

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

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

REPLY OF TRACFONE WIRELESS, INC. TO MOTION TO DISMISS

COMES NOW TracFone Wireless, Inc. ("TracFone"), by its attorneys, and, pursuant to K.A.R. 82-1-218(d), hereby replies to the Motion to Dismiss filed by Commission Staff ("Staff") in the above-captioned matter.

Introduction

1. With more than 2.6 million currently-enrolled Lifeline consumers in approximately 40 states, TracFone is the nation's leading provider of Lifeline service. In 2010, TracFone was designated by the Commission as an Eligible Telecommunications Carrier ("ETC") for the limited purpose of providing Lifeline service to low-income Kansas households. Since that time, thousands of Kansas's neediest households have received wireless Lifeline service through TracFone's SafeLink Wireless[®] Lifeline program. Currently, Kansas Lifeline customers receive at no charge 500 minutes per month of domestic all distance calling (including roaming at no charge), unlimited texting, and important service features such as Caller ID, Call Waiting, voicemail and three-way calling. These services are funded entirely by the federal Universal Service Fund ("Federal USF"). In addition, TracFone's Lifeline customers, who initiated service prior to December 2, 2016, received complementary wireless handsets, provided at TracFone's expense. Commencing December 2, 2016, TracFone now offers Lifeline customers mobile broadband service in accordance with the Federal Communications

Commission's ("FCC") recent modernization of Lifeline to include broadband service.¹ New Lifeline customers have the option of receiving complementary smartphones, provided at TracFone's expense, or providing their own smartphones. Lifeline customers who currently receive voice-only service may upgrade their plans to include broadband service, but must provide their own smartphone.

2. No Lifeline provider operating in Kansas provides Kansas consumers with more generous Lifeline benefits than does TracFone. However, TracFone believes that low-income Kansas households need more service and better service than that which is currently available. For that reason, on December 5, 2016, TracFone applied to the Commission to expand TracFone's ETC designation to allow it to receive support from the Kansas Universal Service Fund ("Kansas USF"). In its application, TracFone explained that the \$7.77 in monthly per customer support from the Kansas USF would flow through to enrolled Kansas Lifeline consumers in the form of increased benefits. Specifically, it proposed to offer the following two plans for Lifeline customers who commenced service prior to December 2, 2016: (1) 1,100 all distance airtime minutes and unlimited text messages for those Kansas Lifeline consumers using their existing handset; and (2) 950 airtime minutes, unlimited texting and 500 MB of mobile broadband data for those consumers electing a bundled voice and broadband data plan and providing their own smartphone. For new Lifeline customers (*i.e.*, those enrolling on or after December 2, 2016 assuming approval of its application), TracFone will provide 950 airtime minutes, unlimited texting and 500 MB of mobile broadband data. TracFone will provide those new customers with a new device – a smartphone capable of accessing the Internet and serving as a Wi-Fi hotspot. Those customers who provide their own device, instead of receiving a free

¹ Lifeline and Link Up Reform and Modernization, et al (Third Report and Order, Further Report and Order, and Order on Reconsideration), 31 FCC Rcd 3962 (2016).

smartphone from TracFone, will receive 1 GB of mobile broadband data for their first three months of enrollment.² Under each of those plans, Kansas Lifeline consumers will receive 600 voice minutes per month above that provided to Lifeline consumers in other states who receive only Federal USF support.

3. No wireless Lifeline provider operating in Kansas offers or has proposed to offer programs with benefits that are even close to those proposed by TracFone. In fact, no other wireless provider, including those who receive Kansas USF support, offers more than 500 minutes per month. Given this wide disparity between what TracFone proposes to provide to low-income Kansas households and that which is available from any other wireless Lifeline provider, one would have expected TracFone's proposal to be warmly embraced by Commission Staff whose responsibility is to serve the public interest, *i.e.*, the interests of Kansas consumers, which includes Kansas's lowest income consumers. Accordingly, TracFone was surprised and dismayed to receive Staff's Motion to Dismiss. In this Reply, TracFone will explain why Staff's Motion is based on a legally erroneous premise and, more importantly, why expeditious approval of TracFone's application would serve the public interest.

I. In Asserting that the FCC's Forbearance Is Applicable Only to Federal ETC Designation, Staff Misconstrues Section 254(f) of the Communications Act.

4. Staff has asserted that TracFone's proposal to provide enhanced Lifeline services to low-income Kansas residents violates Kansas law, specifically, the facilities requirement codified at K.S.A. 66-2008(b). However, that Staff assertion misconstrues applicable federal law, specifically, Section 254(f) of the Communications Act of 1934, as amended.³ In 2005, the

² Since the Kansas USF is available only to subsidize voice telecommunications service, the mobile broadband portions of these bundled plans (currently offering 500 MB of data) will be funded by the Federal USF. The Kansas USF support will only fund the additional voice benefits.

³ 47 U.S.C. § 254(f).

