BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of TRACFONE WIRELESS, Inc. for Designation as an Eligible Telecommunications Carrier for the Limited Purpose of Providing Lifeline Service	)))))))	DOCKET NO. UT-093012 COMMENTS OF TRACFONE WIRELESS, INC.

COMMENTS OF TRACFONE WIRELESS, INC. IN RESPONSE
TO ISSUES RAISED BY COMMISSIONERS AND STAFF

At its open meeting on November 23, 2009, the Commission deferred action on a recommendation by its staff that it approve the application of TracFone Wireless, Inc. for designation as an eligible telecommunications carrier (ETC), pursuant to Section 214(e)(2) of the Communications Act of 1934, as amended,[1] for the limited purpose of providing Lifeline service to low income Washington households. SafeLink Wireless® -- TracFone's Lifeline program -- would provide qualified low-income Washington households with free E-911-compliant wireless telephone handsets and with free minutes of wireless airtime each month. TracFone's Lifeline program would be funded entirely by the federal Universal Service Fund and by TracFone. TracFone already has been designated as an ETC to provide its SafeLink Wireless® Lifeline service in twenty-two states and the District of Columbia.

Since that meeting TracFone has met with each commissioner, the regulatory staff and attorneys, and interested stakeholders in order to identify and address remaining concerns about TracFone's application. In this process TracFone has modified its Lifeline service offering to offer more options and lower rates to customers who choose its Lifeline services. TracFone has also provided factual information and policy analysis to address a variety of concerns.

The purpose of these comments is to provide the Commission with an overview of issues that TracFone has addressed since the November 23 meeting. These comments are not intended to repeat the information in TracFone's original application or subsequent amendments, but rather to supplement that information and to respond to specific issues raised by commissioners and Commission staff. TracFone believes that is has now addressed all concerns raised about its application for ETC designation and requests that the Commission move promptly to approve the application at its February 25, 2010 meeting.

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[1] 47 U.S.C. § 214(e)(2).

I. <u>The Public Interest Would Be Served By Making Affordable Wireless Telecommunications Service Available to Low-Income Washington Households Through the Federal Lifeline Program</u>

The public interest will be served by providing affordable telecommunications service to low-income Washington households. This fundamental precept of universal service policy has been stated by Congress[2] and by the Washington Legislature.[3] The federal Lifeline program and the state Washington Telephone Assistance Program ("WTAP") are meant to achieve that goal.

The unfortunate reality, however, is that most of the Washington households who are eligible for the federal Lifeline benefit are not receiving it. According to Federal Communications Commission data, only 21.2 percent of Lifeline-eligible low-income Washington households are receiving federal Lifeline benefits.[4] In the state of Washington, fewer than one in five households who are eligible for WTAP service actually receive the benefit, according to Department of Social and Health Services, which administers the program. As shown in Attachment 1, since 2005 the participant rate has dropped from 30% of eligible households to 17% of eligible households. In other words, approximately 83% of the households who are intended to benefit from WTAP are receiving those benefits.

There are many likely factors behind the low Lifeline and WTAP participation rates in Washington, but one factor of growing significance is that WTAP offers a type telecommunications service that consumers of all income levels increasingly find to be unsuitable to their needs. WTAP participants are limited to wireline local exchange telephone service, and virtually all local exchange telephone companies are experiencing declines in customer counts.[5] Increasingly, consumers across all income levels are concluding that their telecommunications needs are best met through wireless services. This is true across a range of incomes, but the rate of change is greater for low-income households. The Centers for Disease Control report that in 2009, 33 percent of adults living in poverty reside in households that have wireless service only. This wireless-only percentage doubled from 2006 to 2009.[6]

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[2] 47 U.S.C. §254((b)(3) ("Consumers in all regions of the Nation, including low-income consumers, . . . should have access to telecommunications and information services . . . that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rate charged for similar services in urban areas." (emphasis added).

[3] RCW 80.36.410 states, in part, "The legislature finds that universal telephone service is an important policy goal of the state."

[4] <u>Lifeline and Link-Up (</u>Report and Order and Further Notice of Proposed Rulemaking), 19 FCC Rcd 8302 (2004), at Appendix K - Section 1: Baseline Information Table 1.A. Baseline Lifeline Subscription Information (Year 2002).

[5] Qwest's 3rd Quarter 2009 financial report shows a two-year decline of 21% among residential or mass-market customers.

[6] Blumberg SJ, Luke JV. Wireless substitution: Early release of estimates from the National Health Interview Survey, January-June 2009. National Center for Health Statistics. December 2009. Available from: http://www.cdc.gov/nchs/nhis.htm.

The Commission has recognized since at least 2000 that the public interest is advanced by designation of multiple ETCs, and in particular the designation of wireless carriers as ETCs.[7] The FCC also has recognized that it is in the public interest to designate wireless carriers as ETCs.[8] The Commission has considered this question in the context of universal service in rural and high-cost locations, finding that wireless service would bring customers a wider range of service attributes such as mobility, as well as the possibility of better service and lower prices through competition. TracFone's designation as an ETC for Lifeline purposes will provide low-income households throughout Washington with an affordable mobile telecommunications service alternative.

II. Public Interest Analysis of TracFone's Lifeline Service

In its public interest analysis of ETC applications, the FCC considers the benefits of increased consumer choice and the unique advantages and disadvantages of the applicant's service.[9] In that same 2005 order, the FCC encouraged state commissions to consider similar criteria in their public interest analyses of ETC applications. The FCC in its TracFone ETC Designation Order found that TracFone met this public interest test.[10] Since then, no fewer than twelve other state commissions have concluded that designation of TracFone as an ETC for the limited purpose of providing Lifeline service would serve the public interest in those states.

While designation of TracFone as a Lifeline-only ETC would advance the public interest simply by providing additional service choices and unique service offerings to Washington Lifeline customers, it would do much more than that. TracFone's service offerings have attributes that distinguish them from those of any other ETC serving Washington's low-income households. Unlike any other ETC providing Lifeline service in Washington, TracFone's service is entirely prepaid, which ensures that its Lifeline customers will not be at risk for large unexpected charges for additional services (including, for example, separate charges for service features like call waiting, caller ID, and voice mail, as well as additional charges for toll calling). Nor will its Lifeline customers be at risk of termination of service for nonpayment of such charges. TracFone will also offer a wider calling area than any wireline ETC, since TracFone customers may initiate or receive calls from domestic location. They are not limited to a specified "local" calling area. Indeed, TracFone's SafeLink Wireless® calling area is wider even than that of other wireless ETCs. In addition to allowing for nationwide calling without additional charges, TracFone's SafeLink Wireless® Lifeline customers will be able to place international calls to more than 100

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[7] 3rd Supplemental Order, Docket UT-970325, January 26, 2000.

