

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN INQUIRY INTO THE STATE)	CASE NO.
UNIVERSAL SERVICE FUND)	2016-00059

COMMENTS IN RESPONSE TO APRIL 20, 2017 ORDER

TracFone Wireless, Inc. (“TracFone”), by its attorneys, hereby comments on the issues raised by the Commission’s April 20, 2017 order in this proceeding (“April 20 Order”).

In its April 20 Order, the Commission largely denied several requests, including TracFone’s, for rehearing of its prior order issued March 10, 2017 in this proceeding (“March 10 Order”). In that March 10 Order, the Commission surprised and disappointed Kentucky telecommunications providers, the Commonwealth’s Attorney General, and, most importantly, tens of thousands of low-income Kentucky households, by announcing without benefit of a factual record, that it would be limiting Kentucky Universal Service Fund (“KUSF”) support for Lifeline service to that provided by one select group of Lifeline providers – the Commonwealth’s incumbent wireline telephone companies. The impact of that ruling will be profound. More than 90 percent of low-income Kentucky households enrolled in Lifeline programs have chosen to receive their Lifeline-supported services from wireless Lifeline providers, including TracFone. Elimination of KUSF support for wireless Lifeline will deprive nearly all Kentucky Lifeline consumers of any state Lifeline support, while limiting availability of KUSF support for Lifeline to those relatively few Kentucky’s Lifeline households who have elected to obtain their Lifeline-supported services from wireline telephone companies.

The April 20 Order acknowledges that, subsequent to issuance of the March 10 Order, Kentucky law was changed by the enactment of Senate Bill 10 on March 20, 2017. That law change is significant and undermines much of the theoretical predicate upon which the Commission's decision to exclude wireless Lifeline service from access to the KUSF was based. Yet, the Commission's determination to deny KUSF support to those Kentucky consumers who have opted for wireless Lifeline solutions was reached with no regard for that important law change. Further, in addition to seeking comment on the impact of Senate Bill 10, the Commission stayed its March 10 Order. As a result of that stay, for the indefinite future, all wireline telephone companies as well as those wireless carriers who currently receive KUSF support will continue to receive KUSF support for their Lifeline services. However, other wireless carriers, including, for example, TracFone, which petitioned the Commission in November 2016 for permission to receive KUSF support, will continue to be denied access to KUSF funding which will limit their ability to provide enhanced Lifeline service to its Kentucky Lifeline consumers.

Pursuant to Senate Bill 10, the Commission no longer has jurisdiction over the terms, conditions, rates or availability of retail services provided by wireline local exchange carriers as of September 1, 2017. In short, wireline telephone companies – the very companies to which the Commission has accorded exclusive access to KUSF support for Lifeline – will be largely unregulated by the Commission. Indeed, as a result of Senate Bill 10, those companies will no longer be required to provide service, including Lifeline service, and will be free to withdraw their Lifeline offerings. One such wireline carrier – AT&T – already has discontinued Lifeline service in various states and is expected to do so in Kentucky.

Just as Section 332 of the Communications Act of 1934, as amended (47 U.S.C. § 332), precludes the Commission from regulating the rates of commercial mobile radio service providers, so too, will Senate Bill 10 preclude the Commission from regulating the rates of incumbent wireline telephone companies. Yet, only the latter will continue to be allowed to provide Lifeline service supported by the KUSF to their consumers. The public interest compels that the Commission determine, based on an evidentiary record, whether low-income consumers of one category of unregulated Lifeline providers' services (wireline telephone companies) should continue to receive KUSF support (at increased levels), while denying KUSF support to low-income consumers of another category of unregulated Lifeline providers services (wireless carriers).

