

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of	)	DOCKET UT-093012
)	
TRACFONE WIRELESS, INC.)	
	)	ORDER 03
)	
For Exemption from WAC 480-123-	)	FINAL ORDER ADOPTING
030(1)(d),(f) and (g); and Designation as	)	SETTLEMENT AGREEMENT;
an Eligible Telecommunications Carrier	)	GRANTING, ON CONDITION,
for the Purpose of Receiving Lifeline	)	DESIGNATION AS AN ELIGIBLE
Support from the Federal Universal	)	TELECOMMUNICATIONS
Service Fund	)	CARRIER AND EXEMPTION
	)	FROM PROVISIONS OF WAC 480-
	)	123-030; GRANTING WITA'S
	)	PETITION TO WITHDRAW
.....	)	INTERVENTION

1 **SYNOPSIS.** *In this final order, the Commission adopts the settlement agreement between TracFone Wireless, Inc., and Commission Staff, accepting the conditions for granting the Company designation as an eligible telecommunications carrier, and imposing an additional condition that the designation of TracFone as an eligible telecommunications carrier shall be for a one year interim period, after which TracFone may seek to renew its designation. Under this condition, the Company's interim designation shall continue until the Commission's final decision on designation.*

I. INTRODUCTION

2 **NATURE OF PROCEEDING.** This proceeding concerns a petition by TracFone Wireless, Inc. (TracFone or the Company), for designation as an Eligible Telecommunications Carrier (ETC) in order to receive Lifeline support from the federal universal service fund, and for exemption from Washington Utilities and

Transportation Commission (Commission) rules governing ETCs. In this proceeding, the Commission addresses for the first time an application for ETC designation of a resale-based wireless provider offering only pre-paid Lifeline services.

3 **PARTY REPRESENTATIVES.** Mitchell F. Brecher and Debra McGuire Mercer, Greenberg Traurig, LLP, Washington, D.C., represent TracFone. Richard A. Finnigan, attorney, Olympia, Washington, represents the Washington Independent Telephone Association (WITA). Gregory J. Trautman and Michael A. Fassio, Assistant Attorneys General, Olympia, Washington, represent the Commission's regulatory staff (Commission Staff or Staff).¹

4 **PROCEDURAL HISTORY.** On March 13, 2009, TracFone filed a petition with the Commission requesting designation as an ETC pursuant to section 214(e)(2) of the Communications Act of 1934, as amended (the Act),² and WAC 480-123-030. TracFone requested ETC designation for all of Washington state for the purpose of receiving low-income support from the federal universal service fund, including Lifeline support and Link Up support.³ In the petition, TracFone stated that it intends to resell wireless mobile phone service from AT&T Mobility, Inland Cellular, T-Mobile, U.S. Cellular and Verizon Wireless.

5 On July 10, 2009, the Company filed an amendment to its petition, withdrawing its request for Link Up support, seeking only federal Lifeline support. In this amendment, TracFone also requested an exemption from WAC 480-123-030(1)(d), (f) and (g), which require ETCs to provide a substantive investment plan, a service area map, and emergency back-up power supplies, respectively.

¹ In formal proceedings, such as this, the Commission's regulatory staff participates like any other party, while the Commissioners make the decision. To assure fairness, the Commissioners, the presiding administrative law judge, and the Commissioners' policy and accounting advisors do not discuss the merits of the proceeding with the regulatory staff, or any other party, without giving notice and opportunity for all parties to participate. *See RCW 34.05.455.*

² State law authorizes the Commission to conduct proceedings to implement the Federal Telecommunications Act of 1996. RCW 80.36.610. Proceedings to designate ETCs are such proceedings.

³ Additionally, TracFone stated it did not seek to participate in the state low-income program known as the Washington Telephone Assistance Program (WTAP) pursuant to RCW 80.36.410-470.

- 6 On October 26, 2009, the Company filed a second amendment to correct its previous statement about the scope of its Lifeline service area. The Company clarified that, initially, it only intends to offer Lifeline service in areas served by AT&T Mobility and T-Mobile and that it intends to expand its Lifeline service area to include areas served by Verizon Wireless beginning April 1, 2010.
- 7 On November 5, 2009, the Company filed a third amendment to clarify the options available to low-income consumers of its SafeLink plan for purchasing additional airtime minutes.⁴ The Company stated it will not offer low-value calling cards (\$3, \$5 and \$10 value) to Lifeline customers, as it originally proposed.
- 8 The Commission first considered TracFone's petition at its open meeting on November 25, 2009. Commission Staff identified a number of issues associated with the Company's application and recommended several conditions to address these concerns. The Commission took no action at that meeting and requested additional information prior to taking action on the petition.
- 9 On December 29, 2009, TracFone filed a fourth amendment to its petition, yet again revising its Lifeline offers. In this filing TracFone proposed to reduce the rate for additional minutes for SafeLink customers (from \$.20 per minute to \$.10 per minute) and to expand its Lifeline offering by providing discounts on two prepaid monthly plans presently available to consumers under the Company's "Straight Talk" trademark.
- 10 Subsequent to the November 25, 2009 Open Meeting, TracFone made three supplemental filings containing information in response to information requests from the Commissioners and Staff. First, on January 28, 2010, TracFone filed a letter stating that, other than the Washington State Enhanced 911 (E911) excise tax payment in dispute (which is the subject of litigation pending before the Washington State Supreme Court), TracFone has no unresolved tax issues with the Washington State Department of Revenue. Second, on February 2, 2010, TracFone filed

⁴ TracFone's SafeLink and Straight Talk service plans are described in more detail below in paragraphs 33 and 34.

comments in response to a number of outstanding issues raised by the Commissioners and Staff. Finally, on February 5, 2010, TracFone filed a more detailed description of the two Straight Talk options with the Lifeline discount.

- 11 After the November 25, 2009, Open Meeting, several other parties submitted comments or information regarding TracFone's petition, as amended. Specifically, on December 7, 2009, the Washington State E911 Program Office of the Washington State Military Department asked that TracFone be required to cooperate and coordinate with them to ensure E911 functionality even though it did not raise technological issues with regard to TracFone's 911 compliance.
- 12 On February 18, 2010, counsel for WITA filed a letter informing the Commission of several states' recent decisions on TracFone's ETC petitions. TracFone filed a response on February 19, 2010.
- 13 The Commission again considered TracFone's petition at its February 25, 2010, open meeting. At that meeting, representatives of the E911 Program Office, WITA, and Community Voice Mail (CVM) raised concerns over TracFone's petition and proposed service plans. In particular, CVM commented that when a customer calls TracFone's customer service hotline, the customer is often put on hold for a long time, which counts against the usable minutes. The Commission deferred consideration of the petition to the March 11, 2010, meeting, to provide the Company time to consider this issue.
- 14 On March 9, 2010, Dr. Glenn Blackmon, PhD, representing TracFone, filed a letter urging the Commission not to require the Company to provide free airtime for customer service calls. This letter essentially reversed a specific commitment made by another Company representative to Chairman Goltz during the February 25, 2010, open meeting to not count customer service usage against a customer's monthly airtime usage allotment.
- 15 At the March 11, 2010, open meeting, after hearing comments and recommendations from Commission Staff and CMV, the Company reported that it could not provide free airtime for customer service calls. The Commission set the petition for hearing.

