

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.

**TRACFONE WIRELESS, INC.'S
MOTION FOR LEAVE TO FILE REPLY
AND PROPOSED REPLY IN SUPPORT
OF MOTION TO DENY INTERVENTION
TO CITIZENS' UTILITY BOARD OF
OREGON**

8
9
10
11 **I. MOTION**

12 TracFone Wireless, Inc. ("TracFone") respectfully moves the Commission, pursuant to
13 OAR 860-013-0031 and OAR 860-012-0001, for leave to file a reply memorandum in support of
14 its motion (the "Motion") to deny intervention in this proceeding to Citizens' Utility Board of
15 Oregon ("CUB"), responding to CUB's Response to TracFone's Motion, filed on August 4, 2010.
16 As described below, CUB's response contains a series of factual misstatements and erroneous
17 legal conclusions, including "testimony" of someone not previously involved in this proceeding,
18 all of which warrant reply so that the Commission may make a fully informed ruling on
19 TracFone's motion. TracFone's proposed reply memorandum follows in this document. In
20 addition, TracFone would be pleased to appear for a hearing on the Motion if that would be
21 helpful to the Administrative Law Judge or the Commission.

22 **II. REPLY MEMORANDUM**

23 **A. Introduction**

24 At the outset, TracFone respects the efforts of CUB in representing the interests of
25 Oregon consumers in utility matters before the Commission. However, as explained in this reply
26 memorandum, TracFone's petition for designation as an Eligible Telecommunications Carrier

1 ("ETC") in the State of Oregon is not a utility matter, and no interests of Oregon utility
2 consumers will be affected by TracFone's designation as an ETC for the limited purpose of
3 providing its SafeLink Wireless® Lifeline service to low-income Oregon households. TracFone
4 is not a utility, so its customers will not be utility consumers, nor will it provide a utility service.
5 Moreover, the support which TracFone seeks as an ETC for its Lifeline program will be provided
6 entirely by the **federal** Universal Service Fund. That fund is supported entirely by contributions
7 from providers of interstate telecommunications service based on their interstate
8 telecommunications service revenues. Not a single dime of the federal Universal Service Fund is
9 derived from revenues of any intrastate service subject to the regulatory authority of the
10 Commission.

11 CUB does not dispute the fact that TracFone is not a "utility" under applicable Oregon
12 law and that the interests of the customers of a "utility," as that term is defined in ORS
13 774.010(5) are not affected by this proceeding. Nor does CUB assert that the quality and price
14 of "utility services" are at issue in this proceeding. Instead, CUB's entire legal argument is that a
15 "utility consumer" is any natural person 18 years of age or older who resides in Oregon, and that
16 CUB has statutory authority to intervene in **any** proceeding that affects natural persons over the
17 age of 18 who reside in Oregon, regardless of its subject matter. CUB's simplistic argument
18 impermissibly ignores and fails to give meaning to the term "utility" as it is used in the relevant
19 statutes, and violates other rules of statutory construction. CUB advocates for an expansive and
20 virtually limitless view of its statutory authority which is contrary to the legislature's plain intent.

21 **B. CUB's Reading of the Relevant Statutes Is Plainly Overbroad.**

22 CUB notes that ORS 774.010(2) provides that: "'Consumer' or 'utility consumer' means
23 any natural person 18 years of age or older who is a resident of the State of Oregon." CUB
24 Response at 3. CUB then argues that ORS 774.180 gives CUB the authority to intervene in **any**
25 administrative proceeding that may affect any Oregon resident who is at least 18 years old,
26

1 **without regard for the subject matter of that proceeding.** CUB Response at 4. Under CUB's
2 strained interpretation of the scope of its jurisdictional authority under Oregon statutes, it has the
3 authority to intervene as of right, for example, in any proceeding before the Oregon Liquor
4 Control Commission concerning licensing to serve alcohol, or a proceeding of the Department of
5 Motor Vehicles concerning driver license or vehicle registration requirements. Indeed, CUB
6 would even have the authority to intervene in state or federal proceedings involving
7 environmental standards, automobile safety requirements, immigration policy, medical licensing
8 and other health care issues, insurance, interstate air travel, food and other advertising and
9 labeling requirements, etc. CUB asserts that its authority to participate in administrative
10 proceedings is limitless, so long as the proceeding may affect the interests of natural persons 18
11 years of age or older who reside in Oregon.

12 CUB's expansive reading of the statutes regarding the scope of its jurisdictional authority
13 is unsupported and unsupportable. It completely ignores the use of the defined term "utility" in
14 ORS 774.180 as well as the general context of ORS chapter 774. As is clear from the statement
15 of the legislative intent in ORS 774.020, the legislature's purpose in creating CUB was to
16 establish an advocate for individual consumers of "utilities," defined as energy or
17 telecommunications utilities regulated under ORS chapters 757 and 759, in proceedings affecting
18 the quality and price of "utility services." CUB has no more authority to participate in
19 Commission proceedings affecting wireless carriers (who are indisputably not
20 telecommunications utilities) than it does to participate in proceedings of the State Parks and
21 Recreation Commission concerning user fees for state parks. That is simply outside of its
22 circumscribed statutory authority. Neither do the statutes empower CUB to intervene in a
23 wireless ETC proceeding such as the instant proceeding where the totality of support for the ETC
24 service (in this case, wireless Lifeline service) will come from a federal fund, based on revenues
25 derived from interstate telecommunications services, and which are wholly unrelated to any
26

1 intrastate utility service subject to regulation by the Commission. Since Oregon utility
2 consumers will not be subject to rates which include support for TracFone's Lifeline service,
3 there are no Oregon utility consumer interests for CUB to protect in this proceeding.

