)(a) 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.

TracFone notes that 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,” suggesting 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. However, we agree with the Division that Utah Code Ann. §54-8b-15(10) does not limit the obligation to pay into the USF solely to those telecommunications corporations issuing traditional bills to customers. Utah Code Ann. § 54-8b-15(10)(a) is clear. It requires USF contribution from: 1) telecommunications corporations; 2) that provide public telecommunications service; 3) through explicit charges determined by the Commission; 4) which charges may not apply to wholesale services; 5) and which charges shall be in the form of end-user surcharges; 6) applied to intrastate retail rates.

Reading the plain language of the statute, TracFone is obligated to contribute to the state USF. There is no dispute that 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. Therefore, Utah Code Ann. §54-8b-15(10)(b)(i) requires TracFone to “contribute to the fund on an equitable and nondiscriminatory basis.” TracFone is not seeking to provide a wholesale service. TracFone’s witness admitted it could segregate its intrastate usage from other types of usage. *See Transcript*, p.71, ll.4-8. Accordingly, we have “the authority to require [TracFone] to contribute monies to the fund through explicit charges determined by the Commission.” The statute also plainly states those charges shall be “in the form of end-user surcharges applied to intrastate retail rates.” Utah Code Ann. §54-8b-15(10)(b)(i) and (ii), says nothing about “billed” intrastate retail, rates, but simply “intrastate retail rates.” Therefore, the only question remaining is not *if* we have the jurisdiction to order TracFone to remit to the state USF its end-user funded surcharges, but *how* TracFone will collect and remit the “explicit charges” that are funded through “end-user surcharges applied to intrastate retail rates.”

Administrative rules are interpreted like statutes, with the Commission focusing first on the plain language of the Rule. *Sierra Club v. Air Quality Board*, 2009 UT 76. Our current applicable administrative Rule, when adopted, did not anticipate the manner in which TracFone delivers its pre-paid services and arguably does not require TracFone to contribute to the state USF. 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.

(emphasis added)

TracFone argues because it does not issue a bill to customers, it cannot “bill and collect” a USF surcharge from its customers. The term “billed and collected” implies the issuance of a bill to an individual customer, whereby the customer then remits payment to the state. As the Division pointed out, “neither the Commission’s Rules nor the statute 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 (emphasis added). In essence, at the time our Rule was written, TracFone’s service offering was not technologically in existence, and no one at the time foresaw such an offering.

The Commission agrees with TracFone that the collection method specified in the current rule can be read to exempt telecommunications services for which no “bill” is rendered by the provider. In this instance, our Rule is somewhat narrower than the enabling statute and is somewhat inconsistent with the statute. The Utah Supreme Court stated that “[i]t is a longstanding principle of administrative law that an agency’s rules must be consistent with its governing statutes.” *Sanders Brine Shrimp v. Audit Div.*, 846 P.2d 1304, 1306 (Utah 1993). Further, it has stated that “an administrative rule out of harmony or in conflict with the express provisions of a statute ‘would in effect amend that statute.’” *Crossroads Plaza Ass’n v. Pratt*, 912 P.2d 961,965 (Utah 1996). In this instance, where our Rule would allow TracFone to avoid USF contributions the governing statute would impose, we must follow the statute, depart from the Rule, and require TracFone as a condition of its ETC status to identify a mechanism by which to collect the appropriate USF surcharge from end-users. Only by departing from the

Rule in this way can we ensure we are consistent with the statute governing USF contributions. We will identify the action we will take to amend our Rule as needed in Docket 10-2528-01.

911 AND OTHER PUBLIC INTEREST PROGRAM SURCHARGES

The requirements of ETC designations are detailed in our December 1, 2010 Amended Report and Order and Order on Request for Limited Reconsideration, pages 3-5. *See 47 U.S.C. §214(e)(1)(A) and (B), 47 U.S.C. §214(e)(2) and 47 C.F.R. § 54.101(a).* Section 214(e)(2) of the Communications Act grants us jurisdiction to designate TracFone an ETC, if we find its application satisfies the requirements of Section 214(e)(1). Because it is applying for ETC designation in areas served by rural telephone companies, we must also find granting the application is in the public interest. *47 U.S.C. § 214(e)(2).* Both URTA and OCS ask us to require TracFone to pay the 911 surcharge, Poison Control surcharge, and other public interest program surcharges as a condition of granting ETC designation. By statute, these surcharges are “billed and collected” by the provider of the local exchange service or radio communication access line service, *Utah Code Ann. 69-2-5(3)(f)(i)*, and remitted to the State Tax Commission. *Utah Code Ann. 69-2-5(3)(f)(ii).*

Moreover, the statute governing the payment of the 911 surcharge specifies the State Tax Commission is the entity empowered to “collect, enforce, and administer the charge”, *Utah Code Ann. 69-2-5(3)(i)(i)*. Similarly, the statute governing the poison control surcharge states the “State Tax Commission shall administer, collect, and enforce the [Poison Control Center fund]” charge. Accordingly, since the power to administer these surcharges resides in another agency, it is beyond our jurisdiction to determine whether they apply to the pre-paid

services TracFone seeks to provide. As the Utah Supreme Court has held, we have “no inherent regulatory powers and can only assert those [powers] which are expressly granted or clearly implied [and] any reasonable doubt of the existence of any power must be resolved against the exercise thereof.” *Hi-Country Estates Homeowners Ass’n v. Bagley and Co.*, 901 P.2d 1017 (Utah 1995) (alterations added). Hence, whether TracFone must pay the public interest charges as demanded by URTA and the OCS is not a matter for us to decide.

