

June 24, 2010

VIA ELECTRONIC MAIL AND OVERNIGHT DELIVERY

Mr. Michael Grant
Chief Administrative Law Judge
Public Utility Commission of Oregon
550 Capitol Street, NE, Suite 215
Salem, Oregon 97308-2148

Re: Docket UM 1437 Application of TracFone Wireless, Inc. for Designation as an Eligible Telecommunications Carrier for the Limited Purpose of Offering Lifeline Service to Low-Income Oregon Households

Dear Judge Grant:

By letter dated June 3, 2010, you notified all parties to Docket UM 1437 of certain ex parte communications between Commission Chairman Ray Baum and members of the Commission staff regarding TracFone Wireless, Inc. (“TracFone”). Leaving aside questions of the legality and ethical propriety of Commission staff members engaging in private communications with Commissioners, including the Chairman, regarding the merits of pending matters in docketed proceedings, those communications contain several incorrect, misleading and prejudicial statements which warrant response by TracFone. In the following paragraphs, on behalf of TracFone, we shall address several of those statements.

Preliminarily, we note that your letter states that in addition to the emails provided, “Ms. Marinos also briefed Chairman Baum on TracFone’s business model and SafeLink offer.” It does not appear that TracFone has been provided with all of the information required by OAR 860-012-0015(5) with respect to any such non-written communications. We request that any supplementary information be provided and reserve the right to rebut any such additional statements.

1. Refurbished phones. At page 1 of staff member Kay Marinos’s e-mail to Chairman Baum, it states that TracFone provides each Lifeline customer with a “free refurbished phone.” This statement is wrong. Every customer enrolled in TracFone’s SafeLink Wireless® program receives at no charge to the customer a **new** E911-compliant wireless handset. Those new handsets are provided to Lifeline customers at TracFone’s expense and are not supported in any manner by the federal Universal Service Fund.

2. Grab for customers. At p. 1, Ms. Marinos describes TracFone’s Lifeline program as a “Grab for last remaining carriers -- the poor -- at other phone customers’ expense.” It is not clear what this statement is directed toward, but it seems to imply that use of federal Universal Service Fund resources to provide service to low income households (i.e., “the poor”) is some sort of an undue burden on other phone customers. If there is any doubt that Congress intended to include affordable telecommunications service to low-income households as part of Universal Service,

the Commission's attention is directed to Section 254(b)(3) of the Communications Act of 1934, as amended, which includes among the statutory universal service principles the following: "Consumers in all regions of the Nation, **including low-income consumers**, . . . should have access to telecommunications and information services . . . at rates reasonably comparable to rates charged for similar services in urban areas." The purpose for the federal Lifeline program is to achieve the Congressionally-mandated goal of making available affordable telecommunications service to low-income consumers throughout the United States, including low-income consumers who reside in Oregon.

3. "Obama Phones" -- At page 1 of the same memorandum, Ms. Marinos pejoratively refers to government-supported Lifeline service as "Obama Phones." Not only is this statement prejudicial, politically-charged and clearly intended to polarize the Lifeline program based on national politics, it is factually incorrect. The federal Lifeline program was established by the Federal Communications Commission in 1985 under the leadership of then-FCC Chairman Dennis Patrick -- appointed by President Ronald Reagan. The program was first proposed by former FCC Chairman, Mark Fowler -- also a Reagan appointee. The goal of universal service, including affordable service to low-income consumers (see 47 U.S.C. § 254(b)(3)) was included in the Telecommunications Act of 1996 -- enacted by a Republican-controlled Congress and signed into law by President Bill Clinton, a Democrat. Few, if any telecommunications initiatives have a more bipartisan history than the federal Lifeline program.

4. \$3.50 Additional Benefit - P. 1 of the Marinos memorandum contains the following statement: "Company says that it kicks in \$3.50, but this is debatable; story varies from state to state." First, the assertion that TracFone's \$3.50 per Lifeline customer per month is "debatable" is unsupported and insupportable. TracFone receives up to \$10.00 per month in Lifeline support from the federal Universal Service Fund pursuant to Section 54.403 of the FCC's rules. It then adds \$3.50 to that amount in order to provide a benefit of up to \$13.50 per month. TracFone provides that additional \$3.50 monthly benefit to each Lifeline customer from its own resources. No portion of that additional \$3.50 benefit is subsidized by the federal Universal Service Fund. Moreover, TracFone calculates the Lifeline benefit the same way in every state where it provides Lifeline service as a designated ETC. It is absolutely false to assert that the "story varies from state to state," or that the Lifeline benefit is calculated differently from state to state.

