

# McDevitt & Miller LLP

Lawyers

420 W. Bannock Street  
P.O. Box 2564-83701  
Boise, Idaho 83702

(208) 343-7500  
(208) 336-6912 (Fax)

RECEIVED

2012 MAR 16 PM 2:08  
Thomas F. McDevitt  
Dean J. (Joe) Miller

IDAHO PUBLIC  
UTILITIES COMMISSION

March 16, 2012

*Via Hand Delivery*

Jean Jewell, Secretary  
Idaho Public Utilities Commission  
472 W. Washington St.  
Boise, Idaho 83720

**Re: TFW-T-09-01**

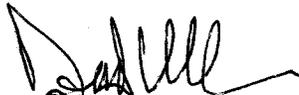
Dear Ms. Jewell:

Enclosed for filing in the above matter, please find an original and seven (7) copies of Tracfone Wireless, Inc.'s Reply Comments in Support of the Stipulation and Motion of Tracfone Wireless, Inc., and the Idaho Public Utilities Commission Staff.

Kindly return a file stamped copy to me.

Very Truly Yours,

McDevitt & Miller LLP



Dean J. Miller

DJM/hh  
Encl.



Commission that they had reached a settlement agreement regarding TracFone's application for designation as an Eligible Telecommunications Carrier ("ETC"). The terms of the settlement agreement, set forth in the Stipulation and Motion, represent a just, fair and reasonable compromise of the disputed issues between TracFone and the Staff. Moreover, the settlement agreement is lawful and serves the public interest. TracFone's reply comments address objections to the Stipulation filed by the Idaho Telecom Alliance ("ITA") and CTC Telecom, Inc. dba CTC Wireless ("CTC") (collectively, "Intervenors") as well as those of the Idaho Emergency Communications Commission ("IECC"), the Idaho Sheriffs Association ("ISA") and the Idaho Association of Counties ("IAC") ("Government Commenters"). Neither the Intervenors nor the Government Commenters raise any valid arguments as to why the Commission should not accept and approve the Stipulation as filed and promptly designate TracFone as an ETC. As explained in these comments, the Intervenors improperly discount the Commission's authority to settle disputes, attempt to introduce irrelevant information regarding TracFone's investors, and overlook the public interest in providing low-income Idaho consumers with a valuable service. The Government Commenters' allegations regarding the applicable law governing 911 fees are not correct. Moreover, questions regarding the applicability of the 911 fee law should be resolved by a tribunal of competent jurisdiction as provided for in the Stipulation, not by the Commission.

## INTRODUCTION

Throughout this proceeding, the primary dispute focused on whether TracFone is responsible for the payment of fees required by the Idaho Telecommunications Service Assistance Program Act ("ITSAP"), Idaho Code § 56-901, *et seq.*, and the Idaho Emergency Communications Act ("IECA"), Idaho Code § 31-4801, *et seq.* As stated in the Stipulation, in a

Final Order on Reconsideration, the Commission reaffirmed its previous determination in Order No. 32301 that TracFone is responsible for payment of the ITSAP and IECA fees and that TracFone's non-payment of those fees warranted denial of TracFone's ETC application. On October 28, 2011, TracFone filed a Notice of Appeal with the Supreme Court of Idaho alleging that the Commission erred by denying TracFone's ETC application due to non-payment of the ITSAP and IECA fees. That appeal remains pending.

The Stipulation resolves the dispute about whether TracFone is obligated to pay the ITSAP and IECA fees and requires the Commission to designate TracFone as an ETC. In the Stipulation, TracFone agrees to remit the ITSAP fee retroactive to January 1, 2011 and to file a stipulation of dismissal of its appeal currently pending at the Supreme Court of Idaho upon the Commission's designation of TracFone as an ETC. TracFone also commits to file a complaint for declaratory judgment in the District Court of the Fourth Judicial District to determine whether the IECA fee is applicable to prepaid wireless service in Idaho. If the District Court determines that TracFone's prepaid wireless service is subject to the IECA fee, then TracFone will remit the IECA fee retroactive to January 1, 2011. Thus, pursuant to the Stipulation, the ITSAP fee will be paid from January 1, 2011 going forward and a method for determining the applicability of the IECA fee to TracFone will be established. Moreover, the Stipulation will enable TracFone to bring to low-income Idaho consumers for the first time a free wireless Lifeline service with a multiplicity of features and with no domestic calling restrictions or limitations. The availability of such a service is an invaluable public interest benefit.

