COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

APPLICATION FOR REHEARING

TracFone Wireless, Inc. ("TracFone"), by its attorneys, pursuant to KRS § 278.400, applies to the Commission for rehearing of its Order issued March 10, 2017 in this proceeding ("March 10 Order"). In support of this application, TracFone states as follows:

Introduction and Statement of Standing

By order issued February 1, 2016, the Commission commenced this proceeding to investigate the current and future funding, distribution and administration of the Kentucky Universal Service Fund ("KUSF"). On February 22, 2016, TracFone moved for waiver of the initial testimony filing requirement, but indicated that it intended to remain a party for the limited purpose of commenting on issues in which it had an interest. At the time of that motion and now, TracFone was and is a designated Eligible Telecommunications Carrier ("ETC") in Kentucky and provides wireless Lifeline service supported by the federal Universal Service Fund ("FUSF"). Since February 2016, there have been some important changes to the Lifeline program. Those changes have resulted in TracFone having an interest in the issues in this proceeding which it did not have in February 2016.

In March 2016, the Federal Communications Commission ("FCC") promulgated a series of rules which modified the federal Lifeline program in many important respects, including expanding the program to support broadband Internet access service.[1] Moreover, on November 22, 2016, TracFone petitioned the Commission to amend its ETC designation to allow it to receive support from the KUSF.[2] If the Commission amends TracFone's ETC designation as requested, TracFone has committed to using the monthly KUSF support amount of $3.50 per customer per month to provide every TracFone Lifeline customer in the Commonwealth of Kentucky an additional 250 minutes per month above the minutes allotment provided under the federal Lifeline program.[3]

By modifying the KUSF to exclude wireless Lifeline providers, TracFone's interests are adversely affected by the Commission's March 10 Order and it therefore has standing to apply for rehearing.

In the March 10 Order, the Commission has limited the availability of KUSF Lifeline support to landline telephone companies and declared all wireless ETCs to be ineligible to receive KUSF support. It did so without benefit of an evidentiary record as no party requested a hearing. The fact that no party sought a hearing is understandable since at no time did the Commission even hint that exclusion of the entire wireless industry from participation in KUSF-supported programs would even be considered. There are three primary reasons why the Commission should rehear this matter: 1) its exclusion of wireless ETCs from receipt of KUSF support is unlawful; 2) denial of KUSF support to wireless Lifeline services is bad public policy

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[1] 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).

[2] Case No. 2009-00100 TracFone Wireless, Inc.'s Petition to Amend its Designation as an Eligible Telecommunications Carrier to Receive Kentucky Universal Service Support for Lifeline Service, filed November 22, 2016.

[3] Customers enrolled in TracFone's voice-only Lifeline program would receive 750 minutes per month. Customers enrolled in TracFone's bundled voice/mobile broadband data plan would receive 600 minutes per month plus 500 MB of mobile broadband data.

and disserves the public interest; and 3) it is avoidable as there are other means available for addressing the Commission's concerns about KUSF growth and increased monthly surcharges to support that growth.

I. Exclusion of Wireless ETCs from KUSF Support is Unlawful

Section 254(f) of the Communications Act of 1934, as amended,[4] authorizes States to establish their own programs to preserve and advance universal service. Indeed, the KUSF was established in accordance with that Congressional grant of authority. However, State authority to establish state-funded universal service programs is subject to one critical limitation: **the rules governing those programs may not be inconsistent with the FCC's universal service rules**. Pursuant to the FCC's rules, both wireline and wireless providers may be designated as ETCs to participate in the Lifeline program, provided that they meet all of the applicable program requirements. Accordingly, a Commission rule which limits the Kentucky Lifeline program to a selected category of providers – wireline telephone companies, while excluding other categories of providers, specifically, wireless carriers, is facially inconsistent with the FCC's universal service rules and is in violation of 47 U.S.C. § 254(f).

The Commission's attention also is directed to Section 253(b) of the Communications Act. That section provides that States may "impose **on a competitively neutral basis** and consistent with section 254, requirements necessary to preserve and advance universal service, … ." (emphasis added). The highlighted words, "on a competitively neutral basis," is a critical aspect of the states' authority to implement state universal service plans. The FCC has defined competitive neutrality, with particular respect to universal service, to mean that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider

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[4] 47 U.S.C. § 254(f).

over another, nor unfairly favor or disfavor one technology over another.[5] Allowing Lifeline providers using one technology (wireline networks) to receive KUSF support for their Lifeline programs while denying KUSF support to those providers' competitors who use another technology (wireless) is the antithesis of competitive neutrality and is in blatant violation of 47 U.S.C. § 253(b).