[8] See, e.g., Federal-State Joint Board on Universal Service, Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, 19 FCC Rcd 6422 (2004).

[9] See Federal-State Joint Board on Universal Service, 20 FCC Rcd 6371 (2005) at ¶ 41.

[10] 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., 23 FCC Rcd 6206 (2008) ("TracFone ETC Designation Order") at ¶¶ 42-43.

destinations at no additional charge. TracFone's service also includes, at no extra charge, voice mail, call forwarding and caller identification services, and roaming. These services can be very important to customers with privacy concerns, but purchasing them from a wireline ETC would significantly increase a customer's bill and would be economically prohibitive for many low-income households.

TracFone's Lifeline service will also advance the public interest by providing a very low-cost alternative for customers whose need for telecommunications service is limited to emergency and convenience calling. TracFone's SafeLink Wireless® service provides Lifeline customers with more than an hour per month of local, nationwide, and international calling at zero cost to the customer. To purchase the same level of service from a wireline ETC would cost $8 (plus any toll and feature charges), and to purchase it from an existing wireless ETC would cost at least $16.49. TracFone SafeLink Wireless® customers also receive free E911-compliant wireless handsets. TracFone is not aware of any other ETC offering Lifeline service in Washington whose Lifeline customers receive free telephones -- wireline or wireless -- without being subject to a service term commitment of at least one year. With TracFone's SafeLink Wireless® Lifeline program, consumers are not subject to term commitments or to early termination fees.

In summary, designation of TracFone as a Lifeline-only ETC will advance the public interest by increasing the range of Lifeline options available to low-income households and TracFone will do so through service offerings and a business focus that are not available from existing ETCs. Traditional wireline Lifeline service may not be suitable for many low-income households, and the post-paid, contract-based Lifeline offerings of the existing wireless ETCs may likewise unsuitable for many people. TracFone's Lifeline service, which will be unlike any other Lifeline service available in Washington, will expand the range of options available to low-income households in Washington.

III. Benefits of the SafeLink Wireless® and Straight Talk® Lifeline Plans

The SafeLink Wireless® plan provides more than an hour per month of wireless airtime usable for local and long distance calling at no charge to the participant. No other ETC offers service at no charge. WTAP costs $8 per month, plus additional charges for extra services and service features used by consumers. While WTAP has the advantage of including unlimited local calls, even an $8 charge can be a burden. The existing wireless ETCs charge approximately $17 per month.

For SafeLink Wireless® participants who need to purchase additional minutes of airtime, TracFone has committed to reduce the rate for additional minutes to 10 cents, irrespective of the quantity of minutes purchased. Sprint charges Lifeline customers 45 cents per minute; AT&T charges 15 cents per minute. The prevailing rate for prepaid minutes purchased in small quantities is roughly 33 cents per minute.

In addition, when TracFone is designated as an ETC, Washington consumers will be the first in the nation to whom TracFone's recently-introduced Straight Talk® plans will be available with Lifeline support. Following discussions with the UTC staff, TracFone has agreed to offer its new high-volume Straight Talk® plans at a discount to Lifeline participants. Under the Straight

Talk® All You Need Plan, Lifeline customers will receive 1,000 minutes of monthly airtime usable for domestic calling anywhere within the United States, 1,000 text or picture messages, and 30 megabits of data usage calls at a Lifeline-supported rate of $20.00 per month. TracFone's Straight Talk® Unlimited Plan will provide Lifeline customers with unlimited airtime usable for domestic calling throughout the United States and unlimited data usage at a Lifeline-supported rate of $35.00 per month. The Lifeline plans of AT&T and Sprint provide 300 and 200 minutes respectively for about $17 per month. Because the Straight Talk® plans, unlike SafeLink Wireless®, are billed services, TracFone is still developing procedures and systems to implement these programs. However, TracFone commits to commencing the availability to Washington consumers of the Lifeline versions of its Straight Talk® plans within ninety (90) days of its designation as an ETC.

TracFone does not claim that every Lifeline customer would be better off with its SafeLink Wireless® or Straight Talk® services than he or she would be with a competing Lifeline plan. Every service has its advantages and disadvantages and consumer needs differ. This is illustrated in Attachment 2, which compares the monthly charges for SafeLink Wireless®, Straight Talk®, and the offerings of two existing wireless ETCs. However, there should be no dispute about the fact that Lifeline customers will have a wider range of options, and that many Washington low-income households will benefit from the availability of TracFone's SafeLink Wireless® and Straight Talk® Lifeline offerings.

IV. TracFone Will Implement Eligibility Certification and Verification Processes to Ensure that Only Qualified Low-Income Households Receive Lifeline Benefits

One concern expressed about TracFone's application is the possibility that some consumers may attempt to enroll in TracFone's Lifeline program when they are not qualified to receive Lifeline benefits. TracFone will operate its Lifeline program with the best feasible set of safeguards. Such safeguards already have been implemented in the 23 jurisdictions where TracFone currently operates as an ETC.

In Washington, however, it is apparently impractical for wireless ETCs such as TracFone to follow the same eligibility verification procedures used by wireline ETCs. Before enrolling an applicant in the Washington Telephone Assistance Program (WTAP), a wireline ETC confirms with the Department of Social and Health Services ("DSHS") that the applicant is eligible for program benefits. This process also provides DSHS with the opportunity to track participation of individual households so as to prevent duplication of benefits. However, only wireline ETCs may offer Lifeline service through WTAP.[11] TracFone is able to use the same eligibility standards – *i.e.*, the set of income-based programs that qualify a household for WTAP support – and it will do so. However, the DSHS data base for determining WTAP eligibility is not at this time available to non-wireline ETCs such as TracFone.

[11] WAC 388-273-0020. A WTAP customer may be served by a wireless carrier "in exchange areas where wireline service is not available without service extension."

Until such time that access to the WTAP verification data base becomes available to wireless ETCs, it will be necessary for TracFone to use the verification method established by the FCC for ETCs where no applicable state verification system is available. This method requires the ETC to collect from each applicant a certification, made under penalty of perjury, that he or she qualifies for Lifeline based on participation in a qualifying means-tested program. If the applicant seeks to qualify based on income rather than participation in qualifying program, FCC rules require the ETC to obtain documentation verifying income. ETCs are also required to obtain annual verification of continued eligibility from a statistically-valid random sample of Lifeline customers.[12]

TracFone anticipates that it will have access on an annual basis to DSHS' records through a data cross-check of the DSHS rolls and TracFone's customer list. UTC staff has agreed to facilitate this cross-check by arranging with DSHS to allow access to its data base by the UTC. This process will greatly enhance TracFone's annual verification process, though it will not be as effective as a timely pre-enrollment certification of eligibility based on access to DSHS data like that currently available only to wireline ETCs participating in WTAP.