Moreover, the Commission's March 10 Order and its April 20 Order are predicated on a false premise, *i.e.*, that according exclusive access to the KUSF to wireline telephone companies is somehow appropriate to offset the Federal Communications Commission's ("FCC") purported elimination of federal Universal Service Fund support for wireline telephone companies.¹ Contrary to what is stated in either prior Commission order, **the FCC did no such thing**. What the FCC has done in its 2016 Lifeline Modernization Order² is modernize the Lifeline program to support broadband Internet access service as well as voice telephone service and, by 2021, to phase out support for voice-only Lifeline service. The FCC is not eliminating federal support for wireline telephone companies; it is eliminating federal support for voice-only Lifeline service, whether those services are provided by wireline telephone companies or by wireless carriers. The FCC's Lifeline rules, unlike the Commission's actions in this proceeding, are competitively

¹ April 20 Order at 4.

² Lifeline and Link Up Reform and Modernization, et al (Third Report and Order, Further Report and Order, and Order on Reconsideration), 31 FCC Rcd 3962 (2016).

neutral in that the FCC's requirements are equally applicable to wireline and wireless Lifeline providers and neither favor nor disfavor any Lifeline provider based on the technology used by the provider to deploy Lifeline services. All Lifeline providers – wireless and wireline – must provide broadband service in order to receive federal support. Wireless Lifeline providers and wireline Lifeline providers who do not offer broadband service may no longer receive federal USF support.³

Kentucky's wireline telephone companies have the same opportunity to continue to receive federal support as do wireless carriers. That support remains available to any Lifeline provider – wireline or wireless – which offers broadband service. Moreover, as of December 2021, no Kentucky Lifeline providers – wireline or wireless – will be allowed to receive federal Universal Service Fund support for Lifeline programs which do not include broadband services which meets the FCC's then-applicable minimum service standards.

The FCC's Lifeline rules do not disadvantage wireline telephone companies as asserted by the Commission. In fact, the FCC rules provide wireline telephone companies with an additional measure of protection not available to wireless carriers by exempting them from the generally-applicable minimum service standards for broadband Internet service in certain circumstances.⁴ The FCC rules provide for no such exemption for wireless Lifeline providers. As a result, Kentucky's wireline telephone companies are less susceptible to loss of federal

³ The Commission is not alone in its misperception that the FCC has eliminated federal Lifeline support for wireline services. That myth also has been articulated by the Windstream Companies. See the Windstream Companies' Brief in Response to Commission's April 20, 2017 Order, filed May 9, 2017, at 2 ("As a result of the federal USF subsidy to landline customers being phased out over the next few years, the Commission's finding that the KUSF support will need to be increased to benefit those landline customers in order to satisfy this guiding principle of providing quality service at just reasonable and affordable rates is justifiable, appropriate and laudable.").

⁴ Lifeline Modernization Order, at ¶¶ 107 – 112. 47 C.F.R. § 54.408(d).

Universal Service Fund support than are those wireless Lifeline providers operating in Kentucky. That important factual circumstance is not changed by enactment of Senate Bill 10.

Neither does the Commission's professed concern about the impact on the elderly population of reduced Lifeline funding warrant according preferential treatment to wireline telephone companies. In the March 10 Order, the Commission notes that of Kentucky's 17,000 wireline Lifeline customers, 56 percent are over 65. That aging demographic of the Lifeline population is not limited to those consumers who obtain Lifeline service from wireline telephone companies. TracFone's Lifeline customers also include many elderly persons. It estimates that nearly 30% of its Lifeline customers are between 45 and 55; about 25% are between 55 and 65; and that more than 20% are older than 65. Based on the 66,569 TracFone Lifeline customers referenced in the March 10 Order, nearly 50,000 are older than 45 and more than 13,000 are above 65. TracFone expects that other wireless Lifeline providers also serve many elderly Kentucky residents. Those Kentucky consumers are every bit as reliant on their Lifeline services as are the wireline telephone companies' Lifeline customers and are no less deserving of KUSF support.

