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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION)
OF TRACFONE WIRELESS, INC. FOR) CASE NO. TFW-T-09-01
DESIGNATION AS AN ELIGIBLE)
TELECOMMUNICATIONS CARRIER) POST-HEARING BRIEF
) OF COMMISSION STAFF

COMES NOW the Staff of the Idaho Public Utilities Commission, by and through its attorney of record, D. Neil Price, Deputy Attorney General, and, pursuant to the Commission's directive, does hereby submit Staff's Post-Hearing Brief regarding the Application of TracFone Wireless, Inc. ("TracFone" or "Company") for Designation as an Eligible Telecommunications Carrier ("ETC") in Idaho.

I. PROCEDURAL HISTORY

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 Idaho Emergency Communications Act (IECA) or the Idaho Telecommunications Service Assistance Program (ITSAP).

II. STATEMENT OF JURISDICTION

“The [Commission] is hereby vested with power and jurisdiction to supervise and regulate every public utility in the state.” *Idaho Code* § 61-501. 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 services 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; and (3) must advertise the availability of its universal service offering and the charges therefore using media of general distribution. 47 U.S.C. § 214(e)(1); *Id.* at 3. Additionally, TracFone has the burden of demonstrating that the public interest would be served by granting its ETC Application. *Id.* at 8.

III. LEGAL ARGUMENT

1. **Granting TracFone’s Application for Designation as an ETC in Idaho is not in the ‘public interest’**

The Commission’s decision regarding TracFone’s Application for Designation as an ETC in Idaho hinges upon whether granting the Application would be “consistent with the public interest, convenience, and necessity. . . .” *Id.* at 3. TracFone’s Amended Application and testimony at the technical hearing demonstrate that, unless it is compelled to do so by the Commission, the Company has absolutely no intention of contributing to the ITSAP and the E911 Service Fund. In state after state where the Company has filed applications for designation as an ETC, TracFone has chosen a combative approach and fought against the payment of such fees and assessments. Indeed, TracFone’s legal counsel has candidly confirmed that it has “contested the applicability of certain 911 tax laws in a number of jurisdictions. . . .” *Tr.* at p. 110, ll. 3-6.

a. TracFone should be ordered to pay applicable ITSAP, TRS and E911 fees prior to being designated an ETC in Idaho

The payment of applicable ITSAP, Telecommunications Relay Service (TRS) and E911 fees, including past due amounts, should be a necessary pre-condition to granting TracFone’s Amended Application for designation as an ETC in Idaho. The Commission should not grant ETC status to TracFone with the promise that it may pay applicable fees in the future.

If TracFone's telecommunications services are truly in the public interest then the Company should be required to make a good faith demonstration of its willingness to provide critical funding support for programs that will ensure that its services will reach all Idahoans in an effective manner. The public interest inquiry is particularly relevant given TracFone's admission that the nature and "the way the system is set up," duplicate enrollments of its subsidized telecommunications services are inevitable and unavoidable. Tr. at p. 117, ll. 10-16.

i. The ITSAP Fund

TracFone does not dispute the Commission's authority to order the Company to pay into the ITSAP Fund. TracFone concedes that the ITSAP fee falls under the Commission's jurisdiction. See Tr. at p. 76, l. 21; see also *Idaho Code* § 56-904.

The ITSAP was created in order to "maximize federal 'lifeline' and 'link-up' contributions to Idaho's low-income consumers." *Idaho Code* § 56-901(1). The ITSAP is dependent upon the support of telecommunications carriers¹ operating in Idaho, particularly those carriers who, like TracFone, directly market their service offerings to low-income consumers. 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).

