

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.)

STAFF'S RESPONSE TO TRACFONE'S REPLY

The Staff of the Kansas Corporation Commission (Staff and Commission, respectively), hereby states the following in response to TracFone's *Reply of TracFone Wireless, Inc. to Motion to Dismiss* (TracFone's Reply):

I. 47 U.S.C. § 254(f)'s inconsistency language should be read strictly

1. TracFone argues in its Reply that Staff has ignored the language from 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 universal service."¹ Additionally, TracFone reasserts that K.S.A. 66-2008(b)'s facilities requirement is inconsistent with the Federal Communications Commission's (FCC) decision to forbear the same requirement for federal Lifeline service providers.²

2. It is apparent from TracFone's argument that TracFone takes a more expansive view on what would be considered "inconsistent" with the federal rules. TracFone appears to be arguing that a mere difference equates to inconsistency. Staff views the word "inconsistency" more akin to impossibility. Staff's definition is more strict, and guided by Kansas pre-emption precedent, as well as the FCC's own statements acknowledging states may have different requirements than the FCC for its federal fund.

¹Reply of TracFone Wireless, Inc. to Motion to Dismiss, p. 3-4 (Dec. 23, 2016) (TracFone's Reply).

²Id. at 5-6.

3. First, as was referenced in Staff's Motion to Dismiss, 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."³ Moreover, but not cited in Staff's Motion to Dismiss, the Kansas Supreme Court has stated: "that the conflict between the two laws must be positive and direct in order to make coexistence of the two laws an impossibility. It is necessary that the state law in its application to the same field contravene federal public policy or cause a different result or consequence."⁴

4. 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.

5. Furthermore, TracFone's expansive view of the word "inconsistency" would imply that anything a state does differently for purposes of its universal service subsidy fund would be pre-empted. The FCC has not taken this view. In a recent 2016 order involving determinations surrounding the federal Lifeline program, the FCC stated the following:

We find that the benefits to the federal Lifeline program of removing state specific eligibility criteria outweigh concerns presented by the states that object to this action. It is important to note that the changes to eligibility only apply to the federal Lifeline program.⁵⁸⁷ Thus, **a state maintaining its own Lifeline fund will still be free to adopt any eligibility requirements it deems necessary.** (Emphasis Added).⁵

6. If "inconsistency" were viewed as encompassing as TracFone argues, states would not be free to adopt different eligibility requirements for state Lifeline programs.

³Bluestem Telephone v. Kan. Corp. Comm'n, 52 Kan. App. 2d 96, 109 (Nov. 25, 2015), citing Doty v. Frontier Communications, 272 Kan. 880, 891 (2001).

⁴Id.

⁵In the Matter of Lifeline & Link Up Reform & Modernization, 31 F.C.C. Rcd. 3962, 4039 (2016).

7. Thus, the Commission should interpret the term “inconsistency” from 47 U.S.C. § 254(f) strictly. It should be interpreted to something that is more akin to impossibility, rather than simply a difference.

II. Public interest cannot override the text of a state statute

8. TracFone also argued that denial of its application would disserve the public interest.⁶

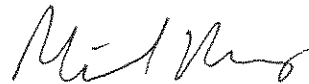
9. Regardless of whether K.S.A. 66-2008(b)’s facilities requirement helps or harms the public interest, the fact remains that it is a state statute and the Commission cannot choose to disregard it. The Commission may only act as authorized by the Kansas Legislature. The statutory text must be followed.

10. The Kansas Court of Appeals has stated that an “administrative agency may not use its power to issue regulations to alter the legislative act which is being administered.”⁷

11. TracFone asks the Commission to modify the legislative act which it is tasked to administer. This would violate the separation of powers doctrine.

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

Respectfully Submitted,



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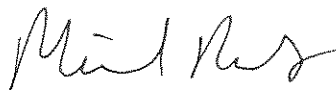
⁶TracFone’s Reply at. 6-8.

⁷Hughs v. Valley State Bank, 26 Kan. App. 2d 631, 637 (1999).

STATE OF KANSAS)
) ss.
COUNTY OF SHAWNEE)

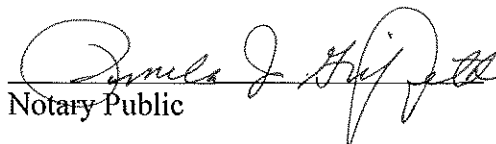
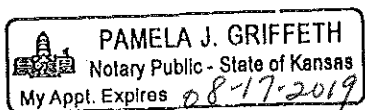
VERIFICATION

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 *Staff's Response to TracFone's Reply* 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 23rd 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 Staff's Response to TracFone's Reply was served by electronic service on this 23rd day of December, 2016, to the following:


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