**I. The Commission Has Authority to Accept the Stipulation Because It Is a Lawful Settlement of the Disputed Issues.**

Intervenors incorrectly contend that the Stipulation contravenes Idaho statutes and the Commission's prior orders in this proceeding. These assertions are incorrect for several reasons. First, Intervenors overlook the Commission's broad authority to settle disputes. Section 61-501 of the Idaho Code provides:

**INVESTMENT OF AUTHORITY.** The public utilities commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and intent of the provisions of this act.

(emphasis added). Settling a dispute with a carrier and resolving a contested ETC designation proceeding is certainly within the Commission's authority to do all things necessary to carry out the spirit and intent of the provisions of the Idaho Code that it is required to enforce.

In addition to this broad grant of authority, settlements of matters on appeal are specifically authorized by the Commission's procedural rules. *See* IPUCRP 352-356. Settlement of Appeal from the Commission. It is not unusual for the Commission to exercise its settlement authority. *See, e.g., In Re Cedar Creek Wind, LLC*, Case No. PAC-E-11-01 *et al.*, Reconsideration Order on Remand, Order No. 32419 (December 21, 2011); ) *see also In Re Hoku Materials, Inc.*, Case No. IPC-E-12-02, Order No. 32486 (March 15, 2012) (accepting a proposed settlement stipulation as a "reasonable compromise of the positions held by the Parties"). In *Cedar Creek Wind* the Commission approved a settlement on appeal upon finding *inter alia* that a settlement would avoid uncertainty and conserve resources (both time and money) and avoid continuing litigation, all of which are reasons for approval of this settlement. To the extent Intervenors are arguing the Commission lacks authority to approve a settlement of

disputed issues, the argument is supported neither by statute, Commission rule nor recent precedent.

Intervenors improperly mischaracterize the Stipulation's statement that payment of the ITSAP fee and of the IECA fee (if determined by the District Court or another tribunal to be applicable to TracFone) as a "waiver" of past due ITSAP and IECA fees. The Commission, if it approves the Stipulation, would not be "waiving" any fees. TracFone has not requested such a waiver nor has Commission Staff suggested that the Commission waive any fees. Rather, the Stipulation settles a dispute regarding TracFone's obligation to remit the ITSAP and IECA fees by requiring TracFone to pay the ITSAP fee and to initiate a legal proceeding before a tribunal of competent jurisdiction to adjudicate the applicability of the IECA fee. The fact that the Stipulation commits TracFone to pay the ITSAP fee and the IECA fee (if the Court finds it to be applicable to TracFone) retroactive to January 1, 2011, notwithstanding its previously-asserted legal position that the fees are not applicable to it, contradicts Intervenors' assertion that any applicable fees are being waived or that TracFone has even requested a waiver.

Intervenors assert that the Commission does not have discretion to settle issues regarding the payment of the ITSAP fee because Section 56-904 requires the Commission to determine and impose a uniform surcharge on telecommunications carriers' end users. Intervenors' position is based on a false premise – namely that there has been a final legal determination that the ITSAP fee is applicable to TracFone. While payment of the ITSAP fee is mandatory for those that fall within the scope of Section 56-904, it is not mandatory for those that are not subject to that statute's requirements. In Idaho, the Commission is responsible for enforcing the ITSAP surcharge. However, prior to this proceeding, the Commission had never attempted to enforce the ITSAP surcharge statute against TracFone by conducting an investigation, convening an

