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 in the State of Kansas for the Limited Purpose of Offering Lifeline Service to Qualified Households	)	Docket No. 17-TFWZ-237-ETC

PETITION FOR RECONSIDERATION

COMES NOW TracFone Wireless, Inc. ("TracFone"), by its attorneys, and pursuant to K.S.A. 66-118b, K.S.A. 77-529(a)(1), and K.A.R. 82-1-235, hereby petitions the State Corporation Commission of the State of Kansas ("KCC") or ("Commission") for reconsideration of its Order Dismissing TracFone's ETC Application issued May 11, 2017 in the above-captioned matter ("Dismissal Order").[1]

1. In 2009, TracFone was designated by the Commission as an Eligible Telecommunications Carrier ("ETC") pursuant to Section 214(e)(2) of the Communications Act of 1934, as amended,[2] to provide Lifeline service supported by the federal Universal Service Fund ("Federal USF").[3] Currently, low-income households enrolled in TracFone's SafeLink Wireless® Lifeline program may receive either 500 minutes per month of wireless voice service or 350 minutes per month of wireless voice service plus 500 MB of mobile broadband Internet access service. In its dismissed application for authority to receive support from the Kansas Universal Service Fund ("KUSF"), TracFone proposed to provide every Kansas Lifeline

[1] For reasons explained in this petition, the Dismissal Order contains errors of fact and law and should be reconsidered. TracFone intends to seek judicial review of that order if necessary. TracFone submits this petition for reconsideration in conformance with the requirement in K.S.A. 66-118b that petitioning for reconsideration is a condition precedent to seeking judicial review of the order.

[2] 47 U.S.C. § 214(e)(2).

[3] Docket No. 09-TFWZ-945-ETC.

customer with an additional 600 minutes per month of wireless voice service if it is allowed to receive support from the KUSF. That is far more service than available from any other Lifeline provider operating in Kansas and significantly more service than the Commission has found to be sufficient for low-income Kansas households. Unfortunately, the Commission chose to deny this additional level of Lifeline service to low-income Kansas households based on its misreading of Kansas law and federal law.

2. In accordance with K.S.A. 66-118b and K.S.A. 77-529(a)(1), the specific grounds upon which TracFone relies in seeking reconsideration are set forth below.

I. K.S.A. 66-2008(b) Contains No Facilities Requirement.

3. The Dismissal Order is built upon an erroneous legal conclusion, *i.e.*, that K.S.A. 66-2008(b) contains a requirement that carriers receiving funds from the KUSF must provide service using their own facilities. However, Section 66-2008(b) contains no such requirement. 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 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.

4. Conspicuously absent from Section 66-2008(b) is any reference to "facilities" or any explicit requirement that a provider must have "facilities." In fact, "facilities" is nowhere defined in the statute so neither the Commission nor anyone else has any idea what may have been contemplated by this unstated "own facilities" requirement. The Kansas Legislature is a sophisticated body. Had the Legislature intended to require that Lifeline providers receiving KUSF support provide service using their own facilities, it easily could have enacted an explicit "facilities" requirement into law. For example, instead of saying, "pursuant to the federal act," the Legislature could have drafted Section 66-20008(b) to read "pursuant to Section 214(e)(1) of

the federal act." Alternatively, it could have provided that distributions from the KUSF be made in a competitively neutral manner to "qualified *facilities-based* public utilities, telecommunications carriers and wireless telecommunications providers." Had the Legislature enacted such an explicit "own facilities" requirement, there would have been little doubt that the Legislature intended to require facilities ownership as a condition to receipt of support from the KUSF. It did not do so. Accordingly, there is no basis for the Commission's speculation that the Legislature may have intended to include a facilities requirement in the statute.

5. In the absence of any explicit Legislatively-imposed facilities requirement, the Commission read such a non-existent requirement into the statute *sub silentio*. It strained to reach this result by taking an expansive – and incorrect – interpretation of the Communications Act of 1934, as amended (or, as referred to by the Kansas Legislature in 66-2008(b), "the federal act"). It is correct that Section 214(e)(1)(A) of the federal act requires that a carrier offer services supported by the federal USF "either using its own facilities or a combination of its own facilities and resale of another carrier's services." However, Section 66-2008(b) does not state either explicitly or implicitly that a recipient of KUSF support must meet the facilities requirement of Section 214(e)(1)(A) of the federal act. Rather, it states that in order to receive KUSF support, the recipient must be "**deemed eligible**" both under subsection (e)(1) of the Section 214 of the federal act and by the commission.

