

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Pat Apple, Chairman
Shari Feist Albrecht
Jay Scott Emler

In the Matter of the Application of TracFone)
Wireless, Inc. for Designation as an Eligible)
Telecommunications Carrier in the State of) Docket No. 17-TFWZ-237-ETC
Kansas for the Limited Purpose of Offering)
Lifeline Services to Qualified Households.)

ORDER DISMISSING TRACFONE'S ETC APPLICATION

This matter comes before the State Corporation Commission of the State of Kansas (Commission). Having examined its files and records, and being fully advised in the premises, the Commission finds and concludes as follows:

I. Background

1. On December 5, 2016, TracFone Wireless, Inc. (TracFone) filed an Application to expand its designation as an Eligible Telecommunications Carrier (ETC) and receive Kansas Universal Service Fund (KUSF) support for Lifeline service in Kansas.¹ TracFone argued that “federal law requires that the Commission approve” TracFone’s receipt of Kansas Universal Service Fund (KUSF) support for providing Lifeline service.² Specifically, TracFone claimed that Kansas law governing the receipt of KUSF support for providing Lifeline service is preempted by federal law, and thus, because TracFone has met the federal requirements for receiving federal universal service fund (FUSF) support for Lifeline service, the Commission must approve its Application to receive KUSF support as well.³

¹ Application of TracFone Wireless, Inc. to Expand Designation as an Eligible Telecommunications Carrier to Receive Kansas Universal Service Fund Support for Lifeline Service, p. 1 (Dec. 5, 2016) (Application).

² *Id.*, p. 1.

³ *Id.*, p. 6 and ¶¶ 9-12.

2. According to its Application, TracFone is a reseller of wireless telecommunications services with AT&T Wireless, T-Mobile and Verizon Wireless as underlying carriers.⁴ TracFone noted that its ETC designation has limited it “to receiving Lifeline support from the *federal* USF.”⁵ TracFone also noted that its previous ETC applications with the Commission acknowledged that 47 U.S.C. 214(e)(1)(A) “states that ETCs shall offer services, at least in part, over their own facilities and that Section 54.201(i) of the FCC’s Rules (47 C.F.R. § 54.201(i)) prohibits state commissions from designating as an ETC ‘a telecommunications carrier that offers the services supported by federal universal service support mechanisms exclusively through the resale of another carrier’s services.’”⁶ However, the Federal Communications Commission (FCC) exempted TracFone from meeting the Section 214(e)(1)(A)’s “own facilities” requirement in order to receive FUSF Lifeline support.⁷

3. TracFone stated that in Docket No. 09-TFWZ-945-ETC, “the Commission did not require TracFone to meet the ‘own facilities’ requirements in Section 214(e)(1)(A) nor did it apply the prohibition on a state commission designating a reseller as an ETC in FCC rule 54.201(i).”⁸ Although TracFone conceded that Kansas law governing reception of Lifeline support from the KUSF “facially requires ETCs to provide Lifeline service by using at least some of its own facilities,” it nevertheless argued that the Commission may not enforce the “own facilities” requirement for KUSF support because such enforcement would be “inconsistent with

⁴ *Id.*, ¶ 1.

⁵ *Id.*, ¶ 5.

⁶ *Id.*, ¶ 6.

⁷ *Id.* See *In the Matter of Fed.-State Joint Bd. on Universal Serv.*, 20 F.C.C. Rcd. 15095, ¶ 1 (2005).

⁸ Application, ¶ 7. See Docket No. 09-TFWZ-945-ETC, Notice of Filing of Staff Memorandum, p. 3 (Sept. 21, 2009) (stating that “TracFone is not requesting ETC designation for the purpose of receiving high-cost support from either the Federal Universal Service Fund (FUSF) or the Kansas Universal Service Fund (KUSF)”).

the FCC requirements.”⁹ TracFone noted the FCC’s decision to forbear from applying 47 U.S.C. 214(e)(1)(A)’s facilities requirement to Lifeline-only ETCs, pursuant to 47 U.S.C. 160.¹⁰

4. Further, TracFone argued that “[t]he FCC’s exercise of its statutory forbearance authority is applicable to and binding on state commissions,” and thus, “the Commission may not apply any facilities-based requirements to TracFone, or any other reseller, that seeks to be designated as an ETC (provided that such resellers comply with the FCC-established conditions of forbearance).”¹¹ TracFone attempted to bolster this contention by citing past instances where the Commission has honored the FCC’s forbearance rule in granting ETC designation “for purposes of receiving *federal* USF support.”¹²

5. To further support its argument that states may not apply the “own facilities” requirement to resellers seeking state USF support for providing Lifeline service, TracFone cited 47 U.S.C. 254(f)’s provision that “[a] state may adopt regulations **not inconsistent** with the [Federal Communications] Commission’s rules to preserve and advance universal service (emphasis added).”¹³ According to TracFone, state enforcement of the “own facilities” requirement as a condition of a carrier receiving state USF Lifeline support “is wholly inconsistent with” the FCC’s forbearance of the “own facilities” requirement for receiving FUSF support.¹⁴ Therefore, TracFone concluded that “the Commission may not require TracFone, nor any other ETC, to be facilities-based as a condition for receiving state USF support.”¹⁵

6. Citing a prior Commission denial of KUSF Lifeline support for an entity that did not meet the “own facilities” requirement, TracFone charged that “[t]he Commission failed to

⁹ Application, ¶ 8.