enforcement proceeding, or otherwise ordering TracFone to pay the surcharge. Indeed, prior to issuance of Order No. 32301, TracFone had no basis to conclude that the Commission even believed the ITSAP fee to be applicable to it. In this proceeding, the Commission determined that the ITSAP fee is applicable to TracFone. However, TracFone has the right to challenge the applicability of any state fee in accordance with the state's legal procedures. TracFone has lawfully exercised its right by filing a notice of appeal with the Idaho Supreme Court. Therefore, there has been no final determination that TracFone is obligated to remit the ITSAP fee today or at any time during which TracFone has provided wireless service in Idaho. TracFone has not conceded that Section 56-904 obligates it to remit the ITSAP fee. In short, the applicability of the ITSAP fee to TracFone's non-billed, prepaid service remains in dispute. However, in the interest of resolving that dispute with the Commission, TracFone has voluntarily agreed to remit the ITSAP fee retroactive to January 1, 2011 as part of the Stipulation.

Intervenors also assert that the Stipulation is inconsistent with the Commission's orders which held that the fees are applicable and with Commission Staff's statements in previous filings.<sup>1</sup> Intervenors disregard the purpose of a settlement, which is to resolve disputed issues through compromise. Indeed, the Stipulation is also inconsistent with TracFone's position throughout this proceeding that it is not obligated to remit the ITSAP and IECA fees. The fact

---

<sup>1</sup> Intervenors' reference to ITSAP being created to maximize federal Lifeline and Link-Up contributions to Idaho's low-income consumers is no longer a relevant consideration. *See* Intervenors' Comments, at 8. In a recent Federal Communications Commission ("FCC") order, the FCC eliminated Link Up support and eliminated the tiered system of Lifeline support whereby the amount of Lifeline support provided by the federal Universal Service Fund ("USF") was determined in part by the amount of Lifeline support provided by a state. *See Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11 (rel. Feb. 6, 2012). The FCC's amended rules establish \$9.25 as an interim uniform amount of Lifeline support. 47 C.F.R. § 54.403(a)(1). Therefore, ITSAP's provision of additional Lifeline support to ETCs in Idaho will no longer impact the amount of Lifeline support provided by the federal USF.

that the Stipulation sets forth a position that differs from the parties' prior positions in this proceeding has no bearing on whether the Commission should accept the Stipulation. Furthermore, the Stipulation is fully consistent with the Commission's Final Order on Reconsideration which states: "Absent the Company's assent to remit the applicable fees, or seek an official ruling from the IECC, or another tribunal with relevant jurisdiction, as to whether the fees applied, the designation of TracFone as an ETC in Idaho would not be the public interest."<sup>2</sup> In the Stipulation, TracFone has assented to remit the ITSAP fee and has agreed to seek a declaratory judgment from a District Court (a tribunal with relevant jurisdiction) regarding the applicability of the IECA fee. The Stipulation is consistent with the Commission's Final Order on Reconsideration and is a lawful exercise of the Commission's authority to settle disputes.

## **II. The Stipulation Is Just, Fair and Reasonable and Is in the Public Interest.**

The Stipulation represents a just, fair, and reasonable compromise between the Commission and TracFone. The Stipulation obligates TracFone to pay the ITSAP fee retroactive to January 1, 2011 which benefits Idaho's telecommunications assistance program by bringing additional funds to that important program. In addition, the Stipulation will benefit Idaho taxpayers and rate payers by enabling the state to avoid the litigation costs associated with the pending appeal of the Commission's orders in this proceeding. By voluntarily dismissing its appeal as part of the Stipulation, TracFone will forfeit its right to challenge the applicability of the ITSAP fee.

---

<sup>2</sup> Order No. 32358, at 11-12.

