

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:)	
)	
AN INQUIRY INTO THE STATE)	CASE NO.
UNIVERSAL SERVICE FUND)	2016-00059
)	

TRACFONE WIRELESS, INC.’S COMMENTS

TracFone Wireless, Inc. (“TracFone”), by its attorneys, hereby comments on the issues raised by the Kentucky Public Service Commission (“Commission”) in its May 20, 2019 Order issued in this proceeding (“May 20, 2019 Order”). In that May 20, 2019 Order, the Commission identifies changes in participation in the Lifeline program by low-income Kentucky consumers and changes in Federal Communications Commission (“FCC”) regulations and policy governing local telecommunications service pricing and support for such service. As will be described in these comments, those changes warrant that the Commission revisit its 2017 decision to limit Kentucky Universal Service Fund (“KUSF”) Lifeline support to the Lifeline services of Kentucky’s landline local exchange carriers – services whose enrollments have been steadily declining for several years.

BACKGROUND

In its May 20, 2019 Order, the Commission requests comment regarding how recent developments may impact decisions made in a prior order issued in this docket on March 10, 2017 (“March 10, 2017 Order”). In the March 10, 2017 Order, the Commission determined that after April 30, 2017, support from the KUSF would cease to be available to low-income consumers of wireless Lifeline service providers, and would be limited to low-income consumers of landline Lifeline service providers. The Commission stated in March 2017 that this decision

was necessary in light of increased demand on the KUSF from wireless carriers that had been authorized to receive support, such as i-wireless, LLC (“i-wireless”),¹ as well as from two wireless carriers (*i.e.*, American Broadband and Telecommunications Company (“American Broadband”) and TracFone) that had petitioned the Commission to be certified to receive KUSF support.

The Commission also decided in the March 10, 2017 Order that it would increase the amount of KUSF support provided to landline Lifeline providers from \$3.50 to a maximum of \$7.50, on a cent by cent basis, to offset the corresponding decrease in federal Lifeline support available to voice-only Lifeline service providers pursuant to Section 54.403 of the FCC’s Rules (47 C.F.R. § 54.403).² The Commission explained that the then-announced (but since rescinded) FCC rate floor for rural local exchange carriers (“RLECs”), caused it to limit KUSF support to those rural landline telephone companies and to increase the level of KUSF support for those landline Lifeline providers.

On April 20, 2017, the Commission issued an Order staying enforcement of the March 10, 2017 Order so that the Commission could consider the impact of an important change in Kentucky law. Specifically, KRS 278.5435 was amended so as to eliminate the Commission’s

¹ The Commission was especially concerned about a pending transaction whereby Sprint Corporation and Virgin Mobile USA, L.P., operating under the brand Assurance Wireless, would transfer approximately 13,000 Lifeline customers in Kentucky to i-wireless, thereby adding an additional \$45,000 monthly liability to the KUSF.

² Under 47 C.F.R. § 54.403, the amount of federal Lifeline support for a Lifeline provider (wireless or wireline) offering standalone voice service or voice service bundled with broadband service that does not meet applicable FCC minimum service standards is \$9.25 per month until November 30, 2019. That support level will decrease to \$7.25 on December 1, 2019, to \$5.25 on December 1, 2020, and to \$0 on December 1, 2021. Contrary to the suggestion of the Commission, that phase-out of federal support for voice-only Lifeline service is not limited to landline local exchange services. It is equally applicable to landline and wireless voice-only Lifeline services whose Lifeline offerings do not meet the applicable minimum service standards.

regulatory jurisdiction over basic landline local exchange service. In short, the effect of amended KRS 278.5435 was to afford those landline local exchange carriers exclusive access to KUSF Lifeline support while allowing those providers to charge whatever they believe the market would bear for their services. Since April 20, 2017, the Commission has not processed any pending petitions from wireless Lifeline providers seeking KUSF support and one of the two wireless Lifeline providers identified in the March 10, 2017 Order has since withdrawn its petition to receive KUSF support.³ In addition, the Commission's concern about an increase in the number of i-wireless Lifeline customers never materialized because the pending transaction that would have caused the transfer of approximately 13,000 Lifeline customers to i-wireless was terminated by mutual agreement of the parties on April 24, 2017. On June 11, 2019, the Commission issued an Order in which it opened a new docket to address TracFone's petition for KUSF support, which has been pending for over two years, and asked TracFone to update its petition.⁴ TracFone appreciates the Commission's willingness to consider its long-pending petition and it will submit an updated petition on or before July 11, 2019, in accordance with the Commission's Order.

