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December 17, 2010

Jean Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
Boise, ID 83720

Re: TFW-T-09-01
Our File: 1233-200

Dear Ms. Jewell:

Enclosed for filing in the above matter, please find an original and seven copies of Idaho Telecom Alliance's Prehearing Brief.

Sincerely,


Cynthia A. Melillo

CAM/sp

Enclosures

cc: Mitchell Brecher
Molly O'Leary
Joe Miller
(all via electronic mail, w/ encl.)

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IDaho PUBLIC UTILITIES COMMISSION

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BEFORE THE IDAHO PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE APPLICATION
OF APPLICANT TRACFONE
WIRELESS, INC. FOR DESIGNATION
AS AN ELIGIBLE
TELECOMMUNICATIONS CARRIER

CASE NO.: TFW-T-09-01

PRE-HEARING BRIEF OF IDAHO
TELECOM ALLIANCE; LEGAL AND
FACTUAL ISSUES; AND REQUEST FOR
HEARING

In Order No. 32127, the Idaho Public Utilities Commission ("Commission"), in the above entitled case requested that each party submit prehearing briefs outlining the legal and factual issues pertaining to this case. On behalf of its member companies, the Idaho Telecom Alliance ("ITA") submits the following legal and factual issues in opposition to the First Amended Application of TracFone Wireless, Inc. for Designation as an Eligible Telecommunications Carrier (the "Application"). TracFone Wireless, Inc. will be referred to herein as "TracFone" or the "Applicant."

A. Legal Issues.

As more particularly set forth below, Applicant does not meet all of the legal requirements of the State of Idaho in order to receive Eligible Telecommunications Carrier ("ETC") designation.

ORIGINAL

1. The Applicant Does Not Meet the Requirements for ETC Designation in Rural Telephone Company Study Areas.

Applicant seeks ETC designation in the study areas of “rural telephone companies,” as defined in 47 U.S.C. § 153(37). TracFone does not meet the requirements of the Commission for designation as an ETC in those study areas, because the Commission may not designate any additional ETCs in study areas of rural telephone companies unless the Commission finds that such designation is in the public interest. The ITA contends that the public interest requirement is a primary issue in this case, and the ITA asks this Commission to schedule a hearing to allow for testimony or to deny the Application without a hearing.

The Application fails to specifically set forth the study areas in which TracFone seeks ETC designation. Rather, it states that it seeks such designation in all areas served by AT&T Mobility, T-Mobile and Verizon Wireless (the “Underlying Carriers”). Based upon a review of the coverage maps of the Underlying Carriers, it appears the Underlying Carriers provide services in all or some portion of the service areas of the following rural telephone companies, each of which is an ETC and all of which provide wireline Lifeline services: Albion Telephone Company (“Albion”), Cambridge Telephone Company (“CTC”), Custer Telephone Cooperative, Inc. (“Custer”), Direct Communications Rockland, Inc. (“Direct”), Farmers Mutual Telephone Cooperative Association, Inc. (“Farmers”), Filer Mutual Telephone Company (“Filer”), Fremont Telcom Co. (“Fremont”), Inland Telephone Company (“Inland”), Midvale Telephone Exchange, Incorporated (“Midvale”), Mud Lake Telephone Cooperative Association, Inc. (“Mud Lake”), Oregon-Idaho Utilities (“Oregon-Idaho”), Project Mutual Telephone Cooperative Association, Inc. (Project Mutual), Rural Telephone Company (“Rural”) and Silver Star Telephone Company, Inc. (“Silver Star”).

Based on the Application, it is clear that Applicant does not have the capability to provide the supported service to the entire study areas of these rural companies nor does the Application provide a detailed plan as to how Applicant will provide such service within a reasonable period of time. Furthermore, Applicant even states on page 6 of Exhibit 12 to the Application that Applicant does not guarantee coverage or service availability even within its proposed coverage area.

The Federal Telecommunications Act of 1996 (the "Act") provides that in those areas served by a rural telephone company, "the State commission *may* designate more than one common carrier as an eligible telecommunications carrier." 47 U.S.C. § 214 (e)(2) (emphasis added). Prior to any such designation, the Commission must find the designation is in the public interest. *Id.* The Applicant has failed to demonstrate that the designation of TracFone as an additional ETC in those areas served by rural telephone companies is in the public interest.

