

Minnesota Public Utilities Commission
Staff Briefing Papers

Meeting Date: **April 7, 2010**

**Agenda Item # 2

Company: **TracFone Wireless, Inc.**

Docket No. **P6823/M-09-802**

In the Matter of a Petition of TracFone Wireless, Inc. for Designation as an
Eligible Telecommunications Carrier (ETC) for the Limited Purpose of Offering
Lifeline Service to Qualified Households

Issues:

1. Should the Commission accept TracFone's compliance filing?
2. What further action is warranted regarding TracFone's ETC application?

Staff: Lillian A. Brion lillian.brion@state.mn.us, 651-201-2216

Relevant Documents

Order granting one-year conditional ETC designation and opening investigation.....	June 9, 2010
Order denying reconsideration.....	October 27, 2010
TracFone's compliance filings.....	November 12, 2010
Notice soliciting comments.....	November 16, 2010
Comments	
TCCVM and other organizations.....	December 6, 2010
DOC	December 6, 2010
TracFone	December 7, 2010
TracFone's supplemental compliance filings	December 21, 2010
Public Comments	January 24 to February 28, 2011

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Statement of Issues

1. Should the Commission accept TracFone's compliance filing?
2. What further action is warranted regarding TracFone's ETC application?

Procedural Background

On June 9, 2010, the Commission issued its Order granting TracFone a one-year ETC designation limited to the provision of Lifeline service in Minnesota, and subject to certain provisions contained in the Order. At the same time, the Commission opened an investigation to determine whether TracFone is currently violating or has in the past violated Minn. Stat. §§403.11 and 237.52. The investigation will be addressed in a separate proceeding in Docket No. P6823/CI-10-519.

On June 29, 2010, TracFone filed a petition for reconsideration of the Commission Order and also modified its Lifeline offering to a). Include a 200 free minute per month option, and b). Allow customers to purchase additional minutes at 10 cents per minute. TracFone stated that this modified offering not only complies with the Commission's condition but greatly exceeds that condition by a substantial amount. TracFone petitioned the Commission to reconsider three issues relating to:

1. Limitation of TracFone's ETC status to a one-year designation with an opportunity to reapply for an extended designation;
2. Requirement with respect to E911 and Telecommunications Access Minnesota (TAM) fee collection; and
3. Opening of an investigation of TracFone's compliance with E911 and TAM fees.

In a filing on August 18, 2010, TracFone withdrew its June 29, 2010 proposal with 200 free minutes of Lifeline offering included in its reconsideration petition. Instead, TracFone informed the Commission it is now offering a national plan starting August 16, 2010, allowing its Lifeline customers a choice from three monthly plans, as follows:

1. 250 free minutes each month, which do not carry over to the next month if unused, with texting available at a rate of one text per minute of airtime; or
2. 125 free minutes each month, which carry over to the following month if unused, with texting available at a rate of one text per minute of airtime; or
3. 68 free minutes each month, which carry over to the following month if unused, with texting available at a rate of 3 texts per each minute of airtime, plus international long distance calling to over 60 destinations.

On October 12, 2010, the Commission issued an Order denying TracFone's petition for reconsideration of parts of the June 9, 2010 Order.

On November 12, 2010, TracFone submitted its compliance filing advising the Commission of its compliance with the conditions set forth in the Order.

On November 16, 2010, the Commission issued a Notice soliciting comments on the compliance filings.

On December 21, 2010, TracFone filed supplemental compliance filings.

By January 7, 2011, the Commission received comments from the Department of Commerce (DOC or Department), joint comments from the Twin Cities Community Voice Mail, Energy Cents Coalition, Main Street Project, Minnesota Center for Neighborhood Organizing, Minnesota Coalition for the Homeless, Minnesota Community Action Partnership and Voices for Change (TCCVM and other organizations), and from TracFone. The Department reviewed TracFone's compliance filing and finds that TracFone satisfied all conditions except Conditions 7 and 8. TCCVM and other organizations provided comments solely on Condition 8, urging the Commission to resolve any disagreement with TracFone regarding compliance with the 911 and TAM obligations, or settle it outside this proceeding so that TracFone can start providing Lifeline service in Minnesota.

