

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission Investiga-)
 tion of the Intrastate Universal Service Dis-) Case No. 97-632-TP-COI
 counts.)

ENTRY ON REHEARING

The Commission finds:

- (1) Pursuant to its Supplemental Finding and Order (Order) of May 21, 2009, the Commission granted TracFone Wireless, Inc. dba SafeLink Wireless (TracFone) a conditional designation as an eligible telecommunications carrier (ETC) for the limited purpose of Lifeline support. This designation was granted for an interim one-year period of time commencing from the date of the Order. The Commission stated that, at the conclusion of the interim period, it would review the company's operations for compliance with the Federal Communications Commission's (FCC) ETC requirements and the requirements of the Order to determine if renewal of the ETC designation is appropriate (Order at 9).
- (2) On June 8, 2009, TracFone filed a "Motion for Partial Rehearing and Conditional Motion for Waiver" of the Commission's Order.
- (3) On June 18, 2009, the Office of the Ohio Consumers' Counsel (OCC) filed a memorandum contra TracFone's application for rehearing.
- (4) Section 4903.10, Revised Code, provides that any party who has entered an appearance in a proceeding may apply for rehearing with respect to any matter determined in the proceeding by filing an application within 30 days of the entry of the decision in the Commission's journal. The Commission may grant and hold rehearing on the matters specified in the application if, in its judgment, sufficient reason appears to exist.
- (5) As further discussed in Finding (15), *infra*, TracFone's filing of June 8, 2009, shall be considered as an application for rehearing that has been timely filed as required by Section 4903.10, Revised Code.

- (6) In its first assignment of error, TracFone objects to the Commission's determination that the ETC designation should be for a one-year interim period of time and, instead, asserts that it should be unconditional and permanent. In support of its position, TracFone asserts that any conditional approval is a violation of 47 U.S.C. 214(e)(2). Rather, TracFone asserts that, upon a demonstration of satisfying the applicable statutory criteria, a carrier is to be unconditionally designated as an ETC (Application for Rehearing at 3). Additionally, TracFone notes that it has been designated as an ETC in ten states and the District of Columbia and in none of those jurisdictions was the ETC designation for a temporary, limited, or interim period.

TracFone further argues that the imposition of a one-year conditional designation will serve as a material impediment to TracFone inasmuch as it conflicts with TracFone's commitment of resources relative to the offering of Lifeline services as an ETC in Ohio. Specifically, TracFone notes that it is "prepared to expend substantial sums of money in Ohio to aggressively advertise and promote awareness of the program throughout the state" (*Id.* at 3, 4). In addition, TracFone represents that it "will provide, at its expense with no support from the universal service fund, an E9-1-1 compliant wireless handset to every qualified Lifeline customer who enrolls in the SafeLink Wireless program" (*Id.* at 4). TracFone submits that it would be financially irresponsible for it to commit such substantial resources to Lifeline program with no assurances that it will continue after one year no matter the success of the program.

TracFone also expresses concern regarding the negative impact that a one-year interim ETC designation will have on Lifeline subscribers. Specifically, TracFone states that many of its subscribers are of limited financial resources. Therefore, TracFone opines that termination of service at the end of one year will create additional and totally unnecessary hardship on these individuals.

- (7) In its Memorandum Contra, OCC points out that, pursuant to 47 U.S.C. 214(e)(2), the Commission must find that granting ETC status to TracFone is in the public interest, apart from the service offering and advertising requirements. OCC highlights the fact that TracFone has failed to identify any FCC authority

that would prevent an interim designation (OCC Memorandum Contra at 3).

- (8) With respect to TracFone's first assignment of error, the application for rehearing is denied. While TracFone asserts that any conditional approval is a violation of 47 U.S.C. 214(e)(2), the Commission disagrees.

First, the Commission highlights the fact that, pursuant to this statutory section, a state commission must determine that the request for ETC designation is consistent with the public interest. As part of this public interest analysis, the Commission must ensure that any carrier that seeks to operate in the state of Ohio must meet the requirements of state law. The Commission also notes that the FCC has recognized that:

Individual commissions are uniquely qualified to determine what information is necessary to ensure that ETCs are complying with all applicable requirements, including state-specific ETC eligibility requirements.

...

[S]tate commissions possess the authority to rescind ETC designations for failure of an ETC to comply with the requirements of section 214(E) of the Act or any other conditions imposed by the state. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, ¶¶ 71, 72 (2005).

