

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Communications Division
Legal Division

San Francisco, California
Date: October 29, 2009
Resolution No.: T-17235

R E S O L U T I O N

**RESOLUTION TO DENY THE REQUEST OF TRACFONE
WIRELESS, INC. (U-4231-C) TO BE DESIGNATED AS AN
ELIGIBLE TELECOMMUNICATIONS CARRIER (ETC) IN
CALIFORNIA.**

SUMMARY

This Resolution denies the request of TracFone Wireless, Inc. (U-4231-C) (TracFone) to be designated as an Eligible Telecommunication Carrier (ETC) for the purpose of receiving federal Lifeline support. The California Public Utilities Commission (CPUC or Commission) finds that it is not in the public interest to designate as an ETC a telephone carrier that: (a) has failed to collect and remit - and refuses to collect and remit – public purpose program surcharges¹ and user fees² on its non-subsidized California intrastate revenue; and (b) argues that it does not have to collect and remit such fees because it is not a public utility. The Commission also directs the Commission’s Communications Division (CD) to 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 public purpose surcharges, and penalized for its violation of the statutes, rules, and orders requiring such payment.

LEGAL BACKGROUND

In the 1996 Telecommunications Act (1996 Act), Congress added new provisions to the Communications Act for the support of universal telephone service.³ In order to be eligible to receive most forms of federal universal service support (high-cost, low-income, and most rural health care support), carriers must be designated as ETCs by State

¹ Public purpose programs, as used herein, include the following: California High Cost Fund (CHCF) – A & B, California Teleconnect Fund (CTF), California Advanced Services Fund (CASF), Deaf and Disabled Telecommunications Program (DDTP) and California LifeLine.

² California P.U. Code §§ 431-35.

³ 47 USC §§ 214(e), 254.

commissions.⁴ In order to facilitate such State ETC designations, a State may adopt “impose other requirements consistent with federal law.”⁵

In Resolution T-17002, the CPUC adopted comprehensive ETC guidelines and reporting requirements. Resolution T-17002 assumes throughout that only registered or certificated wireline and wireless carriers may seek ETC designation, i.e., carriers subject to the CPUC’s general jurisdiction, and required to comply with the requirements for public utility telephone companies.⁶ Resolution T-17002 also requires that each ETC petitioner be “able to show that the carrier’s designation as an ETC is consistent with the public interest, convenience and necessity.”⁷

Federal statute requires that an ETC offer the supported universal telephone services at least in part using its own facilities - “either using its own facilities or a combination of its own facilities and resale of another carrier’s services.”⁸

Federal statute also authorizes States to create their own universal service programs,⁹ statutory scheme, and foresees Federal-State cooperation in the administration of universal service programs.¹⁰ As set forth below, States may require wireless carriers to pay into such programs, as California does. TracFone’s failure to do so, and its denial that it is a public utility, lead us to conclude that it is not in the public interest to designate TracFone as an ETC eligible for Federal universal service support.

⁴ 47 USC § 254(e) (“only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support”); *see also* 47 CFR §54.201(a)(1). Where, however, a “common carrier ... is not subject to the jurisdiction of a State commission,” that common carrier may go directly to the FCC, which may then “designate such a common carrier” as an ETC. 47 USC § 214(e)(6). In petitioning this Commission for an ETC designation, TracFone implicitly acknowledges the CPUC’s jurisdiction, but – as described below – denies that it is “subject to the jurisdiction of [this] State commission” related to public purpose surcharges and other public utility obligations.

⁵ *In the Matter of Federal-State Joint Board on Universal Service*, 20 FCC Rcd 6371; 2005 FCC LEXIS 1673 (2005), at ¶ 28 (Report and Order 05-46).

⁶ Indeed, the July 18, 1997 letter from the CPUC’s Telecommunications Division granting a Wireless Identification Registration to TracFone’s predecessor Topp Telecom explicitly states:

In all respects except authorization for market entry and rates, the authority of the Commission to regulate terms and conditions of newly registered cellular carriers shall apply to the same extent as those holding [a] CPCN prior to August 10, 1994.

⁷ Resolution T-17002, Appendix A, Section II(G).

⁸ 47 USC § 214(e). As explained below, TracFone has successfully petitioned for forbearance on this facilities requirement, setting up the issues presented here.

⁹ 47 USC 254(f)

¹⁰ *Cf. WWC Holding Co. v. Sopkin*, 488 F3d 1262, 1277 (10th Cir., 2007) (“The structure of Section 254 of the Telecommunications Act delineates a federal universal service program ... and a state’s authority to create its own such program”) (citations omitted).

FACTUAL BACKGROUND

Corporate History

TracFone is a Delaware corporation headquartered in Florida. It is what is commonly referred to as a “reseller” of commercial mobile radio service (CMRS). It operates throughout the United States, and has provided non-subsidized, market-rate wireless telephone service in California for a number of years.

TracFone is a subsidiary of América Telecom, S.A.B. de C.V. (América Móvil), a telephone corporation based in Mexico City.¹¹ América Móvil describes its TracFone subsidiary as “engaged in the sale and distribution of prepaid wireless service and wireless phones throughout the United States, Puerto Rico and the U.S. Virgin Islands.”¹² TracFone’s prepaid wireless service is marketed and sold under the “TracFone,” “Net10,” and “SafeLink” brands.¹³ In each case, the customer is required to purchase and activate a TracFone handset.¹⁴ At December 31, 2008, TracFone had approximately 11.2 million subscribers nationwide, including all three brands, and describes it self as “the largest operator in the U.S. prepaid cellular market.”¹⁵

On July 18, 1997, the CPUC’s Telecommunications Division gave to TracFone’s predecessor, Topp Telecom, Inc. (Topp Telecom), Wireless Registration Identification number U-4231-C.¹⁶ The CPUC reminded Topp Telecom that, as a “newly registered cellular carrier,” it was required to collect surcharges from “all end users” to pay for

¹¹ See Form 20-F (Annual and transition report of foreign private issuers) of América Móvil, S.A.B. de C.V., filed with the Securities and Exchange Commission (SEC) June 30, 2009, dated December 31, 2008, available on SEC website at http://www.sec.gov/Archives/edgar/data/1129137/000119312509141628/d20f.htm#rom94469_1 (hereinafter América Móvil Form 20-F). at 52-53. América Móvil, and hence TracFone, are controlled by Carlos Slim Helu and his family. *Id.* at 13 (“The Slim Family may be able to elect a majority of the members of our board of directors and to determine the outcome of other actions requiring a vote of our shareholders ... We cannot assure you that the Slim Family will not take actions that are inconsistent with your interests”).

¹² *Id.* at 17, 52.

¹³ *Id.* at 52. Safelink is apparently TracFone’s Lifeline brand, and accordingly is not yet sold in California. See https://www.safelinkwireless.com/EnrollmentPublic/enroll_lifeline.aspx.

¹⁴ See <http://www.tracfone.com>, www.net10.com, and www.safelink.com.

¹⁵ América Móvil Form 20-F at 52.

¹⁶ July 18, 1997 CPUC letter memorializing Topp Telecom’s wireless registration, at 1.

specified public purpose funds, and comply with other laws relating to telephone service offered in California.¹⁷

In 2003, TracFone unilaterally informed a Telecommunications Division staff person that TracFone “does not render any ‘billings’” which would be reportable to the CPUC, implying (TracFone now contends) that TracFone no longer considered itself obligated to collect and remit public purpose surcharges and user fees.¹⁸ TracFone never formally sought clarifications of the terms or requirements of its Wireless Registration Identification in this regard, including its obligation to collect and remit public purpose surcharges and user fees. At no time did Commission staff accede to TracFone’s view.¹⁹

TracFone claims not to “own any wireless telecommunications facilities or hold any wireless licenses.”²⁰ Instead, TracFone claims that it “purchases airtime through agreements with facilities-based wireless service providers, and resells that airtime to customers.”²¹ TracFone obtains service from the following underlying carriers: Alltel, AT&T mobility, Golden State Cellular, T-Mobile, US Cellular, and Verizon Wireless.²² Through these agreements, TracFone claims “a nationwide network covering virtually all areas in which wireless services are available.”²³

“Customer usage,” TracFone further asserts, “is controlled using patented, proprietary software installed in each phone TracFone sells, and TracFone provides customer service

¹⁷ See, e.g., *id.* at 1-2 (noting “authority of the Commission to regulate terms and conditions”), ¶ 4 (“user fees”); ¶ 5 (“D.E.A.F. Trust”); ¶ 7 (“required to charge all end users the California High Cost Fund (CHCF) B surcharge”), ¶ 8 (“required to charge all end users the California Teleconnect Fund surcharge”).