As noted correctly in the April 20 Order, the FCC, in its Lifeline Modernization Order, acknowledged that states may establish their own Lifeline programs. However, the Commission then proceeded to ignore the fact that the statutory grant of state authority to establish their own programs contains an important explicit condition. Section 254(f) of the Communications Act (47 U.S.C. § 254(f)) empowers states to adopt regulations to preserve and advance universal service, provided that such state regulations are “**not inconsistent with the [Federal Communications] Commission's rules.**” (emphasis added). The Commission's authority to establish rules governing the Kentucky Lifeline program is explicitly conditioned on those rules

not being inconsistent with the FCC's Lifeline rules. The FCC's rules do not limit Lifeline support to wireline telephone companies. Indeed, the FCC rules allow wireless and wireline Lifeline providers to receive federal support and those rules do not discriminate against any category of Lifeline provider with regard to the level of federal support available. By limiting the Kentucky Lifeline program's availability to consumers of wireline telephone companies only, the Commission's rules governing access to KUSF support are facially inconsistent with the FCC's rules and, as such, are in violation of 47 U.S.C. § 254(f).

The Commission's decision to limit KUSF support to wireline telephone companies set forth in the March 10 Order and affirmed in the April 20 Order is based on the Commission's stated concern about the potential growth in the KUSF and need to raise the monthly charge if low-income Kentucky consumers are allowed to receive Lifeline service supported by the KUSF as well as federal support. Whether or not allowing wireless Lifeline service to be supported by the KUSF will increase the size of the KUSF may not be impacted by Senate Bill 10. However, there is no evidentiary basis to support the conclusion that the size of the KUSF and resulting customer charges would increase to levels speculated by the Commission in the March 10 Order.

In its application for rehearing, TracFone recognized the Commission's concerns about fund growth and suggested that, rather than discriminating against wireless Lifeline service providers and their consumers, the Commission could address the potential funding shortfall by modifying the level of KUSF support available to all Lifeline providers, perhaps by reducing the monthly support amount. The Commission acknowledged that suggestion in the April 20 Order.⁵ After acknowledging that proposal, the Commission proceeded to ignore it. Nowhere in the April 20 Order does the Commission offer any explanation as to why the proposed

⁵ April 20 Order at 3.

alternative of modifying the support level available to all Lifeline providers should not be considered as an alternative to abolishing KUSF support for wireless Lifeline. Neither does it offer any reason why the current KUSF support level not be modified so as to ensure sufficient funding for all Lifeline services without increasing the size of the KUSF more than necessary.

In its application for authority to receive KUSF support, TracFone committed to providing every Kentucky Lifeline customer with an additional 250 minutes of wireless usage per month if its application were granted. If, as suggested by TracFone, the Commission were to address the concerns about fund growth by reducing the monthly support amount, TracFone might not be able to provide an additional 250 minutes as it committed to do with a \$3.50 monthly KUSF support payment. However, even at a reduced KUSF funding level, it could – and would – provide a substantial increase in monthly Lifeline service benefits.

Finally, TracFone urges the Commission to consider one additional factor regarding the impact of Senate Bill 10. Under that law, wireline telephone carrier rates will no longer be regulated. Thus, such carriers will be free to raise their rates based upon their perceptions of market conditions. Armed with exclusive access to KUSF funding – funding which will be increased to \$7.50 per customer per month,⁶ those carriers will be free to raise their rates and offer their “discounted” Lifeline services at prices below their unilaterally increased rates. In short, insulated from wireless Lifeline competition, those carriers will be able to retain for themselves much, or possibly all, of their KUSF support, with no regulatory scrutiny. It is difficult to imagine how that will benefit Kentucky consumers, particularly, low-income, Lifeline-eligible consumers. Kentucky Lifeline customers deserve better. They deserve an opportunity to obtain their Lifeline services from a variety of providers based on their

⁶ March 10 Order at 10.

perceptions of which providers and which services best meet their needs. Consumer choice should not be compromised by awarding a Commission-made pricing advantage to one select group of unregulated providers.

Accordingly, TracFone respectfully requests that the Commission promptly and thoroughly consider the impact of Senate Bill 10 on its March 10 Order and its April 20 Order, and that it determine upon further reflection to allow all Lifeline providers to access KUSF support on a non-discriminatory basis.

Respectfully submitted,

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