Further, as part of our public interest analysis, the Commission must find that a common carrier complies with the requirements of 47 U.S.C. 214(e)(1). Additionally, Section 214(e)(2) directs state commissions to designate ETCs in a manner that is "consistent with the public interest." As recognized in our Order of May 21, 2009, this is the first time for the Commission to consider an application of a wireless provider seeking designation as an ETC for the limited purpose of solely providing Lifeline service. Further, we recognized that TracFone's service is supported by the universal service fund, which is already facing an unprecedented demand. We also highlighted the fact that,

given the mobile nature of wireless, it is more difficult to ensure that only eligible customers are receiving the service.

As a result of these concerns, the Commission believes that it is prudent to review our initial designation following a period of one-year to review the company's operations for compliance with the FCC's ETC requirements and the requirements of our Order of May 21, 2009. The Commission clarifies that it is not our intent that TracFone's operations and service to customers would automatically cease at the end of the one-year time frame. Rather, we intend that the company will continue to provide its Lifeline service without interruption, subject to verification of compliance, until the Commission orders otherwise.

To this end, the company should work with the Commission staff to verify its compliance with the FCC's ETC requirements and the Commission's Order of May 21, 2009. As OCC points out, TracFone controls its future in that, as long as it follows the FCC and Commission requirements, it is not at risk of losing its ETC designation.

- (9) In its second assignment of error, TracFone contends that "the Commission should reconsider its decision to subject TracFone to a series of eligibility certification and verification requirements which are contrary to the federal requirements, inconsistent with those of other states, and more burdensome than those applicable to all other Ohio ETCs, including incumbent local exchange company (ILEC) ETCs (Application for Rehearing at 5). Specifically, TracFone objects to the Commission's requirement that TracFone must verify a subscriber's program eligibility prior to sending them a handset.

In support of its position, TracFone states that, pursuant to federal requirements, subscribers seeking to qualify for Lifeline based on income must produce proof of income and that subscribers seeking to qualify for Lifeline based on participation in one of the eight qualifying programs are required to self-certify under penalty of perjury (*Id.*). TracFone avers that the FCC established such a process in order to create a balance between encouraging participation in the Lifeline program and providing disincentives against fraud and abuse (*Id.* at 5, 6).

TracFone asserts that the Commission previously established a self-certification process under penalty of perjury requirement for Ohio ETCs, including for ILECs (*Id.* at 6, citing *In the Matter*

of a Proceeding to Implement Lifeline Assistance Modifications as a Result of a Federal Communications Order, Case No. 05-461-TP-UNC (05-461), Entry, April 13, 2005). TracFone submits that this process is similar to the existing federal requirements. The company argues that the Commission has failed to explain why it has deemed it necessary or appropriate for TracFone to be subject to its own certification of eligibility requirement.

TracFone also disputes the Commission's required annual verification of continued Lifeline eligibility inasmuch as it is different than that required of every other ETC in Ohio. In particular, TracFone objects to the Commission-ordered requirement that the company, on an annual basis, must verify that there is only one Lifeline customer receiving benefits at the address. TracFone avers that this process is directly contrary to the federal requirement (i.e., 47 C.F.R. §54.410[c][2]) and to the Commission's determination in 05-461 that companies may use any reasonable method of verification of a statistically valid random sample of Lifeline subscribers (*Id.* at 7, 8, citing 05-461, at 6).

- (10) OCC submits that TracFone is incorrect in its assumption that, by requiring the production of appropriate documentation, the Commission intended to exclude the possibility of the consumer's self-certification of participation in a Lifeline-qualifying program. Specifically, OCC points out that the production of appropriate documentation could include self-certification, which is made under penalty of perjury (OCC Memorandum Contra at 3, 4).

With respect to TracFone's objections to the Commission-ordered annual verifications, OCC states that TracFone has failed to support its contention that the requirements are contrary to federal law (*Id.* at 4). In regard to TracFone's argument that the required annual verifications are contrary to the requirements set forth in 05-461, OCC points out that 05-461 contemplated the granting of ETC status to just wireline incumbent local exchange companies, "where the potential for multiple carriers providing Lifeline service to a single household was minimal if not nonexistent" (*Id.*). OCC posits that the mobile nature of TracFone's service justifies the Commission's intent to verify that only one Lifeline service is provided to a single address (*Id.*).