FCC exercised its responsibility set forth at Section 10 of the Communications Act⁴ to forbear from applying or enforcing the federal law's facilities requirement codified at Section 214(e)(1)(A) of the Communications Act⁵ subject to certain conditions. In 2012, the FCC's forbearance from applying the facilities requirement was extended to other wireless providers, including wireless resellers, who sought to make subsidized wireless Lifeline service available to low-income households.⁶ In exercising its forbearance responsibility, the FCC concluded that its conditional forbearance from the facilities requirement met all three prongs of the statutory standard for forbearance, *i.e.*, that a wireless carrier's ownership of facilities is not necessary to ensure that the carrier's rates will be just and reasonable or not unjustly or unreasonably discriminatory; is not necessary to protect consumers; and that forbearance will serve the public interest when the carrier only seeks to use its ETC designation to provide Lifeline service.⁷

5. Section 10(e) of the Communications Act⁸ explicitly prohibits State commissions from continuing to apply or enforce any provision that the FCC has determined to forbear from applying. Staff asserts that the prohibition against state enforcement of requirements subject to FCC forbearance only applies to the Federal USF and is not applicable to requirements governing a state USF such as the Kansas USF. Staff's claim is incorrect because it is contrary

⁴ 47 U.S.C. § 160.

⁵ 47 U.S.C. § 214(e)(1)(A).

⁶ Lifeline and Link Up Reform and Modernization, et al. (*Report and Order and Further Notice of Proposed Rulemaking*), 27 FCC Rcd 6656 (2012).

⁷ Federal-State Joint Board on Universal Service (TracFone Wireless Petition for Forbearance), 20 FCC Rcd 15095, ¶¶ 12-13 (2005). In that order, the FCC also explained why the facilities requirement was appropriate in the case of carriers seeking to receive high cost support but not in the case of carriers seeking only Lifeline support. The FCC noted that if a reseller of an incumbent wireline local exchange carrier purchases service at government-regulated wholesale rates which are already subject to USF subsidization, and were to receive its own low-income (Lifeline) USF support, the reseller would be receiving double USF subsidization. Wireless resale is not subject to government-mandated subsidized wholesale rates so the double subsidization problem would not exist. *Id.*, ¶ 5.

⁸ 47 U.S.C. ¶ 160(e).

to another important section of the Communications Act – Section 254(f). Section 254(f) states as follows: “A State may adopt regulations **not inconsistent with the [Federal Communications] Commission’s rules** to preserve and advance universal service.”⁹ In claiming that Section 254(f) is not applicable because the Kansas facilities requirement only applies to the Kansas USF, Staff has badly misconstrued that Section. Indeed, Staff’s interpretation reads the all-important statutory words “not inconsistent with the [Federal Communications] Commission’s rules” out of the statute.

6. In Section 254(f), Congress empowered states, including Kansas, to establish their own universal service programs supported by state resources. States may choose what services to support, how to fund the support, and who would receive funding. However, that broad grant of authority is subject to one explicit statutory condition – State universal service programs may not be inconsistent with FCC universal service rules. What Staff disregards and where it errs is that the FCC’s conditional forbearance actions – both its 2005 forbearance specifically applicable to TracFone, and its 2012 conditional forbearance applicable to other wireless providers – are FCC rules.¹⁰ Those forbearance rules govern who can be the subject of forbearance, what services are subject to forbearance, and the conditions applicable to forbearance. A state requirement which has the effect of negating those rules with respect to a state universal service program is, on its face, “inconsistent with the [Federal Communications] Commission’s rules to preserve and advance universal service.” Accordingly, Staff’s assertion

⁹ 47 U.S.C. § 254(f) (emphasis added).

¹⁰ Pursuant to the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*), an agency-imposed requirement need not be codified in the Code of Federal Regulations to have the status of an agency rule. Section 551(4) of the APA defines a “rule” in relevant part, as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy” The FCC’s conditional forbearance from the facilities requirement for Lifeline-only ETCs is such a statement of general applicability and future effect which prescribes law or policy.

that the FCC's conditional forbearance allowing wireless ETCs to provide Lifeline service via resale is limited to federal Lifeline is barred by Section 254(f) since the effect of Staff's interpretation would be to have Kansas universal service requirements that are inconsistent with federal universal service requirements.

II. By Attempting to Preclude Kansas Low-Income Households From Receiving Enhanced Lifeline Benefits, Staff's Motion Disserves the Public Interest.

7. As described in the preceding section, Staff's Motion improperly construes Section 254(f) of the Communications Act as not being applicable to State Lifeline programs when, in fact, the essence of Section 254(f) is that State universal service programs (including State Lifeline programs) may not be inconsistent with the federal requirements. However, there is another important reason why Staff's Motion should be denied and TracFone's application granted. Denial of TracFone's application to receive support from the Kansas USF would be adverse to the interests of Kansas's lowest income households and would therefore disserve the public interest.