6. There is a critical difference between having facilities as required by Section 214(e)(1) and being "deemed eligible" under that section – a distinction wholly disregarded by the Commission. At the heart of that critical distinction is the first clause of Section 66-2008(b) – "**Pursuant to the federal act**." "Pursuant to the federal act" means the entire federal Act, not

just Section 214(e)(1)(A). The entire federal act includes Section 10.[4] Section 10 requires that the Federal Communications Commission ("FCC") forbear from the application or enforcement of any provision of the federal act upon a determination that application or enforcement is 1) not necessary to ensure just and reasonable rates; 2) not necessary to protect consumers; and 3) would serve the public interest, particularly by promoting competition. Once that three part statutory determination has been made, the FCC is statutorily required to forbear from application or enforcement of the applicable section of the federal act and/or the applicable FCC rules. Moreover, Section 10(e) of the federal act[5] prohibits a State commission from continuing to apply or enforce any provision of the federal act that the FCC has determined it must forbear from applying or enforcing.

7. In the Dismissal Order, the Commission elected not to follow the FCC's forbearance from applying the explicit facilities requirement of Section 214(e)(1) on the basis that the FCC's exercise of its forbearance responsibilities was limited to *federal* Lifeline support. However, Section 10(e) is not so limiting. Once the FCC determined that the explicit facilities requirement of Section 214(e)(1) could not lawfully be enforced, there was no basis for the Commission to impose that no longer applicable explicit federal act requirement on what could at most be called an implicit state requirement.[6]

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[4] 47 U.S.C. § 160.

[5] 47 U.S.C. § 160(e).

[6] At page 15 of the Dismissal Order, the Commission states that it reads Section 10(e) of the federal act 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." Those italicized words are not contained in Section 10(e). By adding words to the federal act which Congress did not include in that act, the Commission has purported to rewrite federal legislation which it has no authority to do. The Kansas Supreme Court has repeatedly admonished Kansas tribunals against adding words not contained in statutes. *See, e.g.*, Seaboard Corp. v. Marsh Inc., 295 Kan. 384, 400 (2012); 143rd St. Investors, L.L.C. v. Bd. of County Commissioners, 292 Kan. 690, 698 ("When a statute is plain and unambiguous, we do

8. In the FCC's 2012 Lifeline Reform Order,[7] the FCC undertook an extensive Section 10 forbearance analysis. Nothing in that FCC forbearance analysis indicates or even suggests that the analysis and resulting conclusions are applicable only to federal Lifeline and would not be applicable state Lifeline programs as well. After concluding that, subject to several conditions, (including conditions requiring 911 access and submission of compliance plans), all three prongs of the statutory forbearance standard had been met, the FCC stated as follows: "Requiring Lifeline-only ETCs to use their own facilities to offer Lifeline service does not further the statutory goal of the low-income program."[8] Once that determination was made, all Lifeline providers, including resale providers, who met the FCC-imposed forbearance conditions were "deemed eligible" under Section 214(e)(1) of the federal act to provide Lifeline service.

9. The statutory goal referenced in that conclusion set forth in the FCC's 2012 Lifeline Reform Order refers specifically to the statutory goals in the Communications Act of 1934 – the act that the Kansas Legislature in Section 66-2008(b) refers to as "the federal act." Nothing in the FCC's extensive forbearance analysis contained in the 2012 Lifeline Reform Order states or implies that the analysis would not be applicable to a state Lifeline program or that the statutory goal of a state Lifeline program would differ from the goal set forth in the federal act.[9] Neither has the Commission in its Dismissal Order identified a single Legislature-stated goal of the Kansas Lifeline program which deviates from or is inconsistent with the Lifeline goals under the federal act.

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not speculate as to the legislative intent behind it and will not read the statute to add something not readily found in it."). If it is impermissible to add words to state statutes, clearly it is impermissible for the Commission to add words of its choosing to federal statutes.

[7] In the Matter of Lifeline and Link Up Reform and Modernization, *et al*, 27 FCC Rcd 6656 (2012) ("Lifeline Reform Order").