The Stipulation's resolution of the dispute regarding IECA fees is also just, fair and reasonable. The terms of the Stipulation enable TracFone to obtain a legal determination from the District Court regarding the applicability of the IECA fee to prepaid wireless services, such as those provided by TracFone and other wireless carriers. Moreover, the public interest is protected because, in the event that the District Court finds that the IECA fee is applicable, TracFone will be required to remit said fees retroactive to January 1, 2011. Intervenors raise no public interest justification for delaying TracFone's designation as an ETC while waiting for the District Court to issue its ruling. Finally, the Stipulation allows low-income Idaho households to gain the benefit of having the option of choosing to receive Lifeline service from another competitive provider.

The Intervenors raise irrelevant and baseless concerns about the fairness of the Stipulation. Intervenors' claim that TracFone should remit ITSAP and IECA fees for the twelve years that it has provided service in Idaho is not valid. Until this proceeding there has been no determination by this Commission (nor any other indication from this Commission or from a state governmental department or court) that either the ITSAP fee or the IECA fee is applicable to TracFone. Similarly, the IECC, the state agency responsible for enforcing the IECA fee, also has not challenged TracFone's non-payment of the IECA fee and has never attempted to commence an enforcement action against TracFone. At this time, there has been no determination by this Commission, the IECC, or a state court of competent jurisdiction, that TracFone is legally required to commence collecting and remitting either ITSAP or IECA fees. Rather, the Commission has only determined that TracFone's failure to remit the ITSAP and IECA fees require it to find that designating TracFone as an ETC is not in the public interest. Therefore, there is no basis for TracFone to voluntarily remit ITSAP and IECA fees going back

twelve years. TracFone's agreement to remit the ITSAP fee (and the IECA fee if it is later determined by the District Court that the fee is applicable) to January 1, 2011 is a just, fair and reasonable compromise, especially given that the relevant agencies have made no effort to enforce those fee requirements against TracFone (or any provider of prepaid wireless services) prior to this proceeding.

Intervenors' snide and condescending reference to TracFone's "foreign investors" as being the beneficiaries of TracFone's non-payment of fees has no place in public interest advocacy before the Commission, is blatantly defamatory and prejudicial, and is entitled to no consideration by the Commission.<sup>3</sup> Neither the nationality of TracFone's investors, nor the financial performance of those investors, has any bearing on whether the ITSAP or IECA fees are applicable to TracFone as a matter of law or on whether designation of TracFone as an ETC is in the public interest. TracFone also objects to Intervenors' filing of documents, specifically the exhibits attached to their Comments that are not part of the record in this proceeding. TracFone respectfully requests that the Commission strike Intervenors' exhibits and references to those exhibits contained in their Comments since they are not included within the proceeding's evidentiary record.

Intervenors' request for the Commission to re-open the ETC proceeding to receive additional evidence should be denied. Intervenors' claim that the economic impact of TracFone's non-payment of "statutorily-mandated fees" needs to be examined ignores the very dispute that is being settled by the Stipulation and the current lack of a final legal determination of whether the ITSAP and IECA fees are "statutorily-mandated" or applicable to TracFone. As explained above, given the fact there has been no determination by this Commission, the IECC,

---

<sup>3</sup> Intervenors' Comments, at 13.

or a state court, that TracFone is legally required to commence collecting and remitting the ITSAP and IECA fees, there is no basis for requiring TracFone to remit such fees for the past twelve years. Moreover, there is no justification for re-opening the proceeding whose record was closed many months ago to receive evidence regarding the amount TracFone would have paid during a time that it was not legally obligated to remit ITSAP and IECA fees nor was it aware that the Commission or IECC believed that TracFone was so obligated.

Finally, neither the comments of IECC, ISA, nor IAC warrant rejection of the Stipulation. While TracFone is respectful of the opinions of those agencies and admires the important work that they do on behalf of the residents of Idaho, their assertions that TracFone is “in violation of Idaho law”<sup>4</sup> are unsupported, unsupportable and legally erroneous. As described above, no such final legal determinations have been made by any Idaho tribunal. Moreover, TracFone is troubled by the unexplained change in position taken by the IECC. As TracFone has described in prior filings, until it filed informal comments on TracFone’s ETC application in March 2010, the IECC never had asserted that Idaho’s 911 fee statute was applicable to prepaid wireless services. Indeed, it had previously indicated the opposite -- that under current law, 911 fees were not applicable to prepaid services and that legislative change would be needed to extend their applicability to prepaid services. Neither the ICA nor the IAC has previously participated in any phase of this proceeding and never before has opined on the applicability of 911 fees under Idaho law to TracFone or to providers of prepaid wireless services in general.