- 16 The Commission held a prehearing conference in this matter on April 12, 2010, in Olympia, Washington, before Administrative Law Judge Ann E. Rendahl. At the conference, the Commission granted WITA's petition to intervene in the proceeding.
- 17 During the conference, representatives for TracFone and Commission Staff notified the Commission that the parties had reach a settlement. The parties agreed on a procedural schedule for filing the proposed settlement and supporting documents.
- 18 On April 14, 2010, WITA filed a motion to withdraw its intervention in this proceeding, conditioned upon the filing and Commission approval of the proposed settlement.
- 19 On April 23, 2010, TracFone and Commission Staff filed their Settlement Agreement, together with Attachments 1 and 2, which identify the terms of the agreement. On April 29, 2010, the settling parties filed the Joint Narrative Supporting Settlement Agreement.
- 20 On May 7, 2010, the Commission cancelled the settlement hearing scheduled for May 12, 2010, notifying the parties that a hearing was not necessary to allow the Commission to consider the proposed settlement.

II. BACKGROUND

A. Universal Service Funds

- 21 Pursuant to sections 214 and 254 of the Act and rules adopted by the Federal Communications Commission (FCC),⁵ the Universal Service Administrative Company (USAC) administers the federal Universal Service Fund to "provide communities across the country with affordable telecommunications services."⁶ The Universal Service Fund is composed of four separate funding components which,

⁵ 47 C.F.R. Part 54.

⁶ USAC website: <http://www.usac.org/about/>.

collectively, offer support for companies serving high-cost rural areas, low-income consumers, rural health care providers, and schools and libraries.⁷

22 There are two programs available to provide discounts on telephone service for low-income customers: Lifeline Assistance and Link-Up America. Eligible telecommunications carriers, or ETCs, may seek reimbursement from the low-income fund for some or all of the revenues designated companies may forego by providing discounted services to qualified low-income consumers. Support from the Lifeline Assistance program directly subsidizes eligible low-income households' monthly charges for basic telephone services, while Link Up support subsidizes certain nonrecurring charges for service activation. Lifeline support is available in four tiers of funding, "each of which must be passed directly from the eligible telecommunications carrier ... to the qualifying low-income consumer in the form of discounts."⁸ TracFone seeks federal Lifeline support for Tiers 1 through 3, which allow subscribers a discount equal to the ETC's subscriber line charge plus an additional \$1.75 per month.⁹

23 The FCC recently referred a number of issues concerning low-income support to the Federal-State Joint Board on Universal Service (Joint Board). In its order requesting guidance from the Joint Board, the FCC identified several concerns about the effectiveness of low-income support:

The universe of carriers participating in the low-income programs has expanded greatly, with the recent addition of competitive wireless providers as ETCs resulting in growth in the low-income programs. These changes have meant that low-income consumers have more options to meet their communications needs. With greater participation in the low-income programs, it is an opportune time to revisit the programs to ensure that they are effectively reaching eligible

⁷ *Id.*, at <http://www.usac.org/about/universal-service/>.

⁸ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link Up*, WC Docket No. 03-109, FCC 10-72, Order (Rel. May 4, 2010), n.3 [Joint Board Low-Income Referral Order]; *see also* 47 CFR § 54.403(a).

⁹ November 25, 2009, Staff Open Meeting Memorandum, Docket UT-093012, Attachment 3.

consumers, and that our oversight continues to be appropriately structured to minimize waste, fraud, and abuse.¹⁰

We note that USAC made disbursements of \$930 million in low-income support in fiscal year 2009, and projects disbursements of \$1.4 billion in calendar year 2010.¹¹

B. Laws and Rules Governing ETCs.

24 The Commission has authority to grant or deny ETC petitions. Specifically, section 214(e)(2) of the Act authorizes state commissions to designate a qualified common carrier as an ETC for the purpose of receiving federal universal service funds.¹² The Commission may designate additional carriers as ETCs if doing so is “consistent with the public interest,” and the carrier seeking designation as an ETC will:

(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.¹³

25 In 2005, TracFone petitioned the FCC to forbear from enforcing the requirement that TracFone offer supported services using its own facilities under 47 U.S.C. § 214(e)(1). The FCC granted the Company's forbearance petition subject to conditions.¹⁴ Pursuant to 47 U.S.C. § 160(e), a state commission may not apply or

¹⁰ Joint Board-Low Income Referral Order, ¶ 11.

¹¹ *Id.*, n.34.

¹² 47 U.S.C. § 214(e)(2); *see also* 47 C.F.R. §54.201(d).

¹³ 47 U.S.C. § 214(e)(1); *see also* U.S.C. § 214 (e)(2).

¹⁴ *In the Matter of Federal-State Joint Board on Universal Service and Petition of TracFone Wireless, Inc. for Forbearance from 47 USC § 214(e)(1)(A) and 47 CFR § 54.201(i)*, Order, CC Docket No. 96-45. FCC 05-165 (Released September 8, 2005). [TracFone Forbearance Order].

enforce any provision of the Act that the FCC has determined to forbear from applying under 47 U.S.C. § 160(a). Therefore, TracFone is not required to use its own facilities to be qualified as an ETC for purposes of receiving federal Lifeline support.

26 In a comprehensive decision released approximately six months prior to adoption of the TracFone Forbearance Order, the FCC adopted a Report and Order addressing minimum federal requirements for its responsibility under section 214(e)(6), to designate ETCs where a state commission does not have jurisdiction.¹⁵ This Procedures for ETC Designations Report and Order addresses the minimum requirements for a telecommunications carrier to be designated an ETC and thus be eligible to receive federal universal service support. These requirements include a demonstration that the carrier will satisfy consumer protection and service quality standards and a requirement that it will offer local usage plans comparable to those offered by the incumbent local exchange carrier in the area for which it seeks designation.¹⁶ As part of that proceeding, the FCC also adopted a public interest analysis that includes, but is not limited to, an examination of the benefits of increased consumer choice, the impact of the designation on the universal service fund, and the unique advantages and disadvantages of the competitor's service offering.¹⁷ Although the Procedures for ETC Designations Report and Order is not binding on state commissions, the FCC made the following recommendation:

In addition, as recommended by the Joint Board, we encourage states that exercise jurisdiction over ETC designations pursuant to section 214(e)(2) of the Act, to adopt these requirements when deciding whether a common carrier should be designated as an ETC. We

The FCC's conditions, and subsequent modifications, are set forth in Attachment 1 to the Settlement Agreement.

¹⁵ *In the Matter of Federal-State Joint Board Universal Service*, Report and Order, CC Docket No. 96-45. FCC 05-46 (Released March 17, 2005), [Procedures for ETC Designations Report and Order] ¶ 18.

¹⁶ Procedures for ETC Designations Report and Order, ¶ 2.

