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Attorney for the Commission Staff

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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

The Staff of the Idaho Public Utilities Commission, by and through its Attorney of Record, Neil Price, Deputy Attorney General, submits the following reply comments in Case No. TFW-T-09-01.

PROCEDURAL BACKGROUND

On September 19, 2011, the Commission issued Order No. 32358, Final Order on Reconsideration. The Order re-affirmed the Commission's previous determination in Order No. 32301 that TracFone Wireless, Inc. ("TracFone" or "Company") is responsible for payment of fees required by the Idaho Telephone Assistance Program Act (ITSAP), *Idaho Code* § 56-901, *et seq.* With respect to payment of fees required by the Idaho Emergency Communications Act (IECA), *Idaho Code* § 31-4701, *et seq.*, the Order provided that TracFone could either "remit the applicable fees, or seek an official ruling from the IECC [Idaho Emergency Communications Commission], or another tribunal with relevant jurisdiction, as to whether the fees applied..." Order No. 32358 at 11-12.

On October 28, 2011, TracFone filed a Notice of Appeal of Reconsideration Order No. 32358 with the Idaho Supreme Court, Docket No. 39331-2011. In its Appeal, the Company alleges that the Commission erred by denying TracFone's Application for Designation as an Eligible Telecommunications Carrier (ETC) due to non-payment of fees required by ITSAP and the IECA.

Subsequent to the filing of TracFone's appeal, Commission Staff (Staff) and TracFone (hereinafter collectively referred to as "the Parties") engaged in negotiations to determine whether the Parties could reach a reasonable compromise that would comport with the Commission's Orders.

On February 8, 2012, TracFone filed a Stipulation and Motion requesting a Commission Order approving the terms of the Parties' Settlement Agreement.

On February 17, 2012, the Commission issued a Notice of Proposed Settlement inviting interested parties to submit comments on the proposed Settlement. *See* Order No. 32463.

On March 9, 2012, the Commission received comments from the Idaho Telecom Alliance and CTC Telecom, Inc. The Commission also received public comments from the Idaho Emergency Communications Commission, the Idaho Association of Counties, and the Idaho Sheriff's Association.

INTERVENORS AND PUBLIC COMMENTS

The Idaho Emergency Communications Commission (IECC)

On March 9, 2012, the IECC submitted comments regarding the proposed Settlement. In the letter, the IECC objects to the proposed Settlement Stipulation and TracFone's Application to be designated as an ETC. The IECC believes that the proposed Settlement does not sufficiently address the fact that TracFone is currently in violation of Idaho law and does not address the fees owed by TracFone from 2004 - 2011.

The IECC believes that TracFone's refusal to collect and remit the fees that it is legally obligated to collect constitutes an unfair business practice and is contrary to protecting those citizens that TracFone claims it will assist through its Lifeline services. IECC believes that a declaratory judgment action to determine the applicability of the E-911 fees is unnecessary because TracFone's legal obligations are clear. Accordingly, the IECC requests that the

Commission reconsider the proposed Settlement Stipulation and deny the application until TracFone's complies with existing law.

Idaho Sheriffs' Association (ISA)

On March 9, 2012, the ISA submitted comments regarding the proposed Settlement Stipulation. In its letter to the Commission, the ISA states that it opposes the proposed Settlement Stipulation and TracFone's Application to become an ETC. ISA believes that the proposed Settlement Stipulation does not sufficiently address the fact that TracFone is currently in violation of Idaho law because the Company has not been remitting Emergency Communications Fees to Idaho's 44 counties as required by *Idaho Code* § 31-4804.

ISA asserts that revenues from 911 fees have been diminished due to TracFone's failure to comply with Idaho law. Further, ISA states that TracFone has not made any attempt to negotiate a process for collecting the IECC fees. Therefore, ISA requests that the Commission reconsider the proposed Settlement and deny TracFone's Application until the Company complies with existing law.

Idaho Association of Counties (IAC)

On March 9, 2012, the IAC submitted comments regarding the proposed Settlement. In its letter to the Commission, the IAC states that it concurs with the objections presented by the IECC. The IAC states that counties, as well as some cities, rely upon the 911 fees for funding support of emergency communications systems statewide. The IAC argues that it is unfair to allow any provider to evade its responsibilities under Idaho law. Therefore, the IAC requests that the Commission reject the proposed Settlement Stipulation and deny TracFone's Application until the Company complies with existing law.

Idaho Telecom Alliance (ITA) and CTC Telecom, Inc., dba CTC Wireless (CTC)

On March 9, 2012, ITA and CTC filed joint comments in response to the proposed Settlement Stipulation. The ITA and CTC oppose the proposed Settlement Stipulation because partial payment of past due ITSAP fees dating back to 2004 is not in the public interest. The ITA and CTC argue that *Idaho Code* § 56-904 requires the Commission to require all telecommunications carriers in Idaho to impose the ITSAP surcharge fee upon all end users. Intervenor Comments at 5.