¹⁸ March 24, 2003 letter from TracFone counsel to staffperson Hassan Mirza, attached to April 22, 2009 TracFone email arguing that the lack of a response from Mr. Mirza indicated no “concern by the Commission regarding TracFone’s understanding of the reporting requirements.”

¹⁹ In 2004, Commission staff realized that TracFone Wireless, Inc. was operating in California under the Wireless Identification Registration number U-4231 assigned to Topp Telecom, and that Topp had changed its name to TracFone, a fact which may not have been disclosed to staff. Articles from the business press suggest that Topp may have changed its name to TracFone Wireless as early as November 2000. See <http://www.allbusiness.com/media-telecommunications/6534943-1.html>. Staff speculates that the change of name may have occurred when Topp was acquired by América Móvil’s predecessor Telmex, when Telmex “began acquiring ... international subsidiaries” in 1999. See América Móvil Form 20-F at 20.

²⁰ *Id.* at 52.

²¹ *Id.*

²² Pursuant to a staff data request, TracFone has provided redacted copies of some of its agreements with these underlying carriers, as discussed further below.

²³ América Móvil Form 20-F at 52.

and manages customers as though it were a network-based carrier.”²⁴ América Móvil tells its investors that “TracFone's business model does not require any significant recurring capital expenditures.”²⁵ TracFone sells both its handsets and airtime (sometimes packaged as “monthly plans”) online,²⁶ and through a variety of U.S. retail stores (Mollie Stone and Walmart, for example).²⁷ TracFone describes itself as “compet[ing] with the major U.S. wireless operators and other mobile virtual network operators.”²⁸

Although TracFone claims not to have any “wireless telecommunications facilities,” it does admit that, as of December 31, 2008, it had 594 employees.²⁹ TracFone’s nationwide revenue for 2008 was \$1.5 billion.³⁰ TracFone has confirmed that a significant portion of this was California intrastate revenue,³¹ a category of revenue on which TracFone’s competitors collect and remit public purpose surcharges and user fees, but which TracFone has not and currently does not collect and remit.

In 2004, TracFone petitioned the Federal Communications Commission (FCC) for “forbearance from the facilities requirement for ETC designation.”³² TracFone here attempts to leverage such forbearance, arguing that because it does not use any of its own facilities in providing telephone service, it is not a public utility subject to this Commission’s jurisdiction. For reasons stated below, we reject that argument.

TracFone’s Advice Letter Petition, Ensuing Comments and Protests, and Draft Resolution T-17175

On August 20, 2008, TracFone filed Advice Letter no. 1 with this Commission, to which it attached a “Petition of Tracfone Wireless, Inc. for Designation as an Eligible

²⁴ *Id.* at 53.

²⁵ *Id.*

²⁶ See websites in footnote [11], *supra*.

²⁷ América Móvil Form 20-F at 53.

²⁸ *Id.*

²⁹ *Id.*

³⁰ America Movil 2008 Annual Report (p.22), found at <http://www.americamovil.com/docs/reportes/eng/2008.html>.

³¹ TracFone responses to staff’s May 8, 2009 Data Requests.

³² See FCC Order 05-165 (issued September 8, 2005) *In the Matter of Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. For Forbearance from 47 U.S.C. § 214(3)(1)(A) and 47 C.F.R. § 54.201(i)*, at ¶ 1.

Telecommunications Carrier for the Limited Purpose of Offering Lifeline and Link Up Services to Qualified Households” (Petition).³³

The Commission received no protests related to TracFone’s Advice Letter No. 1 and Petition. However, on September 9, 2008, Verizon California, Inc. (Verizon) filed a “response,” cautioning that TracFone had failed to understand the process of eligibility determination, and that the ETC petition essentially sought to prejudge this Commission’s Lifeline proceeding (R.06-05-028), among other things.

On October 15, 2008, in compliance with Public Utilities Code § 311 (g), CD staff sent a notice e-mail to all Eligible Telecommunications Carriers informing these parties that Draft Resolution T-17175, granting TracFone ETC designation, was posted on the CPUC’s website and available for public comment.

On December 12, 2008, a coalition of 13 small LECs (Small LECs) submitted a late-filed Comment on the Draft Resolution T-17175.³⁴ The Small LECs were a little more forceful than Verizon had been, explicitly requesting that TracFone’s “request for designation as an Eligible Telecommunications Carrier ... be denied.” Like Verizon, the Small LECs (sometimes referred to as the “rural LECs”) saw TracFone’s petition as an attempt to circumvent the Commission’s Lifeline rulemaking, and argued that granting the TracFone petition would be discriminatory and not “competitively sensitive” because the Small LECs “lack the pricing flexibility that URF carriers have [and] would not have a reasonable opportunity to compete with TracFone’s offering.”³⁵

In response to these concerns, TracFone filed supplemental Advice Letter No. 1A on December 16, 2008, purporting to limit its proposed service areas to “those portions of the state served by LECs who are subject to the Commission’s Uniform Regulatory Framework.”³⁶ In order to allow consideration of this new information, staff withdrew Draft Resolution T-17175 from the December 18, 2008 Commission Meeting Agenda.

³³ On September 8, 2005, the FCC had granted TracFone’s petition for forbearance from the facilities-based requirement for ETC designation, which require an ETC provide service either using its own facilities or using a combination of its own facilities and resale of other providers’ facilities. The Forbearance Order required TracFone to file a compliance plan with the FCC and describe how it will implement the conditions imposed by the Forbearance Order. On October 11, 2005, TracFone filed its compliance plan with the FCC.

³⁴ The Small LECs were comprised of Calaveras Telephone Company (U-1004-C), Cal-Ore Telephone Company (U-1006-C), Ducor Telephone Company (U-1007-C), Foresthill Telephone Company (U-1009-C), Happy Valley Telephone Company (U-1010-C), Hornitos Telephone Company (U-1011-C), Kerman Telephone Company (U-1012-C), Pinnacles Telephone Company (U-1013-C), The Ponderosa Telephone company (U-1014-C), Sierra Telephone Company (U-1016-C), The Siskiyou Telephone Company (U-1017-C), Volcano Telephone Company (U-1019-C), and Winterhaven Telephone Company (U-1021-C).

³⁵ Small LECs’ late-filed comments, at 5.

³⁶ Amendment to Petition, filed as attachment to Advice Letter No. 1A, at 2.

TracFone subsequently filed supplemental Advice Letter Nos. 1B,³⁷ 1C,³⁸ 1D,³⁹ and 1E,⁴⁰ on March 2, 2009, March 16, 2009, July 24, 2009, and September 16, 2009 respectively, in order to provide additional support for its ETC petition. On March 25, 2009, the Small LECs filed a response to Advice Letter supplements 1A, 1B, and 1C.⁴¹ In the interim, the CPUC also received letters from community-based organizations supporting,⁴² opposing,⁴³ or otherwise commenting⁴⁴ on TracFone's request to be designated as an ETC in California.

³⁷ Supplemental Advice Letter No. 1B came in response to a Commissioner's inquiry about how TracFone proposed to assure that its LifeLine customers had access to 911 and E911 emergency services without regard to activation status or availability of prepaid minutes, and how it would certify that applicants for its federal LifeLine and Link Up service are in fact eligible for the service, and do not already receive federal LifeLine or Link Up benefits. TracFone subsequently filed supplemental Advice Letter No. 1D to clarify that it would not be seeking Link up benefits for its customers.