¹⁷ *Id.*, ¶ 18.

believe that application of these additional requirements by the Commission and state commissions will allow for a more predictable ETC designation process.¹⁸

- 27 Pursuant to WAC 480-123-040, the Commission approves petitions for ETC designation if “the petition meets the requirements of WAC 480-123-030, the designation will advance some or all of the purposes of universal service found in 47 U.S.C. § 254, and the designation is in the public interest.” WAC 480-123-030 requires that petitions for ETC designation contain certain information, including a description of the service area, the supported services the company will provide, and the company’s ability to remain functional in emergency situations.
- 28 In evaluating petitions for ETC designation, the Commission has the authority to impose conditions.¹⁹ Under the requirement that state designation of ETCs be consistent with the public interest, convenience and necessity, the FCC allows state commissions exercising jurisdiction over ETC designations to impose other requirements consistent with federal law to ensure that supported services are offered in a manner that protects consumers.²⁰
- 29 Federal and state rules require ETCs to submit annual filings, and in the case of ETCs receiving high cost universal service support, annual certification to continue to receive federal funds.²¹ The Commission may also revoke a company’s ETC status if it is not in compliance with federal or state requirements.²²

¹⁸ *Id.*, ¶ 1.

¹⁹ “[T]he power to disapprove necessarily implies the power to condition an approval.” *State of Washington v. Crown Zellerbach Corporation*, 92 Wn.2d 894, 899, 602 P.2d 1172 (1979), citing *State ex rel. Puget Sound Navigation Co. v. Department of Transp.*, 33 Wn.2d 448, 206 P.2d 456 (1949).

²⁰ Procedures for ETC Designations Report and Order, ¶ 30.

²¹ WAC 480-123-060 through -080.

²² WAC 480-123-050.

C. TracFone and its Service Offerings.

30 TracFone is incorporated under the laws of the State of Delaware and is headquartered in Miami, Florida. The Company is a Commercial Mobile Radio Service (CMRS or wireless) reseller providing service throughout the United States. TracFone does not own physical network facilities to provide wireless services, rather it purchases and resells the wireless services provided on a wholesale basis by other wireless carriers. TracFone has more than 11 million customers nationwide and has been providing service as a wireless reseller in Washington for ten years.

31 In 2008, the FCC designated TracFone as an ETC eligible to receive federal Lifeline support in ten federal default states and the District of Columbia, subject to conditions.²³ TracFone also has been granted ETC status by 18 state commissions. Three state commissions denied TracFone's ETC petition on a temporary basis and without prejudice.

32 TracFone seeks ETC designation in Washington to receive monies from the Lifeline portion of the federal universal service fund. TracFone intends to offer several Lifeline plans in Washington: a free service marketed as SafeLink and two discounted offerings known as the Straight Talk service plans.

33 Under TracFone's Safelink service, each qualified low-income Washington consumer will receive a free cell phone and 65 minutes of airtime per month for eligible customers. The Company will provide a one-year warranty for the cell phone handset and will pay the shipping fees for any handset exchanged during the warranty period. The monthly airtime allotment will be automatically loaded on a customer's handset each month as long as the handset is turned on at least one time during the first five days of the month. According to the Company, unused minutes will roll over to the

²³ See *In the Matter of Federal-State Joint Board on Universal Service, TracFone Wireless, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of New York et al.*, Order, CC Docket No. 96-45. FCC 08-100 (Released April 11, 2008). [TracFone ETC Designation Order] These conditions are identified in Attachment 1 to the Settlement.

next month and do not expire as long as the customer retains the service.²⁴ Customers may purchase additional minutes in specific increments above a customer's initial monthly allotment and are able to place 911 calls regardless of whether there are minutes remaining on their account.

34 TracFone also proposed allowing qualified Lifeline customers to apply a \$10 discount per month on two other service plans, "Straight Talk Unlimited" and "Straight Talk All You Need". Unlike the SafeLink service offering, under this proposal customers will be required to purchase a TracFone handset for Straight Talk plans at their own expense. The "Straight Talk Unlimited" Lifeline plan provides unlimited airtime for \$35 per month (net of discount) and the "Straight Talk All You Need" plan provides 1,000 minutes of airtime for \$20 per month (net of discount) for qualified Lifeline customers.

III. SETTLEMENT AGREEMENT

35 **Introduction.** After the Commission set the petition for hearing, the Company and Commission Staff reached agreement on appropriate conditions for granting the Company's petition for ETC designation. Subject to the terms of the Settlement Agreement (Settlement or Agreement) and conditions set forth in Attachments 1 and 2 to the Agreement, TracFone and Staff agree that the Company's proposed Lifeline offerings meet federal requirements for ETC designation in 47 U.S.C. § 214(e)(1). They ask the Commission to approve the Company's amended petition and request an exemption from WAC 480-123-030(1) (d), (f) and (g).²⁵ A copy of the Settlement Agreement, together with the conditions in Attachments 1 and 2 to the Settlement, are attached as Appendix A to this Order.

36 The conditions in Attachment 1 to the Settlement are simply a restatement of conditions the FCC imposed on the Company in the TracFone ETC Designation

²⁴ TracFone's handsets are equipped with proprietary software to show minute usage balances on the handset screen. When the customer has 10 minutes left on the account, the handset will emit an audible beep as an alert that indicates the customer has "10 minutes of remaining airtime"; the alert notifies the customer of the time remaining when making or receiving a phone call.

²⁵ Settlement Agreement, ¶ 8.

Order, and are the same as Attachment 1 to Staff's February 25, 2010, open meeting memorandum.²⁶ Among other requirements, these conditions require TracFone, as of the date it begins to provide Lifeline service in Washington, to provide Lifeline customers with access to 911 and enhanced 911 (E911) service regardless of the availability of minutes, to provide customers with E911 compliant handsets, and to replace non-compliant handsets at no charge to the customer. Additionally, TracFone must request certification from each Public Safety Answering Point (PSAP) where the Company provides Lifeline service confirming that the Company provides basic and E911 service to its customers. As a curb on potential fraud and abuse, TracFone must require new Lifeline customers to self-certify at the time of service activation that they receive Lifeline-supported service only from TracFone, and the Company is required to track its customers' residential addresses to prevent multiple Lifeline subsidies at the same address.

37 The conditions in Attachment 2 of the Settlement include two revisions to those contained in Attachment 2 to Staff's February 25, 2010, open meeting memorandum to address concerns raised by the Commissioners during discussion at the meeting.²⁷ The first provides that TracFone's ETC designation would be for a one year interim period, at the end of which the Commission may modify or revoke the designation.²⁸ The second requires that customers be able to make free customer service calls, also referred to as "free airtime," by dialing "611."²⁹ The additional conditions as well as those previously advocated by Staff and agreed to by the Company are discussed briefly below according to the following categories: General Compliance, Consumer Protection, Eligibility Verification, Performance Reporting, and E911 Compliance.

38 **General Compliance.** The parties identify several areas of general compliance. First, within 30 days of receiving ETC designation, the Company must make a compliance filing setting forth the rates, terms and conditions of its Lifeline services, the language to be used in its advertising of these services, and its customer

²⁶ *Id.*

²⁷ *Id.*

²⁸ Settlement Agreement, Att. 2, ¶ 1

²⁹ *Id.*, Att. 2, ¶ 11.

application form.³⁰ The Company has agreed to maintain all necessary records and documents to ensure compliance with FCC and Commission requirements, and comply with all applicable federal and state statutes and regulations.³¹ Further, TracFone agrees to cooperate with Commission Staff on telephone number conservation issues in compliance with 47 C.F.R. §52.³² Finally, the Company and Staff agree that TracFone's designation as an ETC shall be for an interim period of one year from the effective date of the Commission's order approving the designation, subject to Commission review. Following the review, the Commission may modify or revoke this designation pursuant to WAC 480-123-050.³³

- 39 **Consumer Protection.** The consumer protection conditions include requirements that TracFone file with the Commission any future changes in rates, terms or conditions for customers at least one day prior to the date of any change and provide customers with a welcome package that includes information about the rates, terms and conditions of service, including the Company's official Lifeline websites.³⁴ Within four months of Commission approval of its ETC petition, TracFone must also provide Lifeline customers with the choice of all other rate plans available to regular customers and offer the discounted versions of the Straight Talk plans addressed in its fourth amendment to its application.³⁵ After one year, TracFone must offer these discounted plans in retail locations.³⁶ TracFone must make a compliance filing with the Commission concerning its Straight talk offering, and must obtain Commission approval before offering the service.³⁷

³⁰ *Id.*, Att. 2, ¶ 2.