The ITA and CTC believe the proposed Settlement should be rejected because the terms of the proposed Settlement Stipulation do not comport with Commission Order Nos. 32301 and

32358. *Id.* at 8. ITA and CTC believe that the Commission should refuse to grant ETC status to TracFone until the Company pays all past due ITSAP fees and fully complies with any court order resulting from its challenge of the applicability of 911 fees. *Id.* at 13. Alternatively, ITA and CTC request that the Commission institute another comment period to obtain new evidence regarding the economic impact of TracFone's non-payment of fees and enter additional findings of fact and conclusions of law regarding the public interest standard. *Id.* at 13-14.

STAFF COMMENTS

Staff has reviewed all the Comments filed in response to the proposed Settlement and respectfully disagrees with the IECC, ISA, IAC, ITA and CTC. Staff believes that the nine (9) conditions of the Settlement Stipulation are fair, just, and reasonable, and in the public interest, or otherwise in accordance with law or regulatory policy. Order No. 32463 at 1-3.

After filing its Notice of Appeal of the Commission's Order on Reconsideration, TracFone contacted Staff in an effort to begin Settlement discussions. Staff agreed and engaged in Settlement discussions with two important considerations in mind: 1) the potential risk of further litigation before the Idaho Supreme Court; and 2) the potential impact of the Settlement on other traditional and prepaid wireless companies.

In reaching the proposed Settlement Stipulation with TracFone, Staff assessed the risk of an adverse decision by the Idaho Supreme Court overruling Final Order No. 32301. Staff believed that the most prudent course of action was to take control of the outcome by way of a Settlement. Staff focused on reaching a Settlement that would comport with the most important elements as well as the spirit and intent of the Commission's Orders.

The proposed Settlement represents a compromise regarding ITSAP fees that Staff believes comports with the spirit and intent of Commission Order No. 32301. The argument regarding applicability of 911 fees will be resolved in the appropriate venue where the IECC, ITA, CTC and any other interested parties can present their respective arguments. Therefore, the term of the proposed Settlement requiring TracFone to file a declaratory judgment to determine the applicability of the E-911 fees strictly adheres to the Commission's directive that "another tribunal with relevant jurisdiction...determine whether the 911 fees apply to TracFone." Order No. 32358 at 11-12. The proposed Settlement also states that in the event that the District Court determines that TracFone is subject to the IECC fees, and should TracFone fail to reimburse the

IECC as outlined in the proposed Settlement or elects to seek judicial review of an adverse ruling by the Court that the Company owes IECC fees, TracFone agrees that the Commission may revoke its ETC designation, until the judicial review is complete. Order No. 32463 at 3. Based on this information regarding the issue of 911 fees, Staff believes that this proposal represents a reasonable resolution of the disputed issue on appeal before the Idaho Supreme Court.

With regard to other prepaid wireless carriers, Staff believed the TracFone proceedings would impact all wireless carriers, especially the rapidly growing prepaid wireless industry. Thus, Staff believed that it was necessary to assess the possible repercussions of any requirements imposed on TracFone and the impact it would have on all prepaid wireless carriers. Staff believed it was important to negotiate a Settlement with TracFone that maintains the spirit and intent of the Commission's findings and at the same time, when applied to other prepaid carriers, establishes a clear and unambiguous position that these carriers are required to remit payments to the ITSAP fund.

Staff emphasizes that TracFone has agreed that its ETC designation will be conditional. Order No. 32463 at 2. The proposed Settlement contains adequate measures to ensure that TracFone meets all of its obligations. If TracFone fails to comply with the terms of the proposed Settlement the Commission can revoke the Company's ETC designation. *Id.* at 3.

In response to the ITA and ICA comments that "nowhere does the statute grant the Commission the authority to waive the mandatory surcharge,"¹ Staff believes that the Commission possesses the requisite authority to endorse the compromise agreement reached by Staff and TracFone. The Idaho Legislature has conveyed to the Commission the authority to exercise appropriate discretion regarding the recovery of penalties or fees owed by regulated telephone corporations. *Idaho Code* § 62-620 reads:

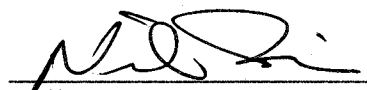
Any telephone corporation who violates or fails to comply with any final order, decision, rule or regulation duly issued by the commission pursuant to this chapter shall be subject to a civil penalty of not to exceed two thousand dollars (\$2,000) for each day that the violation continues . . . Any such action *may be compromised or discontinued* on application of the commission upon such terms as the court shall approve and order. (Emphasis added).

¹ Intervenor's Comments at 5.

While this statute does not directly apply to the ITSAP or 911 fees applicable to TracFone, it demonstrates that the Commission has been empowered by the Legislature to compromise monetary penalties owed by regulated telephone corporations in other contexts.

Finally, with the exception of the ITSAP and 911 fees, Staff believes that TracFone meets all other requirements of an ETC under Section 214(e) of the federal Communications Act of 1934 (the Act), as amended and Order No. 29841. Staff believes that the Commission's finding that TracFone is required to remit ITSAP and 911 fees will be resolved through a reasonable compromise as outlined in the proposed Settlement. Therefore, Staff recommends that the Commission approve the TracFone Settlement Stipulation and the Company's Application for designation as an ETC.

Respectfully submitted this 16th day of March 2012.



Neil Price
Deputy Attorney General

Technical Staff: Grace Seaman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 16TH DAY OF MARCH 2012, SERVED THE FOREGOING **REPLY COMMENTS OF THE 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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