

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**

3 **UM 1437**

4 In the Matter of
5 TRACFONE WIRELESS, INC.
6 Application for Designation as an Eligible
7 Telecommunications Carrier.
8
9

**TRACFONE WIRELESS, INC.'S
MOTION TO DENY INTERVENTION TO
CITIZENS' UTILITY BOARD OF
OREGON**

10 **I. MOTION**

11 TracFone Wireless, Inc. ("TracFone") respectfully moves the Commission pursuant to
12 OAR 860-013-0031 and OAR 860-012-0001 to deny intervention in this proceeding to Citizens'
13 Utility Board of Oregon ("CUB"). CUB lacks authority to intervene and to participate in this
14 proceeding pursuant to ORS 774.180 and OAR 860-012-0001(3) because TracFone is not a
15 "utility," under applicable Oregon law, so the interests of "utility consumers" are not at issue in
16 this proceeding.

17 **II. BACKGROUND**

18 TracFone filed its application for designation as an Eligible Telecommunications Carrier
19 ("ETC") on August 7, 2009, nearly one year ago. In that application, filed pursuant to Section
20 214(e)(2) of the Communications Act of 1934, as amended,¹ TracFone seeks designation as an
21 ETC so as to allow it to provide Lifeline service to low-income Oregon households. TracFone's
22 Lifeline program will be funded entirely by support from the **federal** Universal Service Fund and
23 by TracFone itself. TracFone has not requested support from the Oregon Telecommunications
24 Access Program (OTAP). No portion of TracFone's Lifeline program will be supported by
25 Oregon rate payers, Oregon utility rates, or by Oregon taxpayers.

26

¹ 47 U.S.C. § 214(e)(2).

1 On April 9, 2010, CUB filed a Notice of Intervention ("Notice"), invoking its claimed
2 authority to intervene as of right pursuant to ORS 774.180. Because CUB intervened on that
3 basis, it did not file a petition to intervene pursuant to OAR 860-012-0001 that TracFone could
4 have opposed at the time, nor was the Commission required to consider whether to grant such a
5 petition or to impose any conditions on intervention pursuant to that rule. CUB specifically
6 represented in its Notice that it "intends to monitor the proceeding and, if necessary, raise issues
7 that are appropriate to the proceeding." Notice at 2.

8 CUB's participation in this proceeding has now gone far beyond its stated intent to
9 "monitor" and raise appropriate issues. It has embarked upon an extensive and burdensome
10 discovery campaign seeking data which is not relevant to the issues in this ETC proceeding. It
11 has even threatened to attempt to delay the proceeding if its discovery demands are not met.
12 CUB issued its first set of data requests to TracFone on May 18, 2010, simply requesting copies
13 of TracFone's responses to Staff's first set of data requests. CUB has now issued a total of eight
14 sets of data requests to TracFone.² In addition to requesting copies of TracFone's responses to
15 118 of Staff's individual data requests, on July 14, 2010, CUB began to issue data requests of its
16 own, and has now issued 48 separate requests, including sub-parts. TracFone has objected to
17 several of CUB's data requests because they seek information that is not relevant to this
18 proceeding, are unduly burdensome, and seek information that constitutes highly confidential
19 and proprietary trade secrets. For example, CUB has sought information relating to TracFone's
20 business forecasts, operations and customers in other states, payment of taxes, and wholesale
21 costs, none of which is relevant to this proceeding. TracFone also informed CUB that some of
22 the information is so competitively sensitive that it requires additional protection beyond that
23 available under the Commission's standard protective order, which CUB has indicated it
24

25 _____
26 ² This is in addition to ten separate sets of data requests issued by Commission Staff including an
astounding 120 individual requests, not counting subparts separately.

1 opposes. Most recently, CUB expressed its intention to file a motion to compel further responses
2 to its data requests and to seek further delay in filing testimony.

3 In view of CUB's burdensome, irrelevant, and continuing discovery demands and CUB's
4 threatened motion to compel, TracFone has carefully examined CUB's authority to intervene and
5 participate in this proceeding and has determined that CUB is acting far beyond the scope of its
6 statutory authority. Accordingly, TracFone is bringing this matter to the Commission's attention
7 with this Motion.

8 III. ARGUMENT

9 A. CUB's Authority Is Limited to Representing the Interests of Utility Consumers.

10 CUB was created by the Oregon legislature and its authority is limited by statute. The
11 legislature expressed the policy reasons for creating CUB in ORS 774.020 (emphasis added):

12 The people of the State of Oregon hereby find that **utility**
13 **consumers** need an effective advocate to assure that public
14 policies affecting the quality and price of **utility services** reflect
15 their needs and interests, that **utility consumers** have the right to
16 form an organization which will represent their interests before
17 legislative, administrative and judicial bodies, and that utility
consumers need a convenient manner of contributing to the
funding of such an organization so that it can advocate forcefully
and vigorously on their behalf concerning all matters of public
policy affecting their health, welfare and economic well-being.