Another concern which has been raised in Washington and several other states is the possibility that certain Lifeline-eligible low-income households might attempt to obtain Lifeline-support both for wireline and wireless service. This practice is sometimes referred to as "double dipping." Double dipping is prohibited by the FCC's "one per household rule."[13] Under that rule, no household may have more than one Lifeline-supported service. Eligible customers are entitled to Lifeline benefits for a single wireline or wireless line only. In addition to the general prohibition against more than one telephone service per household receiving Lifeline support, TracFone is subject to a separate FCC-imposed condition which requires TracFone to verify annually that its Lifeline customers remain head of household and that their household only receives Lifeline-supported service from TracFone.[14] TracFone has established internal controls to prevent customers from obtaining multiple Lifeline-supported services, and those controls have worked well to prevent "double dipping" in the states where TracFone is providing Lifeline service.[15] One of the benefits of using WTAP data to determine applicant eligibility is that it would better protect against customer attempt to engage in double dipping.

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[12] 47 CFR 54.410 and 54.416. In addition, the FCC requires that TracFone state the applicable perjury penalties on its enrollment application forms. This requirement is a condition of the FCC's 2005 Forbearance Order. As such, it is applicable in all states where TracFone provides Lifeline service as an ETC.

[13] Federal-State Joint Board on Universal Service, 12 FCC Rcd 8776 (1997), at ¶ 341.

[14] Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i), 20 FCC Rcd 15095 (2005) ("TracFone Forbearance Order"), ¶ 18.

[15] Those controls were described in a Compliance Plan submitted by TracFone to the FCC in October 2005. In its 2008 TracFone ETC Designation Order, the FCC approved that compliance plan, including the internal controls described therein.

While the concerns about ineligible customers and double-dipping customers are important, TracFone believes it also is important for the UTC to recognize that the FCC is already aware of these concerns and specifically considered them in its review of TracFone's Lifeline filings. The FCC's certification and verification procedures and those of the states where TracFone operates, combined with TracFone's own internal procedures, were found by the FCC to provide adequate safeguards:

> We recognize ... that the potential for more than one Lifeline-supported service per eligible consumer is an industry-wide problem. We are confident that these conditions of this grant of forbearance will eliminate this concern with respect to TracFone's customers.[16]

Finally, TracFone, like all ETCs who receive support from the federal Universal Service Fund, is subject to periodic audits by the Universal Service Administrative Company (USAC) -- the Universal Service Fund program administrator. That audit process ensures that ETCs take all reasonable precautions to prevent double dipping and other conduct which results in wasteful utilization of Universal Service Fund resources, and subjects them to financial penalties if they fail to do so. Therefore, TracFone will, like other ETCs, have strong incentives to prevent inappropriate enrollment in its Lifeline program.

V. All Universal Service Fund Support Received by TracFone will be Passed through to Eligible Lifeline Subscribers

Federal rules require that an ETC pass through all Lifeline support to its eligible subscribers.[17] There has been some concern expressed at the UTC that consumers might apply for the service simply because it is free and will metaphorically "put the phone in a drawer." In this hypothetical situation, TracFone would collect $10 of federal Lifeline support each month while providing no benefits to the subscriber.

This concern was considered and rejected by the FCC in its TracFone Forbearance Order. In that proceeding, the United States Telecom Association (a trade organization of the incumbent wireline industry which had opposed TracFone's efforts to be designated as an ETC) alleged that federal support might not be passed through to customers who make little or no use of their service. The FCC said, "[D]espite comments to the contrary we are satisfied that TracFone will pass through all Lifeline support as required by our rules."[18] Moreover, it is USAC, rather than state commissions, who is responsible for verifying the discounts and support provided from the universal service program.[19] The FCC stated in the TracFone ETC Designation Order that it was

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[16] TracFone Forbearance Order, ¶ 18.

[17] 47 CFR 54.407. Subsection (b) provides that the federal reimbursement "shall not exceed the carrier's standard, non-Lifeline rate."

[18] TracFone ETC Designation Order, n.60.

[19] 47 CFR 54.707.

confident that USAC was capable of calculating and determining the amount of Lifeline support to which TracFone would be entitled.[20]

In every ETC application which it has filed with every state commission (including the UTC), as well as its ETC petitions filed with the FCC, TracFone has committed to pass through to its Lifeline customers one hundred percent of the amount of Universal Service Fund support it receives. In fact, TracFone provides to every Lifeline customer in every jurisdiction where it has been designated as an ETC a Lifeline benefit equal to one hundred percent of the Lifeline support it receives, **plus** an additional $3.50 per month benefit which TracFone funds itself.

The UTC is not the first state commission which has inquired about the potential for non-user customers to remain enrolled in TracFone's Lifeline program. The Wisconsin Public Service Commission also considered the potential no-use issue as part of its consideration of TracFone's application for designation as a Lifeline-only ETC in that state.[21] In response to that stated concern of the Wisconsin PSC, TracFone submitted a detailed plan to monitor customer use and to deactivate customers after 60 days of non-use following attempts to contact the customers. The Wisconsin PSC carefully evaluated that plan and concluded that this plan was reasonable.[22] The Wisconsin TracFone non-usage plan is included as Attachment 3 to these comments. TracFone will follow the same procedure in Washington as has been approved in Wisconsin.

The Commission also should recognize that customers often need access to a cell phone even during periods of low or no use of that phone. SafeLink Wireless® service, like other telecom services, consists of both *access to* the network and *use of* the network.[23] Access to the network is valuable to customers even when they make little or no use of the network, because it provides an ongoing ability to make and receive calls to and from any location as well as to have the security and safety benefit of being able to access E911 in emergency situations from anywhere. Access is a service that unsubsidized customers value and demonstrate a willingness to pay for, even when their demand for usage (*e.g.*, minutes) is low. Many non-Lifeline customers pay for wireline or wireless services that are rarely used to make calls, and they willingly pay much more than the $10 or less per month that TracFone receives from the universal service fund.

[20] TracFone ETC Designation Order, n.60.