More importantly, these legal issues need not be resolved here. As the Commission has acknowledged, the Commission does not administer the IECC fee program. Nor is the Commission the governmental entity empowered to enforce the 911 fee law or to determine its

---

<sup>4</sup> IECC Comments, at 1.

applicability. Those are judicial questions which is why the Stipulation submitted by TracFone and Staff will have those questions addressed -- as they should be -- by a court of competent jurisdiction. IECC, IAS, and ICA will have every opportunity to participate in that judicial proceeding and to present their legal arguments to the court.

Designation of TracFone as a Lifeline-only ETC as provided for in the Stipulation will serve the public interest. To date, TracFone has been designated as an ETC in 38 states. It provides SafeLink Wireless<sup>®</sup> Lifeline service in most of those states. TracFone's Lifeline customers receive at no charge full-featured E911-compliant wireless handsets (paid for by TracFone, not by the USF), 250 minutes of free wireless airtime each month they remain enrolled in the program, nationwide calling, no roaming charges, and such important vertical features as call waiting, caller ID, and voice mail. The record established in this proceeding is undisputed. No ETC currently offering Lifeline service in Idaho, including Intervenors, offers Lifeline programs which are in any manner comparable to TracFone's SafeLink Wireless<sup>®</sup> Lifeline program. No Idaho ETC offers nationwide calling, vertical features at no additional charge, free handsets and 250 minutes of free monthly usage.<sup>5</sup>

---

<sup>5</sup> Several of the Intervenors are ETCs (CTC and members of the Idaho Telecom Alliance). Although Intervenors continue to oppose TracFone's designation as an ETC, not one of them offers a wireless Lifeline plan which includes nationwide calling, free phones and vertical features. Moreover, those companies limit their Lifeline calling programs to calls within limited local calling areas. Thus, their opposition is an understandable response to a potential competitive threat to their limited Lifeline programs. While their continuing opposition to TracFone's ETC designation may serve their private commercial interests, their efforts to deprive low-income Idaho consumers of the benefits of competitive choice in Lifeline services most certainly will not serve the public interest. Their opposition does not warrant rejection of the Stipulation.

Based upon public information, most low-income Idaho households who qualify for Lifeline support are not receiving it. According to the Universal Service Administrative Company, in 2010, Idaho's Lifeline participation rate among eligible low-income households was less than 20 percent.<sup>6</sup> With about 3.8 million low-income households currently enrolled in its Lifeline program nationwide, TracFone has materially increased Lifeline participation in those states where its SafeLink Wireless<sup>®</sup> Lifeline service is available. There can be little question that the availability to low-income Idaho households (including the more than eighty percent of which are not receiving Lifeline benefits today) of a free wireless Lifeline program like TracFone's SafeLink Wireless<sup>®</sup> will increase enrollment of low-income Idahoans in the federal Lifeline program -- a program which is supported by all Idaho consumers through their contributions to the federal USF.

### **CONCLUSION**

As explained above, the Stipulation is a lawful and reasonable resolution of the parties' dispute concerning the applicability of ITSAP and IECA fees to TracFone. Moreover, the Commission's approval of the Stipulation and designation of TracFone as an ETC subject to the conditions and commitments set forth in the Stipulation will serve the public interest. For the foregoing reasons, TracFone respectfully requests the Commission approve the Stipulation so that TracFone may be promptly designated as an ETC in Idaho and commence providing its Lifeline service to low-income households in Idaho.

