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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Petition of)	
TracFone Wireless, Inc. dba SafeLink)	Case No. 10-614-TP-UNC
Wireless for Designation as an Eligible)	
Telecommunications Carrier)	

**TRACFONE WIRELESS, INC.’S MEMORANDUM CONTRA APPLICATIONS FOR
REHEARING BY THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL AND THE
EDGEMONT NEIGHBORHOOD COALITION AND THE APPALACHIAN PEACE &
JUSTICE NETWORK**

TracFone Wireless, Inc. (“TracFone”), by its attorneys, hereby files this Memorandum Contra the applications for rehearing filed by the Office of the Ohio Consumers’ Counsel (“OCC”) and the Edgemont Neighborhood Coalition and The Appalachian Peace & Justice Network (collectively, “Edgemont Coalition and Appalachian Network”) concerning the Commission’s May 13, 2010 Entry. This issues raised by the OCC and the Edgemont Coalition and Appalachian Network have previously been considered by the Commission and resolved in the Entry on Rehearing. Furthermore, the OCC, Edgemont Coalition and Appalachian Network’s belated concerns about the Commission’s handling of this proceeding do not warrant reconsideration of the Commission’s May 13, 2010 Entry.

INTRODUCTION

On May 21, 2009, the Commission issued a Supplemental Finding and Order (“TracFone ETC Designation Order”) in Case No. 97-632-TP-COI designating TracFone as an Eligible Telecommunications Carrier (“ETC”) in the State of Ohio for the purpose of offering Lifeline service to qualified low-income consumers. In the TracFone ETC Designation Order, the Commission imposed several conditions on TracFone’s ETC designation, including limiting the

ETC designation to an interim one year period, directing TracFone to comply with certain Lifeline eligibility certification and verification requirements, and requiring TracFone to comply with statutory requirements to contribute to the Ohio 9-1-1 Fund and to the Telephone Relay Service fund (“TRS Fund”), as well as to pay annual Commission assessments. Regarding the interim designation, the Commission stated the following:

The Commission emphasizes that this ETC designation is limited to Lifeline service only and is granted for an interim one-year period of time commencing from the date of this Order. At the conclusion of this interim period, the Commission will review the company’s operations for compliance with the FCC’s ETC requirements and the requirements of this order to determine if renewal of the ETC designation is appropriate.¹

On June 8, 2009, TracFone filed a Motion for Partial Rehearing and Conditional Motion for Waiver of the TracFone ETC Designation Order in which it asked the Commission to modify or waive certain conditions on its ETC designation. On July 18, 2009, the OCC filed a memorandum contra TracFone’s motion for partial rehearing. In the memorandum contra, the OCC supported the Commission’s decision to issue an interim ETC designation and noted that “if TracFone follow[ed] the Commission’s directives and succeed[ed] in providing Lifeline service, there is no reason why the Commission would not likely extend TracFone’s ETC designation or make it permanent.”² The Edgemont Coalition and Appalachian Network did not participate in the ETC designation proceeding.

On July 8, 2009, the Commission issued an Entry on Rehearing granting in part and denying in part TracFone’s Motion. In the Entry on Rehearing, the Commission addressed TracFone’s objection to the Commission’s determination that the ETC designation should be for a one-year interim period. In particular, the Commission clarified that:

¹ TracFone ETC Designation Order, at 9.

² Memorandum Contra TracFone’s Motion for Partial Rehearing and Conditional Waiver by the Office of the Ohio Consumers’ Counsel, filed June 18, 2009, at 3.