³⁸ TracFone's supplemental Advice Letter No. 1C contained its proposed LifeLine certification process and notified the CPUC that FCC Order 09-17 had granted TracFone's petition to modify the Public Safety Answering Point ("PSAP") certification requirement condition in its Forbearance Order, FCC Order 05-165.

³⁹ TracFone's supplemental Advice Letter No. 1D contained further proposed certification and verification procedures, and also provided maps of T-Mobile, Verizon Wireless and AT&T Mobility cellular coverage. CD staff had initially granted TracFone's request for the waiver of the service area map requirement. However, in light of the Small LECs' late-filed comments, the service area map requirement again became germane to the inquiry, as the lack of such maps has prevented a clear understanding of exactly where TracFone intends to provide service, and whether the areas are subject to FCC's special certification requirements for rural carriers.

⁴⁰ Supplemental Advice Letter No. 1E increased the proposed number of free minutes to the customer from 45 to 65 minutes/month.

⁴¹ The Small LECs reiterated their previously expressed concerns, elaborating further that: (1) TracFone had not offered a reasonable mechanism for the Commission to ensure that TracFone's subsidized prepaid wireless offering would only be offered in URF company service territories; and (2) the Commission should defer consideration of TracFone's ETC request until prequalification has been implemented, and the pending reforms to California's Lifeline program have been fully considered, *inter alia*.

On August 13, 2009, staff received Protests to Advice Letter 1D from both the Small LECs and from the Commission's Division of Ratepayer Advocates (DRA). The Small LECs questioned the maps, and reasserted some of their previously made arguments. DRA questioned the affordability, comparability, and adequacy of TracFone's service for low-income consumers, and specifically raised the issue of TracFone's failure to collect and remit public purpose surcharges out of revenue received from non-subsidized end users.

⁴² World Institute on Disability (February 2, 2009), Consumer Action (February 18, 2009), and California Alliance for Retired Americans Letter of support (March 10, 2009).

⁴³ DRA August 13, 2009 Response to TracFone's 4th Advice Letter Supplement.

⁴⁴ TURN (July 7, 2009) letter to the CPUC, expressing concern regarding the application of the TracFone wireless service model to the state LifeLine Fund which is the subject of D.06-05-028.

Further CPUC Investigation

As CD staff looked at the comments and additional information discussed above, it became aware of a more serious problem: since at least 2004, TracFone had failed to collect and remit public purpose surcharges and user fees on its California intrastate telephone revenues.⁴⁵ As discussed more fully below, TracFone took the position that it did not owe any such fees or surcharges on its prepaid revenue, because such revenue was not traditionally “billed.” Staff rejected that position, and stated that TracFone was required to remit the delinquent payments. TracFone has refused to do this, claiming additionally that – although it is a telecommunications “carrier” eligible for federal Lifeline subsidies – it is not a “utility” as defined in Sections 216, 233, and 234 of the California Public Utilities Code. Due to the jurisdictional and other legal issues raised by TracFone, CD staff approached the Legal Division for assistance. Consequently, this Resolution is jointly sponsored by the Communications Division and the Legal Division.

These two facts – TracFone’s refusal to collect and remit public purpose surcharges and user fees on its non-subsidized California revenue, and its refusal to recognize the Commission’s jurisdiction over it as a public utility – lead us to believe that it is not in the public interest to approve TracFone’s Advice Letter request to be designated as an ETC. ETCs serve the most vulnerable populations among California’s consumers, and it is important that the ETCs so engaged observe and comply with Commission processes and requirements designed to protect and support precisely such at-risk consumers.

DISCUSSION

1. A Public Interest Standard Applies to this Commission’s Decision Whether or Not to Designate TracFone as an ETC.

TracFone has argued to staff that there is no “public interest” standard that applies here, and that therefore the Commission has no discretion under section 47 U.S.C. 214(e)(1) to deny such request for ETC designation.⁴⁶ Section 214(e)(2), however, provides that:

⁴⁵ The Commission’s records indicate the TracFone ceased to remit any user fees after Q1 2004. The Commission has no record of TracFone ever paying into the public purpose funds.

⁴⁶ In meetings with staff, TracFone has cited 47 USC § 214(e)(1), which provides in relevant part:

Eligible telecommunications carriers A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received - (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and (B) advertise the availability of such services and the charges therefore using media of general distribution.

A State commission shall, upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest. [Emphasis added.]

As a threshold matter, the “shall” in the first sentence above appears to refer to the initial ETC designation in a given service area, usually that of an ILEC. The grant of TracFone’s Petition to be designated as a second or competitive ETC in areas already served by a designated ILEC is required only when consistent with the public interest, convenience and necessity. The statute mandates a specific finding related to “public interest” when the ETC applicant intends to serve any area already served by a rural carrier, while appearing to leave such an inquiry within the discretion of the State commission (“consistent with the public interest”) when the ETC applicant intends to serve non-rural areas.⁴⁷ We conclude that whether TracFone’s Petition is “consistent

Having won forbearance from Section 241(e)(1)(A)’s facilities requirements (as discussed above), TracFone now argues that the only ETC requirement applicable to it is Section 214(e)(1)(B), which effectively requires only that an ETC petition recite that petitioner will advertise the availability of services and the charges for same using media of general distribution, and that once this criteria has been fulfilled, the Commission has no discretion to deny TracFone’s petition. We disagree, for the reasons stated herein.

⁴⁷ Staff believes that some areas TracFone seeks to serve are rural, although staff can reach no firm conclusion in this regard because TracFone did not comply with Resolution T-17002, Appendix A, Section 1A, which provides:

The service areas for which the carrier is requesting ETC designation including a List of Geographic Service Areas and a map in .shp format showing the proposed service area. For wireless petitioners, the map should identify the location of cell sites and shade the area where the carrier provides commercial radio service or similar service.

TracFone did not submit the required List of Geographic Service Areas, the map in .shp format or the locations of the cell sites. Among other things, this information would have illustrated to what extent

with the public interest, convenience, and necessity” remains a legitimate inquiry of this Commission in either case, rural or non-rural.

FCC decisions support this conclusion. In its Report and Order 05-46 in the *Federal-State Joint Board on Universal Service* docket, the FCC affirmed that a “public interest” standard applies to all ETC applications, and is not limited to rural carriers. The FCC found that:

under the statute, an applicant should be designated as an ETC only where such designation serves the public interest, regardless of whether the area where designation is sought is served by a rural or non-rural carrier.⁴⁸

In its Report and Order 05-46, the FCC also “require[d] a carrier seeking ETC designation to demonstrate its commitment to meeting consumer protection and service quality standards in its application before the Commission.”⁴⁹ In so doing, the FCC specifically acknowledged the jurisdiction of State commissions to craft State-specific public interest norms: “[S]tate commissions that exercise jurisdiction over ETC designations may either follow the Commission’s framework or impose other requirements consistent with federal law to ensure that supported services are offered in a manner that protects consumers.”⁵⁰

TracFone’s signal would intrude into the territory of competing Rural LECs. TracFone’s offer to only sign-up customers with addresses in URF ILEC territory does not solve the problem that even TracFone’s maps, lacking in granularity as they are, indicate that its proposed wireless coverage area necessarily extends into that of the rural Small LECs.

⁴⁸ FCC Report and Order 05-46, *supra*, at ¶ 4. Although States are free to develop their own ETC criteria, the standards the FCC enunciates for itself provide guidance. In later decisions, the FCC has stayed the course on the question of a public interest standard:

In [Report and Order 05-46], the Commission adopted one set of criteria for evaluating the public interest for ETC designations for both rural and non-rural areas. Specifically, in determining the public interest, the benefits of increased consumer choice and the unique advantages and disadvantages of the applicant’s service offering are considered. As the Commission noted in the [Report and Order 05-46], however, the same factors may be analyzed differently or may warrant a different outcome depending on the specifics of the proposed service area and whether it is rural or non-rural.

In re Federal-State Joint Board on Universal Service, TracFone Petition for Designation as ETC, 23 FCC Rcd 6206 (2008), at ¶ 6.

⁴⁹ Report and Order 05-46, *supra*, at ¶ 28.

⁵⁰ *Id.* at ¶ 30.