The Commission has set forth the framework for making its public interest determination as follows:

[i]n adopting the FCC's proposed public interest analysis, this Commission adopts an analytical framework for making a public interest determination. This framework necessarily involves the consideration of certain enumerated factors, such as the benefits to consumer choice, the unique advantages and disadvantages of the applicant's service offering, and, where applicable, consideration of creamskimming. However, the Commission may consider other relevant public interest determinations in its public interest determination. Order No. 29841 at 15-16.

a. *TracFone Has Failed to Demonstrate Any Benefits to Consumer Choice.*

TracFone asserts the public interest benefits include "larger local calling areas, the convenience and security afforded by mobile telephone service, the opportunity for

customers to control their costs by purchasing in advance only the volumes of service which they need and supplementing those quantities on an 'as needed' basis after exhausting their monthly supply of free service, and, availability of E911 service in accordance with the FCC's E911 requirements." Application at 19. Yet, notwithstanding the assertion that the availability of E911 service through mobile telephone service is a public interest benefit, the Applicant states on page 8 of Exhibit 12 that Applicant cannot ensure the availability of 911 service. Such terms and conditions direct the customer to locate a land line phone in the event of an emergency.

Considering that Applicant is providing only resold services on already existing networks, the local calling area will not be expanded by TracFone's designation as an ETC. Moreover, the convenience and security of wireless service is not determinative of serving the public interest. In fact, there are very real disadvantages and challenges to providing wireless service in many portions of Idaho due to mountainous terrain and other geographic features such that mobile service is not necessarily more convenient or secure than wireline service. The other public interest benefits listed by TracFone are not necessarily benefits to consumer choice. Had TracFone provided all other incumbent local exchange carriers ("LECs") local usage plans as required by the Commission, the Commission would be better able to compare TracFone's plan against other plans already in place. Without such additional information and absent any meaningful comparison, the Application on its face does not provide any compelling evidence that such plans by TracFone provide any real benefit to consumer choice.

TracFone's primary assertion that designation as an ETC would serve the public interest is that such designation will promote competition, especially in the rural areas. Application at 18. The Commission, in determining whether it is in the public interest to

designate a competitive ETC in a rural telephone company's service area, has stated that "the value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas." See Order 29541 at 6 (*quoting Virginia Cellular*, 19 F.C.C.R. at 1574). In fact, the Commission has denied prior ETC applications because the applicants failed to carry out their burden of demonstrating that their applications for areas served by rural telephone companies were in the public interest because those applications placed too much emphasis on competition. See Order Nos. 29541 and 30212. Moreover, the Commission must consider the fact that Applicant's proposed service is not competitively neutral. While Applicant can price its services in any manner it chooses, rural ILEC's have no similar pricing flexibility and are bound by this Commission's rules with respect to the establishment of local rates, which in turn control the Lifeline rates they can offer eligible customers.

b. TracFone Has Failed to Demonstrate Any Unique Advantages of Applicant's Service Offering.

The Applicant has failed to show any unique advantages or added benefits to consumer choice through Applicant's service offerings. Applicant states that the unique advantage of its service offering is an easy-to-use free handset with free minutes and the ability to add more minutes on a pay-as-you-go or pre-paid basis. Application at 23. While the free handset and pre-paid minutes may be unique advantages to qualified customers, the Lifeline program is not unique to Applicant. Each of the rural ETCs provides Lifeline services through such company's landline offerings, and Syringa Wireless, LLC provides wireless Lifeline services in its service area. Thus, Applicant would have the Commission find that a limited use handset with 67 free minutes a month is such a unique advantage that it outweighs all disadvantages of designating TracFone as an ETC in the service areas of rural telephone companies. Through the service offerings of the rural telephone companies and the

Underlying Carriers, the potential end users already have access to a full range of wireline and wireless services, including discounted services associated with their Lifeline programs. The coverage area offered by TracFone is no larger than that offered by its Underlying Carriers. TracFone does not intend to invest in the service areas or increase coverage areas by the addition of any new facilities (except those provided by the Underlying Carriers). It would appear that the only unique advantage of TracFone's service offering is that certain qualifying low income customers can obtain a free handset and free minutes and the ability to purchase pre-paid services versus entering longer term service contracts.