18 Consistent with this policy, CUB is authorized to represent the interests of only "utility
19 consumers" in proceedings before the Commission: "The Citizens' Utility Board shall have all
20 rights and powers necessary to represent and protect the interests of **utility consumers**, including
21 but not limited to the following powers: . . . (b) To represent the interests of **utility consumers**
22 before legislative, administrative and judicial bodies." ORS 774.030(3) (emphasis added).

23 Consistent with its purpose, CUB's authority to intervene in Commission proceedings is
24 expressly limited to those cases that affect the interests of "utility consumers": "Whenever the
25 board determines that any agency proceeding may affect the interests of utility consumers,
26

1 Citizens' Utility Board may intervene as of right as an interested party or otherwise participate in
2 the proceeding." ORS 774.180(1). OAR 860-012-0001(3) likewise limits CUB's authority to
3 intervene as of right to situations covered by ORS 774.180.

4 **B. TracFone Is Not a Utility So Its Customers Are Not "Utility Consumers."**

5 "Utility" is defined in ORS 774.010(5) as follows: "'Utility' means any utility regulated
6 by the Public Utility Commission pursuant to ORS chapters 757 and 759, which furnishes
7 electric, telephone, gas or heating service. However, 'utility' does not include any municipality,
8 cooperative, or people's utility district."

9 The term "utility" is not defined in either ORS chapter 757 or chapter 759. Chapter 757
10 uses the term "public utility" and chapter 759 uses the term "telecommunications utility" to
11 define the entities subject to Commission regulation. These are the only entities that can be
12 considered a "utility" for purposes of chapter 774.

13 TracFone is not a "public utility" subject to Commission regulation under ORS chapter
14 757, as that term applies only to entities that, among other things, furnish "heat, light, water or
15 power." ORS 757.005(1)(a)(A).

16 Nor is TracFone a "telecommunications utility" subject to Commission regulation under
17 ORS chapter 759. A telecommunications utility is: "Any corporation, company, individual or
18 association of individuals, or its lessees, trustees or receivers, that owns, operates, manages or
19 controls all or a part of any plant or equipment in this state for the provision of
20 telecommunications service, directly or indirectly to or for the public, whether or not the plant or
21 equipment, or any portion of the plant or equipment, is wholly within any town or city." ORS
22 759.005(9)(a)(A). TracFone is not a telecommunications utility for at least two reasons: (1) it
23 does not "own[], operate[], manage[] or control[]" all or a part of any plant or equipment in this
24 state . . ." TracFone is a pure reseller of wireless telephone service. Application at 2. More
25 importantly, TracFone does not provide "telecommunications service" as that term is defined in
26

1 ORS 759.005(8) because it provides only wireless service, which is expressly excluded from the
2 statutory definition of "telecommunications service." "'Telecommunications service' does not
3 include: (a) **Services provided by radio common carrier.**" ORS 759.005(8)(a) (emphasis
4 added). As a provider of commercial mobile radio services, TracFone is a radio common carrier.

5 Because TracFone is not a telecommunications utility, which is the only type of "utility"
6 subject to regulation under chapter 759, it follows that TracFone's customers are not "utility
7 consumers."

8 **C. TracFone's Application Does Not Affect Utility Consumers, So CUB Cannot Be
9 Permitted To Intervene.**

10 TracFone's application is for authority to provide exclusively wireless service to Oregon
11 residents who qualify for Lifeline support. If TracFone's ETC application is approved by the
12 Commission, none of TracFone's customers will be "utility consumers." Therefore, TracFone's
13 proposed customers are not within the group that CUB is authorized to represent.

14 Moreover, designation of TracFone as an ETC will have no impact whatsoever on the
15 rates or services of those entities operating in Oregon which are utilities and which are subject to
16 Commission regulation, including rate regulation. The federal Universal Service Fund, including
17 those portions of that fund which are used to support Lifeline service, is financed entirely by
18 contributions made by providers of interstate telecommunications services.³ The Commission
19 has no authority to regulate the rates for interstate telecommunications services, *i.e.*, the services
20 upon which contributions to the federal Universal Service Fund are based. No Oregon utility
21 ratepayer interest will be affected by TracFone's designation as a Lifeline-only ETC under the
22 federal Lifeline program.

23
24
25 ³ 47 U.S.C. § 254(d) ("Every telecommunications carrier that provides interstate
26 telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the
specific, predictable, and sufficient mechanisms established by the [Federal Communications]
Commission to preserve and advance universal service.").