In Resolution T-17002, setting out the California-specific requirements for ETC designation, the Commission included a public interest component in an ETC candidate's showing:

The carrier should be able to show that the carrier's designation as an ETC is consistent with the public interest, convenience and necessity.⁵¹

Resolution T-17002 further specified that the “advantages and disadvantages of [the petitioner's] service offerings” would be relevant in an ETC proceeding.⁵² The FCC has on multiple occasions expressed concern about the integrity of State universal service funding.⁵³ Indeed, State universal service programs are necessary to the “partnership between the federal and state governments to support universal service.”⁵⁴ The Commission may consider the disadvantages of ETC designation for a carrier that not only refuses to pay into the State's public purpose program funds, but also contests the Commission's jurisdiction to regulate it as a utility.

2. It is not in the Public Interest for TracFone to Receive an ETC Designation.

The FCC has found that “competitive neutrality” is part of the public interest inquiry associated with ETC petitions,⁵⁵ and is consistent with the statute's “explicit requirement of equitable and nondiscriminatory contributions.”⁵⁶ We find that it is neither competitively neutral nor otherwise in the public interest to certify a carrier as eligible for universal service funding when that carrier refuses to contribute to legally mandated programs to insure universal service, programs into which the carriers' competitors pay and which fund the very sort of universal service which is the goal of the ETC program. It also is not in the public interest to grant ETC designation to a carrier that denies the authority of the State agency charged with insuring universal telephone service and protecting the public's interest, convenience and necessity.⁵⁷

⁵¹ Resolution T-17002 Appendix A, Section II-G.

⁵² *Id.*

⁵³ See, e.g., NPRM in the *Matter of Federal-State Board on Universal Service*, 17 FCC Rcd 2999 (2002), at ¶ 22.

⁵⁴ *Qwest v. FCC*, 258 F.3d 1191, 1203 (10th Cir 2001) (“The FCC acknowledges that the Ninth Order will result in reasonably comparable rates only if the states implement their own universal-service policies”).

⁵⁵ *In the Matter of Federal-State Joint Board on Universal Service, First Report and Order*, 12 FCC Rcd 8776 (1997) (Universal Service First Report and Order), at ¶¶ 45 ff.(competitive neutrality “necessary and appropriate for the protection of the public interest”).

⁵⁶ *Id.* at ¶ 48.

⁵⁷ A logical inconsistency arises when a carrier questions the jurisdiction of the body statutorily charged with determining its status as an ETC. From this perspective, it seems that TracFone implicitly invites us

a. TracFone's Refusal to Collect and Remit Public Purpose Surcharges and User Fees Violates Federal and State Law.

The July 18, 1997 letter granting TracFone's Wireless Registration Identification number specifically conditions that grant on TracFone's ongoing collection and remittance of public purpose surcharges on its intrastate revenue:

All telecommunications carriers are required to charge *all end users* the California High Cost Fund (CHCF) B surcharge as set by the Commission, except for ULTS billings, coin-sent paid calling, debit card messages, one-way radio paging, usage charges to COPTs, customers receiving services under existing contracts what were executed on or before September 15, 1994, and directory advertising.⁵⁸

A subsequent paragraph addresses in the same terms the requirement that TracFone collect and remit to the California Teleconnect Fund surcharge.⁵⁹ Later-enacted statutes added additional fees. Today, the following public purpose surcharges and user fees are required to be collected from end users and remitted to the CPUC:

Regulatory Fee	Statute
California LifeLine Telephone Program (California LifeLine)	§§ 270 et seq., and 871 et seq.
Deaf and Disabled Telecommunications Program (DDTP)	§§ 270 et seq., and 2881
California High Cost Fund A (CHCF-A)	§§ 270 et seq., and 739.3
California High Cost Fund B (CHCF-B)	§§ 270 et seq., and 739.3
California Teleconnect Fund (CTF)	§§ 270 et seq.
California Advanced Services Fund (CASF)	§ 70160
Calif. Public Utilities Commission User Fees	§§401-10, 431 - 435

On May 1, 2009, staff directed TracFone to collect and remit delinquent public purpose surcharges and user fees pursuant to this authority.⁶¹ TracFone has refused to do that.⁶²

not to act in any way on its petition. We nevertheless determine that we are statutorily authorized to make the ETC determination, and that the public interest requires us to deny TracFone's petition for designation as an ETC.

⁵⁸ July 18, 1997 letter to TracFone's predecessor, Topp Telecom, at 2, ¶ 7 (emphasis added).

⁵⁹ *Id.* at ¶ 8.

⁶⁰ This fee was instituted by SB 1193 (Chapter 393, Statutes of 2008), and only applies to revenue collected on or after January 1, 2008.

Federal statute requires that:

*All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.*⁶³

The Federal statute also authorizes States to implement their own intrastate programs to supplement the Federal universal service programs:

*Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State.*⁶⁴

The reference here to “every telecommunications carrier” has been held to include wireless carriers.⁶⁵ As set forth below, California has included wireless carriers in its universal service programs. Although the States’ creation of their own universal funding mechanisms may be viewed separately from the States’ role in designating carriers eligible for Federal funding, the 1996 Act “plainly contemplates” that Federal and State universal service requirements be harmonized, through “a partnership between the federal and state governments to support universal service.”⁶⁶

In 2005, the FCC tightened its rules for ETCs, in part to “improve the long-term sustainability of the universal service fund,” making public interest requirements more

⁶¹ May 1, 2009 email from staffperson Charles Christiansen to TracFone counsel Mitchell Brecher.

⁶² May 15, 2009 letter from TracFone counsel to staff.

⁶³ 47 USC § 254(b)(4) (emphasis added).

⁶⁴ 47 USC § 254(f); *see also WWC Holding Co. v. Sopkin*, 488 F.3d 1262, 1277 (10th Cir., 2007) (“The structure of Section 254 of the Telecommunications Act delineates a federal universal service program . . . and a state’s authority to create its own such program”) (citations omitted).

⁶⁵ *Cellular Telecommunications Industry Assn. v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir., 1999) (Federal statute is “strong support for the proposition that, consistent with federal law, states may require [universal service] contributions [from CMRS carriers]. Instead of preempting such laws, Congress endorsed them”).

⁶⁶ *Qwest v. FCC*, 258 F.3d 1191, 1203 (10th Cir 2001); *accord* NPRM in *In the Matter of Federal-State Board on Universal Service*, 17 FCC Rcd 2999 (2002), at ¶ 22.

explicit, and requiring that ETCs meet consumer protection and service quality standards before receiving ETC designation.⁶⁷

We conclude that failure to pay into the funds identified above violates Federal and State laws, and cannot be said to be in the public interest.

b. The Obligation to Collect and Remit Public Purpose Surcharges and User Fees Is Not Limited to “Billed Revenue.”

TracFone has argued that because its “services are entirely prepaid [and] no customers are billed,” it therefore has “no billed revenues” on which public purpose surcharges and user fees can be assessed under General Order No. 153.⁶⁸ While the Commission has occasionally referred to “billed revenue” (in G.O. 153, for instance), this language stems from 1984, before the shift of significant portions of the telephone market to the prepaid model.⁶⁹

More importantly, the Commission has consistently made clear that “all end users” of telephone services, including wireless users, should be included in the billing base from which user fees and public purpose surcharges are calculated. In D.96-10-066, for example, we adopted an “all end user surcharge” (AEUS), stating that we

reaffirm[ed] the position which we took in D.94-09-065 at page 292. In that decision, we held that *all end users* of every LEC, IEC, *cellular*, and paging company in the state, receive value from the interconnection to the switched network, and that *all users should be included in the billing base* for the ULTS program and the Deaf and Disabled Telecommunications program...⁷⁰

⁶⁷ Report and Order 05-46, *supra*, at ¶ 2, *passim* (“a more rigorous ETC designation process”).

⁶⁸ April 22, 2009 email from TracFone counsel to staff.