The public comments received by the Commission mostly inquire when the Lifeline service as offered by TracFone will be available in Minnesota.

In supplemental filings on December 21, 2010, TracFone provided additional information regarding its compliance with the Department's issues raised in its comments submitted on December 6, 2010. TracFone also filed a revised informational tariff reflective of its response to the Department's comments.

Compliance Issues

The following section lists the Conditions contained in the Commission's Order, TracFone's compliance proposals addressing each Condition, and the parties' comments on whether the compliance satisfies the Commission's Order. Also discussed below are the Department's conclusions that TracFone has not met Conditions 7 and 8, and TracFone's subsequent supplemental compliance filings to address those deficiencies.

The end result shows that TracFone has not fully addressed one remaining issue raised by the Department under Condition 7 pertaining to steps TracFone should take to provide service to customers within its proposed service area but outside its (or its underlying carriers') proposed network, and the contentious issue delineated in Condition 8 regarding TracFone's obligation to collect 911 and TAM fees pursuant to Minnesota law.

Based on the record, Staff agrees that the disputed issues are limited to Conditions 7 and 8 and focuses the analysis on those issues. For reference purposes, the listing below mirrors the numbering of the conditions as listed in the Commission Order.

- 1. The Commission designates TracFone an ETC for one year, with the designation limited to the provisions of Lifeline service and subject to the conditions set in the Order.**

No compliance filing required.

- 2. TracFone may reapply for designation as an ETC 60 days before the expiration of this one-year designation.**

No compliance filing required.

- 3. As a condition of being designated an ETC, TracFone shall take the following actions as of the date it begins providing Lifeline service:**
 - a) provide its Lifeline customers with access to E911 regardless of activation status and availability of prepaid minutes,**
 - b) provide its existing Lifeline customers with E911-compliant handsets and replace non-compliant handsets at no additional charge, and**
 - c) obtain a certification from each Public Safety Answering Point where TracFone provides service that it complies with condition (a). The company may self-certify that it meets the basic and E911 requirements if the PSAP has not provided the certification and made affirmative findings within 90 days of TracFone's request.**

TracFone Compliance

TracFone resells wireless services provided by underlying carriers AT&T Mobility, Verizon and T-Mobile. Exhibit 1 of TracFone's filing contains certifications from the underlying carriers that they route E911 calls made through TracFone according to FCC requirements and in the same manner that they route calls from their own customers to the Public Safety Answering Points or PSAPs. TracFone also confirms that it provides its Lifeline customers with access to E911 service regardless of activation status and availability of prepaid minutes. TracFone also further confirms that it does not deduct minutes for calls to E911.

TracFone states that it will provide every Lifeline customer with an E911-compliant handset.

TracFone offers Exhibit 2, which is a certification received from the Minnesota Department of Public Safety, as proof of its compliance that it provides customers with access to 911 and E911 service.

Parties' Comments

The DOC finds that TracFone has fulfilled Condition 3.

- 4. TracFone shall require its customers to self-certify at the time of service activation and annually thereafter that the customer is the head of household and is receiving Lifeline-supported service only from TracFone. TracFone shall establish safeguards to prevent customers from receiving multiple Lifeline subsidies at the same address.**

TracFone Compliance

TracFone requires and obtains self-certifications from each Lifeline customer that they are the heads of their households and receive Lifeline-supported service only from TracFone at the time of service activation and annually thereafter. TracFone also matches the address given by a Lifeline applicant with a database of Lifeline customers and validates addresses through a third-party vendor. Proof of the address will be asked if a conflict is detected. The applicant is also asked to show proof of participation in a qualified program.

Parties' Comments

The DOC finds that TracFone has fulfilled Condition 4.

- 5. TracFone shall document its service area and coverage within the service area in a manner consistent with Minnesota rules.**

TracFone Compliance

TracFone has provided Exhibit 3 to document its service area and coverage and submitted a list of zip codes within each county where service is offered.

Parties' Comments

The DOC finds that TracFone has fulfilled Condition 5.