[8] *Id.*, ¶ 377.

[9] The FCC's forbearance analysis is contained at ¶¶ 368-381 of the Lifeline Reform Order.

10. In fact, the statutory goals of the federal act and the Kansas statute are remarkably consistent with each other. The federal act's universal service principles are codified at Section 254(b) of that act.[10] Those principles include availability of quality services and access by consumers throughout the nation, including low-income consumers, to telecommunications and information services at affordable rates. The policy principles of the Kansas statute are codified at K.S.A. 66-2001. Those include access by every Kansan [including low-income Kansans] to first class telecommunications infrastructure that provides excellent service at affordable prices; statewide consumer access to a full range of telecommunications facilities and infrastructure at reduced prices; and consumer access to a full range of telecommunications services that are comparable in urban and rural areas throughout the state. Indeed, the Kansas Court of Appeals has acknowledged the consistency of goals between the federal act and the Kansas Telecommunications Act. In Bluestem Tel. Co. v. Kansas Corporation Commission, 52 Kan. App. 2d 96 (2015), the court expressly stated that "the KTA's goals matched those of the 1996 Act – ensuring that every Kansan had access to first class telecommunications service at an affordable price while at the same time promoting consumer access in all areas of the state."[11] Given the facial similarities between the federal act's stated goals and the Kansas act's stated goals (similarities acknowledged by the Court of Appeals in Bluestem), it strains credulity for the Commission to base its determination in this matter on the unsupported and unsupportable supposition that there are differences between the universal service goals of the federal act and those of the Kansas Telecommunications Act.

11. At the heart of the Commission's incorrect analysis is the flawed premise that federal Lifeline and Kansas Lifeline are separate and unrelated programs. While the federal and

[10] 47 U.S.C. § 254(b).

[11] 52 Kan. App 2d. at 98-99.

state components of Lifeline are funded by separate funding sources – the Federal USF and the KUSF, from a consumer perception standpoint, Lifeline is viewed as a single program. Contrary to the statement set forth in the Dismissal Order,[12] they are not distinct programs. Certainly, they are not perceived as distinct programs by those Kansas low-income consumers who receive Lifeline supported service. If TracFone is allowed to receive KUSF support, it will provide Kansas Lifeline customers with 950 voice minutes or 1,150 voice minutes (depending on whether the customer is also receiving 500 MB of mobile broadband Internet access service). Those minutes will be usable by Kansas Lifeline customers for all calling – local and long distance, intrastate and interstate. Low-income Kansas consumers enrolled in TracFone's Lifeline program will have no reason to view their Lifeline benefits as containing specific quantities of Federal USF-funded minutes and KUSF minutes. Those Kansas consumers will be receiving from TracFone a monthly quantity of wireless voice minutes which can be used for all of their calling needs. Yet, inexplicably, the Commission treats them as separate programs, indeed separate services.[13]

12. TracFone does not dispute the fact that Section 254(f) of the federal act allows states to establish their own universal service programs, including Lifeline programs, funded with state resources, provided that those programs are not inconsistent with the FCC's rules governing the federal program. However, the fact that the Kansas Lifeline program is established pursuant to the Kansas Telecommunications Act and the federal program is

[12] Dismissal Order, at 19.

[13] The Dismissal Order's statement that the federal and state Lifeline programs have distinct eligibility criteria (*id.*) is refuted by the Commission's own decision to revise the Kansas Lifeline eligibility criteria so as to conform to the federal eligibility criteria. In the Matter of a General Investigation to Address Issues Concerning Kansas Lifeline Service Program (*Order Modifying Kansas Lifeline Service Program (KLSP) Requirements; Soliciting Further Comment*), Docket No. 16-GIMT-575-GIT, issued October 16, 2016.

established pursuant to the federal act does not change the reality that consumers receiving Lifeline-supported services have no reason to view the programs as separate. Moreover, the Commission never has articulated its own requirements for receiving KUSF support beyond its generalized reference to "the federal act" as set forth at Section 66-2008(b).

II. No State Commissions Have Denied TracFone State Lifeline Funding Based on an Explicit or Non-explicit "Facilities" Requirement.

