

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

**MOTION TO DISMISS**

The Staff of the Kansas Corporation Commission (Staff and Commission, respectively), pursuant to K.S.A. 77-519, hereby moves the Commission to dismiss TracFone Wireless, Inc's (TracFone) Application in this matter for failing to state a claim upon which relief may be granted. Specifically, because TracFone does not provide service using its "own facilities" as required under K.S.A. 66-2008(b), and TracFone's claims of federal pre-emption are without merit, TracFone's Application cannot be granted. In support of its Motion, Staff states the following:

**I. Background – TracFone's Application and Legal Claims**

1. On December 5, 2016, TracFone filed an Application<sup>1</sup> requesting authority to receive Kansas Universal Service Fund (KUSF) support in addition to its federal Universal Service Fund (FUSF) support when providing Lifeline service in the state.<sup>2</sup> TracFone asserted that such grant of authority would promote the public interest.<sup>3</sup> TracFone also stated that it is a reseller of telecommunications services, utilizing AT&T Wireless, T-Mobile, and Verizon Wireless as underlying carriers.<sup>4</sup>

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

<sup>2</sup>Id. at 1.

<sup>3</sup>Id. at 12-16.

<sup>4</sup>Id. at 2.

2. TracFone, in support of its Application, made several interrelated arguments that K.S.A. 66-2008(b)'s "own-facilities"<sup>5</sup> requirement for KUSF distributions is pre-empted by federal administrative order.<sup>6</sup>

3. First, TracFone stated that in 2005, the FCC utilized its authority under 47 U.S.C. § 160 to forbear from applying 47 U.S.C. § 214(e)(1)(A)'s facilities requirement against TracFone.<sup>7</sup> Then, in 2012, such forbearance was extended to all telecommunications carriers seeking Lifeline-only ETC designation so long as the carrier met certain 911 requirements and received approval of a compliance plan.<sup>8</sup> TracFone indicated that it met those requirements.<sup>9</sup>

4. Second, TracFone asserted that "[t]he FCC's exercise of its statutory forbearance authority is applicable to and binding on state commissions" due to 47 U.S.C. § 160(e) which provides "[a] State commission may not continue to apply or enforce any provisions of this chapter that the [Federal Communications] Commission has determined to forbear from applying under subsection (a) of this section."<sup>10</sup>

5. Third, TracFone asserted that the "FCC's decision to forbear from enforcing 47 U.S.C. § 214(e)(1)(A)'s facilities requirement against telecommunications resellers is equally applicable to resellers seeking to receive distributions from a state USF."<sup>11</sup> TracFone supports this statement by citing to 47 U.S.C. § 254(f) which provides "A state may adopt regulations not inconsistent with the [Federal Communications] Commission's rules to preserve and advance

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<sup>5</sup>The "own facilities" requirement is cited by TracFone as the "facilities-based" requirement. Staff considers these phrases to be synonymous. *See Id.* at 7.

<sup>6</sup>*Id.* at 7-12. Such federal administrative orders being specifically the Lifeline and Link Up Reform and Modernization et al., Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656 (2012) and the TracFone Forbearance Order which does not appear to be cited.

<sup>7</sup>TracFone's Application at 7.

<sup>8</sup>*Id.* at 8-9.

<sup>9</sup>*Id.* at 9.

<sup>10</sup>*Id.* at 8.

<sup>11</sup>*Id.* at 9.

universal service.”<sup>12</sup> TracFone stated that a facilities-based requirement for state USF support is wholly inconsistent with the FCC’s rule that resellers who meet the federal forbearance conditions are eligible to receive FUSF.<sup>13</sup>

6. Fourth, TracFone acknowledges that the Commission has held in the past 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,”<sup>14</sup> but that the Commission failed to consider the statutory directive from 47 U.S.C. § 254(f) that state universal service program rules cannot be inconsistent with FCC rules.<sup>15</sup>

7. Finally, TracFone stated that provisions of the FCC’s *Open Internet Order* explicitly mandated that during the period in which the FCC forbore federal USF contribution requirements upon broadband Internet access service providers, states were not allowed to require such providers to contribute to state USFs because such contributions would be inconsistent with federal policy and be pre-empted by 47 U.S.C. § 254(f).<sup>16</sup> TracFone also argued that because the FCC’s facilities Forbearance Order was permanent rather than interim, there can be no doubt that application of the facilities-based requirement for state USF purposes would be inconsistent with the FCC’s rule.<sup>17</sup>

## **II. Main Issue – Federal Pre-Emption of a State Statute**

8. The main issue at this juncture is whether the Commission is pre-empted from requiring TracFone to abide by K.S.A. 66-2008(b)’s “own facilities” requirement in order to

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<sup>12</sup>Id.

<sup>13</sup>Id.

<sup>14</sup>See *generally* 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, Docket No. 13-RITC-181-ETC (Mar. 13, 2013).

<sup>15</sup>Id. at 10.

<sup>16</sup>Id. at 10-11.