³¹ *Id.*, Att. 2, ¶¶ 19, 21.

³² *Id.*, Att. 2, ¶ 20.

³³ *Id.*, Att. 2, ¶ 1.

³⁴ *Id.*, Att. 2, ¶¶ 3-4.

³⁵ *Id.*, Att. 2, ¶¶ 5-6.

³⁶ *Id.*, Att. 2, ¶ 6.

³⁷ *Id.*

40 The parties also agree that TracFone will deactivate a SafeLink Wireless account if the customer has not used it for 60 consecutive days. At least eight business days prior to deactivation, the Company will send the customer a written notice of the potential deactivation. Customers will have a 30-day grace period to reactivate the account. Further, TracFone has agreed to modify its Lifeline services in Washington so that airtime minutes are not deducted for customer service calls from a customer's handset by dialing 611. This policy shall be explicitly stated in the Company's Lifeline service agreements.³⁸

41 Before ceasing business in Washington, TracFone must comply with all cessation of business rules, including:³⁹

- Providing written notice to the Commission, state 911 program, customers and the national number administrator at least 30 days in advance, and including the information required in WAC 480-120-083; and
- Making arrangements with underlying carriers to provide minutes already sold to customers under the same terms and conditions, or providing refunds to existing customers.

42 **Eligibility Verification.** To prevent fraud, waste and abuse of universal service funds, TracFone must work with the Commission and Department of Social and Health Services (DSHS) to work out a procedure to verify customer eligibility.⁴⁰ By March 31 of each year, the Company must file with the Commission its complete Lifeline customer records for the prior calendar year in an electronic format. After Commission and DSHS review and notice of any issues, TracFone agrees to take appropriate measures to correct the records or stop providing service to ineligible customers, reporting the resolution to the agencies within 60 days of notice.⁴¹

³⁸ *Id.*, Att. 2, ¶ 7.

³⁹ *Id.*, Att. 2, ¶ 18.

⁴⁰ *Id.*, Att. 2, ¶ 10.

⁴¹ *Id.*, Att. 2, ¶ 12.

43 TracFone must provide the Commission with a copy of its annual Lifeline verification survey results that it files with the USAC by August 31 of each year.⁴² Further, TracFone will provide quarterly reports beginning with the quarter ending June 30, 2010, identifying the number of Lifeline customers by service plan enrolled each month, as well as those customers deactivated by service plan and the reason for deactivation.⁴³ TracFone must also respond within 30 days to any information requests from Commission Staff concerning TracFone's Lifeline operations, including customer usage patterns and customer records.⁴⁴

44 **Performance Reporting.** TracFone must provide additional reports concerning its service quality performance. Specifically, the Company must provide by March 31 of each year a report on the number of complaints from Washington Lifeline customers, categorized by the different nature of the complaints, regardless of the agency with which the complaint was filed. The Commission may revoke TracFone's designation if the Company fails to provide reasonable quality of service.⁴⁵

45 **E911 Compliance.** TracFone agrees to cooperate with the state E911 program and all PSAPs on E911 issues and the Company will designate a representative to serve as a member or alternate member on the state E911 Advisory Committee or Communications Sub-committee.⁴⁶ The Company will participate in the E911 program's "What's Your Location" public information campaign if the E911 program requests participation by all wireless carriers, and will collaborate with the E911 program to test the compatibility of its handsets with the new Emergency Service Information Network in Washington.⁴⁷

⁴² *Id.*, Att. 2, ¶ 13.

⁴³ *Id.*, Att. 2, ¶ 8.

⁴⁴ *Id.*, Att. 2, ¶ 9.

⁴⁵ *Id.*, Att. 2, ¶ 14.

⁴⁶ *Id.*, Att. 2, ¶ 15.

⁴⁷ *Id.*, Att. 2, ¶¶ 16-17.

46 **Parties' Support of the Settlement.** TracFone and Staff assert that the terms and conditions of the Settlement address the issues and concerns raised during the Commission's review of TracFone's Petition. In support of the Settlement, the parties state that, with the conditions in Attachments 1 and 2, "the Company's Lifeline offering in Washington will preserve and advance the access of low-income consumers to affordable telecommunications service, and it will do so in a way that protects consumers and the financial integrity of the USF."⁴⁸ WITA does not join in or oppose the Settlement, but requests permission to withdraw its petition to intervene on condition that the Commission approve the Settlement.

47 TracFone and Staff assert that the Company has met the legal requirements for designation as an ETC and for exemption from certain Commission rules, and that the designation of TracFone as an ETC is in the public interest.⁴⁹ The parties claim that designation will provide consumers with additional choices of Lifeline service providers, and is likely to increase the number of qualifying households who benefit from the Lifeline program.⁵⁰ Further, Staff asserts that the Settlement will expand the choices available to low-income consumers, while ensuring adequate consumer protection and fiscal integrity.⁵¹

48 The Settlement Agreement and Joint Narrative, the Company's filings, comments by interested persons, Commission Staff memoranda and attachments, and documentation of the Commission's November 25, 2009, February 25, 2010, and March 11, 2010, open meetings constitute the record in this matter. All of these records are identified in the Commission's Records Management System under this docket.⁵²

⁴⁸ Joint Narrative, ¶¶ 12, 14.

⁴⁹ *Id.*

⁵⁰ *Id.*, ¶ 16.

⁵¹ *Id.*

⁵² These documents are located on the Commission's Web site at <http://utc.wa.gov/rms2.nsf/frm2005VwDSWeb!OpenForm&vw2005FilingsDocket=093012&NAV999999>.

IV. DISCUSSION

49 TracFone’s petition for ETC designation is a matter of first impression for this Commission. TracFone is a wireless company that simply resells the wholesale services of other wireless carriers, and seeks to obtain an ETC designation that will enable it to tap into the federal universal service fund to offer a “free” wireless service to low-income consumers in Washington. Unlike previous wireless Lifeline ETC petitions we have addressed where Lifeline service is simply ancillary to a carrier’s principal retail wireless service offerings, here we are asked to approve a petition in which a wireless carrier is using a pure resale business model to access federal Lifeline support as the primary means of support for a major component of its retail service operations.

50 While we see the benefit of widely distributing handsets and offering low-income consumers free or low-cost wireless services, we also understand the risks TracFone must mitigate as it delivers these services. We address these risks in more detail below, but comment first on an important feature of TracFone’s service.