[I]t 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, 2009.³

In accordance with the Commission's Entry on Rehearing, the Commission issued an Entry on May 13, 2010 indicating that it was reviewing TracFone's performance as an ETC. In the Entry, the Commission: (1) required TracFone to provide Commission Staff with a demonstration of its contributions to the 9-1-1 fund and the TRS fund by June 2, 2010; (2) reserved the Commission's right to perform an audit regarding TracFone's contributions into Ohio's 9-1-1 and TRS funds; (3) directed TracFone to continue to abide by the terms of its Compliance Plan, which was filed to advise the Commission as to how it would comply with the TracFone ETC Designation Order and the Entry on Rehearing; (4) directed TracFone to continue to provide quarterly reports to the Commission Staff regarding its operations; (5) directed TracFone to provide all data presented to the FCC for purposes of verifying subscribers' Lifeline eligibility; and (6) directed TracFone to respond to Commission Staff's requests for records and documents so that the Commission may monitor TracFone's provision of Lifeline service in compliance with the Commission's Orders regarding TracFone's ETC designation.⁴ In the May 13, 2010 Entry, the Commission also stated that it had decided to close Case No. 97-632-TP-COI, and address ETC designations in company-specific dockets. The Commission opened Case No. 10-614-TP-UNC solely for consideration of TracFone's designation as an ETC. The OCC

³ Entry on Rehearing, at 4.

⁴ Entry, at 2-3.

and the Edgemont Coalition and Appalachian Network filed motions to intervene in Case No. 10-614-TP-UNC, both of which are pending.

ARGUMENT

The OCC asserts that in the May 13, 2010 Entry, the Commission should have established “a specific deadline for deciding whether TracFone’s ETC certification should be continued, with such a deadline preceded by a public process that includes a hearing with opportunity for input by interested parties.”⁵ The Edgemont Coalition and Appalachian Network similarly claim that “the Commission must establish a procedural schedule, including ample discovery with evidentiary and public hearings” to decide whether to continue TracFone’s ETC designation.⁶ The Commission’s May 13, 2010 Entry requires TracFone to continue to provide quarterly reports and other information to the Commission and contemplates that TracFone will be receiving further requests for documents and information from Commission Staff. Neither the OCC nor the Edgemont Coalition and Appalachian Network raise any issues in their applications for rehearing that demonstrate that the Commission’s Entry was unreasonable or unlawful or that otherwise justify the Commission’s reconsideration of its Entry.⁷

I. The Commission’s Entry Established Reasonable and Lawful Guidelines for the Commission’s Review of TracFone’s ETC Designation Consistent with the Commission’s Previous Orders.

The Commission designated TracFone as an ETC after reviewing TracFone’s petition for ETC designation and TracFone’s detailed responses to three sets of data requests. As noted in the TracFone ETC Designation Order, the “OCC [had] advocate[d] that the Commission consider conducting a hearing regarding TracFone’s application in order to ensure that

⁵ OCC’s Memorandum in Support, at 11-12.

⁶ Edgemont Coalition and Appalachian Network’s Memorandum in Support, at 2.

⁷ See Ohio Adm. Code 4901-1-35(a).

designating TracFone as an ETC is in the public interest.”⁸ However, the Commission granted TracFone’s ETC petition “based on a review of the record in this proceeding” without conducting a hearing.⁹ The Commission also stated that “[a]t the conclusion of this interim period, the Commission will review the company’s operations for compliance with the FCC’s ETC requirements and the requirements of this order to determine if renewal of the ETC designation is appropriate.”¹⁰ There was no indication in the TracFone ETC Designation Order that the Commission’s review should include a public hearing or that it should differ from the procedure employed by the Commission when it initially reviewed TracFone’s ETC application and determined that designation of TracFone as an ETC would serve the public interest.

TracFone filed a motion for partial rehearing related to some of the conditions stated in the TracFone ETC Designation Order, including the one year interim designation. In opposing TracFone’s motion for partial rehearing, the OCC did not indicate that the Commission should hold a hearing when the Commission reviewed TracFone’s ETC designation. Rather, the OCC argued only that TracFone should not be concerned about the interim nature of its ETC designation so long as TracFone complied with the Commission’s directives regarding Lifeline service.¹¹ In the Entry on Rehearing, the Commission clarified that TracFone would be able to continue to provide Lifeline service in Ohio until the Commission ordered otherwise. The Commission further noted that TracFone “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.”¹²

⁸ TracFone ETC Designation Order, at 7.

⁹ Id., at 8.

¹⁰ TracFone ETC Designation Order, at 9.

¹¹ Memorandum Contra TracFone’s Motion for Partial Rehearing and Conditional Waiver by the Office of the Ohio Consumers’ Counsel, filed June 18, 2009, at 3.

