

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Petition of i-wireless,)
LLC for Designation as an Eligible) DOCKET NO. 10-2526-01
Telecommunications Carrier in the State of)
Utah for the Limited Purpose of Offering) REPORT AND ORDER
Lifeline Service to Qualified Households)

ISSUED: June 29, 2011

By The Commission:

This matter is before the Commission on the Petition of i-wireless (Company), LLC for Designation as an Eligible Telecommunications Carrier in the State of Utah for the Limited Purpose of Offering Lifeline Service to Qualified Households (Petition). The Company filed its Petition on August 12, 2010. The Company also entered into a Stipulation and Settlement Agreement with the Division of Public Utilities (Division) and the Office of Consumer Services (OCS) previous to the hearing held in this matter. The Company did not enter into an agreement with either the Utah Rural Telecom Association (URTA) or the Salt Lake Community Action Program (SLCAP).

The Administrative Law Judge of the Commission held a hearing on April 26, 2011 on the Petition. Lance Steinhart was counsel for the Company and appeared telephonically. Patrick McDonough was the witness for the Company and also appeared telephonically.¹ Patricia Schmid, assistant attorney general, was counsel for the Division. Casey Coleman was the Division's witness. Paul Proctor, assistant attorney general, was counsel for the OCS.

¹ The parties had previously consented to the telephonic appearance of the Company's counsel and witness at the hearing, given that the Division and OCS would be signing the Stipulation with the Company, and given that URTA had only limited questioning for the Company's witness.

Cheryl Murray was the OCS's witness. Stephen Mecham was counsel for URТА. Douglas Meredith was URТА's witness.

THE COMPANY

The Company is a reseller of commercial mobile radio service nationally, including Utah. It provides prepaid wireless telecommunications service using the Sprint Nextel (Sprint) network. *Petition, ¶III.A.p.2.* The Company uses the Sprint network's infrastructure and wireless transmission facilities to operate as a Mobile Virtual Network Operator². *Id.* The Company described its basic service offering as follows:

The Company's Lifeline service will provide customers with the same features and functionalities enjoyed by all other i-wireless prepaid customers, with one notable exception: prepaid Lifeline services will be free of charge. Under the current plan, eligible customers will receive 100 anytime prepaid minutes per month at no charge with additional service priced at \$0.10/minute and \$0.10/text message. In addition to free voice services, prepaid Lifeline customers also will have access to a variety of other standard features at no additional charge, including voice mail, caller I.D. and call waiting services.

Id.

Through the Company's partnership with The Kroger Company (Kroger), customers can accumulate free minutes for dollars spent at select Kroger owned store locations using their Kroger shopper's card. *Id. at 3.* The Company has partnerships with 48 Kroger stores in Utah. *Id.* Lifeline customers may accumulate free minutes even when using food stamps to make purchases. *Id.* The Company states that combining the base offering of 100 minutes, with the accumulated free minutes customers gain through purchases at Kroger stores, Company subscribers may enjoy 200 minutes or more each month at no charge. *Id. at p.4.*

ETC DESIGNATION

The Commission has jurisdiction to designate the Company as an ETC pursuant to Section 214(e)(2) of the Communications Act. Section 214(e)(2) of the Communications Act³ provides that State commissions shall designate common carriers that meet the requirements of paragraph (1) as ETCs. Section 214(e)(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.⁴ Section 214(e)(1)(B) requires ETCs to advertise the availability of such services and the charges therefore using media of general distribution.⁵ In addition to the ETC designation requirements codified at Section 214(e)(1)(A) and (B), Section 54.101(a) of the FCC's rules⁶ 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 multi-frequency 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.

Additionally, because the Company 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)*.

² An MVNO is an "organization that buys minutes and services wholesale from an existing carrier (or carriers) and resells them under its own brand." NEWTONS' TELECOM DICTIONARY, 19th Ed. (2003).

³ 47 U.S.C. § 214(e)(2).

⁴ 47 U.S.C. § 214(e)(1)(A).

⁵ 47 U.S.C. § 214(e)(1)(B).

⁶ 47 C.F.R. § 54.101(a).

Regarding the first requirement that the Company uses 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 the Company's petition to forbear the facilities-based requirement. *See Petition of i-wireless for ETC Designation*, p. 5; *see also Post-hearing Brief of the Division*, pp.2-3. Therefore this requirement is not applicable here.

Regarding the requirement that the Company "advertise the availability of such services", there is no dispute that the Company has plans to market its service offerings. *See Direct Testimony of Patrick McDonough*, pp. 8-9; *Post-hearing Brief of the Division*, p.4.

Regarding the requirement the Company 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 i-wireless for ETC Designation*, pp. 7-10; *Post-hearing Brief of the Division*, p.3.

There is dispute as to whether the Company's offering is in the public interest—especially in rural areas of the state. That issue will be analyzed below.