51 We find it disturbing that the Company’s offering contains such a meager monthly airtime allotment given the potential revenues the Company will likely derive by tapping the federal universal service fund if we approve the petition. We note that in the Procedures for ETCs Designations Report and Order, the FCC adopted a local usage requirement that encouraged examination of an ETC applicant’s local usage offering as part of the supported service offering:

We encourage state commissions to consider whether an ETC offers a local usage plan comparable to those offered by the incumbent in examining whether the ETC applicant provides adequate local usage to receive designation as an ETC. In addition, although the Commission has not set a minimum local usage requirement, there is nothing in the Act, Commission’s rules, or orders that would limit state commissions from prescribing some amount of local usage as a condition of ETC status.⁵³

⁵³ Procedures for ETCs Designations Report and Order, ¶ 34.

52 Here, TracFone proposes to offer 65 minutes per month to low-income consumers, an amount that simply pales in comparison to any other local usage amount offered by previous wireless ETCs we have designated or to that of incumbent local exchange carriers. We acknowledge that these minutes are free to the customer, which separates TracFone's application from the others we have reviewed. And, while we support efforts to broaden the reach of telecommunications service to low-income populations, including wireless service options, we are not convinced that TracFone's service offerings, as presently configured, will serve to fully address the communications requirements of such consumers. Nevertheless, despite our hesitancy to approve the petition, our concerns are assuaged significantly by the conditions the parties have agreed to in the Settlement Agreement, particularly the agreement that any designation be an "interim" one, so that the merits of the petition can be revisited in a year. We are also mollified by the FCC's recent referral of a number of Lifeline funding issues in the Joint Board Low Income Referral Order; particularly those items of inquiry aimed at addressing potential waste, fraud, and abuse of the current funding mechanism.⁵⁴

53 We also feel compelled to address TracFone's contention that any conditions we may consider and impose in approving the petition would somehow be unfair or inequitable relative to previous wireless ETC approvals. We reject this argument. Despite the Company's contention, the simple fact is that TracFone's petition is substantially different from those of other carriers seeking ETC status, including previous wireless carriers that obtained ETC designation in this state for Lifeline purposes. Unlike those carriers, TracFone does not own any wireless network facilities in Washington. As a pure reseller of other wireless carrier's services, a clear distinction can be made between TracFone's simple billing and distribution business model versus the full-fledged operations of other wireless carriers whose ETC

⁵⁴ It is also important to note that Washington consumers are subject to the surcharges on their monthly telephone bills associated with funding of federal universal service programs, including the Lifeline program, and that the surcharge has been steadily increasing as a consequence of additional carrier participation as recipients of federal funding. Indeed, over the past 10 years the required federal surcharge assessed to Washington consumers has nearly tripled from 5.7 percent during the second quarter of 2000 to 15.3 percent in the second quarter of 2010. While there are many factors that are attributable to the increase, one factor that we control is the designation of ETCs that seek to draw from the federal fund. <http://www.fcc.gov/omd/contribution-factor.html>.

petitions we have previously considered. Although the FCC has chosen to forbear from requiring TracFone to comply with the requirement that it own its own facilities, and we cannot enforce this requirement in determining the Company's eligibility as an ETC, we can find the distinction meaningful with respect to our public interest analysis. All previous Lifeline ETC applicants we have approved have significantly invested in network facilities in Washington. We find that TracFone's operational characteristics are different and distinguishable from previous ETC petitions brought to us for approval. While we are precluded from applying a facilities requirement as a consequence of the TracFone Forbearance Order, we certainly have the authority to take into consideration that distinguishing factor when conducting our public interest analysis which is an independent aspect of our Section 214 authority. Indeed, during the course of this proceeding, the Company repeatedly contended that certain requirements under consideration or conditions proposed by Staff were unnecessary or discriminatory relative to previous ETC decisions. Because we find the Company's Lifeline service proposal to be distinguishable from those of previous ETC applicants, we specifically reject the Company's "apples to apples" argument.

54 Notwithstanding all of our misgivings and the distinguishing factors associated with the Company's business model, we are inclined to adopt the Settlement Agreement with conditions and therefore approve TracFone's petition essentially because, taken as a whole, it now appears to satisfy federal and state requirements for designating ETCs.

55 With these concerns in mind, we turn to the specific provisions of the proposed Settlement Agreement and the requirements for ETC designation, including the FCC's recommended public interest analysis. In doing so we note that when considering settlement agreements, the Commission "may accept the proposed settlement, with or without conditions, or may reject it."⁵⁵ The Commission must "determine whether a proposed settlement meets all pertinent legal and policy standards."⁵⁶ The Commission may approve settlements "when doing so is lawful, when the settlement terms are supported by an appropriate record, and when the result is consistent with the public interest in light of all the information available to the

⁵⁵ WAC 480-07-750(2).

⁵⁶ WAC 480-07-740.

commission.”⁵⁷ As the Company has requested exemption from certain ETC rules, we must also consider whether the exemption is “consistent with the public interest, the purposes underlying regulation, and applicable statutes.”⁵⁸

56 Though we are precluded from applying the facilities requirement, we must still evaluate whether TracFone’s petition “will advance some or all of the purposes of universal service found in 47 U.S.C. § 254,” and whether the petition is in the public interest.⁵⁹ The FCC recommends states apply the following factors in determining whether an ETC petition meets the public interest requirement: “(1) the benefits of increased consumer choice, (2) the impact of the designation on the universal service fund, and (3) the unique advantages and disadvantages of the competitor’s service offering.”⁶⁰ We address below these factors and the other standards for review, beginning with whether the Settlement, and the underlying petition, are lawful and supported by the record in this case.

A. Federal Requirements

57 After reviewing the amended petition, supporting documents, Staff memoranda, and the proposed Settlement, we find that TracFone meets the federal requirements for ETC designation pursuant to 47 U.S.C. § 214(e)(1). The record is clear that TracFone has demonstrated it is capable of delivering all services supported by federal universal service support mechanisms including access to basic 911 and Enhanced 911 (E911) services.⁶¹ Further, we find that TracFone is committed to providing adequate advertisement through various types of media (including print, internet, radio, and

⁵⁷ WAC 480-07-750(1).

⁵⁸ WAC 480-07-110(1).

⁵⁹ WAC 480-123-040; *see also* 47 U.S.C. § 214(e)(2).

⁶⁰ Procedures for ETC Designations Report and Order, ¶ 18.

⁶¹ TracFone Petition at 9-14; *see also* November 25, 2009, and February 25, 2010, Staff Open Meeting Memoranda, Docket UT-093012.

television) as well as through its arrangements with retail outlets frequented by low-income consumers.⁶²

B. Washington State Requirements

58 The amended petition, Settlement and the Joint Narrative submitted by Staff and the Company assert that TracFone satisfies all but three of the requirements for ETC designation under WAC 480-123-030. TracFone requests an exemption from WAC 480-123-030(1)(d), (f) and (g), which require an ETC applicant to submit a substantive investment plan, an electronic map of service areas and information on specific emergency capabilities of its network.⁶³ The settling parties recommend the Commission grant the requested exemptions because the rule provisions contemplate that an ETC operates its own network facilities.⁶⁴ The parties assert that the Company is a pure wireless service reseller that does not own any wireless facilities and seeks only low-income support. Further, TracFone claims it does not have permission from its underlying carriers to disclose specific network information, nor can it control the underlying carriers' network engineering.⁶⁵ Given the FCC's forbearance decision, TracFone is not required to own facilities to provide services as long as it complies with all of the conditions set forth in the FCC's Forbearance Order, including subsequent modifications, which are set forth in Attachment 1 to Appendix A of this Order. Given the FCC's Forbearance Order, the Commission is persuaded that it is consistent with the law governing ETCs and in the public interest to exempt TracFone from compliance with the provisions of WAC 480-123-030(1)(d), (f) and (g).