13. In the Dismissal Order, the Commission states that the record in this proceeding contained no example of a case where a *state* commission elected to forbear from a state "facilities" requirement for Lifeline based on FCC forbearance.[14] TracFone is the largest provider of Lifeline service in the United States and currently provides Lifeline service in about 40 states. No other state ever has prohibited TracFone from providing – and, more importantly, prohibited TracFone's low-income Lifeline consumers from receiving, state Lifeline support based on a refusal to honor the FCC's forbearance determination and Section 10(e) of the federal act. Of those 40 states, relatively few have their own Lifeline programs. Until recently, TracFone had not sought access to state Lifeline support and limited its program to that which could be provided using federal support. However, given the explosive growth in demand for wireless Lifeline service and greater benefits sought by consumers, and the increasing competition to serve Lifeline customers, TracFone recently began to seek support from state funds in several states as it has done in Kansas. In some states (*e.g.*, Kentucky, Nevada, and New Mexico), those requests are pending. In one state – California – TracFone already has been approved to receive state support as well as federal Lifeline support and is offering a very robust Lifeline program to low-income California households supported by federal and state funding. To date, not a single state commission (other than the KCC) has denied a TracFone request for

[14] Dismissal Order, at 14.

state funding for its Lifeline program based on either an explicit or an implicit facilities requirement.

14. Equally unavailing is the Commission's statement that TracFone failed to cite to any FCC order prohibiting a state from enforcing an alleged "facilities" requirement.[15] There is a readily apparent reason why there is no such FCC order. Requests by Lifeline providers for state fund support would not have been made to the FCC. They would have been made (as was done in this matter) to the appropriate state commission. In short, the applicability of the FCC's exercise of its forbearance responsibilities to a state Lifeline fund in a state whose laws include an implicit "facilities" requirement would be questions for state commissions, not for the FCC. To date, the only state commission which has answered such a question in the negative is this Commission.

III. The Commission's Preemption Analysis Based on a Single Case is Flawed.

15. Notwithstanding the absence of any inconsistency between the federal act and Kansas statutes regarding eligibility for Lifeline support, the Dismissal Order states the proposition that this is a federal preemption matter and that the non-existent Kansas "facilities" requirement is not subject to federal preemption. The entire body of case law cited by the Commission in support of that conclusion is Bluestem – a case which explicitly acknowledges the consistencies between the goals of the federal act (which, of course, contains Section 10(e)) and the Kansas Telecommunications Act). Moreover, Bluestem involved changes to the Kansas high cost fund to offset changes in federal high cost support mandated by the FCC. That case is wholly irrelevant to the issue which was before the Commission in the instant proceeding – whether Section 10(e) of the federal act bars the Commission from imposing a non-explicit "facilities" requirement on TracFone following the FCC's exercise of its Section 10 forbearance

[15] *Id.*, at 17.

responsibilities. Therefore, the Commission's reliance on the Bluestem case to justify its preemption analysis is misplaced.

CONCLUSION

16. For the reasons set forth herein, the Commission's dismissal of TracFone's application for authority to receive KUSF support to enhance its Lifeline program and increase significantly the quantity of Lifeline service available to low-income Kansas households contains material factual and legal errors. Furthermore, depriving low-income Kansas households of an additional 600 minutes (10 hours) per month of wireless telecommunications service would not serve the public interest. Accordingly, reconsideration of the Dismissal Order is warranted.

WHEREFORE, TracFone respectfully urges the Commission to reconsider that order and, on reconsideration, grant TracFone's application. Kansas consumers deserve no less.

Respectfully submitted,

TRACFONE WIRELESS, INC.

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VERIFICATION
(K.S.A. 53-601)

STATE OF KANSAS)
) ss.
COUNTY OF SHAWNEE)

I, Susan B. Cunningham, being of lawful age, hereby state that I have caused the foregoing Petition for Reconsideration of TracFone Wireless, Inc. to be prepared, that I have read and reviewed the Petition for Reconsideration, and that the contents thereof are true and correct to the best of my information, knowledge and belief.

/s/ *Susan B. Cunningham*

Susan B. Cunningham

Executed on the 25th day of May, 2017

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Petition for Reconsideration of TracFone Wireless, Inc. was electronically served on this 25th day of May, 2017, to the persons appearing on the Commission's service as last modified on May 10, 2017.

/s/ *Susan B. Cunningham*

Susan B. Cunningham