

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE AMENDED)	
APPLICATION OF TRACFONE)	CASE NO. TFW-T-09-01
WIRELESS, INC. FOR DESIGNATION AS)	
AN ELIGIBLE TELECOMMUNICATIONS)	
CARRIER)	ORDER NO. 32301
_____)	

PROCEDURAL BACKGROUND

On October 29, 2009, TracFone Wireless, Inc. (“TracFone” or “Company”) filed an Application, pursuant to Section 214(e)(2) of the Communications Act of 1934, for designation as an Eligible Telecommunications Carrier (“ETC”). Application at 1. On February 5, 2010, the Commission issued an Order denying TracFone’s Application. *See* Order No. 30996.

On March 1, 2010, TracFone filed a Petition for Reconsideration and an Amended Application for ETC designation. On March 8, 2010, Commission Staff filed an Answer to TracFone’s Petition. Subsequently, TracFone submitted a letter withdrawing its Petition for Reconsideration and expressing its support for a process that would facilitate a Staff review and recommendation regarding its Amended Application within 60 days.

On April 26, 2010, Staff and TracFone filed a Joint Stipulation Regarding First Production Requests of the Commission Staff.

On May 14, 2010, CTC Telecom, Inc. dba Snake River PCS (“CTC”) and Idaho Telecom Alliance (“ITA”) each filed, pursuant to Commission Rule of Procedure 71, IDAPA 31.01.01.071, a Motion to Intervene Out of Time and Petition to Intervene.

On May 19, 2010, TracFone filed, pursuant to Commission Rule of Procedure 75, IDAPA 31.01.01.075, a Motion in Opposition of TracFone Wireless, Inc. to Petitions to Intervene of CTC Telecom, Inc. dba Snake River PCS and Idaho Telecom Alliance.

On May 28, 2010, the Commission issued an Order granting CTC and ITA’s Petitions to Intervene. *See* Order No. 31096.

On August 13, 2010, TracFone filed a Notice of Expanded Lifeline Offering of TracFone Wireless, Inc. TracFone notified the Commission that, commencing on August 16, 2010, its Lifeline customers in Idaho would be given the option to choose one of three different monthly plans, more fully described in the notice.

On November 15, 2010, representatives for TracFone, ITA, CTC and Commission Staff convened a scheduling conference at the Commission's offices and forwarded their recommendations to the Commission.

On November 24, 2010, the Commission ordered the parties to submit a prehearing brief outlining the legal and factual issues involved in the cases no later than December 17, 2010. *See* Order No. 32127.

On March 31, 2011, the Commission convened a technical hearing regarding TracFone's Amended Application for designation as an ETC.

On April 21, 2011, the Commission issued Order No. 32231 outlining a post-hearing briefing schedule and expressly limiting the scope of the parties' legal briefs to whether TracFone is legally obligated to remit certain fees pursuant to the Idaho Emergency Communications Act (IECA) or the Idaho Telecommunications Service Assistance Program (ITSAP). Thereafter, the Commission received post-hearing briefs from the Company, ITA, CTC and Commission Staff.

AMENDED APPLICATION

TracFone is incorporated in the State of Delaware and is headquartered in Miami, Florida. First Amended Application at 3. TracFone is a reseller of commercial mobile radio service (CMRS) throughout the United States, including the State of Idaho. *Id.* TracFone has obtained a Certificate of Authority and Certificate of Good Standing from the Idaho Secretary of State. *Id.*, Exhs. 1-2.

In its Amended Application, TracFone states that it provides service through a virtual network consisting of services obtained from numerous licensed operators of wireless networks and has provided CMRS service throughout the State of Idaho for the past ten years. *Id.* at 4. In Idaho, TracFone obtains service from several underlying carriers, including AT&T Mobility, T-Mobile, and Verizon Wireless that enable the Company to offer services wherever these providers offer service. *Id.* Initially, TracFone states that it intends to offer its LifeLine service in all areas of Idaho currently being served by AT&T Mobility and T-Mobile and expand its service to areas being served by Verizon Wireless in the second quarter of 2010. *Id.* at 17-18.