¹⁰ *Id.*, ¶ 10.

¹¹ *Id.*, ¶ 11.

¹² *Id.* (Italics added).

¹³ *Id.*, ¶ 12.

¹⁴ *Id.*

¹⁵ *Id.*

consider the statutory directive in Section 254(f) that a state's universal service program may not be inconsistent with FCC rules.”¹⁶

7. In addition, TracFone attempted to draw a parallel between the FCC *Open Internet Order's* forbearance of the requirement that broadband internet access service providers contribute to state universal service support mechanisms and the FCC's forbearance of the “own facilities” requirement for receiving federal Lifeline support.¹⁷ Based on this alleged parallel, TracFone concluded that K.S.A. 66-2008(b), “by limiting disbursements from the Kansas USF to facilities-based ETCs, is inconsistent with the FCC's universal service requirements, and is therefore preempted by Section 254(f)” and may not be enforced.¹⁸

8. TracFone also alleged the ways in which approval of its Application will serve the public interest by enhancing Lifeline options to qualifying Kansas customers.¹⁹

9. On December 14, 2016, Commission Staff (Staff) filed a Motion to Dismiss TracFone's Application, arguing that TracFone does not meet Kansas' statutory requirements for receiving KUSF support for its proposed Kansas Lifeline service.²⁰ The Motion also argued Kansas' statutory requirements have not been preempted by federal law.²¹

10. Specifically, Staff claimed that forbearance from the FCC's “own facilities” requirement applies only to the *federal* Lifeline-only ETC designation,²² and that when an FCC order refers to “the Lifeline program,” it is referring solely to the federal program supported by the FUSF.²³ Staff charged TracFone with trying to conflate the federal and state Lifeline

¹⁶ *Id.*, ¶ 13.

¹⁷ *Id.*, ¶ 14.

¹⁸ *Id.*, ¶ 15.

¹⁹ *Id.*, ¶¶ 16-21.

²⁰ Motion to Dismiss, ¶ 29 (Dec. 14, 2016).

²¹ *Id.*

²² *Id.*, ¶ 9.

²³ *Id.*, ¶¶ 11-12.

programs, a task made easier, according to Staff, by the fact that states have authority to determine *federal* Lifeline subsidy eligibility.²⁴

11. Because the FCC’s “own facilities” requirement applies only to the federal Lifeline program, said Staff, the Commission’s decision to enforce the “own facilities” requirement for the Kansas Lifeline Service Program (KLSP) is not in violation of 47 U.S.C. 160(e)’s prohibition against a state commission continuing to apply or enforce provisions the FCC has determined to forbear from applying under that same statute.²⁵ Indeed, Staff noted, “[t]he Commission . . . has been abiding by the FCC’s determination to forbear the facilities requirement for federal Lifeline-only ETC applicants.”²⁶

12. Staff also explained that applying Kansas’ “own facilities” requirement to Kansas Lifeline applicants does not violate 47 U.S.C. 254(f)’s provision that “[a] state may adopt regulations not inconsistent with the [FCC’s] rules to preserve and advance universal service”²⁷ because Kansas’ requirement “applies to the KLSP, not the federal Lifeline program.”²⁸

13. Regarding the *Open Internet Order*’s forbearance policy prohibiting states from collecting contributions to state USFs from broadband internet access services, Staff pointed out that broadband Internet service is “jurisdictionally interstate,” and therefore, “it logically follows that the FCC may prohibit states from requiring broadband Internet providers to contribute to state USFs.”²⁹ Staff alleged, however, that Lifeline services are distinct from Internet service, with state Lifeline programs subject only to state jurisdiction.³⁰ According to Staff, unless state Lifeline jurisdiction has been expressly preempted, there exists “a strong presumption that

²⁴ *Id.*, ¶¶ 12-13.

²⁵ *Id.*, ¶¶ 15-18.

²⁶ *Id.*, ¶ 18.

²⁷ *Id.*, ¶ 19-20.

²⁸ *Id.*, ¶ 21.

²⁹ *Id.*, ¶¶ 22-24.

³⁰ *Id.*, ¶ 25.

Congress did not intend to displace state law.”³¹ Staff concluded that because there is no evidence of express preemption of Kansas’ “own facilities” requirement for the KLSP, there is a strong presumption against such preemption.³²

14. Staff further contended that “TracFone’s argument violates the notion of state sovereignty” because FCC preemption would allow the federal government to control the Kansas Lifeline program that is “funded by Kansas ratepayers,” with “payments . . . made out of the KUSF at the direction of the Kansas legislature.”³³ Staff asserted that under United States Supreme Court precedent, the FCC lacks such power.³⁴

15. On December 23, 2016, TracFone filed a Reply to Staff’s Motion to Dismiss (TracFone Reply), asking the Commission to deny Staff’s Motion and promptly approve TracFone’s Application.³⁵ TracFone also asked the Commission to convene a hearing should the Commission have questions about TracFone’s Application and Lifeline proposal.³⁶

16. TracFone reemphasized the generosity of its current Lifeline benefits in Kansas and noted the “wide disparity between what TracFone proposes to provide to low-income Kansas households and that which is available from any other wireless Lifeline provider.”³⁷ TracFone expressed surprise and dismay that Staff did not “warmly embrace[]” TracFone’s desire to so serve the public interest.³⁸ Indeed, TracFone stated that “[t]he purpose for the KUSF is to provide meaningful Lifeline service to low-income Kansas households above that which can be

³¹ *Id.*, ¶ 26.