Staff reiterates its strong belief that close scrutiny of TracFone's Amended Application was particularly important because there will be an enormous amount of overlap between ITSAP funding recipients and TracFone's customer base. Without TracFone's cooperation the program would effectively be denied the critical funding support it needs in order to maintain its continued viability. Thus, if TracFone is unwilling to voluntarily contribute to the ITSAP Fund then the Company's Amended Application should be denied.

ii. The TRS Fund

TracFone has also failed to contribute to the TRS Fund. Similar to ITSAP, the Commission is vested with the authority to "promulgate such rules, policies and procedures as may be necessary to govern administration of the program . . . including, but not limited to, . . . matters deemed necessary for the implementation of TRS in Idaho." *Idaho Code* § 61-1306(7).

¹ 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).

“The commission shall contract with a qualified person to administer the program. . . .” *Idaho Code* § 61-1303(1)(a).

The TRS Fund offers essential services to a segment of Idaho’s population, hearing-impaired or speech impaired persons, which is disproportionately economically disadvantaged and included within TracFone’s targeted Idaho market.

. . . Telephone corporations providing interstate or intrastate telephone services provide telecommunications relay services (TRS) for individuals who are hearing-impaired or speech-impaired that will allow them to engage in telephone communication in a manner functionally equivalent to that of individuals without hearing or speech impairments.

Idaho Code § 61-1301.

Obviously, Idaho is not the only state with a TRS Fund where TracFone has filed an application seeking ETC status. Earlier in 2011, the Arizona Corporation Commission was confronted with, *inter alia*, the issue of whether TracFone is obligated to pay into a similar fund in the State of Arizona. *In the Matter of the Application TracFone Wireless, Inc. for Designation as an Eligible Telecommunications Carrier*, 2011 WL 880791, Ariz. C.C. 2011, Docket No. T-20664A—09-0148 at No. 64. TracFone argued that “such fees are not applicable to prepaid wireless services such as those proposed by TracFone. . . .” *Id.* at _____. In response, the Arizona Corporation Commission ordered the following:

TracFone Wireless, Inc., shall, within 30 days of the effective date of this Decision as a compliance item in this docket, file an affidavit stating that it has submitted letters (as well as attach to its filing such letters) to the Arizona Department of Administration; the Arizona Commission on the Deaf and Hard of Hearing (Telecommunications Relay Service); and the Arizona Corporation Commission, seeking a determination as to whether the fees, over which the agencies have jurisdiction, apply to TracFone Wireless, Inc.'s services as an Eligible Telecommunications Carrier in Arizona.

Id. at _____ (emphasis added). TracFone was then ordered to file with the Commission any response(s) received by the Company from the aforementioned agencies. *Id.*

Consistent with the Company’s approach regarding all other state-based telecommunications provider fees/assessments, Staff is unaware of any efforts by TracFone to contact the TRS Program Administrator and ascertain whether the TRS fee is applicable.

iii. The E911 Fund

In its Amended Application, TracFone boasts that it will provide access to emergency services and that its customers will receive an E911-compliant handset free of charge. *See* First Amended Application at 24. Consistent with this assertion, Staff believes that it is not in the public interest of Idaho customers to allow TracFone to be designated as an ETC without requiring the Company to collect and remit applicable E911 fees, including any past due amounts.

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 p. 76, ll. 22-23. TracFone witness Jose Fuentes testified that "with regards to the 911 fee, it is the 911's Commission's jurisdiction to make that determination." Tr. at p. 179, ll. 16-18.

Fortunately, the Commission received correspondence from the IECC, the state agency that TracFone concedes has jurisdiction over the payment of applicable E911 fees. In a letter filed as a public comment and addressed to the IPUC Commissioners, IECC Chairman Garrett Nancolas asked the Commission to "deny the Application before them" and informed the Commission that it is 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 p. 104, ll. 19-21.

The IECC letter is a clear and unequivocal declaration from an agency specifically enacted by the Idaho State Legislature and vested with the authority 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." *Idaho Code* § 31-4801(2)(a) (emphasis added). Nevertheless, TracFone continues to argue against itself and state that it is not subject to such fees.

