

**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)	

**SURREPLY TO STAFF'S RESPONSE AND
REQUEST FOR ORAL ARGUMENT**

COMES NOW TracFone Wireless, Inc. ("TracFone"), by its attorneys, and pursuant to K.A.R. 82-1-218(d), hereby submits its Surreply to Commission Staff's Response to TracFone's Reply ("Response") in the above-captioned matter.

Staff's Response presents only two assertions: 1) that the word "inconsistent" as used by the United States Congress in Section 254(f) of the Communications Act really means "impossible;"¹ and 2) that the Commission should disregard the public interest.² Neither of these assertions withstands analysis, and neither justifies the Commission denying TracFone's application and rejecting its proposal to provide low-income Kansas households with the most generous wireless Lifeline program ever proposed to be offered in Kansas.

I. Kansas Statutes Annotated § 66-2008(b) Is Not An Impediment to Approval of TracFone's Application to Provide Lifeline Service Using Kansas Universal Service Fund Support.

1. The operative state statute at issue is Section 66-2008(b) of Kansas Statutes Annotated. Contrary to Staff's assertion, K.S.A. 66-2008(b) does not contain an explicit requirement that telecommunications carriers in Kansas must own "facilities" to be designated as an Eligible Telecommunications Carrier ("ETC") to provide Lifeline service supported by the

¹ Staff Response, at 1.

² *Id.* at 3.

Kansas Universal Service Fund (“Kansas USF”) in addition to the Federal Universal Service Fund (“Federal USF”). K.S.A. 66-2008(b) states as follows: *“Pursuant to the federal act, distributions from the KUSF shall be made in a competitively neutral manner to qualified 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.”*

2. Conspicuously absent from K.S.A. 66-2008(b) is any reference to facilities, telecommunications facilities, or ownership thereof. What is instructive, however, is what *is* referenced in K.S.A. Section 66-2008(b). The first words of that statute are “[p]ursuant to the federal act.” That reference encompasses the entirety of the federal act, *i.e.*, the Communications Act of 1934, as amended by the Telecommunications Act of 1996.³ It is not a reference only to Section 214(e)(1) of the act, as posited by Staff. The entirety of the Communications Act includes Section 10 of that act.⁴ Section 10 of the federal act is the statute which requires the Federal Communications Commission (“FCC”) to forbear from the application or enforcement of provisions of the act or FCC regulations upon a determination that certain requirements (codified at Section 10(a) (1) - (3)) have been met. The FCC exercised its statutory duty to forbear under Section 10, first in 2005 with specific respect to TracFone,⁵ and on an industry-wide basis in 2012, when it exercised forbearance from the facilities requirement of Section 214(e)(1)(A) regarding Lifeline-only ETCs.⁶

³ 47 U.S.C. § 151 *et seq.*

⁴ 47 U.S.C. § 160.

⁵ Federal-State Joint Board on Universal Service, et al. (TracFone Wireless Petition for Forbearance), 20 FCC Rcd 15095 (2005).

⁶ Lifeline and Link Up Reform and Modernization, et al. (Report and Order and Further Notice of Proposed Rulemaking), 27 FCC Rcd 6656 (2012). In both cases, the FCC forbearance was subject to explicit conditions.

3. Moreover, Congress stated unequivocally in the federal act that exercises by the FCC of its forbearance obligations pursuant to Section 10 could not be disregarded or undone by State commissions. That statutory prohibition against state disregard of Section 10 forbearance actions is set forth at Section 10(e). Section 10(e) states that “[a] State commission 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).” The language of Section 10(e) is broad. It is applicable to “any provision of [the federal] act.” It is not limited to federal universal service programs (or universal service in general), or, more specifically, to federal Lifeline.

4. The federal act as referenced at K.S.A. 66-2008((b) provides further guidance as to which companies may provide Lifeline service supported by the Kansas USF. That section refers to “qualified telecommunications public utilities, telecommunications carriers, and wireless providers.” Nowhere in the federal act is there any mention of public utilities (or telecommunications public utilities). However, the term Telecommunications Carrier is a statutorily defined term in the federal act. Telecommunications Carrier is defined to include “any provider of telecommunications **services**... . A telecommunications carrier shall be treated as a common carrier under this act only to the extent it is engaged in providing telecommunications **services**... .”⁷ Since a telecommunications carrier is deemed to be a common carrier under the federal act when it provides telecommunications services, the statutory definition of common carrier also is relevant. The federal act defines Common Carrier as “any person engaged as a common carrier for hire in interstate or foreign communication by wire or

⁷ 47 U.S.C. § 153(44) (emphasis added).