The negative impact on consumer choice, however, far outweighs the unique advantages. TracFone asserts that designation of TracFone as an ETC will "provide an incentive to the incumbent LECs serving those portions of the state to improve their existing networks in order to remain competitive, resulting in improved services to consumers" (Application at 20). TracFone has failed to specify why it believes this will happen or to provide any explanation or examples as to how this incentive will work. While this assertion may be true in other states where TracFone has been designated an ETC, it is not true in Idaho. As rural Idaho telephone companies lose customers and access lines to companies such as TracFone, they will lose revenues. Specifically, these revenues include local service revenue, related ancillary services revenue such as call forwarding, call waiting, etc. and intrastate and interstate long distance revenues. These revenues have been used by Idaho's rural telephone companies to invest in improvements to their systems and facilities to provide the latest services and technologies to residents of rural Idaho. The increased competition and/or simply the designation of additional ETCs may result in a reduction in such funding which will result in a reduction, rather than an increase, in improvements to existing networks. Moreover, such

reduction in funding will result in an increase in USF draws to those companies receiving USF support, thereby placing a greater burden on the USF. Keeping in mind that TracFone has not committed to providing any facilities or improving any network in Idaho, taking funding sources away from those companies that do provide the facilities will ultimately result in less services available to rural areas. Furthermore, as ETCs, these companies have carrier of last resort obligations, obligations that TracFone cannot meet. Moreover, because TracFone offers the benefit of pre-paid services, TracFone has stated it is not obligated to contribute to the Idaho Telephone Service Assistance Program ("ITSAP"), the Idaho Universal Service Fund ("USF") or into any county funds for the provision of 911 and E911 services. Again, as customers migrate from those companies required to contribute to those funds, the funds will be depleted, again resulting in less funds to invest in providing the services to rural Idaho. In addition, lost interstate revenues will also result in reduced contributions to the federal Universal Service Fund, putting upward pressure on the contribution rate set by the FCC.

One of TracFone's seemingly most compelling arguments is that Applicant's services are necessary because "Idaho's statewide Lifeline participation rate is only 22.1 percent of eligible households." Application at page 23. This statement appears in the comments of Governor Otter and those of Representative Jaquet. However, as noted in the footnote to Applicant's statement, that data was from a report issued in 2004 – prior to the designation of other ETCs in these service areas. It is interesting that the more current statistics are provided only in that footnote which states that the participation rate for Idaho in 2008 was between 20 and 50 percent. The information provided on the Universal Service Administrative Company website shows participation rates for Idaho in 2009 as between 20 and 50 percent, along with at least half the states in the United States. Presumably many of

those states shown with participation rates between 20 and 50 percent are states in which TracFone has previously been designated an ETC to provide its Lifeline services. Such statistics are not an indication that TracFone will necessarily increase Lifeline participation any better than Idaho's existing service providers have already done and continue to do in Idaho. In fact, Applicant states that two of the designated wireless ETCs in Idaho, Syringa Wireless, LLC and Cleartalk, served approximately 1,600 Lifeline customers in 2008. Using Applicant's analysis, that number increased to 1,725 in 2009. If the first quarter of 2010 numbers are annualized, the number of customers served by Syringa Wireless¹ in 2010 increases to 2,115. That represents approximately a 30 percent increase in Lifeline customers served by Syringa Wireless, LLC in just two years.

c. Consideration for Creamskimming.

By providing services only in areas served by the Underlying Carriers and not committing to provide any improvements to the existing networks or facilities, there is great potential for creamskimming by Applicant. Applications for ETC designation that include an entire service area avoid the specter of creamskimming; however, that is not the case where an application seeks ETC designation that does not include all the wire centers that make up a service area. The Act requires that companies seeking an ETC designation must provide the services supported by universal support mechanisms "throughout the service area for which the designation is received." 47 U.S.C. § 214(e). The Act further provides, "In the case of an area served by a rural telephone company, 'service area' means such company's 'study area.'" 47 U.S.C. § 214(e)(5). When comparing the coverage area maps of the Underlying Carriers with the Idaho rural telephone companies' service area maps on file with the Commission, it is

¹ Cleartalk became a member of Syringa Wireless, LLC in 2009, so no longer has its own statistics.

