

**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 REPLY TO THE MEMORANDUM IN OPPOSITION  
OF THE APPALACHIAN PEACE AND JUSTICE NETWORK AND EDMONT  
NEIGHBORHOOD COALITION TO MOTION FOR PROTECTIVE ORDER**

TracFone Wireless, Inc. (“TracFone”), by its attorneys and pursuant to Chapter 4901-1-12(B)(2) of the Ohio Administrative Code, hereby files this Reply to the Memorandum in Opposition of the Appalachian Peace and Justice Network and Edgemont Neighborhood Coalition to TracFone’s Motion for a Protective Order (“Intervenors’ Opposition”)<sup>1</sup>. The Intervenors’ Opposition is based on the Intervenors’ incorrect assumptions regarding the data for which TracFone seeks protection and about TracFone. Moreover, the Intervenors disregard Commission precedent that supports TracFone’s position that the data at issue should be protected from public disclosure.

**INTRODUCTION**

As stated in TracFone’s Motion for Protective Order, TracFone seeks confidential treatment by the Commission of certain confidential, competitively sensitive, and proprietary information contained in its Memorandum Contra Application for Rehearing, filed June 24, 2010 cited in its Memorandum Contra: (1) the percentage of TracFone’s Lifeline customers who deplete the 68 minutes by the end of the month; (2) the percentage of TracFone’s Lifeline

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<sup>1</sup> The Appalachian Peace and Justice Network and Edgemont Neighborhood Coalition are Intervenors in this case.

customers who purchase additional airtime minutes; (3) the total amount paid by Lifeline customers for those additional minutes; (4) the value of the airtime cards purchased by Lifeline customers who buy additional airtime minutes; and (5) TracFone's characterization of the percentages in items (1) and (2). As explained in TracFone's Motion, the information in items (1), (2), (3) and (4) is contained in the quarterly reports or can be calculated or inferred from the quarterly reports. The information in item (5) describes the data disclosed in percentages in terms of magnitude. The Intervenors do not dispute that the information for which TracFone seeks protection is contained in or derived from the quarterly reports TracFone submitted to Commission Staff. The Intervenors assert that the quarterly reports should be public because they are not trade secrets and because public policy requires that TracFone make its customer data available to all members of the public, especially to competitors. The Intervenors' position is not supported by fact or law.

## **ARGUMENT**

### **I. The Information for Which TracFone Seeks Protection Qualifies as Trade Secrets under Ohio Law.**

TracFone's Motion for Protective Order contained sufficient information for the Commission to determine that the data in the quarterly reports constitute trade secrets that may not be disclosed to the public. In particular, TracFone noted that the information was not generally known nor available to any third party other than to the Office of Ohio Consumers' Counsel ("OCC") pursuant to a protective agreement. Thus, there is no way for others to develop the data. In addition, TracFone described the economic value of the data to it and to existing and potential competitors. TracFone clarifies that application of the six factors identified by the Ohio Supreme Court for determining whether information constitutes a trade secret subject to confidential treatment requires the Commission to deny the records request. See

State ex rel. The Plain Dealer v. Ohio Dept. of Ins., 80 Ohio St.3d 513, 525, 687 N.E. 2d 661, 672 (1997) (citing Pyromatics, Inc. v. Petruziello, 7 Ohio App.3d 131, 134-35, 454 N.E.2d 588, 592 (1983)).

First, the information is not known to anyone outside of TracFone, other than to the Commission Staff and to OCC. TracFone provided the information to Commission Staff with the understanding that it would be treated as confidential. The Commission's rules provide that informal submissions of information to Commission Staff are treated as confidential. See OAC 4901-1-24(G). Indeed, Commission Staff has treated the quarterly reports as confidential by alerting TracFone to public records requests for the reports and allowing TracFone an opportunity to work with the entity that requested the reports to negotiate disclosure of the reports or to file a motion for protective order. Other than Commission Staff, the only entity to receive the quarterly reports is OCC. However, OCC's receipt of the quarterly reports is pursuant to a Protective Agreement between OCC and TracFone. TracFone has not provided the information in the quarterly reports to any other third party nor is it subject to any legal obligation to disclose this information to any public entity. As such, the information contained in the quarterly reports is not readily available to persons external to TracFone.

Second, the information in the quarterly reports is only known by those few TracFone employees who collect and analyze relevant data and prepare the reports. Moreover, the quarterly reports are not readily available to TracFone employees outside of those employees who work on the reports.

Third, TracFone has taken precautions to guard the secrecy of the quarterly reports. As mentioned above, TracFone has not disclosed the reports to anyone other than Commission Staff and OCC pursuant to a Protective Agreement. TracFone is also filing, concurrent with this

Reply, a motion for protective order regarding the entirety of the quarterly reports. TracFone's filing of the Motion for Protective Order regarding portions of the Memorandum Contra further demonstrates TracFone's efforts in maintaining the confidentiality of the quarterly reports.