³² *Id.*

³³ *Id.*, ¶ 27.

³⁴ *Id.*, ¶ 28.

³⁵ Reply of TracFone Wireless, Inc. to Motion to Dismiss, ¶ 13 (Dec. 23, 2016).

³⁶ *Id.*

³⁷ *Id.*, ¶¶ 2-3.

³⁸ *Id.*, ¶ 3.

provided with only Federal USF support,”³⁹ and thus, denial of TracFone’s Application would “disserve the public interest.”⁴⁰

17. TracFone again claimed that Staff’s argument that Section 254(f) does not apply to Kansas’ facilities requirement “reads the all-important statutory words ‘not inconsistent with the [Federal Communications] Commission’s rules’ out of the statute.”⁴¹

18. On December 23, 2016, Staff responded to TracFone’s Reply (Staff’s Response), again asking the Commission to dismiss TracFone’s Application.⁴² Staff viewed Section 254(f)’s “not inconsistent with” language as “more akin to impossibility,”⁴³ and concluded: “It is not impossible for the state of Kansas to have a facilities requirement for its fund, while at the same time forbearing the facilities requirement for purposes of the federal fund.”⁴⁴

19. Staff further argued that TracFone’s view of “inconsistency” is so broad as to render preempted any state Lifeline requirement diverging from the federal requirements.⁴⁵ Staff considered this contradictory to the FCC’s 2016 *Lifeline Modernization Order* which allows states that maintain their own Lifeline funds “to adopt any eligibility requirements [they] deem necessary.”⁴⁶ Staff asked the Commission to interpret Section 254(f)’s “not inconsistent with” language strictly.⁴⁷

20. Regarding TracFone’s public interest argument, Staff stated that the Commission cannot disregard the implementation of a statutory requirement in favor of the public interest.⁴⁸

³⁹ *Id.*, ¶ 12.

⁴⁰ *Id.*, ¶ 7.

⁴¹ *Id.*, ¶ 5.

⁴² Staff’s Response to TracFone’s Reply, p. 3 (Dec. 23, 2016).

⁴³ *Id.*, ¶ 2.

⁴⁴ *Id.*, ¶ 4.

⁴⁵ *Id.*, ¶ 5.

⁴⁶ *Id.*

⁴⁷ *Id.*, ¶ 7.

⁴⁸ *Id.*, ¶¶ 8-11.

21. On January 3, 2017, TracFone filed a Surreply to Staff's Response (TracFone Surreply), proposing an oral argument in this matter.⁴⁹

22. TracFone's Surreply alleged that K.S.A. 66-2008(b), "[t]he operative state statute at issue," does not have an explicit "own facilities" requirement for a carrier seeking ETC status to provide KUSF-supported service.⁵⁰ Rather, said TracFone, K.S.A. 66-2008(b) requires the Commission to follow the statute "pursuant to the federal act," which includes following 47 U.S.C. 160(e)'s provision that state commissions "may not continue to apply or enforce any provision of this Act that the [Federal Communications] Commission has determined to forbear from applying under subsection (a)."⁵¹ TracFone claimed that this language "is not limited . . . to federal Lifeline."⁵²

23. In addition, TracFone argued that the federal act's definitions of Telecommunications Carrier and of Common Carrier, like K.S.A. 66-2008(b), are devoid of "any reference to facilities ownership, control, or operation. Rather those definitions are couched in terms of **services** provided."⁵³

24. TracFone then stated it has never asked for preemption of Kansas law.⁵⁴ TracFone also disagreed with Staff's argument that "not inconsistent with" means "impossible," alleging instead that "a state universal service Lifeline program which keys support to ownership of facilities is not compatible with, is contradictory to, and is not in agreement or harmony with, a federal universal Lifeline program in which support is not dependent on ownership of facilities, but rather on the nature of services provided."⁵⁵

⁴⁹ Surreply to Staff's Response and Request for Oral Argument, ¶ 15 (Jan. 3, 2017).

⁵⁰ *Id.*, ¶¶ 1-2.

⁵¹ *Id.*, ¶¶ 2-3.

⁵² *Id.*, ¶ 3.

⁵³ *Id.*, ¶ 4. (Emphasis in original).

⁵⁴ *Id.*, ¶ 5.

⁵⁵ *Id.*

25. TracFone argued against Staff's construction of the language from the FCC's *Lifeline Modernization Order*, which holds that states maintaining their own Lifeline funds are free "to adopt any eligibility requirements [they] deem necessary."⁵⁶ TracFone asserted that:

- a. "[S]tate Lifeline eligibility criteria are readily distinguishable from and irrelevant to whether States may re-impose a facilities requirement of Section 214(e)(1)(A) of the federal act following the FCC's forbearance" policy;⁵⁷ and
- b. "Staff's reliance on the FCC statement about state authority to impose additional eligibility criteria is itself inconsistent with the Commission's own action [in Docket No. 16-GIMT-575-GIT] regarding the propriety of separate state eligibility criteria;"⁵⁸

26. TracFone then interpreted K.S.A. 66-2008(b)'s provision regarding "competitive neutrality" to mean that a state requirement enabling "Lifeline customers served by wireline telephone companies to receive an additional \$7.77 in monthly benefits while denying the same additional monthly benefit to . . . Lifeline customers served by wireless ETCs . . . flies in the face of competitive neutrality."⁵⁹ Indeed, opined TracFone, "[a]ffording one group of ETCs a . . . pricing advantage over another group of ETCs offering the same service and competing for the same consumers favors one group and disfavors the other group," and is thus, "the antithesis of competitive neutrality."⁶⁰

27. Finally, TracFone argued that the Commission may not ignore the public interest,⁶¹ and indeed, if the Commission construes K.S.A. 66-2008(b) as TracFone suggests, wireless ETCs who provide Lifeline service without their own facilities would be eligible to

⁵⁶ See ¶ 19 of this Order, *supra*.