1 If TracFone either were seeking Commission authorization to provide services which are
2 utility services under Oregon law or if TracFone were seeking Commission approval of intrastate
3 rates for utility services subject to the jurisdictional authority of the Commission, CUB's
4 intervention on behalf of the interests of Oregon utility ratepayers would be appropriate and
5 permissible within the scope of CUB's statutory authority. However, that is not the case in the
6 instant proceeding.

7 CUB's Notice is ineffective to support its intervention in this proceeding as of right
8 because it is not representing the interests of Oregon "utility consumers." ORS 774.180.
9 Moreover, it would be pointless for CUB to try to cure that defect by filing a petition to intervene
10 because that would also exceed its statutory authority. ORS 774.030; ORS 774.180(1)
11 ("Whenever the board determines that any agency proceeding may affect the interests of utility
12 consumers, Citizens' Utility Board may intervene as of right as an interested party or otherwise
13 participate in the proceeding.").

14 Far beyond "monitoring" the proceeding as CUB represented it would do in its
15 intervention notice, CUB's participation in this proceeding has now become unduly burdensome
16 and threatens to expand the issues beyond what is reasonable or relevant to TracFone's Lifeline
17 ETC Application. Furthermore, CUB now has overtly threatened to delay the proceeding. A
18 potential consequence of CUB's discovery tactics may be to delay this proceeding and, more
19 importantly, delay – and possibly deny – the benefits of a free wireless Lifeline service to
20 thousands of Oregon's neediest households.

21 Based upon the foregoing, it is apparent that CUB is purporting to act well in excess of its
22 statutory authority. Rather than requiring the parties to brief, and requiring the Commission to
23 consider and decide, motions to compel and possible motions to strike testimony, TracFone
24 requests that the Commission deny CUB intervention in this proceeding.


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IV. CONCLUSION

For the foregoing reasons, TracFone respectfully requests that the Commission deny CUB intervention in this proceeding.

DATED: July 30, 2010

PERKINS COIE LLP

By: 

Lawrence H. Reichman, OSB No. 860836
LReichman@perkinscoie.com
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128
Telephone: 503.727.2000
Facsimile: 503.727.2222

Mitchell F. Brecher
Debra McGuire Mercer
GREENBERG TRAURIG, LLP
2101 L Street, NW
Suite 1000
Washington, D.C. 20037
(202) 331-3100

Counsel for TracFone Wireless, Inc.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I have this 30th day of July, 2010, served the foregoing TRACFONE
3 WIRELESS, INC.'S MOTION TO DENY INTERVENTION TO CITIZENS' UTILITY BOARD
4 OF OREGON upon all parties of record in this proceeding by causing a copy to be sent by
5 electronic mail and U.S. mail to the following addresses (as indicated below):

6 Public Utility Commission of Oregon
7 Attn: Vikie Bailey-Goggins
8 PUC.datarequests@state.or.us
9 PO Box 2148
10 Salem OR 97308-2148

Michael T. Weirich
michael.weirich@doj.state.or.us
Assistant Attorney
Department of Justice
1162 Court Street NE
Salem, OR 97301-4096

11 Kay Marinos
12 kay.marinos@state.or.us
13 Jon Cray
14 jon.cray@state.or.us
15 Public Utility Commission of Oregon
16 PO Box 2148
17 Salem, OR 97308-2148


Mitchell F. Brecher
brecherm@gtlaw.com
Debra McGuire Mercer
mercerdm@gtlaw.com
Greenberg Traurig, LLP
2101 L Street NW, Suite 1000
Washington, DC 20037
(Electronic mail only)

18 Gordon Feighner
19 gordon@oregoncub.org
20 Robert Jenks
21 bob@oregoncub.org
22 G. Catriona McCracken
23 catriona@oregoncub.org
24 Raymond Myers
25 ray@oregoncub.org
26 Kevin Elliott Parks
27 kevin@oregoncub.org
28 Citizens' Utility Board of Oregon
29 610 SW Broadway Ste 308
30 Portland, OR 97205
31 (Electronic mail only)

Steven A. Wolf
steven.wolf@doj.state.or.us
Assistant Attorney General
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096

Brant Wolf
bwolf@ota-telecom.org
Oregon Telecommunications Association
777 13th Street SE, Suite 120
Salem, OR 97301-4038

32 Richard A. Finnegan
33 rickfinn@localaccess.com
34 Law Office of Richard A. Finnegan
35 2112 Black Lake Blvd. SW
36 Olympia, WA 98512

37 
38 By _____
39 Lawrence H. Reichman, OSB No. 860836
40 PERKINS COIE LLP
41 Attorneys for TracFone Wireless, Inc.