¹² Entry on Rehearing, at 4.

Like the TracFone ETC Designation Order, the Entry on Rehearing does not indicate that the Commission would conduct a public hearing to determine whether TracFone's interim ETC designation should continue. The OCC did not seek clarification or appeal the Commission's procedural plan for reviewing TracFone's interim ETC designation by "review[ing] the company's operations for compliance," as stated in the TracFone ETC Designation Order, and by having TracFone "work with the Commission staff to verify its compliance" with Commission and federal Lifeline requirements, as stated in the Entry on Rehearing. The time for challenging the Commission's decision to have Commission staff and TracFone work together to verify TracFone's compliance with applicable law, has long passed. The OCC and the Edgemont Coalition and Appalachian Network may not belatedly attempt to alter the procedure established by the Commission when it designated TracFone as an ETC.

Furthermore, there is no requirement that the Commission set a deadline for making a determination on whether TracFone's interim ETC designation may be extended.¹³ The OCC and the Edgemont Coalition and Appalachian Network assert that the May 13, 2010 Entry "allowed the ETC designation to continue indefinitely while the Commission gathers more information."¹⁴ Neither the OCC nor the Edgemont Coalition and Appalachian Network provide any basis for assuming that the Commission will not diligently pursue its review of TracFone's interim ETC designation. Indeed, the Entry demonstrates that the Commission intends to consider TracFone's ETC designation in an efficient and prompt manner. As indicated in the Entry, the Commission requested TracFone to provide information regarding the 9-1-1 and TRS

¹³ See Edgemont Coalition and Appalachian Network's Memorandum in Support, at 2 ("It was unjust and unreasonable for the Commission not to establish a specific deadline for deciding whether TracFone's ETC certification should be continued.")

¹⁴ OCC's Memorandum in Support, at 2; Network and Coalition's Memorandum in Support, at 2.

funds by June 2, 2010. TracFone provided that information to Commission Staff by letter dated May 28, 2010.¹⁵ The Commission also directed TracFone to continue to provide quarterly reports and to respond to the Commission's requests for information. Moreover, the Commission opened a new docket to address TracFone's ETC designation. The Commission's actions evidence its intent to review TracFone's interim ETC designation consistent with the procedural guidelines established in the Commission's prior orders. Specifically, "TracFone may continue to provide its Lifeline service without interruption, subject to verification of compliance, until the Commission orders otherwise."¹⁶

II. The OCC and the Edgemont Coalition and Appalachian Network Do Not Raise Any Issues That Justify Rehearing of the May 13, 2010 Entry.

The OCC and the Network and Coalition both assert that a public hearing is necessary to evaluate TracFone's performance over the past year. However, neither the OCC nor the Edgemont Coalition and Appalachian Network identify any issues that require the Commission to modify the procedure for reviewing TracFone's interim ETC designation that was put in place at the time that the Commission designated TracFone as an ETC. The Edgemont Coalition and Appalachian Network state that the "investigation of TracFone must include the central issue of whether 68 minutes is adequate to meet the requirements for ETC designation."¹⁷ The OCC claims that 68 minutes of service is not comparable to the flat rate local service available from

¹⁵ The OCC's claim at page 9 of its Memorandum in Support, that it has not received information from TracFone is not justified. While the OCC has filed a Motion to Intervene in Case No. 10-614-TP-UNC, that motion is pending. Given that the OCC is currently not a party to the proceeding, TracFone is not required to provide the OCC with a copy of its submissions to Commission Staff. Notwithstanding the fact that OCC's Motion to Intervene has not been granted, TracFone and OCC have agreed that their prior protective agreement covers the instant proceeding and TracFone has provided OCC with copies of all reports filed with the Commission.

¹⁶ Entry on Rehearing, at 4.

¹⁷ Edgemont Coalition and Appalachian Network's Memorandum in Support, at 2.