5. Annual Verification - At p. 1, Ms. Marinos asserts TracFone "can draw Lifeline reimbursement for full year without tracking/monthly verification." While it is not clear what this is referring to, please be assured that TracFone is subject to all eligibility certification and verification requirements which are generally applicable to ETCs offering Lifeline service. In addition, TracFone is subject to special Lifeline eligibility certification and verification conditions imposed by the FCC as part of its order granting TracFone forbearance from 47 U.S.C. § 214(e)(1)(A). Moreover, in consultation with several state commissions, TracFone has developed and implemented a non-usage policy which ensures that any TracFone Lifeline customers who do not utilize the service for sixty days are de-enrolled from the program. That policy has been implemented in every jurisdiction where TracFone offers Lifeline service as an

ETC. Once customers are de-enrolled, TracFone no longer receives Universal Service Fund support for those customers.

6. Questionable Verification of Eligibility - At p. 1, the Marinos memo claims that TracFone utilizes “questionable verification of eligibility.” Although wholly unsubstantiated, this is a very serious defamatory allegation. TracFone complies fully with all applicable eligibility certification and verification requirements imposed by the FCC and by state commissions. In the nearly two years since TracFone commenced offering Lifeline service, no federal or state commission has found any violation by TracFone of applicable certification and verification requirements -- requirements that are applicable to all ETCs, including TracFone. In the absence of any evidence of violation, Ms. Marinos seems to question TracFone’s practices based on what she calls an “unbelievable number of customers signed up very quickly.” It is undeniably correct that TracFone has succeeded in enrolling many qualified low-income households in its SafeLink Wireless® Lifeline program. However, that success has been the result of hard work, creative and innovative advertising and marketing, and developing a Lifeline service that consumers actually want -- a service which, unlike “traditional” wireline Lifeline services, includes free handsets, free wireless airtime, long distance, international calling, roaming, and vertical features such as voice mail, caller ID, and call waiting. Other ETCs have not succeeded in enrolling Lifeline customers. For example, according to FCC data, only 10.7 percent of qualified low-income Oregon households are enrolled in Lifeline. In other words, during the nearly twenty-five years since Lifeline became a federal program nearly 90 percent of qualified Oregon households have not benefitted from the program. What is unbelievable and should be matters of Commission concern is how few low-income Oregon households, to date, have benefitted from the Lifeline program.

7. Not Sold Through Retail Outlets - The Marinos memorandum states that TracFone’s Lifeline program is “sold through retail outlets.” That statement is categorically wrong. TracFone’s non-Lifeline services are sold through retail outlets. However, SafeLink Wireless® is not. In fact, the FCC specifically held in its 2005 Forbearance Order that retail vendors could play no role in the application and enrollment process for TracFone’s Lifeline service. Customers enroll in TracFone’s SafeLink Wireless® program by contacting the company, completing a state-specific enrollment form, and demonstrating their eligibility based on applicable federal and state criteria. Once they are deemed eligible, TracFone sends the customers their free handsets with the first month’s allotment of free airtime loaded in the phone. Retail outlets play no role in the process.

8. 911 charges/State Lifeline Support - The Marinos memorandum states that TracFone does not pay state 911 surcharges or contribute to state Lifeline funds. Under current Oregon law, TracFone is not required to collect and remit 911 surcharges from its customers nor is it subject to a state universal service fund contribution obligation. If the state agencies or departments with jurisdictional responsibility for enforcement of those laws believe otherwise, they may commence appropriate enforcement actions. To date, they have not done so. If the Commission believes that current laws should be amended to encompass prepaid services, it may wish to propose appropriate legislation. In fact, TracFone has worked cooperatively with state

government departments in other states to enact such legislation, and is prepared to do so in Oregon.

9. Informed Certification - Ms. Marinos states that “[m]any consumers do not know what they are certifying to (especially in ethnic markets).” Again, there is no factual basis for that very serious assertion. It is pure speculation. As noted above, TracFone complies fully with all applicable federal and state eligibility certification requirements.