⁶⁹ G.O. 153 was adopted in 1984, long before the 1996 Telecommunication Act’s creation of the current ETC regime, and even longer before the more recent advent of prepaid wireless service as a market phenomenon. There is no mention of prepaid services in either D.84-11-028, our Decision adopting G.O. 153, or in Resolution T-17202 which updated the General Order in other respects. Nor is there any evidence that TracFone ever sought clarification from the Commission of its obligations under G.O. 153, its Wireless Registration Identification letter, or the statutes set out above.

⁷⁰ D.96-10-066, Slip Op. at 288-89 (emphasis added). At page 269, we clarified that AEUS surcharges are “imposed on all customers’ expenditures for telecommunications services.” See also *id.* at 278 (“imposed on all telecommunications services and customers”); Finding of Fact 164. Ordering paragraph 10(d) enunciated the same ruling for the California Teleconnect Fund.

This ruling is consistent with the statutory bases for the collection of public purpose surcharges and user fees. *See, e.g.*, P.U. Code §§ 270 *et seq.*, 431-35, and 739.3. Section 431, for example, requires the Commission to collect fees from all public utilities, specifically including “radiotelephone utilities,” that provide service to “customers or subscribers,” in order to fund the Commission’s operating budget. Section 270 broadly states that the “Monies in the funds are the proceeds of rates.” Section 739.3(c) requires only that the Commission’s universal service funds for high-cost areas be “suitable, competitively neutral, and broad-based.” We do not find in these statutes a limitation of funding sources to “billed services” or “billed revenue.”

G.O. 153 addresses only the California Universal Lifeline Telephone Service fund, as authorized by the Moore Universal Telephone Service Act, P.U. Code §§ 871 *et seq.*⁷¹ TracFone’s assertion that its revenue is not “billed revenue” as referenced in G.O. 153, because it issues no paper bill, cannot prevail against the clear statutory requirements of P.U. Code §§ 270 *et seq.*, 431-35, and 739.3, and the previously expressed intent of this Commission to include “all end users” in the revenue base.

Moreover, we note that TracFone contributes to the Federal Universal Service Fund (“USF”),⁷² even though USF contributions there are similarly predicated on a “...percentage of amount *billed* to ... residential and business customers.”⁷³

TracFone’s claims that it is not required to collect and remit user fees and public purpose surcharges because it has no “billed revenues” is inconsistent with its positions elsewhere, and with the requirements of California’s statutory user fee and universal service provisions.

c. TracFone’s Service Does Not Come Within Surcharge and Fee Exceptions For “Public Phone Coin Calls and Debit Card Calls.”

TracFone also attempts to come within the language of G.O.153, D.96-10-063 and

⁷¹ D.84-11-028, Appendix B, G.O. 153, at ¶ 1.1; *see also* G.O. 153 as amended April 16, 2009 in Resolution T-17202, at ¶ 1.1.

⁷² Information available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/Locator/.

⁷³ According to the FCC Consumer Fact on Universal Service Support Mechanisms:

Companies contribute a certain percentage of the amount **billed** to their residential and business customers for interstate and international calls. The exact percentage that companies contribute is adjusted every quarter based on projected demand for Universal Service Funding. [Emphasis added]

See <http://www.fcc.gov/cgb/consumerfacts/universalservice.html>.

D.00-10-028 exempting “public phone coin calls and debit card calls” from surcharge requirements.⁷⁴ We note, however, that there are significant differences between debit card calls and TracFone’s prepaid wireless service. Prepaid cellular service includes a handset, an assigned phone number, telecommunications services, and access to the public telephone network, thus allowing a customer to receive (as well as make) calls. Debit cards, do not have any of these attributes and provide none of these services.

d. TracFone’s Denial of Utility Status is Not Supported by Fact, Logic or Precedent.

TracFone’s parent corporation describes TracFone as “engaged in the sale and distribution of prepaid wireless service and wireless phones throughout the United States, Puerto Rico and the U.S. Virgin Islands.”⁷⁵ TracFone nevertheless claims its status as a reseller offering prepaid wireless telecommunication services, and its provision of service through a “virtual network” consisting of services obtained from facilities-based carriers including AT&T Wireless, T-Mobile, and Verizon Wireless, demonstrate that it is “not a Telephone Corporation as defined by the Public Utilities Code” and that it is therefore “not statutorily subject to the fee requirements codified at PU Code Section 432.”⁷⁶

As the name implies, ETCs are telecommunications *carriers*. Telecommunications carriers are telephone corporations under California law, and therefore are, by definition, utilities pursuant to Sections 216, 233, and 234 of the Public Utilities Code.

Public Utilities Code § 234 provides that a telephone corporation (and therefore a utility under § 216) “includes every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state.” A “telephone line” is defined very broadly in Public Utilities Code § 233:

“Telephone line” includes all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, or managed in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires.⁷⁷

TracFone’s claims that it is a “pure” or 100% reseller, with no facilities of its own, is:

⁷⁴ April 22, 2009 email of TracFone’s counsel to staff.

⁷⁵ America Movil Form 20-F, at 52-53.

⁷⁶ May 15, 2009 letter of TracFone counsel to staff, at p. 3.

⁷⁷ P.U. Code § 233.

(a) not credible in any absolute sense, as described below; and (b) would not in any event change the analysis above or absolve TracFone of its duties as a utility. The Commission regularly imposes utility regulation on resellers of landline service,⁷⁸ and requires both competitive local exchange carriers (CLECs) and inter-exchange carriers (IXCs), even if resellers, to collect and remit user fees and public purpose surcharges.⁷⁹ The letter granting TracFone's predecessor a wireless registration number specifically conditioned that grant on the carrier's compliance with all Public Utilities Code sections applicable to telecommunications carriers, except for those regulating rates and market entry.⁸⁰ This Commission has consistently enforced statutory requirements of general applicability on wireless carriers.⁸¹

More fundamentally, the Commission has repeatedly held that even switchless or non facilities-based resellers remain public utilities subject to its jurisdiction. "Resellers not falling within the exemption language [of Section 234, relating to hospitals, motels, and hotels] are subject to our regulation."⁸² Conversely, "only certificated utilities should be permitted to act as resellers."⁸³ As we explained in Decision 92-06-069:

[T]here are at least two types of NDIEC reseller, those that own or lease, and operate facilities such as telephone cable and switching equipment, and those which provide telephone services over facilities owned by others. In our opinion, both types of resellers are public utilities as defined in the California Constitution and the Public Utilities Code.

In a determination of public utility status, it does not matter whether the ownership, control, operation, or management of the telephone line is direct or indirect. As Article XII, Section 3 of the California Constitution states, "[p]rivate corporations

⁷⁸ See, e.g., *Investigation of Clear World*, D. 05-06-033, Slip Op. at 2, O.P. 1 (\$100,000 fine for unauthorized re-sale of long distance service).

⁷⁹ See, e.g., *Id* at O.P. 2(f) (investigation into reseller's failure to pay required fees and surcharges).

⁸⁰ July 18, 1997 Commission letter to Topp Telecom, Inc., *supra*, at 1 ("In all respects except for market entry and rates, the authority of the Commission to regulate terms and conditions of newly registered cellular carriers shall apply to the same extent as those holding certificates of CPCN prior to August 10, 1994").

⁸¹ See, e.g., D. 04-09-062 (*Cingular OII*). The argument that the Commission has exempted CMRS resellers from certain reporting requirement (see, e.g., D.98-03-014) only demonstrates that the Commission had the power and retained jurisdiction over those carriers to assert such requirements in the first instance.

⁸² D.87-01-063, 1987 Cal. PUC LEXIS 838, 40-41, 23 CPUC 2d 554.

⁸³ D.84-04-014, 1984 Cal. PUC LEXIS 1359, *75; 14 CPUC 2d 563.

and persons that own, operate, control, or manage a line, plant, or system for . . . the transmission of telephone . . . directly or indirectly to or for the public . . . are public utilities. . . ."

The fact that a company does not own or physically operate a switch does not determine whether it operates or manages facilities in connection with the provision of telecommunications services. From the customer's viewpoint, the switchless reseller is the telephone company; it orders the establishment of service to the customers' premises and controls the rates that will be charged, and is the business they will look to when problems arise. The switchless nature of a business is irrelevant to its status as a public utility.⁸⁴

In other words, a reseller purchasing "minutes" from a wholesale or facilities-based telecommunications carrier, and certainly a reseller purchasing minutes *and* network access through assigned telephone numbers, must be said to acquire some fractional or marginal ability – even if transitory and/or indirect -- to operate or manage a telephone "line" as defined in Public Utilities Code Section 233.