4 ORS 174.010 sets forth basic rules of statutory construction:

5 In the construction of a statute, the office of the judge is simply to
6 ascertain and declare what is, in terms or in substance, contained
7 therein, not to insert what has been omitted, or to omit what has
8 been inserted; and where there are several provisions or particulars
such construction is, if possible, to be adopted as will give effect to
all.

9 CUB's argument would have the Commission ignore the statutory definition of the term "utility"
10 in ORS 774.180 and also fail to give effect to all the provisions of ORS chapter 174.

11 In addition, Oregon case law on statutory interpretation requires that the sections of a
12 statute be construed in context:

13 We interpret the statutory text in context, *PGE v. Bureau of Labor*
14 *and Industries*, 317 Or. 606, 610-11, 859 P.2d 1143 (1993), and
15 then, to the extent we find it helpful, we consider the legislative
16 history proffered by the parties. ORS 174.020(3); see also *State v.*
Gaines, 346 Or. 160, 171-72, 206 P.3d 1042 (2009) (after
17 considering text and context, court considers any pertinent
18 legislative history, giving it appropriate weight).

19 *State v. Blair*, 348 Or. 72, 75-76, _ P.3d _ (2010) Following this methodology in this case also
20 leads to the conclusion that CUB's authority to intervene in Commission proceedings is limited
21 to cases that involve the interests of customers of **utilities** and that pertain to the quality and
22 price of **utility services**. Interpreting ORS 774.180 in the context of ORS chapter 774 shows
23 that the entire purpose of CUB, and the limit of its statutory authority, is to advance the interests
24 of utility customers who are individuals (as distinguished from corporations or other business
25 entities). No such interests are at issue in this case because TracFone is not a utility, the interests
26 of utility consumers are not at issue, and this proceeding will not affect the quality and price of
utility services. Moreover, as noted above, since TracFone does not seek any support from any
state fund, consumers of Oregon utility services subject to Commission regulation will not bear

1 any portion of the support which TracFone receives as a designated ETC in order to provide
2 Lifeline service to low-income Oregon households.

3 TracFone does not mean to imply that CUB does not serve an important role in utility
4 regulation in Oregon – far from it. CUB does have an important role to play in Commission
5 proceedings that affect the quality and price of services provided by utilities. These are often the
6 largest and most controversial cases that this Commission handles, and that is precisely the sort
7 of case where CUB is authorized to participate. The statutes that establish CUB and define the
8 limits of its authority, however, simply do not extend to proceedings, such as the instant
9 proceeding, that do not affect the customers of a "utility" or the quality and price of utility
10 services.

11 CUB also argues somewhat elliptically that the introductory phrase "Notwithstanding any
12 other provision of law" in ORS 774.180 somehow expands its rights. CUB Response at 3, 6.
13 This phrase, however, does not expand CUB's rights any more broadly than what the legislature
14 set forth in ORS chapter 774.

15 **C. Commission Staff Can Adequately Represent the Interests of TracFone's**
16 **Customers.**

17 CUB asserts that "No other party could adequately represent the interest of utility
18 consumers." CUB Response at 9. As discussed above, the interests of "utility" consumers are
19 not at issue in this case. The Commission Staff, however, has authority to represent the interests
20 of the public even if TracFone's customers are not utility customers. It is the statutory
21 responsibility of the Commission "to represent the customers or any public utility or
22 telecommunications utility *and the public generally . . .*" ORS 756.040(1). Thus, Commission
23 Staff can and does vigorously represent the interests of the public generally in this proceeding.
24
25
26

1 **D. The Commission Should Ignore the Affidavit of Thomas J. Novick.**

2 CUB also offers the affidavit of Thomas J. Novick, a chief petitioner in the initiative
3 campaign to establish CUB, to support its argument. The Commission should ignore the
4 affidavit of Mr. Novick for several reasons.

5 First, ORS 174.020 permits a court to consider "legislative history" and to "give the
6 weight to the legislative history that the court considers to be appropriate." ORS 174.020(3). In
7 this case, the language of the statute is clear and there is no need to consider legislative history.

8 Second, the information CUB offers through the Novick affidavit is not legislative
9 history. It is simply the *contemporary* opinion of Mr. Novick as to how the statute should be
10 interpreted. This is not part of the legislative history of the statute (such as testimony submitted
11 to the legislature or the discussion of legislators **at the time** the bill was considered) and thus is
12 inadmissible for any purpose. Rather than being legitimate legislative **history**, this affidavit
13 seeks to invade the province of the Commission by interpreting the statute itself. *See, e.g.,*
14 *Gaines, supra*, 348 Or. at 80 (discussing the "1971 legislative history" from the year the statute
15 at issue was enacted).