10. Handset 911 Capability - According to the Marinos memorandum, there are “some questions about handset capability with 911.” This statement is factually baseless. **There are no questions about the ability of any handset provided by TracFone to access 911 or E911.** In the 2005 Forbearance Order, the FCC imposed on TracFone as a specific condition of forbearance a requirement that all Lifeline customers be provided with handsets that are E911-compliant. TracFone has never and will never provide any Lifeline customer with a handset that is not E911-compliant. Moreover, pursuant to a FCC-imposed condition, TracFone may not -- and does not -- commence Lifeline service to any location until such time as it has obtained the requisite certification that Public Safety Answering Points will be able to receive 911 calls from TracFone Lifeline customers.

11. Landline Lifeline Customers -- The Marinos memorandum states that it is likely that existing landline customers may enroll in SafeLink Wireless® but that they may not understand their alternatives. That too is pure speculation with no factual support. As Ms. Marinos is presumably aware, the FCC has a “one per household rule” which limits Lifeline support to one line (wireline or wireless) per household. Like all other ETCs, TracFone is subject to that rule. Unlike other ETCs, TracFone is subject to an additional FCC requirement -- that each of its Lifeline customers certify annually that they i) remain head of household; and ii) they only receive Lifeline-supported service from TracFone.

12. Special Treatment - The Marinos memorandum accuses TracFone of “constantly asking for special treatment.” Conspicuously absent is an reference to any example of such requested special treatment. On two occasions, TracFone has petitioned the FCC to modify certain “TracFone-only” forbearance conditions -- conditions imposed on TracFone as conditions of forbearance but which are not applicable to other ETCs. Based on experience, those conditions were unworkable. In one case, the condition was modified; in the other case, the petition remains pending. In both cases, the FCC invited public comment on the petitions and interested persons, including the Commission, enjoyed a full opportunity to comment. In short, rather than seeking “special treatment” as alleged by Staff, TracFone has asked the FCC to be subject to requirements comparable to those applicable to other ETCs.

13. Government Pressure Tactics - Ms. Marinos accuses TracFone of using “pressure tactics” to gain regulatory approval, and specifically, enlisting members of Congress and consumer groups to “pressure the FCC for action.” Again, no examples are provided. TracFone does not deny and, in fact, it readily admits that it participates actively in FCC proceedings that impact its interests; that it engages in fully lawful legislative lobbying; and that it has actively encouraged

support from consumer and other public interest advocacy organizations whose members benefit from TracFone service, especially its Lifeline service. There is nothing unlawful, unethical or inappropriate about communicating a company's views on public policy issues to government departments and agencies and legislative bodies. Petitioning the government, including the federal government, is a fundamental right enjoyed by all Americans. Indeed, the Commission itself occasionally participates in such activities, either directly or through the National Association of Regulatory Utility Commissioners.

The above examples are not intended to be an exhaustive list of the false and misleading information and assertions contained in Staff's ex parte communications with Chairman Baum. Rather, they are illustrative of a pattern of deceptive, incomplete and erroneous information transmitted to the Chairman. Such misinformation has no place in regulatory proceedings which involve public interest determinations based upon factual records. It is especially troubling when such falsehoods and misinformation are communicated to the Commissioners, not by private parties with economic interests in the outcome of proceedings, but rather by Commission staff whose obligation is to advance the public interest.

We are also troubled by the substantial delay in providing notice of these communications to TracFone, in violation of the Commission's rules which not only "discourage" such ex parte communications, but require the person making them to "promptly" notify the presiding ALJ. Some of these communications were made approximately **seven months** before notice was provided to TracFone. It is inconceivable to TracFone that the Staff members making these communications, who may be witnesses in this proceeding, were not aware that these were ex parte communications that should have been promptly reported. Such prolonged delay allows for the incorrect, un rebutted statements to acquire an air of believability, simply by not being rebutted for a long period of time.

TracFone looks forward to participating in this ETC designation proceeding and providing the Commission with a factual record which supports its application. It expects that all parties to this proceeding will base their cases on factual information rather than on speculation, opinion, and unsupported assertions.

Respectfully submitted,

/s/ Mitchell F. Brecher
Counsel for TracFone Wireless, Inc.

Cc: All Parties of Record in Docket UM-1437