not clear that the Applicant can meet this fundamental requirement for ETC designation in most, if not all, of the affected rural telephone companies' service areas, thereby avoiding the specter of creamskimming. Specifically, it does not appear that Applicant will provide coverage in the entirety of the study areas of Albion, CTC, Custer, Direct, Filer, Midvale, Oregon-Idaho, Rural and Mud Lake. Whether it provides service throughout the entirety of the Farmers, Fremont, Project Mutual and Silver Star service areas cannot be determined without further investigation. Applicant is not required to provide services over any of its own facilities. Applicant has not provided any two-year network improvement plan that states how it will serve areas within a study area not currently being served. Rather, Applicant simply wants to be able to obtain federal funds to provide services already made available by others to areas already well-served by others with no obligation, as that imposed on the others, to improve a network or facilities.

Applicant has not shown that the potential benefit of designating TracFone as an ETC outweighs the potential harms. TracFone has not shown a commitment to providing universal service throughout the rural areas, and the potential for creamskimming is great. Designating TracFone an additional ETC in the study areas served by rural telephone companies is not in the public interest, and the few potential benefits do not outweigh the many harms that would occur as a result of such designation.

2. The Applicant Does Not Meet the Additional Eligibility Requirements for ETC Designation in Idaho.

a. Applicant Has Not Shown a Commitment to Provide Supported Services.

Per Commission Order 29841 at Appendix page 2:

The ETC applicant must certify that it will: (a) provide service on a timely basis to requesting customers within the applicant's service area where

the applicant's network already passes the potential customer's premises; and (b) provide service within a reasonable period of time, if the potential customer is within the applicant's licensed service area but outside its existing network coverage, if service can be provided at reasonable cost by (i) modifying or replacing the requesting customer's equipment; (ii) deploying roof-mounted antenna or other equipment; (iii) adjusting the nearest cell tower; (iv) adjusting network or customer facilities; (v) reselling services from another carrier's facilities to provide service; and (vi) employing, leasing or constructing an additional cell site, cell extender, repeater or other similar equipment.

TracFone simply asserts that it will provide service wherever the Underlying Carriers provide service. Whether or not TracFone will reach any customer outside its coverage area is solely dependent upon whether the Underlying Carriers will provide the facilities to do so. TracFone has not shown any intent to make any improvements to serve potential customers outside its network coverage area. Furthermore, the Underlying Carriers who provide the underlying facilities utilized by Applicant will likely invest in facilities that provide a sufficient rate of return on that investment. Because the Underlying Carriers are not CETCs in Idaho, it is unlikely that an investment in facilities in rural Idaho would provide a sufficient rate of return.

Applicant further states that it "currently operates in accordance with the spirit of universal service." Application at page 5. Other than being "universally" available wherever the Underlying Carriers provide service, TracFone does not operate within the spirit of universal service. It does not strengthen the Idaho telecommunications network infrastructure, contribute to state universal service funds or provide carrier of last resort obligations.

b. TracFone Has Not Demonstrated the Ability to Remain Functional in Emergencies.

In regard to remaining functional in emergencies, TracFone simply states that it relies upon the emergency plans of the Underlying Carriers. TracFone admits that it does not

have access to such plans. TracFone Response to First Production Request at 15. However, TracFone would like this Commission to find that TracFone has in fact demonstrated the ability to remain functional in emergencies because the FCC has such plans and because to date there have been no concerns. TracFone has not, however, demonstrated that it has a "reasonable amount of back-up power to ensure functionality without an external power source, is able to re-route traffic around damaged facilities, and is capable of managing different traffic spikes resulting from emergency situations."

c. TracFone Has Failed to Provide a Description of its Local Usage Plans and Those of the Incumbent Local Exchange Carriers.

This Commission has not required an applicant to show that its usage plan is comparable to that of the incumbent LECs. Rather, it has simply asked Applicant to provide the local usage plans along with those of the incumbent LECs so the Commission can better determine whether Applicant's plan provides any unique advantages. Applicant has failed to provide the relevant information.

Because TracFone does not meet all the requirements set forth by the Commission to be designated an ETC, particularly in rural telephone company service areas, the ITA respectfully requests this Commission deny the Application.