---

<sup>6</sup> [http://www.universalservice.org/\\_res/documents/li/pdf/li-participation-rate-map-2010/pdf](http://www.universalservice.org/_res/documents/li/pdf/li-participation-rate-map-2010/pdf).

Respectfully submitted,



---

Dean J. Miller (ISB No. 1968)  
McDEVITT & MILLER LLP  
420 West Bannock Street  
P.O. Box 2564-83701  
Boise, Idaho 83702  
Tel: 208-343-7500  
Fax: 208-336-6912  
joe@mcdevitt-miller.com

Mitchell F. Brecher (*admitted pro hac vice*)  
Debra McGuire Mercer  
GREENBERG TRAUIG, LLP  
2101 L Street, NW, Suite 1000  
Washington, DC 20037  
Tel: 202-331-3100  
Fax: 202-331-3101  
brecherm@gtlaw.com  
mercerdm@gtlaw.com

*Attorneys for TracFone Wireless, Inc.*

March 16, 2012

## CERTIFICATE OF SERVICE

I hereby certify that on the 16<sup>th</sup> day of March, 2012, I caused to be served, via the method(s) indicated below, true and correct copies of the foregoing document, upon:

Jean Jewell, Secretary Idaho Public Utilities Commission 472 West Washington Street P.O. Box 83720 Boise, ID 83720-0074 <a href="mailto:jjewell@puc.state.id.us">jjewell@puc.state.id.us</a>	Hand Delivered <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Fax <input type="checkbox"/> Fed. Express <input type="checkbox"/> Email <input type="checkbox"/>	✕ ☐ ☐ ☐ ☐
---	---	-----------------------

Neil Price, Esq. Idaho Public Utilities Commission 472 West Washington Street P.O. Box 83720 Boise, ID 83720-0074 <a href="mailto:Neil.Price@puc.idaho.gov">Neil.Price@puc.idaho.gov</a>	Hand Delivered <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Fax <input type="checkbox"/> Fed. Express <input type="checkbox"/> Email <input checked="" type="checkbox"/>	☐ ☐ ☐ ☐ ✕
---	---	-----------------------

Molly O'Leary, Esq. Richardson & O'Leary, PLLC P.O. Box 7218 Boise, ID 83707 <a href="mailto:molly@richardsonandoleary.com">molly@richardsonandoleary.com</a>	Hand Delivered <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Fax <input type="checkbox"/> Fed. Express <input type="checkbox"/> Email <input checked="" type="checkbox"/>	☐ ✕ ☐ ☐ ✕
---	--	-----------------------

Cynthia A. Melillo, Esq. Cynthia A. Melillo, PLCC 8385 W. Emerald Street Boise, ID 83704 <a href="mailto:cam@camidaholaw.com">cam@camidaholaw.com</a>	Hand Delivered <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Fax <input type="checkbox"/> Fed. Express <input type="checkbox"/> Email <input checked="" type="checkbox"/>	☐ ✕ ☐ ☐ ✕
---	--	-----------------------

Idaho Sheriff's Association Attn: Vaughn Killeen 1087 W. River Street., Ste 100 Boise, Idaho 83702	Hand Delivered <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Fax <input type="checkbox"/> Fed. Express <input type="checkbox"/> Email <input type="checkbox"/>	☐ ✕ ☐ ☐ ☐
---	---	-----------------------

Idaho Association of Counties Attn: Daniel G. Chadwick 700 Washington P.O. Box 1623 Boise, Idaho 83701	Hand Delivered <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Fax <input type="checkbox"/> Fed. Express <input type="checkbox"/> Email <input type="checkbox"/>	☐ ✕ ☐ ☐ ☐
--	---	-----------------------

Idaho Emergency Communication  
Commission  
Attn: Garret Nancolas  
Idaho Military Division  
4040 West Guard Street, Bldg 600  
Boise, Idaho 83705

Hand Delivered  
U.S. Mail  
Fax  
Fed. Express  
Email

☐  
~~☐~~  
☐  
☐  
☐

BY: Heather M. Houle  
MCDEVITT & MILLER LLP