Moreover, strictly speaking, TracFone does have facilities. As we explained in D. 92-06-069:

There is another reason for finding that switchless resellers are public utilities. Such resellers undoubtedly have offices, desks, files, computers, telephones, and so on which they use in their telecommunication services businesses. This "equipment, appliances, real estate, fixtures, and personal property," is owned, controlled, operated and/or managed in order "to facilitate communication by telephone," and thus is "telephone line." (*PU Code* § 233.) If a reseller owns, controls, operates, or manages any telephone line for compensation, it is a "telephone corporation." (*PU Code* § 234.) "[S]uch ownership may be of 'any part' of such plant or equipment." (*Commercial Communications, Inc. v. Public Utilities Commission* (1958) 50 C. 2d 512, at 520-521.) Thus, it does not matter if a reseller does not own equipment over which calls actually move. If a telephone corporation

⁸⁴ 1992 Cal. PUC LEXIS 972, *9, 44 CPUC 2d 747; *see also* D.95-01-044.

provides a commodity or service to the public for compensation, it is a public utility. (*PU Code § 216.*)⁸⁵

Based on a review of TracFone's reseller agreements with T-Mobile, AT&T, and Verizon, as well as the SEC filings of TracFone's parent company, America Movil, and other sources, staff has concluded that TracFone is operating various forms of appliances, equipment and/or personal property, in short, a "telephone line" as defined in Section 233, in order to "facilitate communications by telephone."⁸⁶

We note also that TracFone has copyrighted its software and defended the copyright, as well as its rights in other business operations, equipment, and personal property necessary to operate its network. In *TracFone Wireless, Inc. v. Carson*, TracFone's complaint alleged:

Unlawful business practices involving the unauthorized and unlawful bulk purchase and resale of TracFone/NET 10 Prepaid Phones, unauthorized and unlawful computer unlocking or reflashing of TracFone/NET 10 Prepaid Phones, [and] alteration of TracFone's copyrighted and proprietary software computer code installed in the Phones . . .⁸⁷

Under California law, software is a form of personal property.⁸⁸

In addition, staff has concluded that TracFone is assigned telephone number blocks by the underlying carriers, which numbers TracFone then bundles with its handsets to provide network access and telephone service for compensation to end users.⁸⁹ All of these facts support our determination that TracFone is operating, managing, and/or controlling "instruments," "appliances," and/or other forms of "personal property" to "facilitate communications by telephone" in California, and is doing so "for compensation in this state."⁹⁰ TracFone is therefore a public utility under California law.

⁸⁵ *Id.*, at fn. 2.

⁸⁶ In response to a staff Data Request, TracFone produced its Wholesale Agreement with Verizon Wireless, and its Resale Agreement with AT&T Mobility, both pursuant to the confidentiality provisions of P.U. Code § 583. Staff has in the interim received permission from TracFone to use limited excerpts from those Agreements, and those are reflected in the "Comments" section below. .

⁸⁷ *TracFone Wireless, Inc. v. Carson*, Civil Action No. 3:07-CV-1761-G, August 28, 2008 Memorandum Opinion and Order, 2008 U.S. Dist. LEXIS 68673 (N.D. Tex.), at *2.

⁸⁸ California Commercial Code § 9102(a)(42) (falling under the category "general intangible" personal property, which "includes payment intangibles and software").

⁸⁹ Staff bases this conclusion on TracFone advertising, the SEC filings of its parent corporation, administrative and court decisions, other public documents, and the confidential number utilization reports from the underlying carriers.

⁹⁰ P.U. Code §§ 216, 233-34.

3. TracFone's ETC Petition Should Be Denied.

As set out above, State and Federal law, including FCC regulations and decisions, make clear that State agencies, sitting in judgment on ETC petitions, have discretion to deny such petitions when they are not in the public interest.⁹¹

TracFone's ETC designation is not in the public interest as long as the following facts obtain: (a) it fails to collect and remit surcharges and fees in violation of California law, surcharges designed to protect the very customers it now wishes to serve; (b) it challenges the Commission's retained jurisdiction over wireless telecommunications carriers in California, jurisdiction which is necessary to enforce the consumer protection provisions of the Public Utilities Code; and (c) it creates a playing field that is not "competitively neutral" as required by law, by seeking to be relieved of a whole spectrum of obligations that apply to public utilities under the California Public Utilities Code.

This Commission's authority over public utilities within the State includes the power to "do all things ... which are necessary and convenient in the exercise of such power and jurisdiction," and thus inherently includes the authority to ensure that telephone carriers operating in California, and particularly those applying for public purpose program subsidies, are qualified and in good standing. See P.U. Code § 701. The Federal framework quoted above also implicitly assumes that an ETC will be a carrier in good standing with the State. Because of its failure to remit at least several million dollars in

⁹¹ Although States are preempted under the Communications Act from regulating the rates or market entry of commercial mobile radio service (CMRS) operators, they have retained jurisdiction over "the other terms and conditions" of CMRS service in their States. 47 USC § 332(c)(3)(A). The legislative history of this provision of the Communications Act indicates what Congress meant by the language "other terms and conditions":

It is the intent of the Committee that the State still will be able to regulate the terms and conditions of these [CMRS] services. By "terms and conditions" the Committee intends to include such matters as customer billing information and packaging and billing disputes and other such consumer protection matters; facility siting issues (e.g. zoning); transfers of control; bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis and such other matters as fall within the State's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

House Report No. 103-111, at 251. The FCC has interpreted 47 USC § 332(c)(3)(a) to allow for State-run universal service programs, in light of the specific statutory authorization of such programs in 47 USC § 254(f). See *CTIA v. FCC*, *supra*, 168 F.3d at 1334-35.

public purpose surcharges and user fees,⁹² TracFone cannot be deemed a carrier in good standing.

4. Order Instituting Investigation/Order to Show Cause.

Our concern about TracFone's unilateral decision to stop remitting user fees, and its refusal to remit either user fees or public purpose surcharges when the issue was brought to its attention, goes beyond the denial of TracFone's ETC Petition. We also note the logical inconsistencies between TracFone's request that the CPUC grant it Eligible Telephone Carrier designation in California, while simultaneously maintaining that the TracFone is not a "Telephone Corporation" or a "Public Utility" over which the CPUC has jurisdiction. We therefore direct CD to prepare an Order Instituting Investigation/Order to Show Cause (OII/OSC) as to why TracFone should not be ordered to pay all outstanding user fees and public purpose surcharges, including appropriate interest and penalties, and/or be subject to other sanctions.

COMMENTS ON DRAFT RESOLUTION

In compliance with PU Code § 311 (g), a notice letter was e-mailed on September 29, 2009 to all Eligible Telecommunications Carriers informing these parties that this Draft Resolution was available at the CPUC's website <http://www.cpuc.ca.gov/static/documents/index.htm> and was available for public comment.

Opening Comments were filed on October 13, 2009 by TracFone and TURN; and reply Comments were filed on October 20, 2009 by TracFone, TURN, DRA, and the Small LECs. TracFone's Comments continue to assert that it is not a telephone corporation or a public utility subject to statutory obligations which California law imposes on public utilities. The Comments of TURN, DRA and the Small LECs support the conclusions of the Draft Resolution to the contrary.

TracFone Opening Comments

TracFone identifies no specific factual finding in the Draft Resolution as incorrect. TracFone denies generally that it has any "telephone equipment ... offices ... desks or other furniture" in California,⁹³ and on that basis continues to assert that it is not a "public utility" or a "telephone corporation" subject to statutory obligations in California.⁹⁴ But it

⁹² TracFone provided certain California intrastate revenue numbers in response to a staff data request. Staff calculates that TracFone owes back fees and surcharges, and late-payment penalties, in an amount in excess of several million dollars.

⁹³ TracFone Comments on Proposed Resolution, served October 13, 2009, at 7.