[21] "To preserve the long-term viability of the federal universal service funds, and to protect the customers served by those funds, the Commission needs to ensure that monies paid out by those funds are not wasted. It needs to ensure that fund payments end up benefiting customers, rather than going to inactive accounts or out-of-service phones. If an account has been abandoned, Lifeline subsidy payments to that account need to cease in a timely manner." Petition of TracFone Wireless, Inc., for Designation as an Eligible Telecommunications Carrier in the State of Wisconsin, Docket 9835-TI-100 (Wisconsin Pub. Serv. Comm'n: May 27, 2009), p. 8.

[22] Petition of TracFone Wireless, Inc., for Designation as an Eligible Telecommunications Carrier in the State of Wisconsin, Supplemental Final Decision, Docket 9835-TI-100 (Wisconsin Pub. Serv. Comm'n: August 7, 2009).

[23] This distinction is reflected in the federal definition of supported services. ETCs must offer both "voice grade access to the public switched network" and "local usage." 47 CFR § 54.101(a).

Some customers need a phone and reliable telecommunications service primarily for personal safety or convenience reasons.

Another factor ameliorating this concern is that, while there is no financial cost to the customer in enrolling in SafeLink Wireless®, enrollment does require effort on the part of the customer. A SafeLink Wireless® handset is not like a free sample at the grocery store -- available simply for the taking. The customer must incur the time and effort to complete the application process and demonstrate its eligibility in order to enroll in the program. With enrollment in SafeLink Wireless®, the customer incurs an opportunity cost, in that all other members of the customer's household are precluded from subscribing to any other ETC's Lifeline program.

TracFone does not receive a financial gain in the hypothesized scenario where a customer subscribes to SafeLink Wireless® service and then rarely uses it. Under the non-usage policy described in the attachment to this response, TracFone will deactivate the service after 60 days of no activity and will not receive Universal Service Fund support for any such customer for the months following deactivation.

TracFone's initial investment in enrolling its Lifeline customers is substantial. TracFone, unlike other ETCs, does not receive any support through the federal Link-Up program, which reimburses ETCs for 50% of their customary service initiation charges up to $30.00. Sprint and AT&T each receive $18 of Link-Up support -- support which is unavailable to TracFone since the FCC has precluded TracFone from obtaining Link-Up support. Whatever costs TracFone incurs in commencing service to Lifeline customers, it funds with its own resources.

VI. TracFone Lifeline Customers Will Have Access to -911 and E911 Service

TracFone is required by the FCC to provide its Lifeline customers with E-911-compliant handsets and to make available access to 911 and E911 to all of its Lifeline customers, without regard to activation status or availability of prepaid minutes.[24] It is working with Washington's Public Safety Answering Points ("PSAPs") to obtain certification that its customers will be able to access 911 and E911 to certify compliance. The Washington State E911 Program Office has identified no issues arising from this process and anticipates certifying TracFone on behalf of all PSAPs in the state.[25] Moreover, the Commission should be aware that TracFone has been providing prepaid wireless service throughout the United States since 1996. During that period, TracFone has never received a complaint about a caller being unable to access 911 from any location where there was wireless coverage.

While there has never been any question raised about TracFone's commitment to the provision of high-quality E911 services, TracFone has no objection to specific requirements regarding its participation in the state's emergency management programs and ongoing compliance with E911 technical requirements. At the request of UTC staff, TracFone is willing to make the following commitments as a part of its ETC designation:

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[24] TracFone Forbearance Order, ¶ 16.

[25] Comments of the Washington State E911 Program Office, December 7, 2009.

1. TracFone will cooperate with the Washington State Enhanced 911 Program and all PSAPs on 911-related issues and will upon request designate a representative to serve as a member or alternate member of the Washington State E911 Advisory Committee.

2. TracFone will participate in the Washington State Enhanced 911 Program's "What's Your Location" public information campaign, if the E911 program requests the participation of wireless carriers.

3. TracFone will cooperate with the Washington State Enhanced 911 Program to test the compatibility of its handsets with the new Emergency Service Information Network (ESINet) in Washington.

TracFone's unwavering commitment to provide its customers with access to 911 and E911 is a separate question from whether Washington's 911 fee requirements are applicable to TracFone and other providers of prepaid wireless services. Whether or not Washington's current 911 funding law is applicable to prepaid wireless services is currently pending before the Supreme Court of the State of Washington. Other states have worked with TracFone and other industry stakeholders to modify their laws and collection and remittance procedures to provide for appropriate collection and remittance methods from all consumers of prepaid wireless services. Interpretation and enforcement of state tax laws is the responsibility of the Department of Revenue and the courts; it is not within the jurisdiction of the UTC.

VII. <u>Designation of TracFone as a Lifeline-Only ETC Should Not be Limited to One Year or Subject to Annual Sunset Reviews</u>

Staff's November 23, 2009 memo recommending approval of TracFone's ETC application proposed three annual filings by TracFone, one of which would be a complete record of every Lifeline customer that it serves in Washington. This is much more information than any existing ETC is required to provide about its Lifeline service. In addition to the required reporting, the UTC has the authority to investigate any concerns about TracFone's performance and may audit the company's records. Although the proposed reporting and investigation provisions are more burdensome that those imposed on any other ETCs, TracFone is willing to accept those requirements as conditions of ETC designation.

TracFone strongly disagrees with the proposal that TracFone's ETC designation be limited to one year, and that it bear the risk of loss of its ETC designation unless the UTC affirmatively votes to renew it. No other ETC is subject to such a short-term ETC designation and neither should TracFone. It has been suggested that such an automatic sunset provision would parallel the annual certification required of ETCs receiving high cost support under Chapter 480-123 WAC. A careful comparison shows that these are not at all alike. Indeed, the existing ETC certification rule does not include an ETC's Lifeline service, even though ETCs receiving high cost support are required to offer and advertise Lifeline service. The certification for high-cost support is specific to a federal requirement governing receipt of high cost funds -- funds which TracFone will not and may not receive. For the UTC to decline to certify a high-cost ETC, it would have to go through the same administrative process required to revoke an ETC designation.[26]

An automatic sunset provision at the end of each year would impose an unfair and unreasonable risk on TracFone. No other ETC in Washington -- or any other state -- is subject to such a condition, and neither should TracFone. TracFone will incur millions of dollars in expenses in the state of Washington to make its Lifeline programs available to low-income Washington households. These expenses will be borne by TracFone and will not be supported by the Universal Service Fund. TracFone will purchase and deliver handsets to customers, widely advertise and market the Lifeline services, and process applications. In addition, it will invest in infrastructure and systems to ensure that all applicants' eligibility is properly certified and verified in accordance with applicable federal and state requirements. It would be irrational and financially irresponsible for any company to incur these expenses to implement a program of this magnitude which can be eliminated after one year as well at the end of every year thereafter through no fault or misconduct. All ETCs face the possibility of suspension or revocation of their ETC designation for proven violations of applicable program requirements and conditions. TracFone would and should face this possibility as well. It should not, however, be subject to any higher risk of decertification than other ETCs, yet that would be the result if the UTC were to impose a condition that gave itself the option to revoke based on unspecified "public interest" considerations absent any demonstrated violation of law or a Commission order or absent any proven misconduct by the company.