- (11) With respect to TracFone's second assignment of error, the Commission finds that the application for rehearing should be granted in part and denied in part. The Commission notes that the FCC previously granted a petition for forbearance filed by TracFone. As a condition of the grant of forbearance, among other requirements, TracFone was ordered to require each of its Lifeline customers to annually self-certify that the customer is the head of household and that the customer receives Lifeline-supported service only from TracFone.¹ We continue to believe that this FCC-imposed requirement is an important one to insure against duplication of funding. Therefore, consistent with the FCC's requirement, we will condition the granting of ETC status to TracFone on the company confirming, on an annual basis, that each TracFone Lifeline customer is the head of household and that the customer receives Lifeline-supported service only from TracFone. The Commission notes that on April 27, 2009, TracFone filed a petition with the FCC seeking modification of these requirements. To the extent that the FCC ultimately grants TracFone's petition, the Commission may reconsider this determination at that time.

Specific to TracFone's arguments pertaining to the Commission's requirement of verification of program-based eligibility, the Commission clarifies that it was never its intention to subject TracFone to a more burdensome verification of program-based eligibility than those conditions already required of TracFone by the FCC or other Lifeline providers pursuant to the Commission's rules in Case No. 05-461. Therefore, the Commission agrees with OCC that, notwithstanding the requirement of "appropriate documentation," the Commission did not intend to exclude the possibility of the consumer's self-certification of participation in a Lifeline-qualifying program, subject to the penalty of perjury. Additionally, the Commission now clarifies that a Lifeline subscriber is not required to provide income-based documentation prior to receiving a phone and Lifeline benefits. Rather, consistent with 05-461, the subscriber shall have sixty days to produce the requisite documentation demonstrating his/her income eligibility. To the extent that the subscriber fails to produce the appropriate verification, TracFone must discontinue the provision of Lifeline benefits.

¹ See CC Docket No. 96-45, Order, 20 FCC Rcd. 15095, 15098 (2005).

With respect to TracFone's assignment of error regarding the Commission's required annual verification of continued Lifeline eligibility, as stated previously, it is not the Commission's intention to subject the company to more burdensome requirements than those conditions already required of TracFone by the FCC or other Lifeline providers pursuant to the Commission's rules in Case No. 05-461. Therefore, the Commission has reconsidered its earlier requirement of an annual verification of the continued Lifeline eligibility of every Lifeline subscriber enrolled in a Lifeline program.

While the Commission continues to remain concerned about the health of the federal Universal Service Fund and the adverse consequences on the fund as a result of potential subscriber fraud, the Commission believes that this concern can be addressed by the statistically valid random sampling verification process set forth in 47 C.F.R. §54.410(c)(2). In order to assist the Commission in monitoring the effectiveness of the established safeguards, especially in light of the fact that nonfacilities-based wireless ETCs are still in the early stages of development, the Commission directs TracFone to provide to the Commission staff the statistically valid random sample data presented to the FCC for the purpose of verifying continued Lifeline eligibility of its subscribers. The Commission staff shall exercise the appropriate oversight to ensure that the Commission's public interest concerns are satisfied.

- (12) In its third assignment of error, TracFone requests that the Commission reconsider the requirement that TracFone must (a) comply with its obligations to contribute to the state of Ohio's 9-1-1 fund for all of its Ohio wireless subscribers, including Lifeline, (b) provide its requisite contribution to Ohio's Telephone Relay Service, and (c) pay its annual Commission assessment consistent with Section 4905.10, Revised Code. In support of its position, TracFone asserts that all telecommunications carriers are required to comply with the tax and fee laws that are applicable to them and that such requirements are wholly irrelevant to a carrier's status as an ETC (*Id.* at 8). TracFone further states that any enforcement of such requirements are separate and apart from the issue of ETC designation (*Id.* at 8, 9).
- (13) OCC notes that the requirement to contribute to the Ohio 9-1-1 and Telephone Relay Service Funds and the payment of annual

Commission and OCC assessments is a legal requirement and not a condition of ETC status. OCC submits that any carrier failing to meet these conditions could be at risk for losing its ETC status in that such status would no longer be in the public interest (OCC Memorandum Contra at 4, 5).