Fourth, TracFone derives value from keeping the information contained in the quarterly reports from competitors. The information contained in TracFone's quarterly reports, and referenced in the Memorandum Contra, is highly confidential and competitively sensitive. The information, which discloses the number of customers and describes the airtime usage and purchase activities of TracFone's Lifeline customers, if disclosed to the public, would provide existing and potential competitors with an unfair advantage by giving them access to proprietary TracFone customer data that is not generally known. Such access would give current and prospective competitors an unwarranted economic advantage in developing and marketing Lifeline services, as well as non-Lifeline services, to consumers in Ohio and elsewhere, in competition with TracFone. Moreover, the information has independent economic value to TracFone because TracFone relies on its customers' usage and purchasing data to assess the effectiveness of its service plans and to determine and to revise, as necessary, its marketing and sales strategies. The fact that TracFone's actual marketing strategy is not disclosed in the quarterly reports has no bearing on whether the reports contain trade secret information. Moreover, the data at issue are not "merely numbers" as alleged by Intervenor.<sup>2</sup> Knowledge of the data at issue in this Motion, including information about TracFone's customers' usage patterns and airtime purchases, allows TracFone to assess whether its service plan meets the needs of Lifeline customers. Competitors could use that information to develop their own

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<sup>2</sup> See Intervenor's Opposition, at 5.

Lifeline plans, which in their assessment based on that data would better meet the needs of low-income consumers.

Fifth, TracFone expends significant resources in creating the quarterly reports. The Intervenor incorrectly assume that it is likely that the data in the quarterly reports is generated with minimal effort as part of TracFone's general business practice.<sup>3</sup> TracFone does not maintain the data required for the reports as part of its normal business routine. As such, TracFone employees responsible for the reports devote a significant amount of time analyzing and organizing the data to develop the reports. TracFone is not required to conduct the data maintenance and analysis required for the Ohio quarterly reports for any of the other 31 jurisdictions in which it has been designated as an ETC. While TracFone understands that it is required to comply with the Commission's Entry directing the filing of the quarterly reports, maintaining the data and conducting the analysis necessary for the reports is extremely burdensome.

Sixth, others are not able to obtain the information contained in the quarterly reports because no part of the information in the reports is publicly available. The only means for any third party, including the Intervenor, to gain access to the reports is through a public records request or through negotiating a protective agreement with TracFone. The Intervenor incorrectly rely on R.C. §§ 4901.12 and 4905.07 for their position that the quarterly reports are public records that can be easily acquired by any third party. First, TracFone's quarterly reports were not submitted to the Commission as part of a proceeding. Rather, TracFone provided the reports to Commission Staff, which is required by Commission rules 4901-1-24(G) to keep the reports confidential. Second, the Intervenor may not simply obtain the quarterly reports through

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<sup>3</sup> Id., at 6.

a records request. As the Intervenor is aware, because they have initiated a records request for the quarterly reports, TracFone has the opportunity to file a motion for protective order to prevent public disclosure of information submitted to Commission staff, and the Commission must rule on such a motion before any public disclosure is made. TracFone also has the opportunity to appeal the Commission's ruling. Thus, Intervenor's access to the quarterly reports is not guaranteed through a records request.

Based on the application of the six factor test, the quarterly reports constitute trade secrets that may not be disclosed to the public. As such, the information in the Memorandum Contra contained in or derived from the quarterly reports should be protected from public disclosure.

## **II. TracFone's Status as the Only Wireless Eligible Telecommunications Carrier in Ohio Does Not Warrant Public Disclosure of the Confidential Information in TracFone's Quarterly Reports.**

The Intervenor incorrectly assert that TracFone, as the only wireless Eligible Telecommunications Carrier ("ETC") in Ohio, has a "monopoly" over a publicly-funded market, and as such, the public interest requires TracFone to disclose its confidential competitively-sensitive information.<sup>4</sup> While TracFone, at this time, is the only wireless ETC in Ohio, it is not the only ETC in Ohio nor does it have a monopoly in the wireless services market. According to the most recent Universal Service Administrative Company ("USAC") reports, there are 43 ETCs in Ohio in addition to TracFone. Furthermore, TracFone does not have monopoly power in the provision of wireless service in Ohio nor in any other state. All of TracFone's services, including its Lifeline service, are subject to competition. In Ohio, any telecommunications carrier can file a petition with the Commission to be designated as an ETC. TracFone's

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<sup>4</sup> Id., at 7-8.

existence as an ETC does not prevent any other wireless carrier from seeking to provide Lifeline service.