<sup>17</sup>Id. at 11.

receive KUSF distributions, or whether the FCC has pre-empted the state of Kansas from applying the “own facilities” requirement to its state subsidy fund. As will be explained below: TracFone has improperly expanded the scope of the facilities Forbearance Order<sup>18</sup> to include state USF programs; application of the “own facilities” requirement for the Kansas Lifeline Service Program (KLSP) creates no obstacle to the federal Lifeline program; and allowing pre-emption in this case would violate state sovereignty.

### **III. Argument 1 – The Forbearance Order cited by TracFone only applies to receipt of FUSF funds and the Federal Lifeline Program**

9. Staff admits that TracFone has been granted forbearance from the “own facilities” requirement as indicated in its Application. However, such forbearance only applies to the facilities requirement for *federal* Lifeline-only ETC designation. Such forbearance does not expressly or impliedly extend to state programs or the KLSP.

10. The 2005 FCC Order granting TracFone’s forbearance from the “own facilities” requirement contained the following statement:

In this Order, we address a petition filed by TracFone Wireless, Inc. (TracFone) pursuant to section 10 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the Act) requesting that the Commission forbear from the requirement that a carrier designated as an eligible telecommunications carrier (ETC) *for purposes of federal universal service support* provide services, at least in part, over its own facilities. (Emphasis Added).<sup>19</sup>

11. The relevant language from the 2012 FCC Forbearance Order stated the following:

We forbear, on our own motion, from applying the Act’s facilities requirement of section 214(e)(1)(A) to all telecommunications

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<sup>18</sup>Lifeline and Link Up Reform and Modernization et al., Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656 (Jan. 31, 2012) (Forbearance Order).

<sup>19</sup>Order, 20 FCC Rcd 15095, ¶ 1 (Sept. 6, 2005).

carriers that seek limited ETC designation to participate in the *Lifeline program*, subject to certain conditions noted below. (Emphasis added).<sup>20</sup>

12. The “Lifeline program” referenced above is the program administered by the FCC and paid out of the FUSF. This is an important distinction because TracFone, in its arguments, attempts to conflate the federal Lifeline program with the KLSP, an independent state of Kansas subsidy program.<sup>21</sup>

13. TracFone is aided in its ability to conflate the two programs because the United States Congress delegated authority to the states to determine which carriers will be eligible for the *federal* Lifeline subsidies.<sup>22</sup> So states like Kansas that have their own *state* programs must determine eligibility for each. However, the federal Lifeline program and the KLSP remain distinct programs with different requirements for eligibility.

14. The Commission has already complied with the provisions of the FCC Forbearance Order by abstaining from applying the facilities requirement in TracFone’s application for *federal* Lifeline-Only ETC designation.<sup>23</sup> However, the KLSP is a separate, state managed program, over which the FCC Forbearance Order does not apply.

#### **IV. Argument 2 – Because the Forbearance Order only applied to the FUSF, Kansas has not violated 47 U.S.C. § 160(e)**

15. Because the FCC Forbearance Order only applied to *federal* Lifeline program eligibility, the Commission is not in violation of 47 U.S.C. § 160(e) by continuing to abide by the facilities requirement for purposes of its *state* KLSP program.

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<sup>20</sup>Id. at ¶ 368.

<sup>21</sup>See K.S.A. 66-2002(f); K.S.A. 66-2006.

<sup>22</sup>See 47 U.S.C. § 214(e)(1)-(2).

<sup>23</sup>See Order Granting in Part and Denying in Part Amended Application of TracFone for Designation as ETC for the Limited Purpose of Offering Lifeline Services to Qualified Households, Docket No. 09-TFWZ-045-ETC, ¶ 8 (Dec. 14, 2010).

16. 47 U.S.C. § 160(e) contains the following prohibition: “[a] State commission may not continue to apply or enforce any provisions of this chapter that the [Federal Communications] Commission has determined to forbear from applying under subsection (a) of this section.”<sup>24</sup>

17. As the FCC Forbearance Order specifically pertained to the federal Lifeline program and not the state KLSP program, the FCC has not expressly forborne the Commission from applying K.S.A. 66-2008(b)’s facilities requirement to its state KLSP program.

18. The Commission, as noted by TracFone in its Application, has been abiding by the FCC’s determination to forbear the facilities requirement for federal Lifeline-only ETC applicants. Therefore, no violation of this provision has occurred.

**V. Argument 3 – The Commission’s use of the “own facilities” requirement from K.S.A. 66-2008(b) does not violate 47 U.S.C. § 254(f) because the requirement is only being used for the KLSP**

19. The Commission’s continued application of the “own facilities” requirement to KLSP applicants is also not inconsistent with the FCC’s rules, as referenced in 47 U.S.C. § 254(f).

20. 47 U.S.C. § 254(f) provides in part: “A state may adopt regulations not inconsistent with the [Federal Communications] Commission’s rules to preserve and advance universal service.”<sup>25</sup>

21. Throughout the FCC’s 2012 Forbearance Order, the FCC references the fact that its rule changes were directed toward the “federal Lifeline program.”<sup>26</sup> In fact, the discussion on the facilities requirement specifically states: “[i]n 2005, the Commission agreed to conditionally

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<sup>24</sup>47 U.S.C. § 160(e).

<sup>25</sup>47 U.S.C. § 254(f).