STIPULATION WITH THE DIVISION AND OCS

At the hearing, the Division and the OCS affirmed that they had entered into a Stipulation with the Company. The key provisions of the Stipulation, related to the Company's offerings and to the state agency's consent that the granting of ETC designation is in the public interest are summarized as follows:

- The Company agrees to pay all "appropriate taxes and fees" including state USF contributions, 911 and E911 fees, poison control surcharges, *Stipulation*, ¶ 12.A.;

- The Company will use an interim certification and verification process to ensure applicant eligibility, and adopt any changes to those processes adopted in Docket 10-2528-01, *Id.* at ¶ 12.B.;
- Development and use of a Utah-specific fact-sheet, listing the information detailed in the Stipulation, *Id.* at ¶ 12.C.;
- The Company shall file a separate application should it request state USF distributions, *Id.* at ¶ 12.D.;
- The Company shall use the appropriate provider of verification services to ensure only one individual per household receive Lifeline subsidies, *Id.* at ¶ 12.E.;
- The Company shall allow Lifeline customers to dial 911, even if they have no remaining minutes, *Id.* at ¶ 12.F.

The stipulating parties further agreed that the granting of the Company's application would be in the public interest for the wire centers listed in Exhibit 5 to the Company's application. *Id.* at ¶ 11.

PUBLIC INTEREST FINDINGS

The stipulating parties agree that the existence of an additional ETC in Utah will expand the provision of low-income Lifeline service in Utah, will further the legislative goal that basic telephone service be available and affordable to all Utahans, and do it all without seeking state USF support. *Stipulation*, ¶¶2-4.

SLCAP, in its direct testimony, expressed its concerns regarding the Company's offering. It stated:

we would prefer the Commission first make a determination of what it considers to be an appropriate wireless Lifeline product prior to making any ETC Lifeline designations. Fundamentally, the issues we are most concerned with are as follows: 1) The limited offering; 2) communications from the Company; 3) the certification and verification process to determine eligibility; and 4) contribution by i-wireless to the verification and eligibility process in Utah.

Direct Testimony of Sonya L. Martinez, on Behalf of SLCAP, pp.2-3. The Commission finds the Company's Stipulation with the Division and the OCS satisfies the 2nd, 3rd, and 4th concerns listed by SLCAP. Regarding the 2nd concern, SLCAP stated that the Commission should "Require the Company to clearly state in its communications, regardless of the format, the nature of the offering and the cost of additional minutes and features." *Id.* at p.3. The Company agreed with the Division and OCS to provide a Utah-specific fact sheet that provides the information requested by SLCAP. Regarding the 3rd and 4th concerns about verification and eligibility, the Company stipulated to use an interim certification and verification process to ensure applicant eligibility, and adopt any changes to those processes ordered in Docket 10-2528-01. The Company will also pay into the state USF, thereby contributing towards the costs of verification for all Lifeline applicants as USF funds are used to certify and verify applicant eligibility.

Regarding the SLCAP's 1st concern, about the number of minutes, the Commission declines to impose a "floor" to the number of minutes ETC's may offer. The Commission notes the rationale in its initial September 13, 2010 TracFone Report and Order, for not imposing a "floor" for the number of minutes offered:

Many parties . . . raised concerns about the need of several low-income Utahns for an increased amount of minutes, and criticized the low amount of minutes [the Company] 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)*. . . . 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. . . .

Here the Company has stipulated to providing a Utah-specific fact sheet providing the consumer with information such as: which options are free and which are paid, the amount of free monthly airtime given, how additional minutes may be purchased, how texts are billed, etc. *See Stipulation*, ¶ 12.C. Therefore, the Commission finds potential Lifeline customers are provided sufficient information to make an informed decision when choosing between an ETC provider like the Company and other Lifeline providers.

Therefore, given the [...] 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.

Id. The Commission makes the same finding and conclusion here.

URTA opposed the Company’s Petition, claiming it was not in the public interest. Its contentions against the Company’s Petition are primarily two-fold: 1) approving the Petition without obligating the Company to serve the same service area as the rural telephone companies is not in the public interest, *see Direct Testimony of Douglas Meredith*, ll.88-109; 2) approving the Petition will have an impact nationally, as lifeline providers like the Company seek increased

support at a time when the Federal Communications Commission (FCC) is attempting to limit or decrease the scope of support, would not be in the public interest.

Regarding the URTA's second basis for opposing the ETC application, the Commission finds there is little basis for it to deny the ETC application based on the FCC's alleged "intent . . . to restrain the size of all federal universal service programs" *Id.* at ll.113-114. If there is any concern with the growth of the federal universal service levels, that concern is properly remedied by the FCC (not this Commission), which has jurisdiction to hear all sides of the matter and fashion a proper resolution. *See Heber Light v. Pub.Serv.Conn'n.* 2010 UT 27, ¶17 (holding that the Commission has "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" (quoting *Hi-Country Estate Homeowners Ass'n v. Bagley*, 901 P.2d 1017 (Utah 1995))) Additionally URTA's argument is based on the National Broadband Plan Recommendation 8.12—not currently effective Regulations, or other governing federal statutes or other legal mandates. *See id.* ll. 113-135. The FCC's concern for the growing universal service fund is not sufficient to deny ETC designation.