8. Currently, two wireless ETCs receive support from the Kansas USF. Although those two companies – TAG Mobile and YourTel America, Inc. d/b/a TerraCom – purport to provide service using their own facilities, that claim seems to be contradicted by the fact that both of those companies represented to the FCC that they are wireless resellers and filed with the FCC compliance plans in order to avail themselves of the FCC's conditional forbearance rule for Lifeline-only wireless resellers.¹¹

9. Moreover, Kansas consumers do not seem to be receiving any benefit from either company's receipt of KUSF support. One of those companies – TAG Mobile – does not appear to be providing Lifeline service in Kansas. In fact, TAG Mobile is subject to an order to show

¹¹ TAG Mobile's compliance plan was granted by the FCC in 2012. YourTel's compliance plan remains pending before the FCC.

cause why it should not be subject to sanctions and fines and have its ETC designation cancelled, suspended or revoked.¹² Among other things, the Order to Show Cause indicates Staff's conclusion that TAG Mobile is not passing along its entire Lifeline discount to consumers, in violation of a Commission order.¹³

10. The other wireless ETC approved by the Commission to receive KUSF support is YourTel. On December 14, 2016, Staff recommended that YourTel's proposed calling plan be denied.¹⁴ Staff's recommendation to deny YourTel's plan is hardly surprising. YourTel had proposed to provide only 650 minutes of wireless calling time per month. That is only 150 minutes per month more than the 500-minute monthly minimum service standard for voice-only service established by the FCC. In short, YourTel has proposed to provide only 150 additional minutes above the FCC mandatory minimum in return for an additional \$7.77 in monthly KUSF support.

11. In contrast, TracFone has committed to provide its Kansas Lifeline voice-only customers with 1,100 voice minutes per month – 600 more minutes than that available to TracFone's voice-only Lifeline customers who receive only Federal USF support. Kansas Lifeline customers electing a bundled plan containing voice and mobile broadband data will receive 950 minutes of voice and 500 MB of data. Those customers too will receive 600 minutes

¹² In the Matter of a General Investigation of TAG Mobile, LLC to Show Cause Why This Commission Should Not Initiate Sanctions and Fines and Cancel, Suspend, and Revoke Any Authority the Carrier Currently Holds (Order to Show Cause), Docket No. 16-TAGC-323-SHO, issued January 14, 2016.

¹³ *Id.*, ¶ 8. TracFone understands that Staff has moved for summary judgment in the TAG Mobile proceeding and that motion remains pending.

¹⁴ In the Matter of a General Investigation to Address Issues Concerning the Kansas Lifeline Service Program, Docket No. 16-GIMT-575-GIT, Notice of Filing of Staff's Report and Recommendation Regarding KLSP Calling Plans for United Wireless, Tempo, I-Wireless and YourTel.

more than that available under TracFone's bundled plan supported only by the Federal USF.¹⁵ No other wireless provider has proposed to offer Kansas Lifeline consumers 600 minutes per month above that available with federal Lifeline plans. No other wireless provider has come close. In fact, with TAG Mobile subject to a show cause order and with YourTel's 650 minute proposal recommended for rejection by Staff, no other wireless Lifeline provider in Kansas appears to be offering more than the 500 voice minutes currently required by the FCC for voice-only wireless Lifeline plans supported only by the Federal USF.

12. The additional 600 minutes per month which TracFone is ready, willing, and able to provide to all qualified Kansas Lifeline consumers will be available to Lifeline consumers to contact current and potential employers, to reach and be reached by health care providers as well as governmental and social service agencies, and, perhaps most importantly, to remain in communication with family and friends. This will be an invaluable enhanced benefit to Kansas Lifeline households since it will materially increase the quantity of wireless service available to Lifeline consumers in Kansas. Kansas consumers deserve and need such increased Lifeline benefits. The purpose for the KUSF is to provide meaningful Lifeline service to low-income Kansas households above that which can be provided with only Federal USF support. The public interest will be served by approval of TracFone's application and by delivery of that important Lifeline enhancement to Kansas's neediest households.

¹⁵ As of December 2, 2016, new TracFone Lifeline consumers in states where there is no State support will receive a bundled offering consisting of 350 minutes of monthly wireless airtime and 500 MB of mobile broadband data. That plan meets the FCC's minimum service standard for broadband data.

Conclusion

13. For the reasons set forth in this Reply, the Commission should deny Staff's Motion to Dismiss, and should promptly approve TracFone's Application so that it may begin to deliver to Kansas households what will be by far the most generous wireless Lifeline program ever offered in Kansas. If the Commission has questions about TracFone's Application and its Lifeline proposal, then TracFone respectfully requests that the Commission convene a hearing at the earliest opportunity so that those questions can be promptly addressed and resolved.

Respectfully submitted,

TRACFONE WIRELESS, INC.



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December 23, 2016

VERIFICATION
K.S.A. 53-601

STATE OF KANSAS)
)
COUNTY OF SHAWNEE) ss:

I, Susan B. Cunningham, verify under penalty of perjury that I have caused the foregoing Reply of TracFone Wireless, Inc. to Motion to Dismiss to be prepared on behalf of TracFone Wireless, Inc., and that the contents thereof are true and correct to the best of my knowledge, information, and belief.



Susan B. Cunningham

December 5, 2016

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Reply of TracFone Wireless, Inc. to Motion to Dismiss was served via electronic mail this 23rd day of December, 2016, to the parties appearing on the Commission's service list as last modified on December 21, 2016.



Susan B. Cunningham