At the technical hearing, TracFone confessed that these fee issues "have come up around the country." Tr. at p. 184, ll. 3-4. This candid admission suggests that it is TracFone policy to contest and avoid payment of these fees if it can. Accordingly, the IPUC is not the only Commission to hear TracFone's arguments. TracFone has contested the applicability of these types of fees in the following states: Maine, Ohio, Arizona, Washington, Kentucky, California,

Colorado, Iowa and Indiana. Moreover, the Company has withdrawn its Application in the states of California, Colorado and Oklahoma. Tr. at p. 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 p. 320, ll. 3-5.

The Kentucky Public Service Commission “held that TracFone should be subject to the conditions imposed by the Federal Communications Commission (“FCC”) in granting forbearance from facilities-based requirements of 47 C.F.R. § 214(e)(1).” *In the Matter of Petition of TracFone Wireless, Inc. for Designation as an Eligible Communications Carrier in the Commonwealth of Kentucky*, 2010 WL 4894488, Ky. P.S.C. November 24, 2010, Case No. 2009-00100 (Slip Copy). In addition to “providing Lifeline customers with basic 911 and E911 access regardless of activation status and availability of prepaid minutes; . . . the Commission also imposed four other conditions upon TracFone” including the obligation “to certify to the Commission that it has complied with the obligations imposed by the U.S. District Court for the Western District of Kentucky.” *Id.* At the time of the issuance of Kentucky P.S.C. Order, TracFone was in the midst of litigation before the federal District Court disputing its obligation to pay certain retroactive fee amounts “for the period between 2002 and 2006.” *Id.*

In another analogous proceeding, the Indiana Utility Regulatory Commission (IURC) granted a rehearing of its Order pertaining to TracFone’s Petition for Designation as an ETC. *In the Matter of the Petition of TracFone Wireless, Inc. for Designation as an Eligible Communications Carrier in the state of Indiana*, 2010 WL 4499409, Ind. U.R.C. November 4, 2010, Cause No. 43732 (Slip Copy). The IURC agreed with the Office of Utility Consumer Counselor that “TracFone's obligation to pay such fees is not left to TracFone's discretion.” *Id.*

The IURC reiterated that “TracFone shall pay the fees listed in Paragraphs 4a - 4j [, including E911, InTrac and USF,] in the CTA Order.” *Id.* The IURC sternly warned TracFone that if it failed to pay the applicable fees “(or any other fees the Commission determines to be appropriate) under Indiana or Federal law from the date of the CTA Order (or from the date deemed appropriate by the IUSF's third-party administrator for IUSF fees), the Commission may initiate a proceeding to inquire into such failure.” *Id.*

Based on the foregoing, Staff requests that the Commission deny TracFone’s Application unless the Company can certify to the Commission that it has paid the appropriate amounts owed by the Company to the ITSAP, TRS and E911 Funds.

CONCLUSION

“TracFone has been operating in Idaho for more than 12 years.” Tr. at 105, ll. 7-9. During that time, the Company has willfully declined to contribute any monetary assistance to the ITSAP, TRS and E911 Funds. Tr. at 105, ll. 10-14. TracFone should not be heard to complain that its wireless service offerings are not amenable to the assessment of such fees. As the Washington Supreme Court has determined, and TracFone witness Fuentes conceded at the technical hearing, 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 p. 109, ll.1-7.

Thus, 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, it is evident from the testimony and supporting documentation presented in this case that contesting the payment of these fees is an orchestrated and Company-wide business decision. Therefore, Staff requests that the Commission deny TracFone’s Amended Application for designation as an ETC in Idaho.

Respectfully submitted this 23rd day of May 2011.



D. Neil Price
Deputy Attorney General

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 23rd DAY OF MAY 2011, SERVED THE FOREGOING **POST-HEARING BRIEF OF COMMISSION STAFF**, IN CASE NO. TFW-T-09-01, BY E-MAILING AND MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

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