ILECs in Ohio.¹⁸ TracFone's ETC petition advised the Commission that it would be providing 68 minutes of free airtime each month to its Lifeline consumers. The Commission, when designating TracFone as an ETC, did not require TracFone to provide additional minutes. Indeed, implicit in the Commission's designation of TracFone as an ETC is the conclusion that TracFone provides all of the supported services codified at Section 54.101 of the FCC's rules, including local usage (47 C.F.R. § 54.101(a)(2). Regarding TracFone's service plan, the Commission determined: "TracFone's service offering is unique inasmuch as it is a wireless service thereby extending the mobility benefits of wireless, as well as the credit protection due to the fact that a customer receives a specified number of monthly minutes and can also purchase specified incremental quantities in advance of utilizing the service."¹⁹ The Commission expressed no concerns about the adequacy of the number of airtime minutes being provided to TracFone's Lifeline customers. There is no basis for the Commission to now hold a public hearing to re-examine whether 68 minutes is adequate.

The OCC claims that based on data provided to the Commission Staff in TracFone's quarterly reports on its operations, the Commission should review the terms of TracFone's Lifeline service in a public hearing. However, the information that the OCC relies upon for its position actually demonstrates that TracFone's Lifeline customers do receive an adequate number of airtime minutes. In Ohio, approximately <<< BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL >>> of TracFone's Lifeline customers deplete the 68 minutes by the end of the month. However, only <<< BEGIN CONFIDENTIAL [REDACTED] END CONFIDENTIAL >>> of Lifeline customers purchase additional minutes and those customers on average purchase a TracFone airtime card in the amount of <<< BEGIN CONFIDENTIAL

¹⁸ OCC's Memorandum in Support, at 7.

¹⁹ TracFone ETC Designation Order, at 10.

████████████████████ END CONFIDENTIAL>>>. TracFone interprets this data to mean that <<< BEGIN CONFIDENTIAL ██████████ END CONFIDENTIAL >>> Lifeline customers are using their free airtime minutes, but <<< BEGIN CONFIDENTIAL ██████████ END CONFIDENTIAL >>> desire to purchase additional minutes. Moreover, based on Universal Service Administrative Company data, TracFone is serving more Lifeline customers than any other ETC in Ohio. If TracFone's Lifeline service was considered to be inadequate by low-income consumers, those consumers could obtain Lifeline service from one of several other ETCs in Ohio. The large number of low-income Ohio households who have enrolled in TracFone's Lifeline program in its first year of operation attest to the fact that many Ohio consumers find the SafeLink Wireless® offering sufficient and that the offering provides benefits that they consider to be invaluable.

The OCC also asserts that the Commission was unreasonable in not establishing a public review process regarding TracFone ETC designation because, as speculated by the OCC, TracFone is obligated to contribute to the 9-1-1 and TRS funds and is not doing so. The OCC provides no rationale as to why the Commission's current procedure as described in the Entry is not sufficient or why a public process for review of TracFone's ETC designation is required. As the Commission noted in the Entry, TracFone was directed to provide a demonstration of its contributions to the 9-1-1 and TRS funds. TracFone complied with that directive. In addition, the Commission reminded TracFone that it reserves the right to perform an audit regarding TracFone's contributions to the 9-1-1 and TRS funds.²⁰ The Commission is aware of and is evaluating TracFone's conduct as it relates to the 9-1-1 and TRS funds. No further procedures are justified or required.

²⁰ Entry, at 2.

CONCLUSION

Based on the foregoing, TracFone respectfully requests the Commission to deny the applications for rehearing filed by the OCC and the Edgemont Coalition and Appalachian Network and issue an order affirming the May 13, 2010 Entry.

Respectfully submitted,

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June 24, 2009

CERTIFICATE OF SERVICE

I, Raymond Lee, a Legal Secretary with the law firm of Greenberg Traurig, LLP, hereby certify that a copy of the foregoing TracFone Wireless, Inc.'s Memorandum Contra Application for Rehearing by the Office of the Ohio Consumers' Counsel was served electronically to the persons listed below, on this 24th day of June 2009.

/s Raymond Lee

Raymond Lee

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Case No(s). 10-0614-TP-UNC

Summary: Memorandum Memorandum Contra Applications for Rehearing by the Office of the Ohio Consumers' Counsel and the Edgemont Neighborhood Coalition and the Appalachian Peace & Justice Network electronically filed by Mrs. Debra M Mercer on behalf of TracFone Wireless, Inc.