⁵⁷ TracFone Surreply, ¶ 6.

⁵⁸ *Id.*, ¶ 7.

⁵⁹ *Id.*, ¶¶ 9-10.

⁶⁰ *Id.*, ¶ 10.

⁶¹ *Id.*, ¶ 11.

receive KUSF support.⁶² By contrast, claimed TracFone, adopting Staff's interpretation will foreclose the Commission's ability to serve the public interest on this issue.⁶³

28. On March 2, 2017, the Commission issued its *Order Scheduling Oral Argument*, setting oral argument in this proceeding for March 29, 2017.⁶⁴

29. On March 24, 2017, TracFone filed a Motion for Leave to Appear *Pro Hac Vice* of Mitchell Brecher.

30. On March 29, 2017, the Commission held oral argument.⁶⁵ Mitchell F. Brecher was admitted *Pro Hac Vice* and argued the case for TracFone,⁶⁶ and Michael Neeley argued the case for Staff.⁶⁷

31. Mr. Brecher contended for two issues in this case: (1) Does K.S.A. 66-2008(b) prohibit the Commission from granting TracFone's Application to receive KUSF support? (2) Would the grant of TracFone's Application serve the public interest?⁶⁸

32. On the first issue, TracFone's arguments did not vary materially from those of its earlier pleadings. TracFone provided its view of the purpose of the FCC's forbearance requirement, arguing that a facilities requirement made sense in "the wireline world" to prevent "a universal service fund double dipping," but such a requirement has no application to a wireless world.⁶⁹ TracFone continued, stating that the FCC's reasons for forbearing the "own facilities" requirement apply equally to Kansas' KUSF Lifeline support provisions.⁷⁰

⁶² *Id.*, ¶ 12.

⁶³ *Id.*, ¶ 14.

⁶⁴ *Order Scheduling Oral Argument*, Ordering Clause A (Mar. 2, 2017).

⁶⁵ Docket No. 17-TFWZ-237-ETC, Hearing Transcript, p. 1 (Mar. 29, 2017) (Tr.).

⁶⁶ Tr., p. 3, line 6 through p. 5, line 5.

⁶⁷ Tr., p. 3, line 7 through p. 4, line 14.

⁶⁸ Tr., p. 7, lines 12-19.

⁶⁹ Tr., p. 9, line 23 through p. 12, line 8.

⁷⁰ Tr., p. 30, lines 4-8.

33. TracFone also invoked K.S.A. 66-2001, arguing that Kansas has a goal of providing access to telecommunications, and therefore, the Commission should consider the “own facilities” requirement in light of the overall goal of providing consumers with access to telecommunications through the Lifeline program.⁷¹

34. On the second issue, TracFone argued that its proposal to give Kansas Lifeline customers an additional 600 minutes per month fulfills the mandate of K.S.A. 66-2001 and serves the public interest.⁷² TracFone suggested that the two approved wireless ETC resellers in Kansas, YourTel and TAG Mobile, “are no more facilities-based than TracFone is,” and are providing a paltry sum of additional minutes compared to TracFone’s offering.⁷³ Indeed, TracFone concluded it would nullify the public interest to deny TracFone, with its generous Lifeline offering, while at the same time having approved companies offering much less.⁷⁴

35. At oral argument, Staff also largely reiterated its previous arguments. Staff intimated that TracFone argued for preemption in its Application but then “simply ask[ed] the Commission to comply with federal law.”⁷⁵ Staff replied that “the federal congress does not have authority to compel states to issue subsidies or otherwise regulate,”⁷⁶ but it does have the power to preempt contrary state laws.⁷⁷ If Section 254(f) indeed prohibits inconsistent state regulations, said Staff, then preemption analysis is warranted, and “in the absence of express preemption, there is a strong presumption that Congress did not intend to displace state law.”⁷⁸

⁷¹ Tr., p. 21, line 21 through p. 22, line 11.

⁷² Tr., p. 15, line 24 through p. 16, line 19.

⁷³ Tr., p. 17, line 10 through p. 18, line 25.

⁷⁴ Tr., p. 19, lines 1-8.

⁷⁵ Tr., p. 35, lines 13-16.

⁷⁶ Tr., p. 35, lines 16-23.

⁷⁷ Tr., p. 35, line 25 through p. 36, line 1.

⁷⁸ Tr., p. 36, lines 2-14.