TracFone states that it "will provide Lifeline service to qualifying customers requesting these services pursuant to the universal service program and in accordance with 47 C.F.R. § 54.202(a)(1)." *Id.* TracFone states that its Lifeline program can be differentiated from

other ETCs' Lifeline programs in the following ways: (1) TracFone will offer low-income consumers the convenience and portability of wireless services; (2) many of its Lifeline-eligible consumers will be able to obtain subsidized wireless service; and (3) TracFone will not charge consumers for certain quantities of its Lifeline service. *Id.*

TracFone will provide a free wireless handset to its Lifeline customers. *Id.* at 5. These customers will not incur any activation or usage charges. *Id.* TracFone service is available at nationally uniform rates. *Id.*

On April 9, 2008, the Federal Communications Commission (FCC) granted all of TracFone's pending petitions for designation as an ETC, subject to certain conditions. *Id.* at 6, 9. The FCC's decision allows the Commission to consider TracFone's Application seeking ETC designation in Idaho under Section 214(e)(2) of the federal Communications Act. *Id.* at 7-8.

TracFone has been granted ETC designation in the following states: Florida, Georgia, Illinois, Louisiana, Maine, Maryland, Michigan, Missouri, New Jersey, Ohio, Texas, West Virginia and Wisconsin. *Id.* at 8, fn. 12. Upon ETC designation in Idaho, TracFone asserts that it will offer "all of the services and functionalities required by Sections 54.101(a) and 54.202(a) of the FCC's Rules (47 C.F.R. §§ 54.101(a), 54.202(a)) and ETC Checklist. . . ." *Id.* at 11.

TracFone states that it is seeking ETC designation solely to obtain USF funding to provide Lifeline service to qualified low-income consumers and will not seek or accept high-cost support. *Id.* at 18. TracFone noted that there is only one other wireless ETC, Syringa Wireless, providing Lifeline service in Idaho to approximately 1,600 Lifeline customers. *Id.* at 22-23, fn. 37. Finally, the Company believes that granting ETC status will benefit low-income consumers, low-volume users, transient users and other types of consumers in Idaho "who either choose not to enter into long-term service commitments or who are unable to meet the credit requirements necessary to obtain service from other wireline or wireless carriers." *Id.* at 28. TracFone states that it will provide access to emergency services and that its customers will receive an E911-compliant handset free of charge. *Id.* at 24.

COMMISSION JURISDICTION AND AUTHORITY

The Commission "has full jurisdiction and authority to designate carriers as ETCs pursuant to the federal Telecommunications Act of 1996. . . ." Order No. 29841 at 2. In order to be designated an ETC, the telecommunications provider must: (1) be a "common carrier" as defined by 47 U.S.C. § 153(10); (2) offer throughout its proposed service areas the universal

services¹ set forth in 47 C.F.R. § 54.101(a) either by using its own facilities or a combination of its own facilities and the resale of another carrier's services;² and (3) must advertise the availability of its universal service offering and the charges therefore using media of general distribution. *Id.* at 3; *see also* 47 U.S.C. § 214(e)(1).

Additionally, in areas already served by a rural telephone company, TracFone has the burden of demonstrating that the public interest would be served by granting its ETC Application. Order No. 29841 at 8; *see also* 47 U.S.C. § 214(e)(2). "Merely asserting that granting the application will lead to increased competition in a particular service area is not enough, by itself, to warrant ETC designation in rural areas." Order No. 30867 at 3; *see also* Order No. 29841 at 4.

COMMISSION DISCUSSION AND FINDINGS

After a thorough review of TracFone's ETC request, including a public comment period, formal discovery, a technical hearing, and briefing of the pertinent legal issues, the Commission finds that TracFone has failed to meet the minimum requirements for ETC designation outlined in 47 U.S.C. § 214(e)(1) and Commission Order No. 29841. The Commission finds that TracFone has failed to demonstrate that granting its Amended Application for designation as an ETC in Idaho would be in the "public interest."