⁹⁴ *Id.* at 1, 4.

does not deny that it sells handsets to customers, and admits that the "handsets ... contain TracFone proprietary software."⁹⁵ TracFone does not deny that its handsets are managed and controlled by its proprietary software even after the handsets are sold to customers.

TracFone quotes from Section 5.6 of its agreement with T-Mobile to the effect that "no provision of this Agreement shall be construed as vesting in [TracFone] any control whatsoever in any Facilities or operations of [T-Mobile]." TracFone fails to acknowledge that, in addition to "Facilities," a further defined term in the Agreement is "Equipment," which refers to the "equipment, software, technology, handsets, accessories or other materials or equipment used by [TracFone] in its business operation or by [TracFone's] End Users,"⁹⁶ and that TracFone remains "responsible for ensuring that any Equipment utilized by itself ... has been approved by [T-Mobile]."⁹⁷

TracFone's operation of equipment is also reflected in its agreement with AT&T, which provides that TracFone "must provide and maintain all Mobile Radio Unit equipment and ensure that it is technically and operationally compatible with the CMRS systems [of Verizon]."⁹⁸ Similarly, TracFone's agreement with Verizon wireless requires TracFone "to own, operate and maintain at all times during this Agreement the technology platform ('Platform') that supports and monitors the TracFone Handset."⁹⁹

TracFone takes issue with the conclusion above that resellers like TracFone, in purchasing minutes from a wholesaler, obtain "some fractional or marginal ability – even if transitory and/or indirect – to operate or manage a telephone line."¹⁰⁰ TracFone does not contest that the wholesaler provides available phone numbers to TracFone which allow access to the network. Its agreement with AT&T, in turn, provides that these numbers "represent a unit of access to the Facilities," and thus provide to TracFone and its end users some fractional access to, and ability to operate or manage devices on, the network facilities.¹⁰¹

TracFone admits that its predecessor was put on notice that it "would be required to collect from customers certain enumerated fees" and "comply with certain Public Utility Code sections generally applicable to telecommunications carriers."¹⁰² As a legal matter,

⁹⁵ *Id.* at 8 (fn. 7), and Appendix, p. 1 (proposed Finding of Fact 9).

⁹⁶ [T-Mobile] Wireless Service Purchase Agreement, at Section 1.14 (emphasis added).

⁹⁷ *Id.* at Section 5.4.

⁹⁸ AT&T Reseller Agreement at 10.

⁹⁹ [Verizon] Wholesale Agreement for TracFone Wireless, at 5, ¶ 2.3(ii).

¹⁰⁰ Comments, at 6.

¹⁰¹ AT&T Reseller Agreement, at 5 (provided pursuant to P.U. Code § 583, TracFone has permitted the brief excerpts stated herein)

¹⁰² Comments (proposed Findings of Fact 3-5).

TracFone admits that the FCC "allows state commissions to impose reasonable public interest standards in reviewing ETC petitions."¹⁰³

TracFone nevertheless believes that the proposed Resolution "erroneously confuses federal law with state law and misstates state law," and asserts that

the Commission may not exploit its ETC designation responsibilities under the **federal** Communications Act to extend requirements of the **state** Public Utilities Code to entities not otherwise subject to the Public Utilities Code.¹⁰⁴

We have concluded, however, that TracFone is a public utility and is subject to the California Public Utilities Code, including its public purpose program and user fee requirements. As pointed out above, there is no conflict between State and Federal law in this regard, as Federal law authorizes complementary State and Federal universal service programs, and requires all telecommunications carriers to participate. Nor is there any conflict in this case between the terms "common carrier," "telecommunications carrier," and "telecommunications corporation" as applied to TracFone.¹⁰⁵

TracFone states that the draft Resolution violates the principle of competitive neutrality by "attempt[ing] to shift user fees and public purpose program fees onto the shoulders of service providers."¹⁰⁶ TracFone is correct in asserting that telecommunications service providers traditionally have collected required surcharges and fees from their customers, and there is nothing preventing TracFone from doing likewise, by (for instance) allocating a portion of the revenue it collects from consumers to the required surcharges and fees. It is TracFone that violates the principle of competitive neutrality by not paying fees that all other carriers pay.

TracFone asserts that its request to become a designated ETC should be granted, and that the proposed Order Instituting Investigation and Order to Show Cause should not be instituted. We disagree. There is a fundamental disconnect between submitting to this Commission's jurisdiction for a designation of eligibility for Federal Lifeline support, while denying this Commission's jurisdiction when it comes to collection and remittance of State Lifeline support. Moreover, it appears that TracFone owes several million

¹⁰³ *Id.* at page 12.

¹⁰⁴ *Id.* at 13 (emphasis added), 11-16.

¹⁰⁵ *Id.* at 14-15, *citing* the definitions of common carrier and telecommunications carrier in 47 U.S.C. 155(10) and (44) respectively; *compare* D.07-08-031, *Cox Telecom v. Global NAPs*, 2007 Cal. PUC LEXIS 475 at *5 (noting common ground of "'telecommunications carriers' as defined by State and Federal law," and that a "telecommunications carrier shall be treated as a common carrier" as provided in 47 U.S.C. 153(44)).

¹⁰⁶ *Id.* at 16-17.

dollars (at least) in delinquent surcharges and user fees, and an OII/OSC is the appropriate vehicle to pursue that issue.

TURN Opening Comments

TURN supports the Draft Resolution's conclusion that TracFone should be denied ETC status based on the Draft Resolution's legal and policy reasoning.¹⁰⁷

TURN strongly supports the Draft Resolution's reasoning and conclusions, finding that the Draft Resolution's conclusions correctly addressed three issues that cut across wireline and wireless technologies: (1) States are authorized to apply a public interest standard on applications for Federal ETC status; (2) "pure-resellers" such as TracFone remain "telecommunications corporations" subject to the statutory mandates of the Public Utilities Code; and (3) prepaid wireless carriers are thus subject to the same obligation to collect and remit public purpose surcharges and user fees as are all prepaid and postpaid wireline and wireless carriers.¹⁰⁸ TURN believes that exempting prepaid wireless resellers from surcharge and user fee obligations is not consistent with the principle of competitive neutrality found in the law and rules relating to Lifeline subsidies.

TURN disputes one factual specific of the Draft Resolution: its characterization of "TURN's July 7th 2009 letter to Commission as 'opposing TracFone's request to be designated as an ETC in California'."¹⁰⁹ TURN states that its letter is more accurately characterized as an expression of "concern regarding the application of the TracFone wireless service model to the state LifeLine Fund slated for changes in D.06-05-028."¹¹⁰

Reply Comments

Four parties submitted Reply Comments: TracFone; TURN; the Small LECs; and the CPUC's Division of Ratepayer Advocates (DRA).

TracFone's Reply Comments question why TURN would "seek denial of TracFone's ETC petition" when TURN's goals are "affordable rates for California consumers, particularly low-income consumers."¹¹¹ Because TracFone asserts that it does not

¹⁰⁷ TURN Opening Comments, at 1

¹⁰⁸ TURN Opening Comments, at 3

¹⁰⁹ TURN Comments, at 1-2.

¹¹⁰ *Id.* TURN's comments in this regard echo earlier comments by Verizon and the Small LECs, as discussed above, and we agree that these comments address an issue of legitimate concern, namely the granting to one wireless company (indeed, a prepaid wireless company) the ability to operate a Lifeline service in California, without resolution or definition of the framework in which wireless Lifeline will be offered.

¹¹¹ TracFone Reply Comments, at 1-2.

operate or manage any “telephone lines” in California, it believes it is not covered by the statutes as written and that the “solution is to amend the law.”¹¹² We disagree, for the reasons stated above.