Neither URTA nor the OCS point to any specific provision of the Communications Act that confers upon the Commission jurisdiction to determine whether TracFone must pay the public interest charges administered and enforced by the State Tax Commission. Nor does the Act make the payment of such charges an explicit requirement of ETC designation. *See 47 U.S.C. §214(e)(1)-(2)*.

We recognize, however, TracFone seeks to offer its services in areas currently served by rural telephone companies and that we may only confer ETC status in such areas if doing so serves the public interest. In order for TracFone to meet this standard we will require it, among other things, to comply with the laws governing the payment of public interest program surcharges to the extent deemed applicable by the agency charged with responsibility to administer and enforce them, the State Tax Commission. Indeed, we specifically condition the ETC status granted in this order upon TracFone’s ongoing compliance in all of its service areas with all Utah laws governing its operations. As to the public interest program surcharges, however, we must leave to the State Tax Commission the specific questions of how the statutes in question are applied and enforced.

TracFone has represented to the Commission that it will comply with Utah laws governing it. We have no basis to find that it will not comply with all legal obligations imposed upon it. To the extent the State Tax Commission determines TracFone's services are subject to the 911 and other public interest program surcharges, we expect TracFone to comply. Failure to do so would be grounds for revoking the ETC designation.

Consistent with the foregoing discussion, we vacate any conclusions in previous orders to the effect that TracFone, as a matter of law, is not subject to the 911 and other public interest program surcharges. We reach no conclusion on that issue, except to state we lack jurisdiction to determine whether TracFone must pay those surcharges.

GRANTING TRACFONE ETC DESIGNATION IS IN THE PUBLIC INTEREST

Subject to the conditions we impose on TracFone, we find granting TracFone ETC designation is in the public interest. The goals of the federal universal service program and the legislative policy declarations of Utah Public Telecommunications Law are both served by granting the designation. Title 47, Section 254(b)(3) states that the preservation and advancement of universal service shall be based, in part, on the following principle: "Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high-cost areas, should have access to telecommunications and information services" Further, our own state telecommunications law states that it is the policy of the state to "facilitate access to high quality affordable public telecommunications services to all residents and businesses in the state." *Utah Code Ann.* § 54-8b-1.1(3).

Having an additional ETC in the state will increase affordable telecommunications services particularly for low income consumers and in rural areas. *Direct Testimony of Jose Fuentes, TracFone Ex.1*, at p.12, line 17 to p.13, line 2. In concluding that allowing TracFone to compete as

an ETC in Utah would be beneficial, the Division contended that one important benefit to being a Lifeline customer is that there is no charge to activate service. *Direct Testimony of Casey Coleman, p.14, ll.314*. This is particularly beneficial for transient and low-income consumers for whom activation charges could be prohibitive. Another benefit the Division noted was that TracFone's service does not require a term contract, minimum service period, minimum volume commitment, credit check, or early termination fee. The absence of these barriers will make wireless service more available to transient and low income consumers, regardless of age, residency, or creditworthiness. *Direct Testimony of Casey Coleman, p.14-15*.

Designating TracFone as an ETC also will increase participation in the Lifeline program. Evidence shows the Lifeline enrollment rate among low-income Utah households eligible for Lifeline is only 12.4 percent, *Direct Testimony of Jose Fuentes, TracFone Ex.1, p.12, line 15-16*, meaning about 88% of eligible low-income households do not participate in the Lifeline program. If we grant TracFone's application, TracFone estimates it will generate "anywhere between 1,000 [to] 2,000" Lifeline applications per week. *Id.*, p.26, ll.9-13. TracFone's evidence shows its offerings have helped increase Lifeline enrollment in at least three states more than 100%. *Id.* The potentially substantial increase in applications submitted in Utah would go far towards making quality telecommunications service a reality, especially for transient and low-income consumers, including those in rural areas. Granting TracFone ETC designation also is in the public interest for Utah consumers because the monies for Lifeline service will come from federal USF, not state USF. TracFone has represented that it will not seek state USF funds. Therefore, there will be no depletion of state USF, which state funds help provide telecommunications services in rural areas.