In their various filings, Commission Staff, ITA and CTC have presented numerous objections to TracFone's Amended Application. However, the primary issue regarding TracFone's Amended Application is whether the Company is legally obligated to contribute to the IECA and/or the ITSAP Fund. Inasmuch as the payment of these fees is dispositive of TracFone's ETC request, the Commission needs not address or otherwise offer substantive comments regarding the individual requirements specified in Commission Order No. 29841 and 47 U.S.C. § 214(e)(2).

¹ The enumerated services include: (1) voice grade access to the public switched network; (2) local calling; (3) touch tone signaling or its functional equivalent; (4) single-party service or its functional equivalent; (5) access to 911 emergency services where available; (6) access to operator services; (7) access to long-distance service; (8) access to directory services; and (9) toll limitation service. 47 C.F.R. § 54.101(a).

² TracFone was granted a forbearance of the "facilities requirement." *See* FCC 05-165, *In the Matter of Federal-State Joint Board on Universal Service Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, Docket No. 96-45, September 8, 2005.

IECA and ITSAP

During the entirety of this proceeding, TracFone has steadfastly argued that it is not required to contribute to either the IECA or the ITSAP Fund. *See* TracFone Post-Hearing Brief at 6.³ While the Company does not dispute that the Commission possesses the authority to determine whether the Company should be required to pay into the ITSAP Fund,⁴ TracFone suggests that its status as a vendor of telecommunications services to third party sellers exempts the Company from any duty to contribute to the Funds. *See* Tr. at 3-6, 76; *see also Idaho Code* § 56-904. The Company states that collecting fees from consumers would be impractical because there is “no monetary exchange between the consumer and the retail vendor.” *Id.* at 5. According to TracFone, nothing can be done to collect applicable 911 fees from prepaid wireless service providers until Idaho enacts a point-of-sale collection law. *Id.*

The Company also cites the qualification found in *Idaho Code* § 56-904(1) (“The surcharge shall be explicitly stated on end user billings . . .”) as evidence that the ITSAP fee cannot be assessed to TracFone, a prepaid wireless service provider. *Id.* at 6. The Company points out that it does not issue a monthly billing statement and thus cannot be called upon to remit the fees collected from the surcharge that consequently cannot be “explicitly stated on end user billing.” *Id.*

TracFone asserts that the Idaho Legislature may wish to extend the collection of ITSAP fees to “non-billed services” emanating from prepaid wireless service providers but, as of now, there is no mechanism for doing so. *Id.* at 6-7. According to TracFone, the creation of such a mechanism is the responsibility of the Legislature, not the Commission. *Id.* at 7.

TracFone also claims that the issue of whether the IECA and ITSAP fees are applicable to the Company is not relevant to TracFone’s Application for designation as an ETC.

³ TracFone has forwarded similar arguments in the following states: Maine, Ohio, Arizona, Washington, Kentucky, California, Colorado, Iowa and Indiana. The Company has withdrawn its ETC Application in California, Colorado and Oklahoma. Tr. at 195, ll. 3-4. In other states such as Florida, Oregon and Minnesota, TracFone has “supported legislation to require retailers to collect and remit the 911 fees.” Tr. at 320, ll. 3-5.

⁴ Unlike TracFone’s concession that the Commission possesses the authority to administer the ITSAP Fund, the Company asserts that “the 911 fee is subject to enforcement by the Idaho Emergency Communications Commission [IECC], which is part of the Department of Administration.” Tr. at 76, ll. 22-23. TracFone witness Jose Fuentes opined that “with regards to the 911 fee, it is the 911’s Commission’s jurisdiction to make that determination.” Tr. at 179, ll. 16-18.

Id. TracFone argues that if the Commission has concerns regarding the applicability of those fees then it should open another proceeding/docket to examine that issue separately. *Id.* at 8.

Commission Findings

1. IECA and ITSAP. The Commission finds that IECA and ITSAP are applicable to TracFone. The plain and unambiguous language of these laws requires all telecommunications carriers – including prepaid wireless carriers – to remit fees established under those statutes. *See Idaho Code* § 56-901(2). “The language of a statute is to be given its plain, rational and obvious meaning.” *State v. Burnright*, 132 Idaho 654, 659, 978 P.2d 214, 219 (Idaho 1999). TracFone will not be allowed to escape the duty to remit the surcharges simply because it chooses not to bill its customers on a monthly basis.