In this regard, it is important to note that the UTC's authority to designate ETCs is derived exclusively from Section 214(e)(2) of the Communications Act of 1934, as amended (47 U.S.C. § 214(e)(2)). That statute directs State commissions (including the UTC) to designate common carriers as ETCs who meet the requirements of Section 214(e)(1) and where such designation would serve the public interest. Nothing in the statute nor in the legislative history provides any support for the notion that State commission ETC designations may be short-term, interim, temporary, or otherwise limited or subject to annual sunset reviews.

In addition to being inconsistent with the Communications Act, an automatic sunset provision would be bad policy, and would be inappropriate to impose such a requirement as a condition on a single carrier's ETC designation. The existing annual certification process for high-cost ETCs, including the reporting requirements, was not imposed through a condition in an order. It was developed through a rulemaking process with input from all affected stakeholders. Moreover, it is applicable to all ETCs -- not a special condition to be imposed on a single ETC. TracFone has no objection to a process similar to the annual high cost certification being imposed with respect to Lifeline, provided that it be imposed in a competitively neutral and nondiscriminatory manner on all Lifeline providers. This rulemaking process would allow input from all affected stakeholders and would better ensure that all ETCs are subject to uniform regulatory requirements.

One of the stated reasons for imposition of such an extraordinary requirement as an automatic sunset is that TracFone is expected to draw a larger amount of universal service funds

[26] WAC 480-123-050.

than other ETCs. There is no factual basis for speculative claim. United States Cellular – a wireless ETC that is also not allowed to use WTAP for verification – has since 2002 received more than a million dollars per year in federal Lifeline support for service in Washington. It received $5.9 million in 2008 and $6.4 million in 2009 for Washington Lifeline support.[27] Notwithstanding these substantial Universal Service Fund payments, the UTC amended United States Cellular's ETC certification in May 2008[28] without adding an automatic sunset provision.[29] Indeed, it did not even impose the level of Lifeline-related reporting now being proposed for TracFone. There also is no indication from the staff memo or company filings that the UTC conducted any additional inquiry into U.S. Cellular's Lifeline performance during the course of its 2009 review and certification pursuant to WAC 480-123-070.[30] This is not to suggest that this carrier's Lifeline performance is any way unsatisfactory or that the UTC is ignoring its performance. Rather, the point is that the UTC has apparently found informal investigation and reporting methods to be sufficient even when carriers are receiving substantial amounts of support and are using similar customer verification processes.

While TracFone believes an automatic sunset provision is inappropriate and beyond the UTC's authority, it is not opposed to a condition that would require an annual review of TracFone's Lifeline program. TracFone is prepared to meet with Staff on an annual basis to review its performance as a Lifeline ETC and to discuss measures to improve the program. Similar annual review procedures are being implemented in other states where TracFone has been designated as an ETC.

VIII. <u>TracFone Should Not be Subject To Revocation of its ETC Designation Based on Post Hoc "Public Interest" Determinations</u>

Closely related to the Staff's recommendation that TracFone's ETC designation be subject to annual sunset reviews is Staff's suggestion that TracFone bear the risk of revocation based on after-the-fact public interest determinations. Specifically, Staff's revised proposal states as follows:

> The Commission reserves the right to suspend or revoke TracFone's ETC designation based on . . . inconsistency with the public interest.

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[27] USAC and Joint Board monitoring reports. The majority of U.S. Cellular's funding in Washington state is for Tribal Lifeline customers. TracFone is prohibited by the FCC from obtaining Tier Four Lifeline support. Thus, it will not be eligible to receive the additional $25.00 per customer per month to provide Lifeline service to residents of Tribal communities.

[28] 4th Supplemental Order, Docket UT-9730345, May 14, 2008. It is clear from issues discussed in the order that the UTC was aware of the fact that the carrier would not be participating in WTAP.

[29] As a recipient of high cost support, United States Cellular is subject to the annual re-certification process provide for at WAC 480-123.070.

[30] Docket UT-091216.

Under this proposal, TracFone's ETC designation could be revoked even if it never violated any law or order relating to the universal service program. No other ETC is subject to a risk of revocation based on such an undefined and ephemeral concept as "inconsistency with the public interest."

As noted in the preceding section of these comments, the Commission's authority to designate ETCs is derived from Section 214(e)(2) of the Communications Act. While Section 214(e)(2) as interpreted by the FCC does empower state commissions to apply public interest criteria to initial ETC designations, nothing in the statute nor its legislative history provides any support for the view that state commissions may cancel or revoke ETC designations based on upon their evolving notions of what is or is not in the public interest at indefinite points in the future.

Significantly, the UTC considered, but decided not to impose a similar "public interest" condition on ETC designations when it adopted its generally-applicable ETC designation rules in 2006.[31] The UTC adopted these rules after more than a year of workshops and deliberation involving a wide range of stakeholders, including various industry segments and Public Counsel. At one point in 2005 the UTC published a staff draft that included a public interest standard for revocation:

> **WAC 480-123-0040 – Revocation of Eligible Telecommunications Carrier Designation.** The Commission may modify, suspend, or revoke the designation of an ETC if it determines that the ETC is not in compliance with its designation order or this chapter, **or is not operating in a manner that is consistent with the public interest**.[32]

The Commission wisely decided not to adopt that open-ended ETC revocation condition and instead chose to tie any revocation action to actual behavior by ETCs which is proven to be in violation of applicable law.

The proposed "public interest"-based revocation set forth in Staff's recommendation is actually more discriminatory and more unfair than that rejected by the UTC four years ago, in two respects. First, the 2005 proposed standard of "not operating in a manner that is consistent with the public interest" is less vague than the current proposal of "inconsistency with the public interest," since the 2005 proposal actually tied the public interest to conduct by the ETC. In contrast, the current TracFone "public interest" proposal makes no linkage to the carrier's actions; it would empower the UTC to revoke an ETC designation in the absence of any finding by the UTC that the ETC's conduct violated any law or rule or, for that matter, even engaged in conduct which the Commission deemed to be inconsistent with the public interest. Second, the 2005 proposed rule would have applied equally to all ETCs. The current proposed condition would be applicable only to a single carrier -- TracFone -- while all other ETCs would remain insulated from risk of revocation based on future variations in the UTC's view of the public interest.

