BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

FILED
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Order Instituting Investigation on the Commission's Own Motion into the Alleged Failure of TracFone Wireless, Inc. (U-4231-C) to Collect and Remit Public Purpose Program Surcharges and User Fees on Revenue from its Sale of Intrastate Telephone Service to California Consumers, in violation of the laws, rules and regulations of this State; Order to Show Cause why Respondent should not Immediately be Ordered to Pay All Such Outstanding Sums plus Interest, and be Subject to Penalties for Such Violations	)	I.09-12-016

RESPONSE TO OPPOSITION TO MOTION FOR STAY

TracFone Wireless, Inc. ("TracFone") hereby responds to the opposition to TracFone's motion for stay of the Commission's Order Instituting Investigation ("OII") filed by the Commission's Consumer Protection & Safety Division ("Staff" or "CPST"). This response is being submitted pursuant to the e-mail communication of Administrative Law Judge Regina M. DeAngelis, dated February 19, 2010, granting TracFone's request to submit a response by March 2, 2010.

Staff's first stated basis for opposing TracFone's stay motion is that the matter for which a stay has been sought -- the Order Instituting Investigation -- is not part of the same proceeding for which TracFone has applied for rehearing.[1] That is not correct. While the OII has its own proceeding number, the Commission's decision to commence the OII proceeding was announced

[1] Staff Opposition at 1.

in Resolution T-17235.[2] In TracFone's application for rehearing of Resolution T-17235, TracFone requested rehearing on the paragraph of the Resolution directing the commencement of the OII. In order to alleviate any lingering confusion as to whether the pending stay motion seeks relief in both proceedings, the caption of this response includes both Resolution T-17235 and I.09-12-016.

Next, Staff attempts to dispute TracFone's showing of irreparable injury by noting that TracFone is a subsidiary of a large company, America Movil. What Staff disregards is that America Movil is not subject to the OII. TracFone is. In the motion for stay, TracFone described how failure to stay the instant OII proceeding could cause TracFone to suffer immediate, adverse and irreparable harm if the requested stay is not granted.[3] Moreover, TracFone explained that, while monetary loss alone does not show irreparable injury sufficient to warrant a stay, monetary loss may cause irreparable harm if the loss is sufficient to jeopardize an applicant's entire enterprise.[4] What Staff's opposition disregards is that the applicant for stay and the party to whom the OII is directed is TracFone -- not America Movil. It is TracFone's ability to continue to operate as a going concern in California that will be jeopardized if a stay is not granted. Irrespective of the financial wherewithal of America Movil, TracFone will not be able to continue to operate in California if it is forced to remit to the state large amounts of fees which are not applicable to it, and which it has no opportunity to collect from its customers.

Staff asserts incorrectly that another state - South Carolina - has denied a TracFone ETC application based on what Staff calls a "contradictory posture" regarding contributions to that

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[2] Resolution T-17235, issued December 17, 2009, contains the following ordering paragraph: "CD shall prepare an Order Instituting Investigation and Order to Show Cause why TracFone should not be ordered to collect and remit all outstanding user fees and surcharges, and penalized for its violation of the statutes, rules, and orders requiring such payment."

[3] TracFone Motion for Stay at 5.

[4] *Id.*, citing to Decision No. 04-08-056.

state's universal service fund.[5] Staff's information regarding TracFone's South Carolina ETC designation is neither current nor accurate. Staff references an October 15, 2009 directive from the South Carolina Public Service Commission which would have denied TracFone's ETC application. No order denying that application was issued. Rather, TracFone worked with South Carolina's Office of Regulatory Staff to find a solution which would resolve the questions about state universal service fund contributions and enable TracFone's SafeLink Wireless® service to become available to low-income South Carolina households. Those discussions led to an agreement between TracFone and the Office of Regulatory Staff. That agreement was filed with the South Carolina PSC and was considered by that commission on February 3. The PSC voted unanimously to issue another directive. A copy of that February 3 directive favorable to TracFone's proposal is attached hereto. Among other things, that unanimously-approved directive states as follows: "We applaud the efforts of the Company and the ORS to craft a mutually agreeable solution. Under the proposal, the new company [SafeLink Wireless, Inc.] would remit contributions to the State USF . . . ." The Directive expresses the view that the proposed settlement is "just and reasonable on its face." In short, contrary to Staff's erroneous assertion that South Carolina has denied a TracFone ETC application, that commission is poised to approve SafeLink Wireless as an ETC. The South Carolina experience demonstrates that positive results for all parties can be achieved when companies and commission staffs work together to resolve their differences rather than instituting enforcement actions.

[5] Staff Opposition at 4.

Finally, TracFone's motion for stay identifies two pending Commission proceedings where questions about application of public purpose program and user fees to prepaid wireless services are being addressed. One of those pending proceedings is the rulemaking proceeding requested by Verizon Wireless. In its opposition, Staff acknowledges Verizon Wireless's petition for rulemaking but states that "the Commission has taken no action on this petition, and currently no rulemaking addressing the issues underlying this OII is open and active."[6] That statement also is erroneous. On February 10, 2010 (two days before Staff filed its opposition), the Commission, by Karen V. Clopton, Chief Administrative Law Judge, issued a Notice of Prehearing Conference in P.09-12-018 (Petition to Adopt, Amend, or Repeal A Regulation Pursuant to Cal. Pub. Util. Code § 1708.5, specifically to Review the Assessment of Surcharges for the Commission's Public Policy Programs With Respect to Prepaid Wireless Services).[7] The notice of the prehearing conference demonstrates that, contrary to Staff's assertion, action has been taken on the Verizon Wireless rulemaking petition. The proceeding has been docketed and the first procedural event -- a prehearing conference -- has been scheduled. In short, a

[6] Staff Opposition at 6.