radio or in interstate or foreign radio transmission of energy... .”⁸ Importantly, neither the federal act definition of Telecommunications Carrier nor the federal act definition of Common Carrier contains any reference to facilities ownership, control, or operation. Rather those definitions are couched in terms of **services** provided. Thus, it should not be surprising that for more than four decades, providers of telecommunications services (wireline and wireless) have been deemed to be common carriers and telecommunications carriers under the federal act, based on the services they provide, without regard to facilities ownership.⁹

5. Contrary to Staff’s assertion, Section 254(f) is not necessarily about federal preemption and, moreover, TracFone has not asked the FCC or a federal court to preempt Kansas law. Rather, TracFone is asking the Commission to apply Kansas law in a manner not inconsistent with the federal act as it is required to do by Section 254(f) of the federal act.¹⁰ This is about consistency between federal and state universal service programs, including federal and state Lifeline programs. In this regard, the claim that the Commission should view Section 254(f) – and the entirety of the federal act as referenced at K.S.A. 66-2008(b) – from an “impossibility” standpoint is unsupported and incorrect. Nowhere in the federal act or in its legislative history is there any indication that the “not inconsistent with” clause of Section 254(f) is intended to be limited to situations where compliance both with federal and state requirements

⁸ 47 U.S.C. § 153(10).

⁹ See Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC2d 261 (1976), *aff’d sub nom. American Telephone and Telegraph Company v. FCC*, 572 F.2d 17 (2nd Cir), *cert. den.* 99 S.Ct. 213 (1978).

¹⁰ In its application to expand its ETC designation to allow for receipt of Kansas USF support, TracFone noted the Commission’s own acknowledgment that Section 254(f) of the federal act reflects Congressional intent to preempt state law. See TracFone Application, at 9 and citations contained therein. That said, TracFone has not asked the Commission to preempt state law. Rather, it has asked the Commission to comply with applicable federal law. Because TracFone’s application asks the Commission to construe K.S.A. 66-2008(b) in a manner consistent with federal law rather than preempt state law, Staff’s reliance on Bluestem Tel. C. v. Kansas Corporation Commission, 52 Kan. App.2d 96, 363 P.3d 1115 (Kansas Court of Appeals 2015) (Staff Response to Reply at 2 n. 3) is misplaced.

is an impossibility. Black's Law Dictionary defines "inconsistent" as "lacking agreement among parts; not compatible with another fact or claim."¹¹ A more helpful definition of "inconsistent" is found in a standard dictionary: "contradictory; not in agreement or harmony."¹² In short, 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 service Lifeline program in which support is not dependent on ownership of facilities, but rather on the nature of the services provided, including the provider's commitment to comply with the conditions attached to the FCC's exercise of its Section 10 forbearance responsibilities.

6. Staff supports its argument that "not inconsistent with" as that term is used at K.S.A. 66-2008(b) is tantamount to impossibility by referencing a passage from the FCC's recent Lifeline Modernization Order.¹³ That passage articulates the view that a state with its own Lifeline fund may adopt "any eligibility requirements it deems necessary" with regard to the state program.¹⁴ Staff's reliance on that passage from the recent FCC Lifeline Modernization Order is misplaced for several reasons. First, state 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 from application or enforcement of that section of the federal act done in full conformance with Section 10 of the federal act. It is one thing for a state to adopt additional eligibility criteria to govern the availability of state Lifeline support; it is quite another thing for a state to deny state Lifeline

¹¹ Black's Law Dictionary Ninth Edition, West Publishing Company, 2009, at 834.

¹² Webster's II New Riverside University Dictionary, Riverside Publishing Company, 1984, at 620.

¹³ Lifeline and Link Up Reform and Modernization, et al., 31 FCC Rcd 3962 (2016).

¹⁴ Staff Response, at 2.

support to fully qualified low-income households who obtain their Lifeline service from a designated Lifeline provider which provides Lifeline service without ownership of facilities.

7. Second, Staff's reliance on the FCC statement about state authority to impose additional eligibility criteria is itself inconsistent with the Commission's own action regarding the propriety of separate state eligibility criteria. By order issued October 18, 2016, the Commission acted on Staff's recommendation and revised the Kansas Lifeline eligibility criteria to be fully consistent with the recently-amended federal Lifeline eligibility criteria.¹⁵ As a result, the eligibility criteria in Kansas for federal Lifeline and for state Lifeline are the same. By revising the Kansas Lifeline eligibility criteria to conform with the FCC's modified federal criteria as of December 2, 2016, the effective date of the modified federal eligibility criteria, the Commission did precisely what it is expected to do pursuant to Section 254(f) of the federal act – adopt regulations **not inconsistent with** the federal requirements to preserve and advance universal service.