16 Third, his affidavit is irrelevant. Mr. Novick states that the term "utility" is defined only
17 for certain purposes. However, that term is defined for the entirety of chapter 774 (ORS
18 774.010) and must be given effect wherever it appears in that chapter, including in the term
19 "utility consumer."

20 **E. TracFone's Motion Is Timely.**

21 CUB also asserts that TracFone could have objected to CUB's intervention at an earlier
22 date and implies that TracFone's Motion is untimely. CUB states: "Pursuant to OAR 860-013-
23 0050(1)(a) and (c), TracFone had 20 days to file a motion against the petition or 10 days to
24 answer it. It did neither." CUB Response at 2. CUB is wrong. OAR 860-013-0050(1)(a)
25 requires an "answer to a complaint, application, or petition" to be filed within 20 days. OAR
26

1 860-013-0050(1)(c) requires "an answer to a petition to intervene" to be filed within 20 days.

2 CUB did not file a complaint, application, or petition, nor did it file a petition to intervene.

3 OAR 860-012-0001 allows parties to file a petition to intervene. It also allows CUB (and
4 only CUB) to file a "notice of intervention" in cases where CUB is permitted to intervene as of
5 right under ORS 774.180. OAR 860-012-0001(3). The Commission's rules do not establish any
6 deadline whatsoever to object to a notice to intervene. Thus, TracFone's Motion is timely.

7 **F. CUB Cannot Seek Permission To Intervene.**

8 CUB also asserts that if it "accidentally" exceeded its statutory authority by intervening
9 in this docket, it "would simply petition the Commission for authority to intervene out of time."
10 CUB Response at 9. However, the limits of CUB's statutory authority are the same, regardless of
11 whether it seeks to intervene as of right in a timely manner or to petition to intervene in an
12 untimely manner. CUB is created by statute and its authority is limited as provided in those
13 statutes. CUB simply has no statutory authority to participate in Commission proceedings that
14 do not affect the interests of Oregon utility consumers and the quality and price of utility
15 services. This is not such a case. Therefore, CUB does not have an adequate "interest" that
16 supports intervention under ORS 756.535. TracFone reserves its right to respond further if CUB
17 does file a petition to intervene.

18 **G. CUB's Comments Regarding Discovery Are False and Are Not Relevant.**

19 In an apparent effort to distract attention from the singular issue raised in TracFone's
20 Motion, the bulk of CUB's Response – including the entirety of the Affidavit of Catriona
21 McCracken (Exhibit A to CUB's Response) and Exhibit C – discusses CUB's concerns about
22 TracFone's responses to CUB's overbroad and burdensome discovery requests. Indeed, CUB
23 misleadingly includes incomplete portions of its communications with TracFone's counsel
24 regarding discovery (incomplete in that they omit TracFone's responses). TracFone will respond
25 to discovery issues in connection with CUB's motion to compel as they are not relevant to
26

1 TracFone's Motion. However, TracFone strongly disagrees with the erroneous and defamatory
2 assertion of CUB that TracFone's discovery answers are "not fully accurate."¹ TracFone has
3 exercised its right to object to discovery questions propounded by CUB and others on the
4 grounds of confidentiality and relevancy, as it is entitled to do. However, all discovery responses
5 which TracFone provided contain accurate information. TracFone resents CUB's defamatory
6 and unsupported assertion that it has not provided accurate responses.

7 **III. CONCLUSION**

8 For the foregoing reasons as well as those asserted in TracFone's Motion, TracFone
9 respectfully requests that the Commission deny CUB intervention in this proceeding.

10 DATED: August 10, 2010

PERKINS COIE LLP

11 By: 
12 _____

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.

21
22
23
24
25
26 ¹ CUB Response at 7.

1
2 **CERTIFICATE OF SERVICE**

3 I hereby certify that I have this 10th day of August, 2010, served the foregoing
4 **TRACFONE WIRELESS, INC.'S MOTION FOR LEAVE TO FILE REPLY AND**
5 **PROPOSED REPLY IN SUPPORT OF MOTION TO DENY INTERVENTION TO**
6 **CITIZENS' UTILITY BOARD OF OREGON** upon all parties of record in this proceeding by
causing a copy to be sent by electronic mail and U.S. mail to the following addresses (as
indicated below):

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

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


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

15 Gordon Feighner
16 gordon@oregoncub.org
Robert Jenks
17 bob@oregoncub.org
G. Catriona McCracken
18 catriona@oregoncub.org
Raymond Myers
19 ray@oregoncub.org
Kevin Elliott Parks
20 kevin@oregoncub.org
Citizens' Utility Board of Oregon
21 610 SW Broadway Ste 308
Portland, OR 97205
22 (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

23 Richard A. Finnegan
24 rickfinn@localaccess.com
Law Office of Richard A. Finnegan
25 2112 Black Lake Blvd. SW
Olympia, WA 98512

26 By 
Lawrence H. Reichman, OSB No. 860836