Indeed, ITSAP provides the Commission with the discretion to authorize “less frequent remittances” than monthly remittances. *See Idaho Code* § 56-904(3). In its filings, TracFone has not sought Commission authorization for a less frequent remittance, choosing instead to argue that the fees are wholly inapplicable.

TracFone clearly falls within the definition of “telecommunications provider” found in the IECA. *Idaho Code* § 31-4802(13). The intent and purpose of the IECA is to “provide authority to counties and 911 service areas to impose an emergency communications fee on the use of telephone lines, wireless, VoIP or other communications services that connect an individual dialing 911 to an established public safety answering point.” *Idaho Code* § 31-4801(2)(a). The 911 fee is “imposed upon and collected from purchasers of access lines.” *Idaho Code* § 31-4804(2). “In the case of wireless technology, each active dedicated telephone number shall be considered a single access line.” *Idaho Code* § 31-4802(1).

The only specific exemption granted by the Idaho Legislature in the IECA pertains to prepaid calling cards. *Idaho Code* § 31-4813. “Prepaid wireline, wireless and VoIP phones with a service address or place of primary use within Idaho are not considered prepaid calling cards.” *Id.* Thus, the Legislature clearly did not create an exemption for prepaid wireless providers like TracFone.

Other jurisdictions have also adjudged that wireless companies like TracFone are not exempt from such fees. During the technical hearing it was established that the Washington Supreme Court rejected TracFone’s main argument against application of the 911 fee, declaring: “The plain language of the controlling statutes requires payment of the state E-911 excise tax . . .

[and] the fact that TracFone does not send monthly billing statements is a consequence of the way in which it chooses to conduct its business.” Tr. at 108, ll. 5-10; Exh. 103.

To wit, TracFone witness Jose Fuentes conceded at the technical hearing that the Company has the ability to track the usage rate of its customers and “calculate the amount of tax due without any problem with uniformity.” Tr. at 109, ll. 1-7. TracFone’s refusal to contribute to these funds in numerous states across the country cannot be attributed to an inability to accurately assess its fiscal responsibilities to these funds. Rather, the testimony and supporting documentation presented in this case revealed that contesting the payment of these fees is an orchestrated and Company-wide business decision.⁵ Rather understatedly, TracFone acknowledged that disputes over fee issues “have come up around the country.” Tr. at 184, ll. 3-4. Thus, it is evident to this Commission that it is TracFone policy to vigorously contest the applicability and payment of these fees.

The Commission notes that the governmental agency that TracFone concedes has the authority to determine the Company’s obligation to contribute to the IECA Fund has submitted an explicit statement regarding these issues. Idaho Emergency Communications Commission (IECC) Chairman Garrett Nancolas submitted a public comment urging the Commission to “deny the Application before them” and conveyed the IECC’s official position that TracFone’s failure to remit payment of E911 fees constitutes a “violation of the Idaho Emergency Communications Act, Idaho Code Section 31-4801. . . .” Tr. at 104, ll. 19-21.

Therefore, inasmuch as the IECC letter represents a clear statement from an agency that the Company agrees is vested with the authority by the Idaho Legislature to levy “an emergency communications fee on the use of telephone lines, wireless, VoIP or other communications services that connect an individual dialing 911 to an established public safety answering point,” TracFone is required to make appropriate contributions, in accordance with statute, to the Fund. *Idaho Code* § 31-4801(2)(a) (emphasis added).

2. Public Interest Analysis. Testimony at the technical hearing phase revealed that “TracFone has been operating in Idaho for more than 12 years.” Tr. at 105, ll. 7-9. During that lengthy time period, the Company has declined to contribute even one dollar to either the ITSAP or IECA Fund. Tr. at 105, ll. 10-14. TracFone’s staunch opposition to contributing to these

⁵ Courts in Kentucky, Indiana and Nebraska have entertained similar arguments to those made by TracFone in the instant case and have reached similar conclusions as the Washington Supreme Court.