The Small LECs support the reasoning and conclusion of the Draft Resolution, and argue additionally that TracFone’s failure to comply with the more particular requirements of Resolution T-17002 for ETC designation (particularly as to adequate mapping of its proposed service area) is an independent ground for rejecting TracFone’s Petition.¹¹³

DRA also supports the reasoning and conclusion of the Draft Resolution. Like TURN, it voices concern that granting TracFone’s application might prematurely determine issues in the Commission’s open docket on universal service, R.06-05-028, and would “set a substandard model for wireless lifeline services.”¹¹⁴

We do not reach the timing issues raised by TURN and DRA, the affordability issues raised by DRA, or the service area issue raised by the Small LECs, as we find that TracFone’s ongoing violation of statutory obligations to collect and remit public purpose surcharges and user fees is dispositive of the ETC Petition. These additional issues might become relevant should TracFone remedy the outstanding arrearage in surcharge and user fee remittances.

Findings of Fact:

1. TracFone is a Delaware corporation headquartered in Florida.
2. TracFone is a subsidiary of América Telecom, S.A.B. de C.V. (América Móvil), a telephone corporation based in Mexico City.
3. América Móvil describes its TracFone subsidiary as “engaged in the sale and distribution of prepaid wireless service and wireless phones throughout the United States, Puerto Rico and the U.S. Virgin Islands.”
4. On July 18, 1997, the Commission granted a Wireless Registration Identification number to TracFone’s predecessor, Topp Telecom, assigning

¹¹² *Id.* at 4.

¹¹³ Small LECs letter Reply Comments of October 20, 2009, at 3-4. Both the Small LECs and TURN disagree with TracFone’s assertion, at footnote 24 of its opening Comments, that Resolution T-17002 is “applicable only to those ETCs who receive high cost support” and not those like TracFone that seek only Lifeline ETC designation. The Small LECs and TURN point out that Resolution T-17002, by its terms, applies to *all* ETC designations, and thus TracFone must comply with the requirement that it provide maps in .shp format, and of sufficient granularity to “identify the location of cell sites and shade the area where the carrier provides commercial mobile radio service or similar service.”

¹¹⁴ DRA Reply Comments, at 1.

Topp Telecom the corporate utility number U-4231-C under which TracFone operates today.

5. The July 18, 1997 letter assigning TracFone's predecessor a corporate utility number also put TracFone's predecessor and then TracFone on notice that they would be required to collect and remit user fees and public purpose program surcharges.
6. The July 18, 1997 letter also put TracFone on notice that it would be required to comply with all Public Utilities Code sections generally applicable to telecommunications carriers.
7. In 2003, TracFone informed a Telecommunications Division staffperson that TracFone "does not render any 'billings'" which would be reportable to the CPUC, and therefore had no revenue from which it would collect and remit public purpose surcharges and user fees. TracFone never formally sought clarifications of the terms or requirements of its Wireless Registration Identification in this regard, including its obligation to collect and remit public purpose surcharges and user fees.
8. TracFone purchases wholesale telecommunications services and network capacity from the following underlying carriers: Alltel, AT&T Wireless, Golden State Cellular, T-Mobile, US Cellular, and Verizon Wireless.
9. At the same time, TracFone requires its customers to purchase phones containing TracFone proprietary software.
10. Staff has concluded that TracFone operates and/or manages various forms of equipment or personal property to facilitate communication by telephone.
11. TracFone advertises its telecommunications services to customers, and from the TracFone customer's viewpoint, TracFone is their telephone company.
12. TracFone filed Advice Letter 1 and Advice Letter supplements 1A, 1B, 1C, 1D, and 1E on August 20, 2008, December 8, 2008, March 2, 2009, March 16, 2009, July 24, 2009, and September 16, 2009 respectively, requesting designation as an ETC for the limited purpose of offering federal Lifeline services to qualified households in California.
13. On September 9, 2008, Verizon filed a "response" to TracFone's Advice Letter no. 1 that is not a protest or opposition to the advice letter and cautioned about possible future problems and identified deficiencies in the advice letter.
14. On October 15, 2008, in compliance with PU Code § 311 (g), a notice letter was e-mailed to all [Eligible Telecommunications Carriers] informing these parties that Draft Resolution T-17175 was available for public comments.
15. On December 15, 2008, the Small LECs' late-filed Comments raised issues regarding the Draft Resolution.

- a. The draft Resolution would confer unfair competitive advantages on TracFone in violation of the Commission's charge to administer Lifeline funding and evaluate ETC requests in non-discriminatory manner.
 - b. The draft Resolution fails to meet federal requirements relative to TracFone's proposal to service Small LEC areas.
 - c. The draft Resolution unjustifiably waives critical requirements in CPUC Resolution T-17002.
 - d. The draft Resolution would prejudge the outcome of this Commission's Lifeline docket.
16. CD withdrew Draft Resolution T-17175 from the December 18, 2008 Commission Meeting Agenda Item no. 3 (Agenda ID no. 8008) to allow consideration for new information, and comments received.
 17. In the course of such consideration and analysis, staff discovered that TracFone had paid neither the statutorily required user fees since at least the First Quarter, 2004, and apparently had never collected and remitted the statutorily required public purpose surcharges.
 18. Staff directed TracFone to make such payments and TracFone refused, claiming variously that it did not owe any such fees or surcharges on its prepaid revenue, that such revenue was not traditionally "billed" revenue, that its service more nearly similar to a phone debit card service, and that it was not a public utility.
 19. TracFone provided certain California intrastate revenue numbers in response to a staff data request. Staff calculates that TracFone owes back user fees and public purpose surcharges, and late-payment penalties, in an amount in excess of several million dollars.
 20. In compliance with PU Code § 311 (g), a notice letter was e-mailed on September 29, 2009 to all Eligible Telecommunications Carriers informing these parties that this Draft Resolution T-17235 was available at the CPUC's website <http://www.cpuc.ca.gov/static/documents/index.htm> and was available for public comment.
 21. Opening Comments were filed on October 13, 2009 by TracFone and TURN; and reply Comments were filed on October 20, 2009 by TracFone, TURN, DRA, and the Small LECs.

Conclusions of Law:

1. The Commission retains jurisdiction over the operations of wireless carriers in California in all respects except for market entry and rates.

2. The CPUC has the authority to address an application by a CMRS provider, in this case TracFone, seeking designation as a Federal ETC in California.
3. The CPUC is authorized by State and Federal law to require telecommunications carriers in California to collect public purpose surcharges and user fees from all end users and to remit such sums to the CPUC in order to subsidize universal service in California. TracFone's failure to collect and remit such monies is a violation of such State and Federal law.
4. TracFone is a telecommunications carrier providing telephone service to the public.
5. TracFone's claim that it has no "billed revenue," and is therefore excused from contributing to public purpose funds, misconstrues the statutory requirements applicable to those funds, and does not excuse TracFone's failure to collect and remit public purpose surcharges.
6. In providing and maintaining customer handsets that have assigned telephone numbers and access to a telephone network, and employing proprietary software to support and monitor telephone telecommunications services offered through these handsets, TracFone owns, controls, operates, or manages telephone equipment, instruments, appliances and other personal property to provide communication services to the public, and it is therefore a public utility as defined in Public Utilities Code Sections 216, 233, and 234.
7. In providing, maintaining and monitoring customer handsets that have assigned telephone numbers and access to a telephone network, thereby operating or managing a telephone "line" as that word is used in Public Utilities Code Sections 233 and 234, TracFone's service provide more than a debit card system that merely offers minutes on the public telephone system to users who already have access to that system.
8. TracFone's other defenses to payment of statutorily required fees are groundless and without merit.
9. TracFone's designation as an ETC is not in the public interest at this time because it has failed and refused to comply with its legal obligations as a California registered CMRS carrier, particularly collection and remittance of public purpose surcharges and user fees.
10. TracFone's concurrent challenge to CPUC jurisdiction would undermine CPUC efforts to protect TracFone consumers, and reflects a further inconsistency between TracFone's petition for ETC status and the public interest.

THEREFORE, IT IS ORDERED that:

1. The request of TracFone Wireless, Inc. to be designated as an ETC in California for the limited purposed of offering federal Lifeline service in California is denied without prejudice to its reconsideration if and when TracFone adequately addresses the issues described herein.
2. 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. This Resolution is effective today.

I hereby certify that this Resolution was adopted by the Public Utilities Commission at its regular meeting October 29, 2009. The following Commissioners approved it.

PAUL CLANON
Executive Director