C. Public Interest Considerations

59 Whether approval of TracFone's will be in the public interest is a closer question. In various open meeting memoranda, Staff evaluated whether TracFone's amended

⁶² *Id.*, at 15-17.

⁶³ TracFone Amended Petition, at 1-2, filed July 10, 2009; *see also* TracFone Petition, n.1, ¶¶ 12, 18.

⁶⁴ Joint Narrative, ¶ 15; Settlement, ¶ 8.

⁶⁵ TracFone Petition, ¶ 18.

petition meets the public interest standard, and identified a number of conditions TracFone must meet before Staff would recommend approving the Company's petition. In these memoranda, Staff addressed the FCC's public interest factors, specifically identifying the benefits of providing additional choices for low-income consumers, recognizing there will be a significant impact on the universal service fund, and identifying the advantages and disadvantages of TracFone's proposal.⁶⁶

60 The parties assert that Staff's conditions, and others agreed to in the Settlement, are necessary for the Commission to retain meaningful oversight of the Company's Lifeline programs and to ensure adequate consumer protection and fiscal integrity of universal service funds.⁶⁷ We concur that the Company's service offerings will provide a range of options to low-income consumers that should help preserve and advance the access of low-income consumers to affordable telecommunications services. However, the meager 65 minutes of free air time could lead to substantial purchases of more minutes by low-income consumers such that the net service acquired may not be nearly as inexpensive as TracFone represents. Because we do not have a history of TracFone's service in Washington, the ultimate impact of these services on low-income consumers is not clear. As a result, it is very difficult to determine whether granting this petition would be in the "public interest." Further, we acknowledge the dissent's concern that designating the Company as an ETC will increase the size of the fund. Increased pressure on the fund would present another uncertainty that makes evaluating the public interest very difficult.⁶⁸ However, the FCC's approval of TracFone's ETC designation in 10 states and the District of

⁶⁶ November 25, 2009, Staff Open Meeting Memorandum, Docket UT-093012, at 5-12.

⁶⁷ Joint Narrative, ¶¶ 14, 16.

⁶⁸ The FCC has indicated that impact on the fund is a factor that states should consider in evaluating the public interest. Procedures for ETC Designations Report and Order, ¶¶ 18-19, 54-57. Our concern on this point is alleviated somewhat by the FCC's recent referral of a number of Lifeline funding issues to the Joint Board. In addition, the Settlement conditions described above will provide for enhanced eligibility review by the Company, Staff and DSHS, safeguards for consumer protections, E911 compliance, and reporting of program performance and operational details. Collectively, these conditions provide some assurance that TracFone will provide sufficient Lifeline service to low-income consumers, and comply with state and federal requirements governing universal service, all in the public interest.

Columbia gives us some comfort that the FCC is monitoring the fund balance.⁶⁹ Further, though impact on the fund can be a relevant concern for state commissions in evaluating ETC applications,⁷⁰ it is the FCC, not this Commission, that controls the fund and makes distributions from it according to its regulations. Therefore, so long as the FCC continues to approve ETC designations, including those similar to TracFone's in design and impact, we are not inclined to allow fund size to limit our actions, at least in the context of the interim approval we order in this case.

61 Because of these uncertainties, we feel compelled to clarify one provision of the Settlement and adopt an additional condition we find necessary to ensure approval of the application is in the public interest. As we discuss above, along with the authority under section 214(e)(2) of the Act and WAC 480-123-040 to grant or deny ETC petitions, the Commission has the authority to impose conditions.⁷¹ Similarly, under our authority to accept or reject a settlement, we may also impose conditions.⁷² Specifically, we condition our approval of the Settlement by clarifying the interim designation condition in Attachment 2 to the Settlement. This issue was discussed at the February 25, 2010, open meeting, and the condition in the Settlement does not address our concern completely.

62 Unlike ETCs that receive high-cost universal service funding, TracFone is not required under federal or state rules to obtain annual re-certification to remain eligible for federal universal service funding, as it only seeks low-income support. This means the Company remains eligible to receive low-income funds unless there is justification to revoke its eligibility. The Company's business model includes, but is not limited to, (1) operation as a prepaid wireless service provider, (2) extensive reliance on federal universal service funding for its Lifeline service offerings, (3) substantial use of third-party unaffiliated retail providers for verification and initiation of Lifeline service, and (4) ambiguities concerning the terms and conditions of its wireless service offerings. Because of the nature of this business model and its

⁶⁹ See TracFone ETC Designation Order.

⁷⁰ Procedures for ETC Designations Report and Order, ¶¶ 18-19.

⁷¹ *Washington v. Crown Zellerbach*, 92 Wash.2d at 899.

⁷² WAC 480-07-750(2).

attendant uncertainties, we do not find it in the public interest to grant permanent designation at this time. Rather, we believe a more prudent step would be to approve TracFone's petition for ETC designation for an interim period of one year, and allow TracFone to seek to renew its petition for designation at the end of the one-year period, making an affirmative presentation based on its compliance with the conditions of the Settlement Agreement during that year. An interim designation would also allow the Commission to ensure that TracFone's proposed operations consistently and continuously meet the public interest standard. Thus, we condition our approval of the Settlement on modifying Condition 1 of Attachment 2 to the Settlement as follows:

TracFone's designation as an Eligible Telecommunications Carrier (ETC) shall be for an interim period of one year from the effective date of the Commission's Order approving such designation, subject to Commission review. ~~At the end of the interim period, TracFone's ETC designation thereafter may be modified or revoked by the Commission pursuant to WAC 480-123-050, depending upon the result of the Commission's review~~ Before the end of one year after the effective date of the Order, TracFone may seek to renew its designation pursuant to WAC 480-123-030 through -040. TracFone's interim designation shall continue until the Commission's decision on designation.⁷³

- 63 For the forgoing reasons, we find the Settlement Agreement, attached as Appendix A to this Order, and as modified in this Order, resolves our concerns about whether TracFone meets the requirements for designation as an ETC, and whether designation is in the public interest. We find the Settlement, as conditioned in this Order, to be in the public interest (albeit barely in the public interest), and that we should proceed with designation of Tracfone as an ETC on an interim basis. We also exempt the Company from compliance with WAC 480-123-030 (1)(d), (f) and (g).

⁷³ This is consistent with the discussion at the open meeting on February 25, 2010, when a settlement was discussed.

V. MOTION TO WITHDRAW

64 WITA filed a petition to intervene in this proceeding after receiving notice of the prehearing conference. In its petition, WITA stated that TracFone’s petition “raises significant questions of public interest that are a concern to WITA's members.”⁷⁴ After learning that the Company and Staff had reached a settlement in this matter, WITA filed a motion to withdraw its petition to intervene, conditioned upon the settlement actually being filed with and approved by the Commission.