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[31] General Order No. R-534, Docket UT-053021.

[32] Notice of Opportunity to File Written Comments, Docket UT-053021, October 21, 2005 (emphasis added).

Concerns about the 2005 public interest standard revocation proposal were voiced by the Washington Independent Telephone Association (WITA) :

> Such an open standard for affecting the status of a company that allows access to millions of dollars of support is not consistent with due process standards. There is no prior notice of the conduct that may place the status and the receipt of the funds in jeopardy. Making a determination that a specific act or conduct "is not consistent with the public interest" during a proceeding to determine whether or not the ETC status should be modified, suspended or revoked does not meet due process standards. WITA recommends that the Commission not move to a CR 102 process until more detail is provided on what standards and process will apply in this "revocation" setting. WITA is willing to participate in the development of the standards and process.[33]

In supplemental comments, WITA stated as follows:

> There are two point that WITA wants to highlight in these supplemental comments. The first is the significant due process question raised by the manner in which the proposed rules would deal with the removal of ETC status. If ETC status can be removed, whether a CETC or incumbent ETC, simply because during the course of the hearing the Commission determines that such removal is in the public interest, then it appears that due process consideration are in significant danger.
>
> For example, it is a well settled principle of law that a party must have prior notice that their conduct will run afoul of established standards before a status can be taken away. On a more prosaic note, Washington courts have found that even the notice of the violation must be at least sufficiently accurate to prevent the cause from being decided on unexpected grounds if undue surprise or prejudice would result. <u>See</u>, <u>e.g.</u>, <u>Levison v. Washington Horseracing Commission</u>, 48 Wn. App. 822, 829, 740 P.2d 898 (1987). Beyond notice, the standards for which removal of a status can be effected must provide clear warning of the offending behavior. <u>See</u>, <u>also</u>, <u>City of Marysville v. Puget Sound Air Pollution Control Agency</u>, 104 Wn.2d 115, 702 P. 469 (1985).

When the UTC published its proposed ETC rules in 2006, it wisely deleted the public interest standard from the staff draft. In doing so, it noted that the change was in response to WITA's comments. The UTC ultimately adopted the revocation rule – without a public interest standard – as WAC 480-123-050. For reasons which were well-articulated by WITA, a rule allowing for revocation of a ETC designation based on future public interest determinations unrelated to the conduct of the ETC would be discriminatory and unfair, and such a rule itself would disserve the public interest. If a rule of general applicability allowing for ETC revocations based solely on the Commission's evolving notions of the public interest at unspecified future

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[33] Comments of the Washington Independent Telephone Association, Docket UT-053021, November 14, 2005, p. 5.

times would be unlawful and unfair, imposition of such a rule or condition on a single ETC would be especially discriminatory.

As described above, TracFone is prepared to invest millions of dollars in the State of Washington upon ETC designation to commence its SafeLink Wireless® and Straight Talk® Lifeline offerings in Washington. No company can be expected to incur an investment of this magnitude when faced with the possibility that its authority to provide these services could be revoked for reasons having nothing to do with its compliance with applicable laws and regulations.

For all these reasons, the UTC should not impose a condition on TracFone which would allow it to revoke TracFone' ETC designation based on a standard lower than that applied to other ETCs, including "inconsistency with the public interest."

IX. Concerns About the Growth of the Federal USF Do Not Warrant Denial of TracFone's Application for Designation as a Lifeline-Only ETC

It has been suggested that the UTC should not grant ETC designations to additional carriers out of concern for the impact of additional designations on the federal universal service program.[34] TracFone shares those concerns about growth of the federal Universal Service Fund and has actively advocated measures to limit growth of the fund.[35] Refusal to designate Lifeline-only ETCs who have the ability to materially increase participation in the underused Lifeline program is not an appropriate means for limiting growth of the fund. While the UTC has every right to work for reform of the federal program, it should not attempt to do so by declining to designate additional qualified ETCs. It would be particularly inappropriate to place a hold on TracFone's designation as a Lifeline-only ETC when virtually all of the concerns expressed about the federal Universal Service Fund programs are related to federal programs other than Lifeline, specifically the high-cost fund and the schools and libraries program. The low income program, particularly the Lifeline program, has been less susceptible to waste, fraud and abuse than have other programs supported by the Federal Universal Service Fund.

A frequent concern with the high-cost program has been duplication of expenditures. This concern is not present with the low-income program. In the high-cost program, entry of a competitive provider raises the total amount of support paid by the Universal Service Fund because the incumbent carrier continues to be compensated for its network investment even after it has lost customers to competitors. This duplication of benefit does not happen in the low-income program since funding goes with the customer. Two ETCs will not receive funding for the same customer. An increase in the total payout from the universal fund occurs only with an increase in the number of customers receiving service.

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[34] For example, see Commissioner Jones' dissent in Docket UT-073023, Order 01, October 23, 2007.

[35] TracFone has advocated at the FCC for the use of reverse auctions to award high-cost support to the most efficient providers. TracFone also supported FCC imposition of a cap on high-cost support payments to competitive ETCs. Such a cap was adopted by the FCC.

The FCC, which is the agency responsible for managing the federal program and the universal service fund, has considered and rejected the notion that concerns about fund size should impede designation of TracFone as a Lifeline-only ETC:

> We are not persuaded by some commenters' concerns regarding the impact on the size of the universal service fund and the associated contribution obligation if we grant this Petition . . . . The Commission has recognized the potential growth of the fund associated with high-cost support. In 2004, low-income support accounted for only 14 percent of the distribution of the total universal service fund; whereas, high-cost support accounted for 64.2 percent. Any increase in the size of the fund would be minimal and is outweighed by the benefit of increasing eligible participation in the Lifeline program, furthering the statutory goal of providing access to low-income consumers. Significantly, granting TracFone's Petition will not have any effect on the number of persons eligible for Lifeline support.[36]

The low-income funding requirements have actually decreased since the time of the FCC's analysis. In 2008, low-income support represented 11.5 percent of the universal service funding requirement.[37]

Continuing to delay approval of TracFone's Lifeline-only ETC application is self-defeating when the FCC and other states already have designated TracFone as an ETC in many states. TracFone currently has been designated as an ETC in 23 jurisdictions. USAC projects that it will disburse funds to TracFone for Lifeline service in 18 states during 1st Quarter 2010.[38] This represents service to approximately 2.1 million eligible low-income customers. Consumers in Washington will, through their payments to their interstate telecommunications carriers, pay approximately $1.3 million[39] per quarter to support the low-income families in other states who are served by TracFone and other ETCs providing Lifeline service.[40] In light of TracFone's success in enrolling low-income households in other states into its Lifeline program, designation of TracFone as an ETC in Washington will increase the amount of Universal Service Fund support received by Washington consumers, rather than paid by Washington consumers to support service in other states.