- 6. TracFone shall submit to the Department of Commerce for its approval a plan listing the local and community newspapers and commercial broadcast stations in Minnesota through which it intends to advertise the availability of Lifeline and a proposed schedule or anticipated frequency of such advertising. TracFone shall post notice of the availability of Lifeline service on its website.**

TracFone Compliance

TracFone provides its proposed schedule for advertising in its Exhibit 4. TracFone has also posted the availability of and pricing for its Minnesota Lifeline offering in its SafeLink website.

Parties' Comments

The DOC finds that TracFone has fulfilled Condition 6.

- 7. TracFone shall revise its informational tariff and/or customer service agreement to address the concerns raised by the Department.**

TracFone provides in Exhibit 5 its revised informational tariff which addresses the earlier concerns raised by the Department. The Department's comments and responsive supplemental filing by TracFone are presented in turn as follows:

7. a.). The policies regarding disconnection, de-enrollment, deactivation of handsets, and flagging of customers' personal information to thwart future Lifeline eligibility do not comport with Minn. Rules 7810.1800 – 7810.2000, which allow disconnection only under certain defined circumstances and provide for appropriate notice to customers.

TracFone Compliance

TracFone revised its tariff to include Section 5.4.5 that states:

TracFone will provide a written notice to customers prior to deactivating service due to a customer's breach of the terms of service or if deactivation is necessary for TracFone to comply with any order or request of any governmental authority having jurisdiction or for any other reason enumerated in Minn. R. 7810.1800. A customer's decision to allow the service end date to expire without purchasing additional minutes is not a breach of the terms of service. TracFone's decision to de-enroll a customer from Lifeline service is not a deactivation of service.

Parties' Comments

The Department finds that TracFone has not fully satisfied this matter and asks TracFone to file and/or clarify the following:

1. The tariff should also contain a list of circumstances under which TracFone may deactivate service with notice.
2. The tariff should include the notice provision in Minn. Rule 7810.2300 which requires that “.. notices required by this chapter must precede the action to be taken by at least five days excluding Sundays and legal holidays. No notice may be given until the condition of which it informs presently exists.”
3. The tariff should make clear that service will be disconnected or deactivated without notice **only** under the circumstances allowed by Minn. Rule 7810.1900.

TracFone’s Supplemental Compliance

On December 21, 2010, TracFone submitted a revised informational tariff and addressed the Department’s additional concerns mentioned above, as follows:

1. TracFone revised Section 5.4.5. to list the relevant reasons for which it could deactivate a customer’s service with prior written notice in accordance with Minn. Rule 7810.1800, as suggested by the Department.
2. TracFone added Section 5.4.5.B. to include the notice requirement in Minn. Rule 7810.2300, as suggested by the Department.
3. TracFone references the customer’s handset, rather than “equipment” and added Section 5.46 to clarify disconnection without notice under the circumstances allowed by Minn. Rule 7810.1900, as suggested by the Department.

Staff Comments

Staff believes that TracFone’s supplemental filing has addressed the Department’s concerns on this issue.

7. b.). Include commitments to comply with the Commission’s consumer protection and service quality standards codified in Minn. Rules 7810, including those relating to record keeping and reporting billing practices and complaint handling procedures.

TracFone Compliance

TracFone revised its tariff in Section 4.12 pertaining to its practices for handling customer complaint, including in Section 4.12.3 its commitment to keep a record of all complaints received. Since TracFone does not issue bills or require deposits, such provisions are not necessary.

Parties' Comments

The Department finds that TracFone has not fully satisfied this matter and asks TracFone to include a commitment to provide the records of customer complaints to the Commission and the Department upon request.

TracFone's Supplemental Compliance

TracFone revised Section 4.12.3 to include a statement that TracFone will provide records related to complaints from Minnesota customers to the PUC or the DOC upon request, as suggested by the Department.

Staff Comments

Staff believes that TracFone's supplemental filing has addressed the Department's concerns on this issue.

7. c.). Clearly list and explain the pricing for the Lifeline offering.

TracFone Compliance

TracFone describes and includes the pricing for its Lifeline offering in Section 4.1.3.

Parties' Comments

The Department believes that TracFone satisfies its concern on this matter.

