IN THE MATTER OF THE PETITION OF
TRACFONE WIRELESS, INC. FOR
DESIGNATION AS AN ELIGIBLE
TELECOMMUNICATIONS CARRIER IN
THE STATE OF NEW MEXICO FOR THE
LIMITED PURPOSE OF OFFERING
LIFELINE SERVICE TO QUALIFIED
HOUSEHOLDS

Case No. 17-00031-UT

POST-HEARING BRIEF OF TRACFONE WIRELESS, INC.

TracFone Wireless, Inc. ("TracFone" or "Petitioner") hereby submits its brief in the above-captioned matter as directed by Hearing Examiner Anthony Medeiros at the conclusion of the hearing held on May 2, 2018. Filed concurrently with this brief are TracFone's proposed Findings of Fact, Conclusions of Law and Proposed Form of Order, also as directed by the Hearing Examiner.

Introduction

TracFone is a telecommunications carrier as that term is defined at Section 3(44) of the Communications Act of 1934, as amended.\(^1\) TracFone provides commercial mobile radio service. It does so by purchasing service at wholesale rates from operators of commercial wireless networks and reselling that service to consumers. TracFone is also the nation's leading provider of Lifeline service supported by the federal Universal Service Fund and has been designated as an Eligible Telecommunications Carrier ("ETC") pursuant to Section 214(e) of the Communications Act\(^2\) to provide Lifeline service in 44 states, including New Mexico. It was

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\(^1\) 47 U.S.C. § 153(44).
\(^2\) 47 U.S.C. § 214(e).
designated as an ETC by the Commission unanimously in 2012.3

When TracFone applied to the Commission for ETC designation in 2010, it only sought the Commission’s approval to provide Lifeline service supported by the federal Universal Service Fund (“Federal USF”). It did not ask for the Commission’s approval to receive Lifeline support from the New Mexico State Rural Universal Service Fund (“SRUSF” or “State Fund”). In its Final Order designating TracFone as an ETC in 2012, the Commission noted that TracFone would need to submit a separate application if, in the future, it were to seek support from the SRUSF.4 TracFone believes that the time has now come for it to offer New Mexico low-income households the most generous, feature rich Lifeline service based on combined Federal USF and SRUSF funding. For that reason, on December 5, 2017, TracFone filed its First Amended Petition to Amend Its Designation as an Eligible Telecommunications Carrier to Receive SRUSF Support for its Lifeline Service. That amended application is the subject of the instant proceeding.

I. If TracFone’s Amended Petition is Granted, TracFone will Offer Low-Income New Mexico Households the Most Generous, Feature Rich, Lifeline Service Plans Ever Available in New Mexico

As described in its First Amended Petition, TracFone proposed to utilize the $3.50 per customer per month in SRUSF support available pursuant to the New Mexico Low Income Telephone Assistance Program (“LITAP”) to provide every TracFone SafeLink Wireless® Lifeline consumer with 250 minutes of wireless airtime in addition to the Lifeline benefit levels funded by the federal USF. During the hearing, TracFone’s pre-filed testimony in a proceeding

3 In the Matter of the Petition of TracFone Wireless, Inc. for Designation as an Eligible Telecommunications Carrier in the State of New Mexico for the Limited Purpose of Offering Lifeline Service to Qualified Customers, Final Order, Case No. 09-00300-UT, March 22, 2012 (“Final Order”).