65 Under WAC 480-07-380(3), once the Commission has commenced an adjudicative proceeding, a party may withdraw only upon permission by the Commission in response to a written motion. The Commission may grant a motion to withdraw if withdrawal is in the public interest. Under the circumstances in this proceeding, WITA sought to intervene with the understanding that the Commission intended to adjudicate the issues involved in determining whether to designate TracFone as an ETC. The circumstances have now changed, in that the Staff and the Company have reached a settlement and seek Commission approval of the Settlement and designation of TracFone as an ETC. WITA did not participate in the Settlement, nor did it submit comments or objections to the Settlement. As we approve the Settlement on condition, we find it appropriate and in the public interest to grant WITA’s motion to withdraw its petition for intervention.

VI. FINDINGS OF FACT

66 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary of those facts, incorporating by reference pertinent portions of the preceding detailed findings:

67 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate the rates,

⁷⁴ WITA Petition for Intervention, ¶ 3.

rules, regulations, practices, and accounts of public service companies, including telecommunications companies.

- 68 (2) TracFone Wireless, Inc., is a telecommunications company and a public service company subject to Commission jurisdiction. TracFone is a reseller of Commercial Mobile Radio Service throughout the United States.
- 69 (3) On March 13, 2009, TracFone filed a petition requesting designation as an ETC pursuant to section 214(e)(2) of the Telecommunications Act of 1996, and WAC 480-123-030. TracFone subsequently amended its petition on July 10, 2009, October 26, 2009, November 5, 2009, and December 29, 2009, to address Staff's concerns and request exemption from WAC 480-123-030(1)(d), (f) and (g).
- 70 (4) As amended, TracFone's petition seeks designation as an ETC for all of Washington state for the purpose of receiving solely Lifeline support from the federal universal service fund to provide wireless service to low-income consumers.
- 71 (5) The petition came before the Commission at its regularly scheduled open meetings on November 25, 2009, February 25, 2010, and March 11, 2010.
- 72 (6) After TracFone did not address the Commission's concerns about its petition for designation at the March 11, 2010, open meeting, the Commission set the matter for hearing.
- 73 (7) On April 23, 2010, the parties filed a Settlement Agreement and requested the Commission approve the Settlement and grant TracFone's petition for ETC designation and exemption from Commission rules. The Settlement Agreement includes a number of conditions aimed at enhancing consumer protection, compliance with federal and state law, verification of eligibility, E911 program compliance and reporting on program performance.

VII. CONCLUSIONS OF LAW

- 74 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law, incorporating by reference pertinent portions of the preceding detailed conclusions:
- 75 (1) The Commission has jurisdiction over eligible telecommunications carriers (ETCs) in Washington and the subject matter of this Order pursuant to 47 U.S.C. § 214(e)(2), 47 C.F.R. §§ 54.201(b)-(c) and WAC 480-123-040.
- 76 (2) State commissions must designate a carrier as an ETC if the carrier meets the requirements in 47 U.S.C. § 214(e)(1), and if doing so is in the public interest. 47 U.S.C. § 214(e)(2). State commissions may apply the FCC's requirements for determining whether designation is in the public interest. *Procedures for ETC Designations Report and Order*, ¶ 1.
- 77 (3) The Commission must approve petitions for ETC designation if the petition meets the requirements of WAC 480-123-030, the designation will advance some of all of the purposes of universal service found in 47 U.S. C. § 254, and the designation is in the public interest. *WAC 480-123-040*.
- 78 (4) The Commission's authority to grant or deny petitions for ETC designation includes the authority to impose conditions.
- 79 (5) The Commission may grant an exemption from a rule if the exemption is in the public interest, and is consistent with the purposes underlying the regulation and applicable statutes. *WAC 480-07-110(1)*.
- 80 (6) When considering settlement agreements, the Commission may accept the proposed settlement, with or without conditions, or may reject it. The Commission may approve settlements "when doing so is lawful, when the settlement terms are supported by an appropriate record, and when the result is consistent with the public interest in light of all the information available to the commission." *WAC 480-07-750*.

- 81 (7) TracFone Wireless, Inc. should be exempted from compliance with WAC 480-123-030(1)(d), (f) and (g) because it is a resale-based wireless telephone service provider and it seeks only federal Lifeline support. The exemption is consistent with the public interest, the purposes underlying regulation, and applicable statutes.
- 82 (7) While TracFone's proposed service offerings will provide more options for low-income consumers, the Company's business model presents concerns that we must consider in determining whether ETC designation is in the public interest. Given the uncertainties about the impact of TracFone's offerings on the consuming public, we do not find that granting TracFone's petition on a permanent basis would be in the public interest. However, we conclude that it would be in the public interest to grant the Company interim designation and an opportunity to renew this designation after a year of operations. Without this condition, the Settlement Agreement does not meet the FCC's recommended public interest requirements.
- 83 (8) Approval and adoption of the Settlement Agreement, subject to the condition imposed in this Order, is lawful, supported by an appropriate record, and in the public interest.
- 84 (9) Subject to the condition in this Order, TracFone's amended petition meets the requirements for ETC designation under 47 U.S.C. § 214(e)(1), 47 C.F.R. § 54.201(d) and WAC 480-123-030.
- 85 (10) The Commission finds that, subject to the condition in this Order, granting TracFone's petition for ETC designation for the limited purpose of receiving federal Lifeline support will advance the goal of universal service found in 47 U.S.C. § 254. The designation will benefit low-income households in Washington. The designation is in the public interest and should be granted subject to the conditions set forth in Attachments I and 2 to the Settlement Agreement, Appendix A to this Order, as modified by this Order.

- 86 (11) The Commission should retain jurisdiction over the subject matter and the parties to effectuate the terms of this Order.

VIII. ORDER

THE COMMISSION ORDERS:

- 87 (1) The Settlement Agreement filed by TracFone Wireless, Inc, and Commission Staff, which is included as Appendix A to this Order and incorporated by reference as if set forth in full here, is approved and adopted in full resolution of the issues in this proceeding, subject to the condition that TracFone Wireless, Inc.'s petition for ETC designation is granted for an interim period of one year, and that TracFone Wireless, Inc. may seek to renew its petition for designation at the end of the one year period, making an affirmative presentation based on its operations during that year.
- 88 (2) In adopting the Settlement Agreement, on condition, the Commission grants the petition of TracFone Wireless, Inc., for designation as an Eligible Telecommunications Carrier in Washington on an interim basis for one year for the limited purpose of receiving Lifeline support (Tiers 1 through 3) from the federal universal service fund.
- 89 (3) TracFone Wireless, Inc.'s petition for an exemption from WAC 480-123-030(1)(d), (f) and (g) is granted.
- 90 (4) The Washington Independent Telephone Association's Motion to Withdraw Intervention is granted.

- 91 (5) The Commission retains jurisdiction over the subject matter and the parties to this proceeding.

DATED at Olympia, Washington, and effective June 24, 2010.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

DISSENT

TracFone Wireless, Inc., Petition for ETC Designation:
Docket UT-093012
Dissenting Opinion, Commissioner Philip B. Jones

PHILIP B. JONES, Commissioner (dissenting):

92 I respectfully dissent from the majority decision. Let me begin by emphasizing that my overarching concerns about the current federal universal service funding (USF) mechanism inform my evaluation of TracFone’s pending application. I believe the process for designating eligible telecommunications carriers (ETCs) is fundamentally flawed, which has resulted in exorbitant and unnecessary growth of the fund, especially in the low-income support payments in the Lifeline program. I oppose designating additional ETCs, such as TracFone, because the services it offers low-income consumers are of uncertain value and its designation is likely to exacerbate problems of the existing universal service system.