<sup>26</sup>See Forbearance Order, ¶¶ 61, 67, 127, 140, 189, 362.

forbear from the own-facilities requirement for the *limited purpose* of allowing TracFone to participate in the *federal Lifeline program* and receive Lifeline-only support.” (Emphasis added).<sup>27</sup> Kansas’ facilities rule is not inconsistent with the FCC’s rule because it only applies to the KLSP, not the federal Lifeline program.

**VI. Argument 4 – The Open Internet Order is distinguishable from the Forbearance Order because Internet service is jurisdictionally interstate and such Order provided express federal pre-emption**

22. The *Open Internet Order* relied upon by TracFone stated the following:

Today, we reaffirm the Commission’s longstanding conclusion that broadband Internet access service is *jurisdictionally interstate* for regulatory purposes. As a general matter, mixed jurisdiction services are typically subject to dual federal/state jurisdiction, except where it is impossible or impractical to separate the service’s intrastate from interstate components and the state regulation of the intrastate component interferes with valid federal rules or policies. (Internal Citations Omitted) (Emphasis Added).<sup>28</sup>

23. 47 U.S.C. § 152(a) explicitly states that the FCC’s jurisdiction extends only to interstate communications.<sup>29</sup>

24. Therefore, due to the interstate nature of broadband Internet service, it logically follows that the FCC may prohibit states from requiring broadband Internet providers to contribute to state USFs.

25. However, the FCC has not made any such declarations pertaining to Lifeline service or voice service. Such services continue to exist with dual federal/state jurisdiction, with the state Lifeline program subject to state jurisdiction only.

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<sup>27</sup>Id. at ¶ 362.

<sup>28</sup>Protecting and Promoting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 ¶ 431 (Feb. 26, 2015).

<sup>29</sup>47 U.S.C. § 152(a).

26. It is important to point out that the Kansas Supreme Court has stated “[i]n the absence of express preemption, there is a strong presumption that Congress did not intend to displace state law.”<sup>30</sup> The *Open Internet Order* provided for express pre-emption. However, TracFone has provided no evidence of express language requiring state USFs to apply the facilities requirement to state-run (intrastate) programs that are similar to the federal Lifeline program, and as such, there is a strong presumption against such a finding.

#### **VII. Argument 5 – TracFone’s argument violates the notion of state sovereignty**

27. Finally, TracFone’s pre-emption argument should fail because it implies that the state of Kansas does not have control over its own subsidy program. The KLSP is funded by Kansas ratepayers and payments are made out of the KUSF at the direction of the Kansas legislature.<sup>31</sup> To allow the FCC to dictate how the state of Kansas can operate its state subsidy program would violate state sovereignty.<sup>32</sup>

28. The Supreme Court has stated that “[t]he sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission...”<sup>33</sup> The KLSP was created by the Kansas legislature. Kansas alone has the power to decide who will be recipients of those funds. The FCC does not have power to decide how the state of Kansas will spend funds gathered under its authority.

#### **VIII. Conclusion**

29. TracFone’s Application in this matter cannot be granted as filed because TracFone will not provide KLSP service using its “own facilities,” as required by K.S.A. 66-2008(b). TracFone’s claims of federal pre-emption fail because express pre-emption has not

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<sup>30</sup>Bluestem Tel. Co. v. Kansas Corp. Comm’n, 52 Kan. App. 2d 96, 109, 363 P.3d 1115, 1125 (2015).

<sup>31</sup>See K.S.A. 66-2008(b).

<sup>32</sup>See U.S. Const. Amend. X.

<sup>33</sup>McCulloch v. Maryland, 17 U.S. 316, 429 (1819).



occurred, the state of Kansas' continued application of the "own facilities" requirement to its state program does not pose any obstacle to the federal Lifeline program, and allowing pre-emption would violate state sovereignty.

WHEREFORE, for the reasons set forth above, Staff respectfully moves the Commission to dismiss TracFone's Application.

Respectfully Submitted,



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                                      ) ss.  
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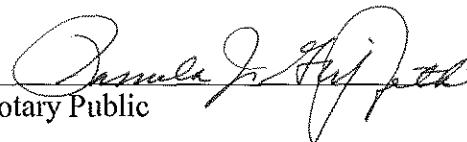
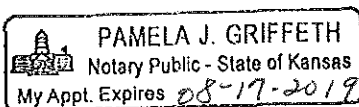
**VERIFICATION**

Michael Neeley, being duly sworn upon his oath deposes and states that he is Litigation Counsel for the State Corporation Commission of the State of Kansas, that he has read and is familiar with the foregoing *Motion to Dismiss* and that the statements contained therein are true and correct to the best of his knowledge, information and belief.



Michael Neeley # 25027  
Kansas Corporation Commission of the  
State of Kansas

Subscribed and sworn to before me this 14th day of December, 2016.

  
Notary Public

My Appointment Expires: August 17, 2019

## CERTIFICATE OF SERVICE

17-TFWZ-237-ETC

I, the undersigned, certify that a true and correct copy of the above and foregoing Motion to Dismiss was served by electronic service on this 14th day of December, 2016, to the following:

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