Funds is particularly problematic given that the ITSAP Fund was created precisely to “maximize federal ‘lifeline’ and ‘link-up’ contributions to Idaho’s low-income consumers[,]” services that TracFone proudly touts in its Amended Application for ETC status. *Idaho Code* § 56-901(1).

The success of both the IECA and ITSAP hinges upon the support of telecommunications carriers⁶ operating in Idaho. Specifically, ITSAP relies upon the cooperation of telecommunications carriers who, like TracFone, directly market their service offerings to low-income consumers.⁷ Evidence of this is found in TracFone’s Amended Application which is replete with references to its SafeLink Wireless service, a “low-income program” offered “to qualifying Idaho consumers.” Amended Application at 1, fn. 1.

“In evaluating the public interest issue, the Commission weighs whether the potential benefits of ETC designation outweigh the potential harms.” Order No. 30629 at 8. The Commission assesses whether the ETC applicant is “committed to providing universal service throughout the entire rural service areas,” as well as the impact the applicant’s ETC status would have on the federal universal service fund. *Id.* “Rapid escalation of the high-cost fund” is a serious concern being addressed at the federal level. *Id.* Absent an exemption from the FCC, “all newly designated and existing CETCs in Idaho will share the high-cost USF support in the amount that was distributed to Idaho CETCs in March 2008.” *Id.*

The Commission has issued several Orders analyzing and refining the “public interest” standard. In Order No. 29541, issued on July 23, 2004, the Commission denied the ETC applications of two wireless carriers, IAT Communications, Inc. dba NTCH-Idaho, Inc. or Clear Talk and NPCR, Inc. dba Nextel Partners, because both applicants failed to carry their burdens demonstrating that their applications, which applied to areas served by rural telephone companies, were in the public interest (the *Clear Talk* Order).

In the *Clear Talk* Order, “the Commission enumerated the public interest factors specifically applicable to applications for ETC designation in rural telephone company service areas”:

⁶ A “telecommunications carrier” is defined by statute as any “telephone corporation providing . . . personal communications services and mobile radio services for compensation.” *Idaho Code* § 56-901(2).

⁷ Recipients of ITSAP funding must “meet narrowly targeted eligibility criteria based solely on income or factors directly related to income established by the department of health and welfare.” *Idaho Code* § 56-901(3).

[T]he value of increased competition, by itself, is not sufficient to satisfy the public interest test in rural areas. Instead, in determining whether designation of a competitive ETC in a rural telephone company's service area is in the public interest, we weigh numerous factors, including the benefits of increased competitive choice, the impact of multiple designations on the universal service fund, the unique advantages and disadvantages of the competitor's service offering, any commitments made regarding the quality of the telephone service provided by competing providers, and the competitive ETC's ability to provide the supported services throughout the designated service area within a reasonable time frame.

Clear Talk Order at 6 (quoting *Virginia Cellular*, 19 F.C.C.R. at 1574) (emphasis added).

Therefore, in accordance with statute and our prior ETC Orders, the Commission finds that TracFone's intransigence and refusal to remit applicable fees represents an obvious conflict with the "public interest" in this case and provides sufficient cause to deny TracFone's Application. An agreement to voluntarily contribute applicable fees to the aforementioned IECA and ITSAP Funds should be viewed as a minimum requirement for any telecommunications carrier seeking designation as an ETC in Idaho. Thus, the Commission will not grant ETC status to TracFone until the Company, at minimum, assents to the payment of IECA and ITSAP fees, as well as any past due amounts accrued during its 12-year tenure of operations in Idaho.

ORDER

IT IS HEREBY ORDERED that the Amended Application of TracFone Wireless, Inc. for designation as an eligible telecommunications carrier is denied.

THIS IS A FINAL ORDER. Any person interested in the Order may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. *See Idaho Code* § 61-626.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 29th
day of July 2011.



PAUL KJELLANDER, PRESIDENT

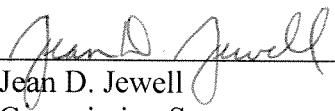


MACK A. REDFORD, COMMISSIONER



MARSHA H. SMITH, COMMISSIONER

ATTEST:



Jean D. Jewell
Commission Secretary

O:TFW-T-09-01_np8