Other consumers, legislators, local politicians, and public interest groups support TracFone's ETC designation for a variety of reasons. SLCAP endorsed TracFone's application with conditions, recognizing TracFone's service offering would facilitate increased access to telecommunications service to more transient, low-income, and rural consumers. Several state Senators and representatives, from various parts of the state, support the TracFone application. They commented that the "ongoing economic recession has created enormous financial burdens on Utah families, and has disproportionately impacted low-income seniors and families in Utah who are often forced to give up telephone service that had served as both a safety lifeline and a critical link to seeking and maintaining employment status." The legislators recommended granting ETC designation because the increased access to Lifeline service would allow "low-income families and seniors to increase their potential, protect their personal safety and have access to emergency service". The National Consumers League opined a wireless ETC would provide many benefits. For example, wireless Lifeline allows low-income consumers (who may change residency more often due to eviction, homelessness, or changing employment) to have a mobile number not tied to a particular residence. For similar reasons, the Alliance for Generational Equity and the League of United Latin American Citizens also wrote and recommended the Commission grant the application.

The OCS complains that we have improperly relied upon many letters written in support of TracFone's Petition in concluding that granting TracFone ETC status is in the public interest. OCS complains that the many letters written to us by members of the public are "unsworn form letters . . . for which there is no foundation of the context and information provided when the signatures were solicited." The OCS further complains none of the parties were given an opportunity to "ask" questions of the members of the public regarding the writers'

basis for signing the letters—presumably a complaint that the letter writers were not available for cross-examination. *Id. at p.15.*

It is not improper for us to rely on letters from the public in reaching our decision. “Unlike traditional court proceedings, hearings before the Commission are not designed to consider only the interests of the litigating parties. The Commission must consider the interests of the utility's customers and the interests of the public.” *Bradshaw v. Wilkinson Water Co.*, 2004 UT 38, ¶ 36. Additionally, our Rules state that we are “not bound by the technical rules of evidence and may receive any oral or documentary evidence¹. . . .” One of the reasons we are not bound by the technical rules of evidence and may receive any oral or documentary evidence,” even if it is hearsay, is precisely to allow the type of public comment contained in the letters referenced above.

VERIFICATION OF INITIAL AND ONGOING ELIGIBILITY

Administrative Rules R746-341-3 and R746-341-4 govern the processes for determining initial eligibility for Lifeline service and continuing eligibility. As we noted in our previous order, the Commission currently oversees these processes through a contract with the DCC². The DCC is faced with the challenge of verifying large volumes of new recipients of TracFone’s Lifeline pre-paid services. More recently we have learned that because of limited resources and other primary obligations, DCC has declined “adding on the pre-paid wireless lifeline phone service to [their] existing obligation under [the Commission] contract.” *December 22, 2010 Letter from Gordon D. Walker, Director, Division of Housing and Community*

¹ The Utah Rules of Evidence, in contrast, states that “hearsay is not admissible except as provided by law or by these rules.” Utah R.Evid. Rule 802.

² The DCC is a sister agency, and as such, the Commission does not have jurisdiction over the DCC.

Development, Utah Department of Community and Culture to Commission Chairman Boyer.

We must still condition TracFone's ETC status on it identifying one or more appropriate means of satisfying its responsibility to assure Lifeline eligibility is properly determined initially.

Likewise, we must ensure the process for verifying continuing eligibility ensures Lifeline customers are in-fact eligible for Lifeline service and, as much as possible, ensures there is no "double-dipping." Consequently, we will still require that the verification of continuing eligibility occur as soon as practicable 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 after self –certification. Continuing eligibility shall be verified at least annually thereafter. Also TracFone's ETC designation is conditioned on its commitment to bear verification costs once they are determined. Finally, we require TracFone to agree to accept the process by which ongoing eligibility will be verified to be identified in Docket No. 10-2528-01.

ORDER

1. We affirm the grant of TracFone's Petition for ETC designation, with conditions as detailed above;
2. As outlined in R746-341-3, qualified applicants for pre-paid wireless 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's existing self-certification application form or provide its own form that complies with R746-341-3.C for our prior approval;

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- c. TracFone will promptly provide to the Commission or its designated responsible agency all initial self-certification applications, including supporting documents.
 - d. 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 in accordance with the process to be established in Docket No. 10-2528-01;
 - e. continuing eligibility shall be verified at least annually thereafter for each continuing recipient of pre-paid wireless Lifeline services;
 - f. TracFone shall bear ongoing verification costs once they are determined.
3. TracFone shall receive no state USF support. If it desires state USF, it shall submit a new application requesting such support;
 4. TracFone shall contribute to the state USF in a manner approved by us;
 5. TracFone shall prepare to submit to us for review a method for accomplishing the annual eligibility verification specified in Utah Admin. Code R746-341-4 and related statutes, as DCC has declined to provide continuing eligibility verification. It shall do so in Docket No.10-2528-01 or as otherwise approved by us;
 6. Judicial review of the 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.

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DATED at Salt Lake City, Utah, this 9th day of March, 2011.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#71404