7. d.). Include a narrative description of the area in which TracFone proposes to offer service and explain the steps TracFone will take to provide service to customers within its proposed service area but outside its existing network coverage.

TracFone Compliance

TracFone includes a narrative description of the area it proposes to serve in Section 4.5. That section states in part, "TracFone does not guarantee coverage or service availability." According to TracFone, its service area is limited by the networks of its underlying carriers and believes that all its customers are within its network coverage.

Parties' Comments

The Department agrees that TracFone's tariff includes an adequate description of its proposed service area in Exhibit 1 attached to the tariff. However, the Department finds that TracFone does not provide information regarding the steps it will take to provide service to customers within its proposed service area but outside its (or its providers') network coverage.

TracFone's Supplemental Compliance

TracFone did not revise its tariff related to this concern by the Department. TracFone again emphasizes that its service area is limited by the networks of its underlying carriers. Therefore, according to TracFone, all customers within its proposed service area are within its existing network coverage and that there would not be a situation in which potential Lifeline customers would be denied service.

Staff Comments

Staff believes that TracFone has not fully satisfied Condition 7 pertaining to information on the steps TracFone will take to provide service to customers within its proposed service area but outside its (or its underlying carriers') existing network coverage.

In addressing this matter, TracFone focuses on its business model providing service in an area limited by the network coverage of its three underlying carriers. However, the Telecommunications Act of 1996 and the federal rules for ETCs are critically based on an ETC's obligation to serve all reasonable requests for service within an ETC's designated service area.

47 C.F.R. 54.202 provides in part

In order to be designated an eligible telecommunications carrier under section 214(e)(6), any common carrier in its application must:

1. Commit to provide service throughout its proposed designated service area to all customers making a reasonable request for service.

TracFone has identified its service area in Exhibit 3 and lists all the zip codes and corresponding counties in Minnesota encompassing its designated service area. In the event that a customer within this designated service area cannot be served through TracFone's (or underlying carriers') facilities, Staff agrees with the Department that TracFone still has an obligation to take steps to fulfill a reasonable request for service. Staff believes that TracFone has not fully satisfied Condition 7.

In addition, Staff raises an objection relevant to the discussions above on an ETC's obligation to serve throughout its designated service area. Section 4.5 of TracFone's tariff describes the area TracFone proposes to serve. It contains the following sentence "TracFone does not guarantee coverage or service availability." Staff recommends that TracFone be directed to delete the sentence.

Staff believes that as presently written, TracFone's tariff contains a statement that does not comport with the integral principle and law behind an ETC designation and does not reflect the Company's ETC obligations.

7. e.). Provide clear notice that this Commission is available for assistance in resolving customer questions, concerns, comments, and complaints; provide contact information for the Commission; and eliminate the provision in the Terms and Conditions requiring binding arbitration.

TracFone includes in Section 4.12.4 contact information for the Commission and clear notice that the Commission is available for assistance in resolving customer questions, concerns, comments and complaints. The tariff does not contain a provision requiring binding arbitration.

Parties' Comments

The Department believes that TracFone satisfies its concern on this matter.

8. TracFone shall comply with the collection and remittance provisions of Minn. Stat. §§ 403.11 and 237.52. The Department of Commerce and the Department of Public Safety will monitor TracFone's compliance of this requirement.

TracFone Compliance

TracFone's compliance states:

TracFone will continue to comply with Minn. Stat. §§ 403.11 and 237.52, statutes concerning surcharges to fund the 911 emergency telecommunications program and the TAM program, **to the extent those statutes are applicable to TracFone, as a prepaid wireless carrier that does not issue bills.** (Emphasis added).

Parties' Comments

Department

The Department finds that TracFone has not fulfilled Condition 8. The Department believes that TracFone does not meet the Commission's intent in its June 29 Order,

TracFone apparently does not remit 911 or TAM surcharges for over 90% of its prepaid access lines and does not plan to remit these surcharges for any of its Lifeline access lines. Between August 2007 and September 2007, TracFone's 911 and TAM remittances to the Department of Public Safety dropped by some 96% and have remained at that level ever since. The Company explained by letter that it was limiting its 911 and TAM remittances to access lines "where it has a direct financial relationship with the end user customer that provides the opportunity for collection. Remittance amounts will be based on a collection methodology practicable for prepaid wireless service."