8. TracFone is aware of one case in which the Commission denied a wireless ETC's request to receive Kansas USF support on the basis that the ETC did not own facilities.¹⁶ TracFone was not a party to that proceeding and is not familiar with the factual record or with the legal arguments presented to the Commission. Nonetheless, for the reasons set forth herein,

¹⁵ See In the Matter of a General Investigation to Address Issues Concerning the Kansas Lifeline Service Program (Order Modifying Kansas Lifeline Service Program (KLSP) Requirements; Soliciting Further Comment), Docket No. 16-GIMT-575-GIT, issued October 18, 2016.

¹⁶ See In the Matter of Application of Telrite d/b/a Life Wireless for Designation as an Eligible Telecommunications Carrier on a Wireless Basis (Low Income Only) (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), Docket No. 13-RITC-181-ETC, issued March 13, 2013. See also In the Matter of the Petition of Budget PrePay, Inc. for Designation as a Non-Rural Wireless Eligible Telecommunications Carrier, Docket No. 16-BGPT-158-ETC (Application for KUSF Lifeline support withdrawn by Budget based on Staff's recommendation that Budget relies on the FCC's blanket forbearance and, therefore, does not meet the statutory "own facilities" requirement, resulting in Staff recommending denial of the Application).

denial of Kansas USF support to a designated ETC who has received FCC forbearance from the requirements of Section 214(e)(1)(A) of the federal act would be a violation of K.S.A. 66-2008(b). TracFone notes further that the Commission's 2013 decision in the Telrite matter predates by several years the Commission's October 16, 2016 order in Docket No. 16-GIMT-575-GIT. That recently-issued Commission order demonstrates the Commission's recognition that the rules governing the Kansas Lifeline program may not be inconsistent with the federal Lifeline program.

9. Also disregarded by Staff is the all-important "competitively neutral" language of K.S.A. 66-2008(b). That section requires that distributions from the Kansas USF be made to qualified carriers in a "competitively neutral manner." Competitive neutrality is a critical aspect of the federal act. The FCC has defined competitive neutrality, with particular respect to universal service support, to mean that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, nor unfairly favor or disfavor one technology over another.¹⁷ Imposition of a facilities requirement in order to receive Kansas USF support unquestionably will advantage some Lifeline providers and will disadvantage other providers. More importantly, imposition of such a requirement will advantage low-income Lifeline-eligible consumers of some providers' Lifeline services and disadvantage low-income Lifeline-eligible consumers of other providers' Lifeline services.¹⁸

10. Based upon reported data available from the Universal Service Administrative Company ("USAC"), as of September 2016, approximately 6,975 low-income Kansas

¹⁷ Federal-State Joint Board on Universal Service, 12 FCC Rcd 8876 (1997) at ¶ 47. *See also Federal-State Joint Board on Universal Service (Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission)*, 15 FCC Rcd 15168, ¶ 21 (2000).

¹⁸ As previously noted by TracFone, the FCC has explained in detail why the facilities requirement is necessary for ETCs seeking high cost support but is not relevant or necessary with regard to carriers seeking only Lifeline support. *See TracFone's Reply to Staff's Motion to Dismiss*, at p. 4, n. 7.

households obtained Lifeline service from the state's 27 wireline telephone companies. Approximately 51,603 low-income Kansas households obtained their Lifeline service from the state's 17 wireless Lifeline providers, almost all of whom provide service on a resale basis and therefore do not receive Kansas USF support. Any state requirement which enables those 6,975 Lifeline customers served by wireline telephone companies to receive an additional \$7.77 in monthly benefits while denying that same additional monthly benefit to those 51,603 Lifeline customers served by wireless ETCs (more than 88 percent of Kansas Lifeline customers) flies in the face of competitive neutrality.¹⁹ It is undeniable that Lifeline providers compete with each other for Lifeline consumers. Qualified low-income Lifeline-eligible consumers will choose those providers whose Lifeline programs offer consumers the greatest perceived value. A state requirement which makes available \$17.02 (\$9.25 Federal USF support + \$7.77 Kansas USF support) to some providers (those who may receive Federal USF and State USF support) while limiting other providers (those permitted by the Commission only to receive Federal USF support) to \$9.25 enables the former to deliver greater service value than the latter. Affording one group of ETCs a \$7.77 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. As such, it is the antithesis of competitive neutrality and disregards that incontrovertible fact that

¹⁹ Of those 17 wireless ETCs operating in Kansas, most are resellers. Two of those resellers claim to provide service in Kansas, in part, using their own facilities, and have been approved to receive Kansas USF support. However, neither appears to be providing that state support to consumers in the form of additional benefits. One of those companies has had its receipt of USF support suspended and is subject to an order to show cause why its ETC designation should not be cancelled, suspended, or revoked. The other is subject to a Staff recommendation that its proposed calling plan be denied. *See* TracFone's Reply, at 6-7. TracFone understands that the latter ETC recently has submitted a revised calling plan which would increase the number of additional minutes, but to a level still far below that set forth in TracFone's proposal.