36. Staff viewed competitive neutrality to mean that support may be obtained by any entity willing to invest in infrastructure and facilities.⁷⁹

II. Discussion

37. TracFone contended it has met all of K.S.A. 66-2008(b)'s eligibility requirements for receiving KUSF Lifeline support.⁸⁰

38. K.S.A. 66-2008(b) states:

Pursuant to the federal act, distributions from the KUSF shall be made in a competitively neutral manner to qualified telecommunications public utilities, telecommunications carriers and wireless telecommunications providers, that are deemed eligible both under subsection (e)(1) of section 214 of the federal act and by the commission.

39. TracFone alleged that K.S.A. 66-2008(b) has no "own facilities" requirement.⁸¹ However, the statute requires carriers seeking KUSF Lifeline support to be "deemed eligible . . . under subsection (e)(1) of section 214 of the federal act."⁸² Subsection (e)(1) of section 214 of the federal act provides that a common carrier designated as an ETC under the appropriate provisions of subsection (e) may receive universal service support pursuant to 47 U.S.C. 254 and shall, throughout the designated service area, "offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either *using its own facilities or a combination of its own facilities and resale of another carrier's services* (including the services offered by another eligible telecommunications carrier)."⁸³ Thus, while the text of K.S.A. 66-2008(b) does not mention "own facilities," the statute includes Section 214(e)(1), which brings "own facilities," within 66-2008(b)'s ambit. TracFone conceded this

⁷⁹ Tr., p. 37, lines 20-25.

⁸⁰ Application, p. 16. *See* TracFone Surreply, ¶ 1.

⁸¹ *See* ¶ 22 of this Order, *supra*; Tr., p. 8, lines 4-5.

⁸² 47 U.S.C. 214(e)(1).

⁸³ 47 U.S.C. 214(e)(1)(A). (Emphasis added).

when it noted that K.S.A. 66-2008(b) “includes Section 214(e)(1) which does contain a facilities requirement.”⁸⁴ Thus, the Commission finds that K.S.A. 66-2008(b) has an “own facilities” requirement through its inclusion of 47 U.S.C. 214(e)(1).

40. The Commission also finds that it must enforce the “own facilities” requirement of K.S.A. 66-2008(b) for carriers seeking KUSF support to provide Lifeline service in Kansas. TracFone noted the FCC’s grant of its petition for forbearance regarding the “own facilities” requirement.⁸⁵ However, that grant only exempted TracFone from using its own facilities when it comes to the receipt of *federal* Lifeline support.⁸⁶ Moreover, TracFone’s assertion that “the Commission did not require TracFone to meet the ‘own facilities’ requirements . . . nor did it apply the prohibition on a state commission designating a reseller as an ETC” in Docket No. 09-TFWZ-945-ETC⁸⁷ leaves out the fact that TracFone did not in that docket request ETC designation for the purpose of receiving KUSF Lifeline support, as it has requested in this case.⁸⁸

41. Nevertheless, TracFone argued that K.S.A. 66-2008(b)’s introductory phrase, “[p]ursuant to the federal act,” means the Commission must consider the entirety of the federal Telecommunications Act when applying the statute, and more specifically, 47 U.S.C. 160(e).⁸⁹ Section 160(e) prohibits a state commission from continuing “to apply or enforce any provision of this chapter that the [Federal Communications] Commission has determined to forbear from applying under subsection (a) of this section.” TracFone argued that, because the FCC has “determined to forbear from applying” the own facilities requirement to Lifeline-only ETCs, a

⁸⁴ Tr., p. 8, lines 20-21.

⁸⁵ See Application, ¶ 6.

⁸⁶ See ¶ 2 of this Order, *supra*.

⁸⁷ See ¶ 3 of this Order, *supra*.

⁸⁸ See *Id.*; See also Docket No. 09-TFWZ-945-ETC, Notice of Filing of Staff Memorandum, Report and Recommendation, p. 1 (Sept. 21, 2010) (stating that “[i]n this application, TracFone requests ETC designation for only **federal** low-income support throughout the state of Kansas” (emphasis added)).

⁸⁹ See ¶ 22 of this Order, *supra*.

state commission must also forbear from applying the own facilities requirement when administering its state Lifeline program supported by the state USF.⁹⁰

42. At the outset, the Commission finds the record in this proceeding contains no example of a case where a *state* commission determined to forbear from applying the “own facilities” requirement when approving *state* USF support for its *state* Lifeline program because the FCC’s forbearance requirement necessitated that it do so. Indeed, TracFone was only able to adduce examples of this Commission “referenc[ing] and act[ing] in accordance with the TracFone Forbearance Order” when approving *federal* USF support.⁹¹ The two wireless resellers TracFone mentions as receiving KUSF support for Lifeline, YourTel and TAG Mobile, represented to the Commission that they had their “own facilities” and were approved for KUSF Lifeline support on that basis.⁹² Moreover, as TracFone acknowledged, Telrite was denied KUSF Lifeline support because it did not meet the facilities requirement of K.S.A. 66-2008(b).⁹³ Thus, based on rulings in previous dockets, the Commission finds no basis to diverge from its consistent interpretation and application of K.S.A. 66-2008(b).

⁹⁰ See ¶¶ 3-4 of this Order, *supra*.

⁹¹ See Application, ¶ 11.