The Commission now requests comment about whether it should vacate or modify its March 10, 2017 Order restricting KUSF support to landline Lifeline providers given that (1) the FCC has eliminated the rate floor for RLECs and (2) the number of landline customers and the amount of the requests for disbursements from the KUSF have decreased.

³ See March 10, 2017 Order, at 6-7. On October 18, 2018, American Broadband withdrew its petition to receive support from the KUSF. See *Petition of American Broadband and Telecommunications Company for Reimbursement from Kentucky Universal Service Fund as an Eligible Telecommunications Carrier*, Order, Case No. 2016-00426 (October 30, 2018).

⁴ See *Petition of TracFone Wireless, Inc. to Amend Its Designation as an Eligible Telecommunications Carrier to Receive Kentucky Universal Service Support for Lifeline Service*, Order, Case No. 2019-000185 (June 11, 2019).

I. The FCC’s Elimination of the Rate Floor on RLEC Pricing Removes that Factor as a Basis for Limiting KUSF Support to Landline Lifeline Providers.

In the March 10, 2017 Order, the Commission explained its decision to limit KUSF support to landline Lifeline service providers by pointing to: (1) the decrease in federal USF support that would be available to voice-only Lifeline carriers under 47 C.F.R. § 54.403; (2) FCC rules that reduced to zero the access rates rural carriers traditionally had been permitted to charge interexchange carriers for access to their networks; and (3) FCC rules which require RLECs to charge minimum benchmark rates, which would increase annually, to offset a phased reduction in high-cost loop support from the federal USF. The Commission explained that these conditions would lead to a substantial increase in monthly charges for basic local exchange service, especially for landline customers in rural areas where the landline Lifeline service provider is also the only incumbent carrier. Furthermore, according to the Commission, KUSF support would become even more important to customers affected by increased monthly charges for basic telephone service.⁵

TracFone agrees that the recent FCC decision to eliminate the minimum benchmark rate or “rate floor” for RLECs is a significant change that warrants re-examination of the Commission’s prior decision to limit KUSF support to Lifeline customers of landline telephone companies. RLECs will no longer risk losing support from the high-cost portion of the federal USF if they do not charge a certain FCC-mandated amount for their services – an amount that would have led to rate increases each year. The Commission asks what effect the FCC’s elimination of the rate floor will have on the price of landline service. TracFone is not aware of Kentucky landline carriers’ pricing strategies. However, the absence of a federally-required rate floor will enable Kentucky landline carriers to develop prices based on actual costs and other

⁵ See March 10, 2017 Order, at 9.

factors, given the latitude to do so as a result of the deregulation codified into Kentucky law as part of KRS 278.5435. TracFone expects that landline carriers will charge competitive prices to maintain their businesses, rather than inflated prices that are no longer incentivized by the FCC's rules. As such, there is no reason to rely on the no longer existent federally-mandated floor for RLEC rates as justification for limiting KUSF support to landline Lifeline service providers.

II. The Decline in the Number of Landline Customers and Requests for Payments from the KUSF Reflect Decreased Demand for Landline Lifeline Services.

The Commission observes that since the March 10, 2017 Order, the number of landline Lifeline customers has decreased from approximately 15,000 in March 2017 to approximately 8,800 in March 2019. The Commission also discloses that there has been a decrease in the total amount of the requests for disbursements from the KUSF. In addition, since the March 10, 2017 Order, the Commission has decreased the monthly surcharge twice – from \$0.14 to \$0.09 on August 31, 2017 and from \$0.09 to \$0.07 on February 17, 2019.