The Intervenor's rely on Indiana state cases to support their position that the information in TracFone's quarterly reports is not protected from public disclosure.<sup>5</sup> However, those cases have no relevance to or precedential weight before this Commission. Indeed, the Commission's own precedent supports the conclusion that TracFone's quarterly reports, including the information from those reports cited in the Memorandum Contra, should remain confidential. In In the Matter of the Joint Application of Frontier Communications Corporation, New Communications Holdings, Inc., and Verizon Communications Inc. for Consent and Approval of a Change in Control, Entry, Case No. 09-454-TP-ACO (Ohio Public Utilities Commission: November 24, 2009), an attorney examiner granted a motion for protective order regarding information similar to the information contained in the quarterly reports. In granting the motion the attorney examiner stated:

Upon review of the material, the attorney examiner finds, among other sensitive data, information that appears to reveal matters relating to the number of service orders, the number of customers, the number of port orders, broadband services, and projected capital investment. Because the information appears that it would be of value to competitors, the attorney examiner finds that the information should be protected as trade secret information.

TracFone's quarterly reports contain similar types of information, including number of customers, which was used to calculate the percentage of TracFone's Lifeline customers who deplete the 68 minutes by the end of the month and the percentage of TracFone's Lifeline customers who purchase additional airtime minutes number of applications for service – two of the items referenced in the Memorandum Contra that TracFone seeks to have protected from public disclosure.

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<sup>5</sup> Id. at 9.

An attorney examiner of this Commission also has held that customer count and volume information, in the case of a natural gas provider, was competitively sensitive and should be afforded protection from public disclosure. See In the Matter of the Application of Metromedia Energy, Inc. for Renewal of Certification As a Retail Natural Gas Supplier, Entry, Case No. 02-1926-GA-CRS (Ohio Public Utilities Commission: October 5, 2006); see also In the Matter of the Applications of: Energy Cooperative of Ohio, and Metromedia Energy, Inc. for Certification as a Retail Natural Gas Supplier in the State of Ohio, Entry, Case Nos. 02-1891-GA-CRS, 02-1926-GA-CRS (Ohio Public Utilities Commission: September 16, 2004 (customer count and volume data protected). TracFone's data regarding its customer's airtime usage and purchase activities, which is contained in the quarterly reports and cited to in the Memorandum Contra, similarly should be protected from public disclosure.

Furthermore, TracFone is not attempting to rely on the trade secrets statute to "stifle competition or hide the fact that a market exists for potential competition."<sup>6</sup> TracFone is not restricting competition by wanting to keep its confidential customer data from the public, including its competitors. Intervenor's assertion that other ETCs have disclosed data about their Lifeline customers has no bearing on whether TracFone may lawfully seek to protect its customer data from disclosure.<sup>7</sup> Each carrier can determine for itself whether it wants its customer data to remain confidential. In addition, TracFone cannot hide the fact that there is a potentially competitive market for Lifeline services in Ohio. Publicly-available USAC data indicate that in 2009, between 20 and 50 percent of households eligible for Lifeline in Ohio

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<sup>6</sup> Id. at 8.

<sup>7</sup> Id., at 10.



actually were enrolled in Lifeline programs.<sup>8</sup> A review of publicly available USAC data, not a review of TracFone's confidential customer data, indicates that the Lifeline services market in Ohio is potentially competitive.

Finally, Intervenors' claim that the public has a right to know how TracFone spends funds received from federal Universal Service Fund ("USF") does not address the information for which TracFone seeks protection.<sup>9</sup> TracFone's Lifeline plan clearly discloses how TracFone is using federal USF funds to provide Lifeline service. The information in the quarterly reports and referenced in the Memorandum Contra concerns the airtime usage and airtime purchase patterns of TracFone's Lifeline customers. It does not reveal how federal USF funds are used. Intervenors have not asserted any valid basis for denying TracFone's Motion.

### **CONCLUSION**

Based on the foregoing, the information in the Memorandum Contra for which TracFone seeks confidential treatment is contained in or is directly derived from TracFone's confidential quarterly reports submitted to Commission Staff. Those quarterly reports contain highly confidential trade secret information that may not be disclosed to the public. TracFone respectfully requests the Commission to grant its Motion for Protective Order and to issue an order protecting the portions of its Memorandum Contra identified as confidential from public disclosure.

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<sup>8</sup> See 2009 Participation Rates by State, available at <http://www.usac.org/li/about/participation-rate-information.aspx>.

<sup>9</sup> Intervenors' Opposition, at 10-11.

Respectfully submitted,

**TRACFONE WIRELESS, INC.**

/s Mitchell F. Brecher

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August 10, 2010

### **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 Reply to the Memorandum in Opposition of the Appalachian Peace and Justice Network and Edgemont Neighborhood Coalition to Motion for Protective Order was served electronically to the persons listed below, on this 10<sup>th</sup> day of August 2010.

/s Raymond Lee  
Raymond Lee

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