⁹² See Docket No. 12-TPCT-768-ETC, Application of YourTel America, Inc. to Amend Its Designation as an Eligible Telecommunications Carrier in the State of Kansas, ¶ 18 (Apr. 17, 2012) (stating that “[t]he Company continues to provide the required services via a combination of its own facilities and those of other network providers”); Docket No. 12-TPCT-768-ETC, *Order Expanding Eligible Telecommunications Carrier Status to Additional Service Areas*, ¶ 4 (Aug. 8, 2012) (finding that “YourTel will offer the required services throughout its requested service areas using a combination of its own facilities and resale of another carrier’s services,” and adopting by incorporation Staff’s finding that “YourTel states in its Application that it meets the minimum facilities requirements as discussed above . . . However, *in an abundance of caution*, YourTel has requested from the FCC coverage under the blanket forbearance from applying the ‘own facilities’ requirement to telecommunications carriers, such as YourTel that seek limited ETC designation to participate in the federal Lifeline program” (Emphasis added)). See also Docket No. 12-TAGC-843-ETC, Application for Designation as an Eligible Telecommunications Carrier on a Wireless Basis, ¶ 10 (May 22, 2012); Docket No. 12-TAGC-843-ETC, *Order on ETC Application*, ¶ 6 (Nov. 15, 2012).

⁹³ Tr., p. 12, lines 9-14. See Docket No. 13-RITC-181-ETC, *Order Granting Application for Eligible Telecommunications Carrier Status in Kansas for Purposes of Receiving Federal Lifeline Support and Denying Application for Kansas Lifeline Service Program Support*, ¶¶ 4, 8, Ordering Clause B (Mar. 13, 2013) (finding that “Applicants who have received forbearance from the ‘own facilities’ requirement for FUSF Lifeline purposes by filing a Compliance Plan with the FCC will not be eligible to receive KUSF Lifeline funds unless they meet the ‘own facilities’ requirement in Kansas”).

43. Turning to the text of 47 U.S.C. 160(e), the Commission finds TracFone's assertion that this statute binds the Commission and prohibits it from enforcing the facilities requirement on resellers seeking KUSF Lifeline support⁹⁴ to be conclusory and without merit. TracFone assumes, without any authority save its own assertion, that Section 160(e) should be read as though it says, "[a] State commission may not continue to apply or enforce any provision of this chapter *with respect to state USF support* that the [Federal Communications] Commission has determined to forbear from applying under subsection (a)."⁹⁵ There are several problems with this assumption.

44. First, the text of 160(e) itself does not specifically name the policy, program or subsidy to which "[a] state commission may not continue to apply or enforce any provision of" Chapter 5 of the Telecommunications Act. In other words, it does not specify whether it refers to forbearance of state USF support, federal USF support, or both. In light of the larger context of the *federal* act, the Commission reads 160(e) to mean: "A state commission may not continue to apply or enforce any provision of this chapter *with respect to federal USF support* that the Commission has determined to forbear from applying." Indeed, 47 U.S.C. 152(a), which discusses the application of Chapter 5 of the Telecommunications Act, states that the provisions of the chapter "apply to all interstate and foreign communication," which would be jurisdictionally federal. Thus, the Commission interprets 160(e) under the presumption that a federal telecommunications statute applies to federal telecommunications programs unless explicitly stated otherwise.

45. Second, although provision of federal Lifeline service is, by definition, a federal program, Staff is correct in pointing out that Congress has delegated authority to the states to

⁹⁴ See Application, ¶ 11.

⁹⁵ See *Id.*

determine ETC status for a Kansas carrier's receipt of *federal* Lifeline subsidies.⁹⁶ This strongly suggests that Congress was telling state commissions in 160(e) that, when determining eligibility for *federal* Lifeline in their respective states, they could not apply or enforce provisions that the FCC has determined to forbear from applying. As Staff pointed out, the FCC's 2005 Order granting forbearance to TracFone pertained to "federal universal service support," not KUSF.⁹⁷ Staff also correctly argued that when the 2012 FCC Forbearance Order stated that the FCC will forbear from applying the facilities requirement to carriers participating in "the Lifeline program," it was referring only to the federal Lifeline program, supported by the FUSF.⁹⁸ The FCC's Order makes this clear when it states: "Although Lifeline is *a federal program*, its administration varies significantly among the states, including on key policies such as eligibility and verification."⁹⁹ The Commission agrees that Section 160(e) prohibits it from applying any provision the FCC has determined to forbear from applying when considering federal Lifeline ETC designations.¹⁰⁰ However, Section 160(e) imposes no forbearance obligations on the Commission when it considers ETC designations for state Lifeline services supported by the KUSF. Thus, Section 160(e) has nothing to do with states determining separate criteria for *state* Lifeline subsidies.

46. Third, TracFone has not cited any case law, nor any FCC order, that corroborates its reading of Section 160(e). Therefore, the Commission will not adopt TracFone's reading.

47. The Commission is also persuaded by Staff's interpretation of 47 U.S.C. 254(f). As with Section 160(e), TracFone has failed to cite any legal authority, including any FCC

⁹⁶ See Motion to Dismiss, ¶ 13; see also 47 U.S.C. 214(e)(2).

⁹⁷ See Motion to Dismiss, ¶ 10.

⁹⁸ See Motion to Dismiss, ¶¶ 11-12.

⁹⁹ *In the Matter of Lifeline & Link Up Reform & Modernization Lifeline & Link Up Fed.-State Joint Bd. on Universal Serv. Advancing Broadband Availability Through Digital Literacy Training*, 27 F.C.C. Rcd. 6656, 6667, ¶ 19 (2012) (*italics added*).