The primary reason for the decrease in landline Lifeline customers is that Lifeline-eligible low-income Kentucky consumers, when given a choice, prefer mobile wireless Lifeline services over fixed landline Lifeline services. Many Kentucky Lifeline-eligible low-income consumers have decided to cease receiving landline Lifeline service, and instead have opted for the convenience and mobility of wireless service, the all-distance calling availability, and the included service features such as call waiting, caller ID and three-way calling, and/or because they desire the benefit of mobile broadband Internet access service, which is often bundled with wireless service. Indeed, data regarding the federal USF demonstrate the large and growing demand by low-income Kentucky consumers for wireless Lifeline services. Specifically, during the period of January through March 2019, wireless Lifeline service providers received over 94

percent of federal USF support for customers residing in Kentucky.⁶ TracFone expects that the percentage of consumers who choose wireless over landline service will continue to increase in Kentucky as they have throughout the nation. Allowing wireless Lifeline providers to receive KUSF support will enable those providers to enhance their offerings to low-income Kentuckians.⁷

The Commission also requests comment regarding the reason for a decrease in the total amount of requests for KUSF support. The primary reason for the decrease in KUSF Lifeline disbursements is that there are fewer landline Lifeline customers. Prior to the March 10, 2019 Order, the Commission also authorized wireless Lifeline carriers to receive KUSF support. TracFone understands that at least one wireless Lifeline carrier, i-wireless, is currently receiving KUSF support. However, because information about the balance of the KUSF or the amount of support provided to each Lifeline carrier in Kentucky is not available, TracFone is unable to discern whether any wireless carriers, along with landline carriers, are requesting less KUSF support for Lifeline service. Nevertheless, the fact that there is a lower demand for KUSF support relieves the pressure on the fund that had been the reason for the Commission's 2017 decision to limit KUSF support to landline Lifeline carriers.

Although the number of landline Lifeline customers and the amount of disbursements from the KUSF have decreased, neither of these changes eliminates the value of the KUSF support to those low-income Kentucky residents who qualify for Lifeline service and who would

⁶ See LI05 Annual Low Income Support Claimed by State and Company January 2016 through March 2019.xlsx, available at <http://www.usac.org/about/tools/fcc/filings/2019/q3.aspx>.

⁷ The details of TracFone's service proposals will be set forth in its revised petition due on or before July 11. TracFone plans to offer Kentucky Lifeline customers two service options if allowed by the Commission to do so: 1) 1,350 voice minutes plus 700 MB of mobile broadband; or 2) 1,024 voice minutes plus 2,048 GB of mobile broadband. Based upon publicly-available filings, no other Lifeline provider in Kentucky, including those wireless providers already receiving KUSF support, even come close to providing Lifeline service with comparable value.

benefit from enhanced Lifeline service offerings made possible by a combination of federal Lifeline support and KUSF support. The availability of additional Lifeline support to Kentucky Lifeline customers through the KUSF would enable those low-income Kentucky households to receive increased service benefits so that their service would be more comparable to that received by non-Lifeline customers. TracFone urges the Commission to recognize that the decrease in KUSF disbursements is the result of decreased demand for landline Lifeline service and the corresponding growing demand for wireless Lifeline options as it reconsiders its decision to limit KUSF support to voice-only landline Lifeline carriers.

III. Limiting KUSF Support to Landline Carrier Lifeline Services Would Violate Federal Law.

The Commission limited KUSF support to landline Lifeline service providers in its March 10, 2017 Order. While that order has been stayed, the Commission is considering whether to vacate or modify the March 10, 2017 Order by allowing wireless and landline Lifeline carriers to be eligible to receive KUSF support, but to limit the support to voice-only offerings. In an Application for Rehearing of the March 10, 2017 Order, TracFone explained that restricting KUSF support to landline carriers violates Section 254(f) of the Communications Act of 1934, as amended (47 U.S.C. § 254(f)) because such a restriction would be inconsistent with the federal universal service program which allows wireless and wireline carriers to participate.⁸ Pursuant to Section 254(f) of the federal act, a State may adopt regulations to preserve and advance universal service, provided that such regulations are not inconsistent with the FCC's rules (that is, a state Lifeline program may not, under Section 254(f), be inconsistent with the federal program). A Commission regulation limiting KUSF Lifeline support to wireline providers would be facially inconsistent with those federal regulations established by the FCC

⁸ See TracFone Application for Rehearing, Case No. 2016-00059, April 13, 2017, at 3.

which explicitly allow both landline and wireless providers to offer Lifeline services supported by the federal Universal Service Fund.