93 Recently, the Federal Communications Commission (FCC) has taken a number of steps to consider structural changes to federal USF funding. These changes reflect a marked shift in thinking on the effectiveness and benefit of approving new ETC petitions, particularly those such as TracFone’s, which are likely to increase Lifeline and Linkup funding significantly. The process for designating ETCs, as well as the oversight and management of the use of federal universal service subsidies, is a shared responsibility between the FCC and state commissions. Pursuant to section 214(e) of the Act, Congress designed a unique program with a federalist formulation, in which the FCC provides overall “guidance” but delegates most of the key decisions on the merits of ETC applications to state commissions. Because federal universal service funds are not unlimited, and are ultimately paid by ratepayers through interstate long-distance rates, I do not believe the ETC designation process should enable or encourage a state to seize its “fair share” of what it may perceive is an unlimited federal pie. The current ETC designation process contains no constraint or

incentive that would encourage a state commission to deny an ETC designation request. Nonetheless, I believe that state commissions, including this Commission, must be mindful of the fiscal realities of the federal USF and act responsibly by denying those applicants whose plans have dubious benefit yet impose significant costs on an overly stressed funding mechanism. Unlike the majority, I believe the prudent course for this Commission would be to withhold approval of TracFone's petition until the FCC implements significant revisions to the Lifeline program.

94 The federal USF is in dire need of reform and repair. Since I joined the Commission five years ago, I have consistently aired my concern about the dysfunctional nature and substantial growth of the federal USF program; first with the high cost fund as additional competitive ETCs were designated and later in the Lifeline and Linkup programs. The annual outflow from the Lifeline and Linkup programs has grown from \$519 million in 2000, approximately \$930 million in 2009, to an estimated \$1.4 billion in 2011.⁷⁵ Most of the recent growth in the low-income program is directly attributable to carriers such as TracFone that entered the prepaid wireless market and the increasing number of state commissions that have approved its designation as an ETC through its SafeLink product.⁷⁶

95 Two recent developments clearly show that the FCC recognizes the need for reform. First, the FCC calls for broad, comprehensive reform of the federal USF in Chapters 8 and 9 of the National Broadband Plan (NBP),⁷⁷ including reform of the Lifeline and Linkup funding programs. The FCC has already acted on some of the Plan's recommendations including, most recently, referral to the Federal-State Joint Board on Universal Service of a number of issues concerning Lifeline and Linkup. The referral clearly demonstrates the FCC's concern about the size and scope of these

⁷⁵ Universal Service Monitoring Report, CC Docket No. 98-202, 2008, Table 2.2 (http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-287688A4.pdf); see also *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link Up*, WC Docket No. 03-109, FCC 10-72, Order (Rel. May 4, 2010), n.34 [Joint Board Low-Income Referral Order].

⁷⁶ See Joint Board Low-Income Referral Order, ¶ 11, n.33.

⁷⁷ *Connecting America: The National Broadband Plan*, Federal Communications Commission (rel. March 16, 2010). (<http://www.broadband.gov/>).

programs and the need for reform.⁷⁸ Perhaps as a sign of the urgency the FCC applies to the matter, it took the unusual step of asking the Joint Board for its recommendations “within six months of release of this Order” instead of the customary practice of waiting for inter-agency clearance and publication in the Federal Register.⁷⁹

96 More importantly, the referral asks the Joint Board to address quickly a number of the issues that are central to TracFone’s petition. For example, the FCC asks the Joint Board to undertake “a thorough review of the existing consumer eligibility requirements, as well as the certification and documentation requirements imposed on ETCs.”⁸⁰ It also asks the Joint Board to examine carefully the transition from a paper-based to an electronic certification and verification of consumer eligibility that would automate the interaction between the carriers and the state and federal governments both at enrollment and on an ongoing basis. I believe the Joint Board referral is an important effort that will produce valuable recommendations and a more comprehensive set of practices to be applied to participants in the Lifeline and Linkup programs. Patience is a virtue and, for such rapidly growing programs I think a better course for us would be to wait for implementation of the Joint Board’s recommendations before making a final decision on the pending petition.

97 In addition to my observations regarding the potential changes to federal USF policy, I also have concerns about conditions in the Settlement Agreement. In particular, the conditions related to eligibility and verification in the settlement negotiated by our staff with Tracfone, while steps in the right direction, do not go far enough. In condition 8, TracFone is required to provide a quarterly report that contains the number of Lifeline customers in the plan and the number of deactivated customers. In my view, this condition is merely a reporting requirement that does not address what occurs if an ineligible customer actually enrolls and who will enforce compliance. Similarly, condition 10 specifies that Tracfone “shall cooperate” with DSHS to work out a procedure to verify eligibility but that is about as far as the

⁷⁸ Joint Board Low-Income Referral Order, ¶¶ 10-12.

⁷⁹ *Id.*, ¶ 1.

⁸⁰ *Id.*, ¶ 15.

condition goes. This appears to be an endorsement of the current paper-based verification system of eligibility which largely occurs after the fact and has failed in many other states to detect and prevent fraud and abuse of the Lifeline program.

98 Finally, condition 12 requires TracFone to provide information necessary for an audit of customer records through the submission by March 31st for the prior calendar. Such records “must have all the necessary information and be in an electronic format required by DSHS.” While this condition is well-intentioned, in my view it is insufficient to prevent abuses in the eligibility and verification system because such an audit occurs well after the date of enrollment of the low-income consumer.

99 While I believe our staff has been diligent in crafting a series of detailed conditions addressing some of my concerns while preserving the potential benefits of mobile communications for low-income and homeless populations, I must conclude the conditions do not meet the public interest test. In my view, these conditions will soon become outdated based on the imminent recommendations of the Joint Board and the FCC as they address the necessary reforms to this program. I applaud staff for their efforts and hope they continue to demonstrate equal vigor in the oversight of Tracfone as this program is implemented. Even staff admits that the designation of TracFone in Washington State will create a large program overnight based on the results achieved in other states: Staff estimates TracFone will enroll about 84,000 customers at a cost to the fund of \$8.4 million, and a penetration rate of 11 percent in the first year, before the first full audit.⁸¹ I believe this is a conservative estimate. For a prepaid wireless carrier such as Tracfone, which does not pay a regulatory fee to the Commission and is not under our direct jurisdiction, this will be a challenge for our staff and that of DSHS to oversee the Company’s compliance and will likely consume a disproportionate amount of staff time and resources.

100 In conclusion, I believe that federal and state policymakers need to identify better means to extend the reach of telecommunications services of all forms to low-income populations. The business model that Tracfone has developed is not the best and most cost-effective approach and does not warrant our approval. Despite the majority’s intent to grant the petition on an interim basis, I believe that once-

⁸¹ November 25, 2009 Staff Open Meeting Memorandum, Docket UT-093012, at 7.

approved, it will be difficult to deny access to a federal subsidy after it has been provided. Hence I believe we should not approve this settlement agreement or TracFone's amended petition.

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.

APPENDIX A