¹⁰⁰ TracFone Reply, ¶ 5.

Order, supporting its interpretation of Section 254(f) regarding a state commission retaining a facilities requirement for its state Lifeline program. The FCC has never explicitly ordered that state enforcement of 47 U.S.C. 214(e)'s "own facilities" requirement in the state's Lifeline program is "inconsistent with" the FCC's rules to preserve and advance universal service, nor that it "burdens Federal universal service support mechanisms."¹⁰¹

48. This raises the issue of preemption. Although TracFone disavowed that this is a preemption case,¹⁰² its Application argued for preemption,¹⁰³ and TracFone stated that "if [Kansas] had a facilities requirement that conflicted with the federal law, which is forbearance from the facilities requirements subject to conditions, there would be a preemption situation."¹⁰⁴ The Commission has already found that K.S.A. 66-2008(b) has a facilities requirement, and therefore, finds that preemption analysis is warranted.

49. In its preemption analysis in a previous Commission telecommunications case, the Kansas Court of Appeals held that "[i]n the absence of express preemption, there is a strong presumption that Congress did not intend to displace state law," and "the conflict between the two laws must be positive and direct in order to make coexistence of the two laws an impossibility."¹⁰⁵ The Court further stated that "[i]t is necessary that the state law in its application to the same field contravene federal public policy or cause a different result or consequence."¹⁰⁶ Regarding "conflict pre-emption," the Court held that it "exists where 'compliance with both state and federal law is impossible,' or where 'the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

¹⁰¹ See Section 254(f).

¹⁰² Tr., p. 27, line 20.

¹⁰³ See ¶ 7 of this Order, *supra*.

¹⁰⁴ Tr., p. 27, line 22 through p. 28, line 2.

¹⁰⁵ *Bluestem Tel. Co. v. Kansas Corp. Comm'n*, 52 Kan. App. 2d 96, 109, 363 P.3d 1115 (2015).

¹⁰⁶ *Id.*

Congress.”¹⁰⁷ Ultimately, the Court held that “we cannot conclude that the 1996 [Telecommunications] Act expressly preempts state law in the area of universal service subsidies.”¹⁰⁸

50. The Commission agrees that there is no express preemption of K.S.A. 66-2008(b)’s facilities requirement because, as mentioned above, none of the FCC Orders cited by TracFone in this proceeding have provided any express preemption language when it comes to a state Lifeline’s “own facilities” requirement. TracFone’s analysis of the FCC’s *Open Internet Order* only bolsters the Commission’s finding because, even were that *Order* to apply to state Lifeline service, it has the FCC concluding “that any state requirements to contribute to state universal service support mechanisms . . . would be inconsistent with federal policy and therefore preempted by section 254(f).”¹⁰⁹ This is explicit preemption language which is missing when it comes to forbearance specifically of the “own facilities” requirement.

51. On conflict preemption, Staff correctly noted that it is possible for Kansas to enforce a facilities requirement when it comes to the receipt of KUSF Lifeline support while refraining from such a requirement for the receipt of federal Lifeline support. Indeed, this is precisely what the Commission has been doing.¹¹⁰ In addition, TracFone has not demonstrated that Kansas’ facilities requirement contravenes, obstructs or prevents the accomplishment and execution of federal Lifeline policy. TracFone detailed the anticipated benefits it would provide through its proposed expanded Kansas Lifeline service offering.¹¹¹ However, TracFone has not shown that current Kansas Lifeline service is inadequate for “the preservation and advancement

¹⁰⁷ *Id.*

¹⁰⁸ *Bluestem Tel. Co.*, 52 Kan. App. 2d at 111.

¹⁰⁹ See Application ¶ 14.

¹¹⁰ See ¶ 42 of this Order, *supra*.

¹¹¹ See Application, ¶¶ 16-21.

of universal service in the State.”¹¹² TracFone has also not shown that KUSF is unavailable to provide Lifeline service support “above that which can be provided with only Federal USF support.”¹¹³ Indeed, the KUSF is currently providing such support.¹¹⁴

52. The Commission rejects TracFone’s broad interpretation of Section 254(f)’s “not inconsistent with” language.¹¹⁵ The Commission agrees with Staff that TracFone’s interpretation of the phrase would preclude Kansas from enacting state USF provisions that vary at all from the federal provisions, including a difference in the subsidy amount or the eligibility criteria,¹¹⁶ rendering Section 254(f) self-contradictory.¹¹⁷

53. Section 254(f)’s specific language also prohibits states from adopting “regulations” that would be “inconsistent with” the FCC’s rules to preserve and advance universal service. Kansas has adopted no such “regulations.” K.S.A. 66-2008(b) is a statute, not a regulation, and thus, Section 254(f) is not directly applicable to it. The fact that KUSF support is governed by state statute also emphasizes the reality that the Federal Lifeline Program and the Kansas Lifeline Program are distinct programs, enacted by distinct legislative bodies, supported by distinct universal service funds, with distinct subsidy amounts and distinct eligibility requirements.¹¹⁸ The Commission therefore agrees that, in the absence of preemption, “Kansas alone has the power to decide who will be recipients of [KLSP] funds. The FCC does not have power to decide how the state of Kansas will spend funds gathered under its authority.”¹¹⁹

¹¹² See Section 254(f).

¹¹³ See ¶ 16 of this Order, *supra*.