As noted by the Commission, federal support for voice-only Lifeline services will decrease over time and eventually will be eliminated. A Commission rule that would only allow KUSF support for voice-only service also would be facially inconsistent with federal rules, and therefore, would violate Section 254(f). For that reason, TracFone respectfully asks that the Commission not limit KUSF Lifeline support to voice service. In addition to being a federal mandate that Universal Service programs support broadband, allowing KUSF funding to support broadband service would be wise policy. Residents of all states, including Kentucky, rely increasingly on high speed Internet access to manage nearly every aspect of their lives – from obtaining government services, to completing school assignments, from seeking employment, to obtaining health care information and communicating important medical data with their health care providers, Internet access is a 21st Century essential. TracFone encourages the Commission to allow the KUSF to be available to make those services affordable to low-income Kentucky households.⁹

The Commission’s statement that the FCC has “expressed reservations about its decision to phase out voice-only support” does not alter the conclusion that limiting KUSF support to voice-only Lifeline services would be inconsistent with current federal law. The Commission’s assertion about the FCC’s position on voice-only Lifeline support is based on a notice of proposed rulemaking, which remains pending, and does not change the validity of the current FCC rules which include a gradual elimination of voice-only Lifeline support as of December

⁹ If the Commission elects to limit KUSF Lifeline support to voice service, TracFone will modify its enhanced Lifeline proposals to ensure that the totality of KUSF support received is used for the provision of voice service.

2021. In that notice, the FCC seeks comment on the phase down of Lifeline support for voice-only services, but neither recommends nor proposes that the phase down be eliminated.¹⁰ Furthermore, the FCC cites to the positions of entities that sought reconsideration of the rule implementing a phase down of voice-only Lifeline support.¹¹ The FCC's acknowledgement that certain entities have expressed dissatisfaction with the FCC rule that eliminates voice-only Lifeline support over time does not provide a valid justification for the Commission to disregard the FCC's rule that Lifeline support be available for services that include broadband service.

As a basis for limiting KUSF support to voice-only services, the Commission claims that records from the Universal Service Administrative Company ("USAC"), the administrator of the federal USF, show that the overwhelming majority of Kentucky Lifeline customers subscribe to voice, and not bundled service. Based upon USAC data, that assertion is incorrect. As noted above, over 94 percent of federal Lifeline support for Kentucky customers is received by wireless carriers. Those carriers all offer bundled services that meet the minimum service standards for voice or mobile broadband Internet access service. For example, both TracFone and Q Link Wireless offer Lifeline customers in Kentucky the option of two plans: 1,000 voice minutes, unlimited texts and 1 GB of mobile broadband data (which meets the current minimum service standard for voice service) or 350 voice minutes, unlimited texts and 2 GB of mobile broadband data (which meets the current minimum service standard for mobile broadband data). In short, all of the Lifeline customers of those two providers (which are Kentucky's two largest Lifeline service providers) receive Lifeline service with both voice and mobile broadband allowances. Given that the FCC's rules mandate federal USF support for Lifeline service that

¹⁰ See *Bridging the Digital Divide for Low-Income Consumers*, Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, 32 FCC Rcd 10475, ¶¶ 74-76 (2019).

¹¹ See *id.*, ¶ 75 & n.164.

includes broadband service, a Commission decision to preclude Lifeline broadband service providers from receiving KUSF support would violate Section 254(f).

CONCLUSION

TracFone respectfully requests that the Commission consider TracFone's views and recommendations set forth in these comments as it determines whether to vacate or modify its March 10, 2017 Order regarding KUSF support.

June 19, 2019

Respectfully submitted,

TRACFONE WIRELESS, INC.

/s/ Thomas P. O'Brien, III

Thomas P. O'Brien, III

Cory J. Skolnick

FROST BROWN TODD LLC

400 West Market Street, 32nd Floor

Louisville, KY 40203-3363

(502) 589-5400

/s/ Mitchell F. Brecher (with permission)

Mitchell F. Brecher

Debra McGuire Mercer

GREENBERG TRAURIG, LLP

2101 L Street, NW, Suite 1000

Washington, DC 20037

(202) 331-3100

Counsel for TracFone Wireless, Inc.

CERTIFICATE OF SERVICE

In accordance with 807 KAR 5:001, Section 8, I certify that the electronic filing of TracFone Wireless, Inc.'s Comments is a true and accurate copy of the same document being filed in paper medium; that the electronic filing was transmitted to the Public Service Commission on June 19, 2019; that there are currently no parties that the Public Service Commission has excused from participation by electronic means in this proceeding; and that on or before June 20, 2019 this Response in paper medium will be delivered to the Public Service Commission.

/s/ Thomas P. O'Brien, III
Counsel for TracFone Wireless, Inc.