II. Limiting KUSF Support to Wireline Lifeline Providers is Bad Public Policy

As described in comments filed today by CTIA – The Wireless Association® and as acknowledged by the Commission in the March 10 Order, a substantial portion of Lifeline customers in Kentucky and elsewhere have opted to enroll in wireless Lifeline programs rather than the Lifeline programs offered by incumbent local exchange carriers. There are various possible explanations for this migration of Lifeline customers to wireless providers: Some wireless providers (including TracFone) actively market their Lifeline services using media of general distribution as required by Section 214(e)(1)(B) of the Communications Act. Many consumers prefer the convenience and mobility available through wireless technology. Some consumers have gravitated to wireless because of the all distance calling aspect and other service features.[6] Still other consumers may be attracted to wireless Lifeline plans which include Broadband Internet Access Service. Whatever the reasons, Lifeline-eligible households continue to prefer wireless Lifeline. They should not be penalized for that choice in the form of reduced benefits caused by the unavailability of KUSF support.

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[5] Federal-State Joint Board on Universal Service, 12 FCC Rcd 8876 (1997) at ¶ 47. *See also* Federal-State Joint Board on Universal Service (*Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission*), 15 FCC Rcd 15168 (2000) at ¶ 21.

[6] Most wireless plans, including wireless Lifeline programs include service features such as voicemail, caller ID, call waiting and three-way calling. Wireline carriers typically charge extra for those features.

The Commission acknowledged in the March 10 Order that one of the goals in establishing the KUSF more than two decades ago was to "promote through wireline and wireless technology, connection to the telecommunications network … ."[7] Thus, since its inception, the purpose for the KUSF has been to support wireless and wireline telecommunications connectivity and availability to low-income Kentucky households. For the Commission to retreat from that important public purpose now would be bad public policy, would disserve the public interest, and (as explained in the following section) is unnecessary and avoidable.

III. Concerns About KUSF Growth Can Be Addressed Without Penalizing Wireless Lifeline ETCs and Their Low-Income Kentucky Consumers

Notwithstanding the legal and public policy infirmities in the March 10 Order which warrant rehearing, TracFone acknowledges that the Commission's concerns about KUSF growth and the need for increased surcharge levels are real and need to be addressed. TracFone also understands the Commission's frustration with changes to FCC rules governing access charges and intercarrier compensation which reduced previously-available subsidies to rural wireline telephone companies. Those concerns also should be addressed. Fortunately, they can be addressed by the Commission without the draconian, unlawful and unnecessary step of excluding wireless Lifeline providers from KUSF support – support which would be used to enhance the Lifeline benefits provided to thousands of low-income Kentucky households who have selected wireless ETCs as their Lifeline providers.

Currently, the monthly Lifeline subsidy provided by the KUSF is $3.50 per customer. As the Commission notes in the March 10 Order, that amount resulted from a FCC-established

[7] March 10 Order at 2, quoting from PSC Administrative Case No. 355 *An Inquiry Into Local Competition Through Universal Service, and the Non-Traffic Sensitive Access Rate.*

matching provision which provided an additional FUSF match of one-half the state amount up to $3.50.[8] However, that federal match provision was eliminated by the FCC in 2012. As a result, the current KUSF monthly subsidy is based upon a federal rule which no longer exists. Since there is nothing magic (or even legally significant) about the $3.50 monthly KUSF subsidy, the Commission may revise that amount. If funding were not a concern, then the amount could be retained or even increased, which would enable wireless and wireline ETCs to provide even more generous Lifeline benefits than they are able to provide with the available $3.50 subsidy. However, as described in the March10 Order, funding IS a concern.

Therefore, TracFone suggests that the Commission re-open this proceeding to determine based on an evidentiary record whether a revised, and possibly reduced, level of KUSF support would be appropriate. If the KUSF monthly subsidy were reduced by one-half, from the current $3.50 to $1.75, there would likely be sufficient KUSF resources to provide Lifeline subsidies to all Kentucky Lifeline households – wireline and wireless. The level of Lifeline benefits would be reduced but there would still be valuable benefits. For example, in its November 22, 2016 petition to amend its ETC designation, TracFone committed to providing an additional 250 minutes to each Kentucky Lifeline consumer if its request were granted. With only a $1.75 monthly KUSF subsidy rather than a $3.50 monthly subsidy, TracFone would be unable to provide the additional 250 minutes proposed, but could still provide a substantial enhancement over its federal Lifeline support, *e.g.*, an additional 125 minutes on top of the 500 minutes being provided to voice-only customers or an additional 125 minutes above the 350 minutes being provided to its bundled voice and mobile broadband customers. A reduced monthly subsidy

[8] March 10 Order at 3-4.

would still be sufficient to provide a significant support amount to those Lifeline customers who continue to utilize wireline Lifeline services.

Conclusion

For the reasons set forth in the application for rehearing, the actions taken in the March 10 Order are unlawful, are bad public policy which disserve the public interest, and are unnecessary as there are alternatives which can resolve the Commission's stated concerns in a lawful manner without favoring or disfavoring any category of Lifeline providers or any technology, and which can provide for a robust state Lifeline program funded by the KUSF. Accordingly, TracFone respectfully requests that the Commission grant this application and conduct a further hearing in this proceeding.

This 3rd day of April, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing electronic filing is a true and accurate copy of the document being filed in paper medium; that the electronic filing was transmitted to the Commission on April 3, 2017; that there are currently no parties that the Commission has excused from participation by electronic means in this proceeding; and that a copy of the filing in paper medium is being hand delivered to the Commission on this the 3rd day of April, 2017.

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