B. Factual Issues.

1. Does All of TracFone's Lifeline Support Flow Through to Customer?

FCC Rules require, and TracFone asserts, that all of its Lifeline support flows through to the eligible Lifeline customers in the form of 67 free minutes of service. The 67 free minutes are calculated based upon a rate of \$.20 per minute, which is TracFone's retail rate. Without access to TracFone's contracts with its Underlying Carriers and a breakdown of TracFone's costs in providing the service, the Commission cannot verify that \$.20 per minute is TracFone's

cost to provide the service. Thus, there is no verification that all support flows through to the customer, or if TracFone is obtaining a financial benefit from receiving the government support.

2. Is TracFone Exempt From Paying into County Emergency Funds?

TracFone contends that it is not required to pay into county funds for 911 emergency services. County emergency agencies dispute this. This issue requires more investigation.

3. Is TracFone Prepared to Offer Services into the Foreseeable Future?

Again, without access to TracFone's contracts with the Underlying Carriers, there remains a factual issue as to how long TracFone will remain in business in Idaho. We do not know the length of the term of the contracts or what might trigger an early termination event.

4. Are TracFone's Lifeline Application Procedures Adequate to Prevent Fraud and Abuse?

The October 2010 United States Government Accountability Office Report to Congressional Requesters entitled "Telecommunications Improved Management Can Enhance FCC Decision Making for the Universal Service Fund Low-Income Program" ("GAO Report") stated that 76% of the 41 performance audits performed reported more than one Lifeline claim per household. The only control Applicant uses to determine eligibility, whether applicant is the head of household and whether there are any other Lifeline claimants at the same address, is a signed affidavit of the Applicant. Has TracFone ever been audited to determine how well this system works to prevent fraud? If so, what were the results of such audits? If not, in light of the recent GAO Report, does TracFone have any plans to reduce the risk of fraud?

5. Quality of Service; Customer Complaint Information.

TracFone asserts at page 14 of the Application that “Throughout its ten years of existence, TracFone’s service reliability has compared favorably with that of any facilities-based operator in the wireless telecommunications industry.” Applicant has provided no support for this assertion. Nor has Applicant provided any information as to where its customer service operations for Idaho will be performed. Will there be local TracFone offices in rural Idaho communities? Will TracFone be required to submit customer complaint information to the Commission? How can TracFone ensure quality of service when they do not control the underlying facilities used to provide service? A simple search of the Internet reveals many customer complaints with customer service, and such complaints appear to indicate that TracFone’s customer service functions are out-sourced. A common complaint is long wait times resulting in use of minutes, lack of English-speaking service representatives and long wait times to receive SIM cards and/or phones. There is an inherent problem with discovering that a problem exists at such time as a customer has an emergency and needs the service.

6. When Does TracFone Begin to Receive Lifeline Support?

Because Lifeline customers must sign up for service on-line and wait for their free Lifeline-funded handset, and in light of the comments stating that customers have sometimes waited for up to several months to receive their handsets, an issue is raised as to when TracFone begins to receive support. Does TracFone receive support from the time the application for Lifeline is made or at the time TracFone commences service to that customer with a fully functional handset?

7. Impact of Universal Service Fund.

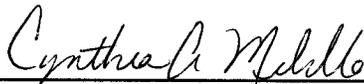
Interestingly, Applicant asserts that its designation as an ETC will have a negligible impact on the Universal Service Fund. However, TracFone received zero percent of total Lifeline support in 2007. In 2008, TracFone received less than one percent of the total support paid in 2008. That number jumped to 22 percent of the total support paid in 2009, and 32 percent of the total for the first quarter of 2010. Total TracFone receipts for 2009 were \$189 million; and annualizing the first quarter of 2010 indicates that TracFone will receive approximately \$334 million in 2010. That is not a negligible impact. Coupled with the fact that the performance audits show that in 76 percent of the audits performed, there is more than one Lifeline claim per household, and TracFone has no real controls other than the affidavit of the customer, there is huge potential for abuse of the Universal Service Fund.

C. ITA Requests a Hearing.

ITA continues to request that a hearing be set in this matter. There are legal and factual issues, and TracFone has failed to provide sufficient information to resolve those issues. ITA respectfully requests the opportunity to conduct further discovery and present evidence.

DATED this 17th day of December 2010.

GIVENS PURSLEY LLP



Cynthia A. Melillo
Attorneys for Idaho Telecom Alliance

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of December 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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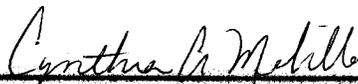
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