- (14) With respect to TracFone's third assignment of error, the application for rehearing is denied. Through its Supplemental Finding and Order, the Commission was simply clarifying that TracFone, just like every other carrier which operates in Ohio, must abide by all of the laws in the state of Ohio, including payment of taxes, fees, and assessments. Failure to do so may result in revocation of state authority.
- (15) On June 25, 2009, TracFone filed a reply to OCC's memorandum contra, as well as a motion for leave to file a reply to OCC's memorandum contra. TracFone states that a reply is necessary in order to advise the Commission of OCC's misstatements of law and omission of facts so that the Commission will have all of the relevant information before it. While recognizing that Rule 4901-1-35, Ohio Administrative Code (O.A.C.), does not provide for the filing of a reply memorandum, TracFone asserts that its reply memorandum is appropriate inasmuch as its filing of June 8, 2009, was intended to be both an application for partial rehearing and a conditional motion for waiver. Due to the fact that its filing is also intended to represent a motion for a waiver, TracFone believes that it is entitled to file a reply pursuant to the Commission's rules.

To the extent that the Commission decides to treat TracFone's June 8, 2009, filing solely as an application for rehearing, TracFone requests leave to file its reply. TracFone states that, pursuant to Rule 4901-1-38(B), O.A.C., the Commission should waive the procedural requirements applicable to applications for rehearing and consider TracFone's reply as part of the record in this proceeding. In support of its request, TracFone posits that, given that this proceeding represents the first time that the Commission has designated a wireless carrier as an ETC, it is essential that the Commission develop a complete record. Specifically, TracFone believes that it should be allowed to respond to OCC's misstatement of the mandatory federal law governing state commissions' designation of ETCs and to re-

spond to OCC's assertion that the Commission-ordered conditions are consistent with the public interest.

- (16) Pursuant to Rule 4901-1-35(B), O.A.C., "[a]ny party may file a memorandum contra within ten days after the filing of an application for rehearing." The Commission notes, however, that, unlike Rule 4901-1-12(B)(2), O.A.C., Rule 4901-1-35, O.A.C., does not contemplate the filing of reply memorandum.

Upon reviewing the arguments set forth in TracFone's motion for leave to file a reply to OCC's memorandum contra, the Commission determines that the motion is denied and the reply memorandum shall not be considered as part of the record in this proceeding. In reaching this determination, the Commission finds that TracFone has failed to demonstrate that TracFone will be unduly harmed in the absence of it being granted leave to file its reply memorandum.

With respect to TracFone's assertion that its reply memorandum is appropriate inasmuch as its June 8 filing should, in part, be considered as a conditional motion for a waiver, the Commission disagrees. Specifically, upon a review of the filing, it is apparent that the filing was clearly intended to serve as an application for rehearing. In support of this conclusion, the Commission notes that nowhere in the pleading is there a specific discussion of a waiver request or the raising of arguments in support of a waiver of the ordered condition. Rather, the request for a waiver is simply referenced as an afterthought to the extent that TracFone's application for rehearing is not granted.

- (17) On June 18, 2009, TracFone filed a motion seeking an extension of time to file its compliance plan. TracFone explains that, pursuant to the Commission's Supplemental Finding and Order of May 21, 2009, the Commission ordered that TracFone file a compliance plan, within thirty days of the Order, addressing how it will comply with the certification of a subscriber's initial eligibility and verification of continued eligibility to receive Lifeline in accordance with the conditions set forth in the Order. TracFone submits that, in light of its pending application for rehearing, it is appropriate to extend the filing date of the compliance plan until July 20, 2009.
- (18) TracFone's motion seeking an extension of time to file its compliance plan is reasonable and should be granted. TracFone

should file its compliance plan with the Commission on or before July 20, 2009.

It is, therefore,

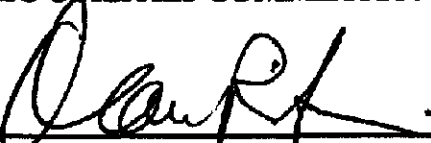
ORDERED, That the application for rehearing is granted in part and denied in part as stated above. It is, further,

ORDERED, That TracFone's motion for leave to file its reply memorandum is denied in accordance with Finding (16). It is, further,

ORDERED, That TracFone's motion for an extension of time to file its compliance plan is granted pursuant to Finding (18). It is, further,

ORDERED, That a copy of this entry on rehearing be served upon all parties and interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman



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