¹¹⁴ See ¶ 42 of this Order, *supra*.

¹¹⁵ See TracFone Surreply, ¶ 5.

¹¹⁶ See Staff’s Response, ¶¶ 5-6. It appears that Staff’s purpose in discussing state Lifeline eligibility criteria was simply to argue that the FCC would be violating Section 254(f)’s “not inconsistent with” stricture by allowing states the freedom to adopt their own Lifeline eligibility requirements, not to equate Lifeline eligibility criteria with the Lifeline “own facilities” requirement. See ¶ 25 of this Order, *supra*. See also Tr., p. 39, line 24 through p. 40, line 5.

¹¹⁷ See Tr., p. 34, line 16 through p. 35, line 9.

¹¹⁸ See Tr., p. 33, lines 6-21; see also Motion to Dismiss, ¶ 27.

¹¹⁹ Motion to Dismiss, ¶ 28.

54. The Commission also disagrees with TracFone's argument regarding "competitive neutrality" in K.S.A. 66-2008(b).¹²⁰ TracFone's argument renders K.S.A. 66-2008(b) incoherent. The statute says that KUSF distributions must be made in a "competitively neutral manner" to entities "that are deemed eligible." In other words, all carriers "deemed eligible" by the Commission must have an equal opportunity to receive KUSF Lifeline support. Yet in order to be deemed eligible, the carrier must have its own facilities.¹²¹ This does not "unfairly advantage nor disadvantage" any one *deemed eligible* provider over another, nor does it "unfairly favor or disfavor one technology" of a *deemed eligible* provider over another.¹²² Whether a carrier is wireline or wireless, it must have its own facilities. The wireline carrier does not have an advantage simply because it is wireline.¹²³

55. To define "competitive neutrality" as requiring the Commission to give equal consideration to both facilities-owning and non-facilities-owning carriers when determining KUSF distributions for Lifeline service is to nullify the "deemed eligible" provision of K.S.A. 66-2008(b). The Commission rejects this position, and finds that the facilities requirement of K.S.A. 66-2008(b) allows for competitive neutrality in making KUSF distributions only to carriers with their own facilities.

56. TracFone also maintained that an "own facilities" requirement made sense when most telecommunications was wireline, but the FCC has now recognized the dominance of wireless technology and the concomitant pointlessness of requiring wireless resellers to have their own facilities in providing Lifeline service.¹²⁴ TracFone averred that Kansas should

¹²⁰ See ¶ 26 of this Order, *supra*.

¹²¹ See ¶ 39 of this Order, *supra*.

¹²² See TracFone Surreply, ¶ 9.

¹²³ See ¶ 26 of this Order, *supra*.

¹²⁴ See ¶ 32 of this Order, *supra*.

recognize the same reality and adjust accordingly.¹²⁵ Whatever the merits of TracFone's policy argument, they are more properly directed to the Kansas legislature, rather than to this Commission, which as a creature of statute is bound by the authority granted by the legislature.¹²⁶

57. Regarding the "public interest," Black's Law Dictionary defines it as "[t]he general welfare of a populace considered as warranting recognition and protection," and "[s]omething in which the public as a whole has a stake."¹²⁷ The Kansas public has an interest in access to a full range of excellent telecommunications infrastructure and service; to the increased services, improved facilities and reduced rates brought about by competition; to continuing development of telecommunications applications in the health and education sectors; and to protection from fraudulent and self-dealing telecommunications business practices.¹²⁸ However, Kansans also have an interest in their state governmental agencies following the laws enacted by their elected representatives. This is an interest in which the entire Kansas public has a stake, because ignoring or misapplying Kansas statutes jeopardizes more than access to telecommunications services. It is a recipe for arbitrary application of the law in general. Weighed in the balance, the Commission finds the public interest is best served by complying with the provisions of K.S.A. 66-2008(b), as the Commission has done in all previous dockets on this issue.

THEREFORE, THE COMMISSION ORDERS:

A. TracFone has failed to meet the requirements of K.S.A. 66-2008(b), and therefore, its Application is dismissed.

¹²⁵ *Id.*

¹²⁶ *Mobil Oil Corp. v. State Corp. Comm'n*, 227 Kan. 594, 600, 608 P.2d 1325 (1980).

¹²⁷ *Public Interest*, Black's Law Dictionary (10th ed. 2014).

¹²⁸ See K.S.A. 66-2001.

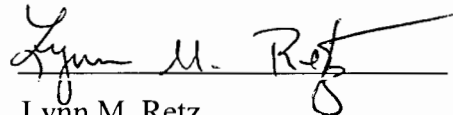
B. The parties have 15 days from the date of electronic service of this Order to petition for reconsideration.¹²⁹

C. The Commission retains jurisdiction over the subject matter and the parties for the purpose of entering such further orders as it deems necessary.

BY THE COMMISSION IT IS SO ORDERED.

Apple, Chairman; Albrecht, Commissioner; Emler, Commissioner

Dated: MAY 11 2017


Lynn M. Retz
Secretary to the Commission

MJD

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MAY 11 2017

¹²⁹ K.S.A. 66-118b; K.S.A. 77-529(a)(1).

CERTIFICATE OF SERVICE

17-TFWZ-237-ETC

I, the undersigned, certify that the true copy of the attached Order has been served to the following parties by means of

Electronic Service on _____.

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MAY 11 2017