In other words, TracFone would remit no 911 or TAM surcharges for customer who purchased the Company's prepaid service from a third party – typically a retail outlet.

This constitutes nearly all TracFone's current customers and would constitute all TracFone's Lifeline customers under the terms of its ETC application.

The Department notes that the Commission's Order considered, acknowledged and appropriately dismissed TracFone's argument that "it complies with the 911 and TAM surcharge statutes to the extent that they are applicable," when it said

Obviously, a telecommunications service provider cannot be excused from the surcharge requirements of Minn. Stat. §§ 403.11 and 237.52 on grounds that its chosen business model (in this case, offering prepaid service through third-party outlets) makes collecting surcharges from customers difficult. Further, it appears that other carriers offering prepaid service through third-party outlets – including Verizon, AT&T, and T-Mobile, all cited in TracFone's comments – have found ways to accomplish this.

Nor does the Commission accept TracFone's claim that the failure of other prepaid carriers to collect surcharges from customers with account balances under the combined surcharge of 81 cents vitiates their compliance and demonstrates the futility of attempting compliance until the Legislature creates a more convenient collection mechanism for prepaid carriers. De minimis collection shortfalls exist in any collection regime and do not justify abandoning collection efforts or statutory responsibilities.

Finally, the Commission is clearly not free to permit TracFone a competitive cost advantage over prepaid carriers who are collecting and remitting 911 and TAM surcharges as the law requires; this would violate both state and federal policies promoting fair and reasonable competition in the local telecommunications market.

The Commission will therefore condition TracFone's ETC designation on its collection and remittance of 911 and TAM surcharges on the **per customer/per access-line** basis required by statute. (Emphasis added).

TCCVM and other organizations

This is the only issue addressed by the TCCVM and other organizations. They request the Commission to move forward on the TracFone application so that low-income Minnesotans can now avail of the free cell phone program supported by the Lifeline program that TracFone proposes to offer.

The organizations urge that if no agreement can be reached on this issue, the Commission should resolve it outside of the ETC designation process so as to not further delay TracFone's application.

Staff Analysis

Staff believes that the Commission has clearly defined the Commission's authority to exact those surcharges and the rationale why TracFone cannot be exempted from such obligations required of all ETCs. Staff agrees with the Department that TracFone has not fulfilled Condition 8 related to TracFone's obligations to collect and remit 911 and TAM fees. Instead, TracFone reiterates earlier arguments that have been considered and dismissed by the Commission in both the June 9, 2010 Order, and the Order on Reconsideration on October 27, 2010.

Staff also notes that TracFone has initiated a bill in the Minnesota Legislature that will allow sellers of prepaid cards to collect 911 fees from customers. As of writing, H.F. 441 and its companion S.F. 236 have been referred to committees but not been scheduled for hearings. Until such time that there is a law change relieving TracFone from its obligations to collect and remit 911 and TAM fees on a per access line or its equivalent basis pursuant to Minn. Stat. §§ 403.11 and 237.52, Staff agrees with the Department that TracFone has not met this requirement.

- 9. TracFone shall provide an annual 60-day inactivity report on customers whose service is cancelled due to 60 days on non-usage and shall submit evidence that TracFone does not collect Universal Service Fund subsidies on those inactive phones.**

TracFone Compliance

TracFone commits to providing an annual report that discloses the number of customers who were de-enrolled from Lifeline service over the past year due to having more than 60 days of non-usage pursuant to TracFone's non-usage procedures as described in Section 5.4.4 of its tariff. TracFone will provide evidence that it does not seek Lifeline support from the federal USF for customers who were de-enrolled due to non-usage. TracFone will file this report annually on February 15.

Although the Department did not raise any objection to the compliance above, TracFone filed additional information in its supplemental compliance filing that appears consistent with its commitment in other jurisdictions.

On December 21, 2010, TracFone provides additional information on this matter. TracFone clarifies that as evidence that it does not seek Lifeline support for customers who were de-enrolled for non-usage, it will also submit an affidavit stating the number of customers at the start of each month, number de-enrolled for non-usage, number de-enrolled for any other reason, and number of customers at the end of each month (i.e., the number for which Lifeline

reimbursement was requested for that month). TracFone commits that this report will also be filed annually on February 15.