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[36] TracFone Forbearance Order, ¶ 17 (footnotes omitted).

[37] Universal Service Monitoring Report, CC Docket No. 98-202, 2009, Table 1.11.

[38] USAC Report LI01 - Low Income Support Projected by State by Study Area 1Q2010.

[39] Calculated based on USAC's projected disbursements to TracFone of $64.8 million. According to the Universal Service Monitoring Report, 2.02% of USF revenues were received from Washington state customers.

[40] According to data issued by the FCC in the most recent (2009) Federal-State Joint Board Monitoring Report, for 2008, Washington rate payers contributed $27,916,000 more to the federal Universal Service Fund than Washington received in Universal Service Fund support, making Washington a leading exporter of Universal Service Fund support. See Table 1.12 (Universal Service Support Mechanisms by State: 2008), 2009 Monitoring Report at 1-39.

Conclusion

For all of these reasons, the Commission should promptly designate TracFone as a Lifeline-only ETC so that the company may promptly bring the benefits of its free SafeLink Wireless® program to low-income Washington households, as it is doing in numerous other states, and so Washington residents may be the first in the country to enjoy the option of the Lifeline-supported versions of TracFone's innovative Straight Talk® programs.

Respectfully submitted,

TRACFONE WIRELESS, INC.

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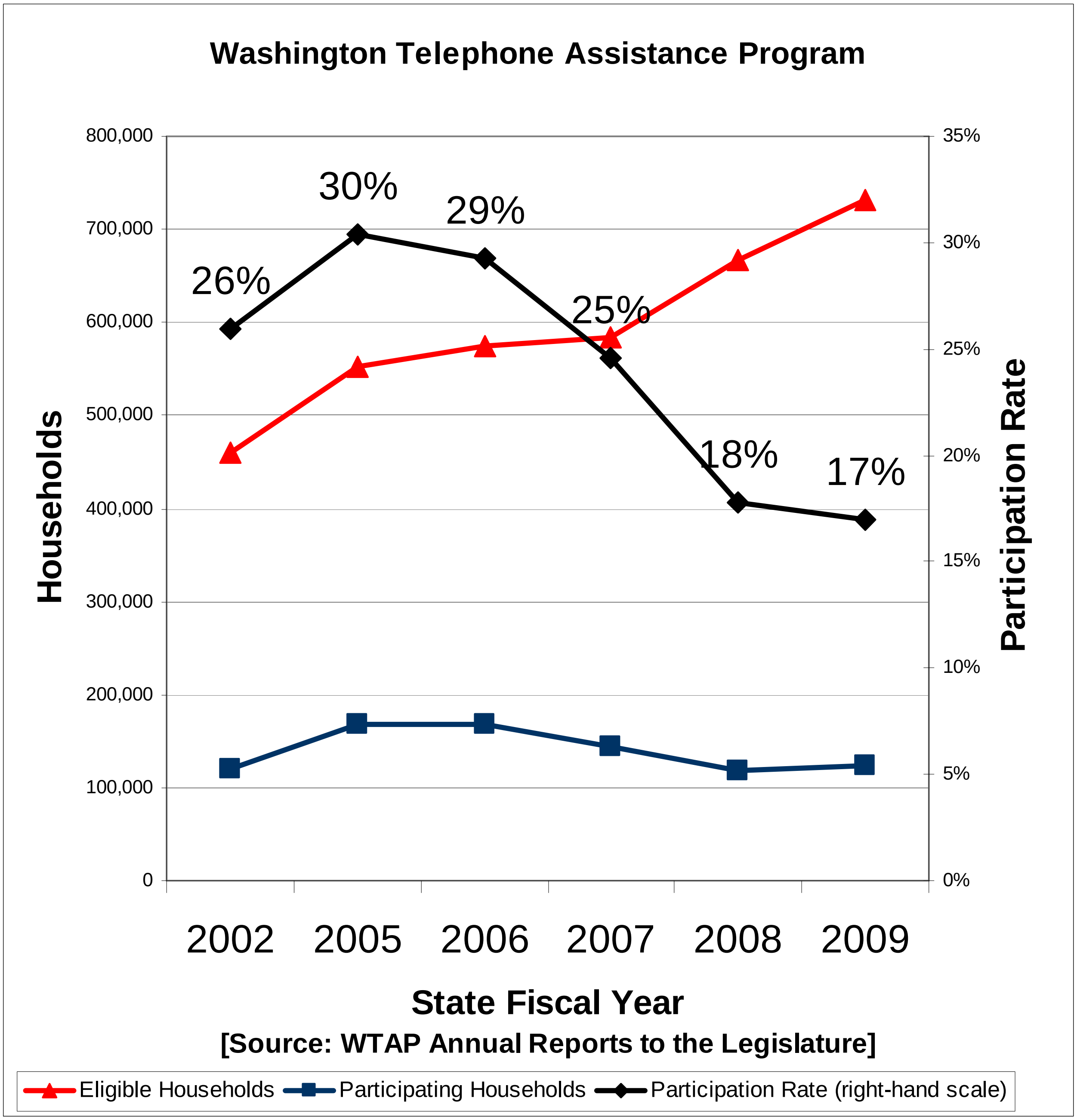
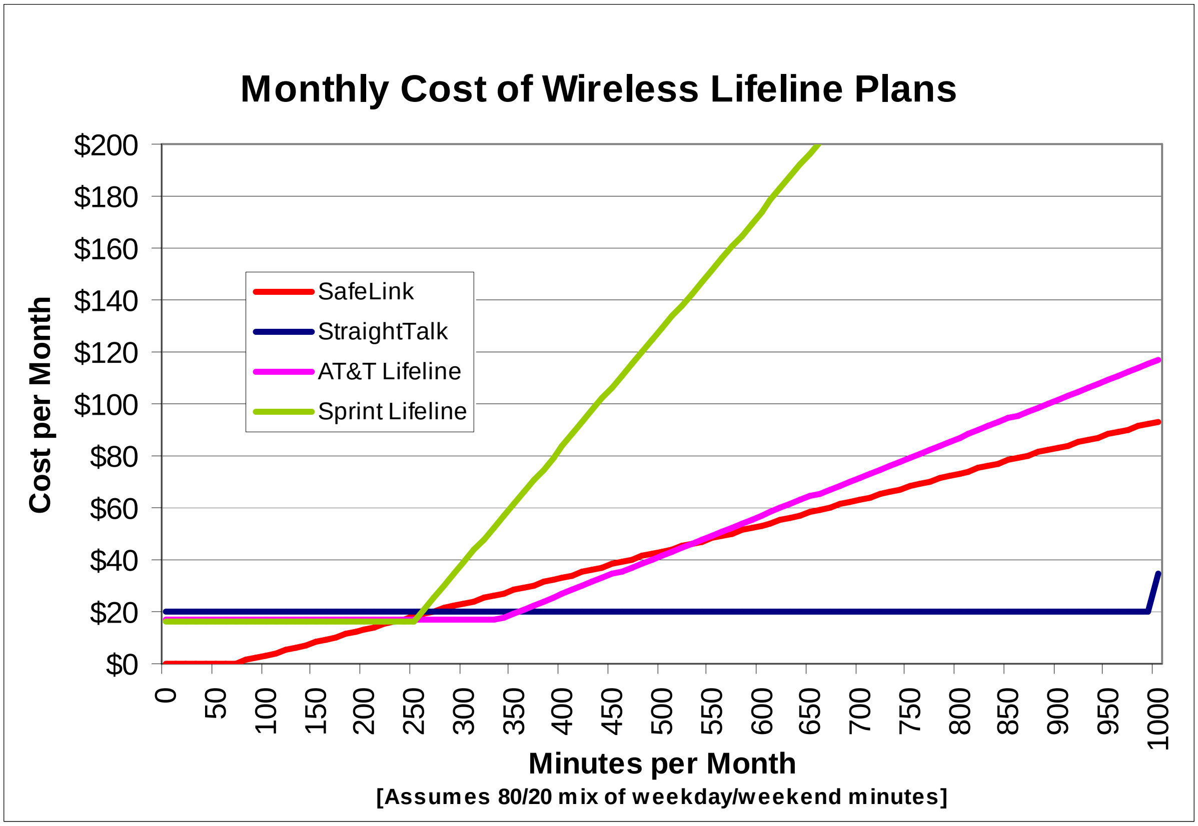
February 2, 2010