“competitively neutral” is an explicit statutory requirement of K.S.A. 66-2008(b) – a statutory requirement imposed by the Kansas Legislature which the Commission may not disregard.²⁰

II. Neither Staff nor the Commission May Disregard the Public Interest.

11. Staff’s final assertion is that the Commission may ignore the public interest in construing the requirements of K.S.A. 66-2008(b). The Commission should not, indeed may not, ignore the public interest. Regulating in the public interest is the *sine qua non* of the Commission’s responsibilities. Indeed, making public interest determinations is the Commission’s *raison d’etre* as well as that of virtually all federal and state regulatory agencies and departments.

12. Contrary to Staff’s claim, TracFone is not asking the Commission to disregard a statute.²¹ As described in the preceding section of this Surreply, TracFone has not asked the Commission to disregard K.S.A. 66-2008(b). Rather, before the Commission is TracFone’s application which asks the Commission to construe K.S.A. 66-2008(b) in a manner consistent with its own purpose, with the Commission’s October 2016 order, and with the entirety of the federal act specifically described in the preceding section. For the reasons described in the preceding section of this Surreply, a proper construction of K.S.A. 66-2008(b) would not bar receipt of Kansas USF support by Commission-designated wireless Lifeline-only ETCs, including those ETCs who provide Lifeline service without use of their own facilities.

²⁰ K.S.A. 66-2008(a) requires that every telecommunications carrier, telecommunications public utility and wireless telecommunications service provider that provides intrastate telecommunications service contribute to the Kansas USF on an equitable and nondiscriminatory basis. This contribution requirement is applicable to all service providers irrespective of whether they provide service using their own facilities. Requiring telecommunications carriers and wireless telecommunications service providers who provide Lifeline service as designated ETCs to contribute to the Kansas USF while, at the same time, being precluded from receiving Kansas USF funds to provide Lifeline service is neither equitable nor nondiscriminatory.

²¹ Staff Response, at 3.

13. As described by TracFone in its application and as reiterated in its Reply to Staff's Motion to Dismiss, TracFone is committed to delivering to each of its Kansas Lifeline customers an additional 600 minutes of all distance wireless service per month, in addition to unlimited text messages and important service features. Those additional 600 minutes will provide Kansas Lifeline customers among the most substantial wireless Lifeline benefits available anywhere.²²

14. The public interest compels that the Commission enable qualified low-income Kansas households to avail themselves of the most generous wireless Lifeline program ever proposed to be offered in Kansas. Interpreting K.S.A. 66-2008(b) in the narrow manner advocated by Staff will preclude the Commission from meeting that important public interest objective. It will also create a facial inconsistency between the federal Lifeline program and the Kansas program in violation of Section 254(f) of the federal act.

Conclusion and Request for Oral Argument

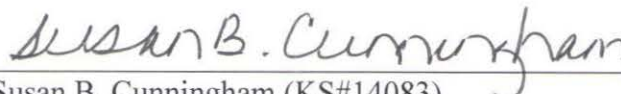
15. For the reasons stated herein as well as those set forth in TracFone's application and in its Reply to Staff's Motion to Dismiss, TracFone respectfully requests that the Commission promptly approve its application so that Kansas consumers may soon enjoy the enhanced Lifeline program which TracFone has proposed and sought approval to provide. If the Commission deems it appropriate, TracFone respectfully proposes that the Commission hold an oral argument in this matter at the earliest practicable time so that the parties can address any

²² So far as TracFone is aware, only California Lifeline customers enjoy greater Lifeline benefits than will TracFone's Kansas Lifeline customers (made possible by a monthly state support payment of \$13.20 per customer from the California LifeLine program). Also, some Lifeline customers residing in Federally Recognized Tribal Areas receive more substantial Lifeline benefits which are made possible by the FCC-mandated additional \$25.00 per month in Lifeline support to ETCs serving tribal lands.

questions that the Commission may have regarding the factual, legal and public interest considerations at issue in this proceeding.²³

Respectfully submitted,

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²³ In its Reply to Staff's Motion to Dismiss, TracFone requested that the Commission convene a hearing on this matter if the Commission had questions about TracFone's application and Lifeline proposal. *See* TracFone Reply, at 6-7. On further reflection, TracFone believes that an oral argument would be a more appropriate mechanism for the Commission to explore the legal questions and public interest considerations at issue in this proceeding.

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 Surreply to Staff's Response 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.

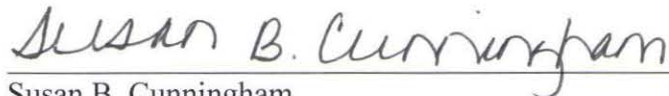


Susan B. Cunningham

January 3, 2017

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Surreply to Staff's Response was served via electronic mail this 3rd day of January, 2017, to the parties appearing on the Commission's service list as last modified on December 23, 2016.



Susan B. Cunningham