[7] That Notice announces the convening of a prehearing conference before Administrative Law Judge Regina DeAngelis, on March 4, 2010.

rulemaking proceeding which will address the issues underlying the OII (as well as TracFone's motion for stay) is open and active.[8]

CONCLUSION

For the reasons contained herein as well as those set forth in TracFone's motion for stay, TracFone respectfully reiterates its request that the Commission forthwith stay the pending OII proceeding.[9]

Respectfully submitted,

TRACFONE WIRELESS, INC.

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Its Attorneys

March 2, 2010

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[8] At 8:15 p.m. EST on February 26, 2010, undersigned counsel for TracFone received via e-mail a courtesy copy of a document styled Motion Of Consumer Protection & Safety Division For An Order Compelling Production Of TracFone's Form 499 Pursuant To Staff Data Requests. Staff's motion to compel states correctly that counsel for Staff and TracFone did "meet and confer" prior to the filing of the motion to compel. Undersigned counsel for TracFone explained that TracFone's motion for stay of the OII remains pending and that, so long as the stay motion is pending, TracFone would not respond to the data request. If and when there is a ruling on the motion for stay, TracFone will respond accordingly to the data request, either by providing the requested data or by submitting an objection. Either way, TracFone will comply with the "meet and confer" requirement. Given the short period of time between receipt of the motion to compel and the prehearing conference, TracFone will not submit a detailed response to the motion to compel now. If requested by the ALJ, it will address the motion at the prehearing conference. Alternatively, if requested by the ALJ, it will submit a written response to the motion to compel.

[9] Staff's opposition also describes suggested alternative procedures for considering legal issues regarding the OII. Given the 5 page limitation on its response agreed to by TracFone, it will not address those procedural suggestions here. TracFone will be willing to discuss those and other procedural suggestions during the March 4 prehearing conference, in the event that its motion for stay is not granted on or before that date.

Attachment 1

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received
2/8/10

Action Item 12

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
COMMISSION DIRECTIVE

ADMINISTRATIVE MATTER	☐	DATE	**February 03, 2010**
MOTOR CARRIER MATTER	☐	DOCKET NO.	**2009-144-C**
UTILITIES MATTER	☑	ORDER NO.	

SUBJECT:
DOCKET NO. 2009-144-C - Application of TracFone Wireless, Incorporated for Designation as an Eligible Telecommunications Carrier in the State of South Carolina for the Limited Purpose of Offering Lifeline and Link Up Service to Qualified Households – Discuss this Matter with the Commission.

COMMISSION ACTION:
This motion addresses the Application of TracFone Wireless for Designation as an Eligible Telecommunications Carrier to offer Lifeline and Linkup Service. We issued a Directive on October 15, 2009 denying the Application for Designation as an ETC based upon our finding that the Company's stated position that it would not contribute to the State Universal Service Fund was not consistent with the public interest. Subsequently, the Company and the Office of Regulatory Staff engaged in extensive discussions and negotiations aimed at satisfying the Commission's concerns about the application, and more specifically, for the purpose of creating a corporate structure which facilitated the Company's requirement to make appropriate State USF contributions. To that end, the Company has established a subsidiary corporation called SafeLink Wireless, Inc. which would offer Lifeline and Linkup services to qualified customers and make appropriate contributions to the State USF.

The parties have filed a joint proposal under which SafeLink Wireless would receive ETC designation to offer Lifeline and Linkup service. We applaud the joint efforts of the Company and the ORS to craft a mutually agreeable solution. Under the proposal, the new company would remit contributions to the State USF, and the rates charged by SafeLink Wireless would be somewhat lower than those contained in TracFone's initial application. TracFone has requested that its application be assigned to SafeLink, and that the application be approved as modified by the joint proposal.

While we believe the proposed settlement of this matter to be just and reasonable on its face, we find that the public interest would require that public notice and an opportunity to intervene be given prior to formal approval, since the ETC designation would be awarded to a different entity than that which initially applied for such designation in this docket. Only those persons who wish to be heard with regard to any changes to the initial application will be allowed to intervene. The notice period shall be fifteen days.

To facilitate and expedite the remaining procedural matters necessary to conclude this docket, including but not limited to the drafting and filing of the required notice, Randall Dong shall be appointed Hearing Officer.

PRESIDING: Fleming SESSION: Regular TIME: 2:30 p.m.

	MOTION	YES	NO	OTHER
FLEMING	☐	☑	☐	
HAMILTON	☐	☑	☐	
HOWARD	☐	☑	☐	
MITCHELL	☑	☑	☐	
WHITFIELD	☐	☑	☐	
WRIGHT	☐	☑	☐	

(SEAL)

RECORDED BY: J. Schmieding

CERTIFICATE OF SERVICE

I, Raymond Lee, a Legal Secretary with the law firm of Greenberg Traurig, LLP, hereby certify that on March 4, 2010, a true and correct copy of the foregoing TracFone Wireless, Inc.'s Response to Opposition to Motion for Stay was sent via electronic-mail to the following:

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