Regarding the first concern, however, URTA notes that the Company undertakes a greater obligation under USC § 214(e)(2) because it seeks to serve in rural service territory. URTA has argued that one aspect of this obligation is the ETC "...shall, throughout the *service area* for which the designation is received – (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title..." (emphasis added). URTA further notes the term "service area" is defined in Section 214(e)(5), as "... a

geographical area established by a State commission ... for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, ‘service area’ means such company’s ‘study area’ ...”⁷ URITA reasons because the Company only seeks to serve specified exchanges in rural areas “unfair cherry picking” will negatively affect URITA members. No party sufficiently disputed the URITA’s contentions that, in the case of a rural telephone company, the “service area” and the “study area” are effectively the same. Neither the Division nor the Company offered any contrary authority. Accordingly, the ETC designation granted in this order, as to each area served by a rural telephone company, includes the concomitant obligation to offer the supported services throughout the service area, i.e., study area, of that rural telephone company. As to each such service area, the Commission conditions ETC designation on the Company submitting a compliance filing within 30 days of this order certifying its technical capability and commitment to provide service, as defined in Section 214(e)(1) of the Act, throughout the respective rural telephone company study area. ETC designation is not granted for any rural telephone company service area (i.e., study area) in which the Company does not certify its ability and willingness to provide the requisite service throughout the service area.

Subject to the conditions stated in this Order, the Commission finds it is in the public interest to grant the ETC designation. The goals of the federal universal service program and the legislative policy declarations of Utah Public Telecommunications Law are 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

⁷ The statute also specifies an alternative definition to be used in circumstances that do not apply here.

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 provides 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. An additional ETC in the state will increase competitive choice among Lifeline providers. *See Transcript*, p.52. An additional ETC wireless service will make telephone service more available to transient and low income consumers, regardless of age, residency, or creditworthiness. Other benefits that qualified subscribers to the Lifeline service will receive are:

- Prepaid Lifeline services will be free of charge;
- Eligible customers will receive 100 anytime prepaid minutes per month at no charge with additional service priced at \$0.10/minute and \$0.10/text message;
- Customers also will have access to a variety of other standard features at no additional charge, including voice mail, caller I.D. and call waiting services;
- Customers can accumulate free minutes for dollars spent at any one of the 48 Kroger-owned store locations using their Kroger shopper’s card;
- Lifeline customers may accumulate free minutes even when using food stamps to make purchases. Combining the base offering of 100 minutes,

with the accumulated free minutes customers may gain through purchases at Kroger stores, subscribers may enjoy 200 minutes or more each month at no charge;

Designating the Company as an ETC will increase participation in the Lifeline program. Granting the Company 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—as the Company has agreed not to seek state USF funds. Granting ETC designation is in the public interest. Based on the findings above, the Commission makes the following Order:

ORDER

1. The Company's Petition is granted, subject to the Conditions stated in this Order;
2. The Stipulation of the Company, the Division and OCS is approved, and its terms are incorporated into this Order as if set forth here;
3. ETC Designation is conditioned on complying with the terms of the Stipulation including, but not limited to:
 - a. Payment of appropriate fees:
 - i. State USF Contributions: The Company shall, within 15 days of the issuance of this order submit a compliance filing detailing the applicable surcharge factor it will use in calculating its remittance to the Commission based on its intrastate revenues;
 - ii. Hearing and Speech Impaired Surcharge: The Company shall collect such charges and remit them to the Commission, pursuant to 2011 General Session S.B. 209-Enrolled (as of its effective

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date). An enrolled copy is available here:

<http://le.utah.gov/~2011/bills/sbillenr/sb0209.pdf>

- b. Verification that appropriate taxes are being paid, including:
 - i. 911 and E911 fees: Verification that such fees are being collected by the Company and remitted to the State Tax Commission pursuant to the 2011 General Session H.B. 303-Enrolled (as of its effective date). An enrolled copy is available here:
<http://le.utah.gov/~2011/bills/hbillenr/hb0303.pdf>
 - ii. Poison Control Fees: Verification that such fees are being collected by the Company and remitted to the State Tax Commission;
 - iii. Payment of these taxes, to the extent applicable, is a condition of ETC designation;
 - c. Compliance with any interim or ultimate certification and verification processes developed within Docket No 10-2528-01;
 - d. The Company shall receive no state USF support. If it desires state USF, it shall submit a new application requesting such support;
4. 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

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request for review or rehearing within 20 days after the filing of the request, it is deemed denied. 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.

DATED at Salt Lake City, Utah, this 29th day of June, 2011.

/s/ Ruben H. Arredondo
Administrative Law Judge

Approved and confirmed this 29th day of June, 2011, as the 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

D#207539