Attachment 1



Attachment 2



Beyond the comparison of monthly costs, TracFone's SafeLink Lifeline service offers other advantages over existing wireless Lifeline offers:

- Up to 68 minutes per month at zero cost. First-minute cost is approximately $17 with Sprint and AT&T.
- SafeLink minutes roll over from month to month. Sprint does not allow rollover. AT&T does not allow rollover on Lifeline, even though its standard plans do.
- SafeLink includes a free phone without a contract.
- No extra charge for many international calls. Sprint and AT&T block international.
- No extra charge for directory assistance.
- No activation fee. Sprint charges $18 to activate.
- No credit check. Some ETCs deny Lifeline to customers with past due amounts.
- No contract. Sprint requires a two-year commitment; AT&T requires a one-year commitment.
- No termination fee. Sprint charges $200 for early termination.
- No surprises. Huge excess minute bills can’t happen with prepaid service.

Compared to existing wireless Lifeline planes:

- TracFone’s SafeLink plan is better for low-volume customers, with a monthly free allowance that rolls over, a lower additional minute rate than any other Lifeline plan, and a free phone.

- TracFone’s Straight Talk plan is better for high-volume customers, with up to 1,000 minutes for $20 per month and unlimited minutes for $35 per month.

Attachment 3
TracFone Non-usage Plan

Before the
PUBLIC SERVICE COMMISSION OF WISCONSIN

In the Matter of	)	
	)	
Petition of TracFone Wireless, Inc.	)	Docket No. 9385-TI-100
for Designation as an Eligible Telecommunications	)	
Carrier in the State of Wisconsin	)	
	)	

NOTICE OF FILING TRACFONE WIRELESS, INC.'S NON-USAGE PLAN

In accordance with the Final Decision issued in this matter on May 20, 2009, TracFone Wireless, Inc. ("TracFone"), by its counsel, files this plan describing how it will prevent reimbursement from the federal Universal Service Fund ("USF") for Lifeline credits being paid to inactive customers. TracFone's non-usage plan specifically addresses how it will handle situations involving customers who enroll in its SafeLink Wireless Lifeline program but who show no usage of the service for prolonged periods.

TRACFONE'S NON-USAGE PLAN

TracFone has implemented a policy that covers inactive handsets that are enrolled to receive Lifeline benefits. Under the policy, if SafeLink Wireless customers go 2 months without any usage independent of the service end date, they will be deactivated and given a 30 day grace period to reactivate. Usage includes, but is not limited to, making calls, receiving calls, sending text messages, receiving text messages, downloading data content or adding airtime. TracFone has the ability to monitor call activity through call detail record reporting platforms.

During the 30 day grace period, if the customer tries to use his or her handset, the call will be intercepted and routed to an interactive voice response ("IVR") system that will advise the customer that the handset is not active. The customer will also be advised that if the call is an emergency, the customer should hang up and dial 911 from the handset. The IVR also will prompt the customer to contact a TracFone customer service agent if the customer desires to change his or her status so as to become an active SafeLink Wireless Lifeline customer. If a customer does not use the handset during the 30 day grace period, any subsequent attempts to place a call from the handset will not be intercepted by IVR and the handset may only be used to dial 911.

Once a customer has been deactivated after 60 days of non-usage, TracFone will not seek further reimbursement from the federal USF for that customer. Customers who have been deactivated following 60 days of non-usage may re-enroll in the Lifeline program in the future. Assuming that such customers remain qualified for Lifeline benefits, they will be re-enrolled in the program and will be provided with the monthly allotments of minutes following reenrollment. In addition, when such customer's service is reactivated, that customer's handset will receive any unused minutes that accrued during the 60 day non-usage period and the 30 day grace period. TracFone will resume seeking reimbursement from the federal USF following such customer's re-enrollment.

CONCLUSION

Pursuant to the Final Order, TracFone respectfully requests the Administrator of the Telecommunications Division to promptly approve the foregoing plan so that TracFone may commence providing its SafeLink Wireless Lifeline service to eligible low-income individuals in Wisconsin.

Respectfully submitted,

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July 7, 2009