Parties' Comments

The DOC finds that TracFone has fulfilled Condition 9.

10. TracFone's Minnesota Lifeline service offering shall include the highest number of free minutes of usage offered in any jurisdiction and supplementary minutes priced at the ten-cent level offered in other jurisdictions.

TracFone Compliance

TracFone commits that its Lifeline service offering shall include the highest number of free minutes of usage offered in any jurisdiction and supplementary minutes priced at the ten-cent level offered in any jurisdictions. Section 4.1.3 of its proposed tariff also has a description of its three monthly plans, including the plan with 250 free minutes each month.

Parties' Comments

The DOC finds that TracFone has fulfilled Condition 10.

11. TracFone shall not subtract from the free-minutes allowance customer calls to its customer service center, providing those calls use the 611-customer service number and that calls about handset issues are made from another line.

TracFone Compliance

TracFone confirms, as described in Section 5.5.3 of its proposed tariff that it will not deduct airtime minutes when a Lifeline customer contacts customer service by dialing 611, and that calls about handset issues are made from another line.

Parties' Comments

The DOC finds that TracFone has fulfilled Condition 11.

12. TracFone shall assign its Lifeline customers only numbers that are local to their billing address.

TracFone Compliance

TracFone confirms that it assigns Lifeline customers numbers that are local to their residential address and will ensure that those numbers are local based upon the zip code provided on the

customers' Lifeline application. TracFone notes that it does not issue bills and therefore residential addresses are referenced in lieu of billing addresses.

Parties' Comments

The DOC finds that TracFone has fulfilled Condition 12.

13. TracFone shall comply with the same annual Lifeline verification procedures that apply to other Minnesota ETCs.

TracFone Compliance

TracFone commits to comply with the same annual Lifeline verification procedures that apply to other Minnesota ETCs.¹

Parties' Comments

The DOC finds that TracFone has fulfilled Condition 13.

14. TracFone shall promptly report any changes to its Lifeline service and shall promptly update its informational tariff or customer service agreement to reflect those changes.

TracFone Compliance

TracFone commits to promptly report any changes to its Lifeline service and will promptly update its tariff to reflect any such change.

Parties' Comments

The DOC finds that TracFone has fulfilled Condition 14.

¹ Staff notes that in Docket No. P999/M-10-211, In the Matter of the 2010 Lifeline Verification Results, *Order Accepting Reports, Approving Sample Size, Approving Electronic Verification Procedures, and Approving Form Modifications released on March 14, 2011*, the Commission approved TracFone's request to modify the customer notification and verification form, subject to Department and/or Commission staff approval.

Commission Options

Issue 1: Should the Commission accept TracFone's compliance filing?

- 1.a. Yes, as recommended by TracFone it has complied with all the conditions in the Commission Order to the extent that relevant Commission rules are applicable.
- 1.b. As recommended by the Department,
 - accept TracFone's compliance as to conditions 3, 4, 5, 6, 9, 10, 11, 12, 13, and 14;
 - do not accept TracFone's compliance as to conditions 7 and 8.
- 1.c. Other action determined by the Commission.

Issue 2: What further action is warranted regarding TracFone's ETC application?

- 2.a. Allow TracFone to operate its one-year ETC designation within 10 days of Commission Order.
- 2.b. Hold TracFone's one-year ETC designation in abeyance until TracFone complies with any or all of the following:
 - i. Condition 7 – submit information on steps to take to provide service to customers within its proposed service area but outside its (or underlying carriers') network coverage.
 - ii. Condition 7 – delete the following sentence in Section 4.5 of the tariff ““TracFone does not guarantee coverage or service availability.”
 - iii. Condition 8 - collect and remit 911 and TAM fees on a per access line or its equivalent basis pursuant to Minn. Stat. §§ 403.11 and 237.52.
- 2.a. Other action determined by the Commission.

Staff Recommendations

Staff recommends Options 1.b and 2.b. (i,ii,and iii).