4 Id. at 2.
before the Utah Public Service Commission was introduced into evidence.\footnote{Smith Bagley Exhibit 13.} As reflected in Smith Bagley Exhibit 13, TracFone has committed to provide Utah Lifeline consumers with an additional 400 minutes per month if it is approved to receive support from the Utah Universal Service Fund. TracFone agreed to provide 400 additional minutes in order to comply with Utah law.\footnote{R746-8-403(2) of the Utah Administrative Code conditions receipt of Utah USF support of $3.50 per month on ETCs meeting certain standards. Specifically, Lifeline service must either 1) meet FCC Lifeline minimum standards for broadband (codified at 47 C.F.R. § 54.408) and provide at least 750 voice minutes per month, or 2) meet FCC requirements for broadband but without a voice component. In short, under Utah regulations, an ETC may receive state USF support without providing any voice service, provided that it meets the FCC minimum standard for broadband. However, if the ETC provides any voice service, it must provide at least 750 voice minutes per month. Since all TracFone Lifeline plans meet the FCC broadband minimum standard (currently, 1 GB per month), Utah’s regulation left TracFone with a choice: either provide 750 minutes of voice service in addition to broadband service or provide no voice service. TracFone concluded that it would not serve the public interest to request Utah USF support and not provide any additional service to Utah Lifeline consumers beyond that already provided with only Federal USF support. Given that choice, TracFone chose to provide 400 additional minutes in order to meet the first prong of the Utah requirement.}

Notwithstanding the fact that TracFone’s commitment to offer 400 minutes in Utah was deemed necessary to comply with an anomaly of the Utah law, TracFone understands and agrees with the concern articulated during the hearing, including by the Hearing Examiner, about the level of poverty in New Mexico and the need for Lifeline services in New Mexico which compare favorably with those available in other states.\footnote{See, e.g., Tr. at 183.} For that reason, TracFone hereby commits to providing every New Mexico SafeLink Wireless\textsuperscript{6} Lifeline consumer with an additional 400 minutes of wireless voice service per month above and beyond the Lifeline benefits supported by the Federal USF if its application for SRUSF LITAP support is granted. TracFone will accept a condition attached to approval of its petition that it provide not less than 400 additional voice minutes per month. Qualified New Mexico Lifeline consumers who enroll...
in SafeLink Wireless® after December 2, 2016 will receive monthly at no charge 750 minutes of wireless voice service (350 minutes under the federal program and 400 minutes through LITAP support) and 1 GB of mobile broadband Internet access service (based on the currently applicable FCC minimum service standard for broadband). This commitment should alleviate any concerns that TracFone is proposing greater benefits in other states than those it has committed to provide in New Mexico.8

II. TracFone Meets All Requirements for Designation as an ETC to Receive New Mexico SRUSF Support

The Commission’s requirements governing petitions for ETC designation to receive support from the SRUSF are codified at § 17.11.10-24 NMAC. As described in detail in the First Amended Direct Testimony of TracFone witness David Avila, as amended by Rebuttal Testimony and Supplemental Rebuttal Testimony9 TracFone’s petition and supporting testimony demonstrate that it meets every enumerated requirement contained in that rule. Specifically, TracFone’s First Amended Petition:

1. Contains a description of the proposed service area consistent with the requirements of 47 C.F.R § 54.207;10

2. Demonstrates that TracFone meets all federal requirements set forth at 47 U.S.C. 214;11

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8 Qualified New Mexico consumers who participate in TracFone’s Walmart Family Mobile® Financial Assistance Lifeline program will receive discounts of $12.75 off the retail price of any Walmart Family Mobile® service plan which complies with the FCC minimum standards. Of that $12.75 discount, $9.25 will be supported by the Federal USF and $3.50 by the SRUSF.
9 TracFone Exhibits 1-3.
10 TracFone Exhibit 1 at 10; TracFone Exhibit 2, Rebuttal Exhibit 2; TracFone Exhibit 3 at 1, Rebuttal Exhibit 4; TracFone’s Responses to Bench Requests, Response to Bench Request No. 7, Exhibit 4.
11 TracFone Exhibit 1 at 10-12; TracFone Exhibit 2 at 16.
3. Demonstrates that the proposed designation is in the public interest;\textsuperscript{12}

4. Includes the information required by 17.11.10-25 NMAC;\textsuperscript{13}

5. Explains why TracFone, as a Lifeline-only provider not requesting high cost support to deploy facilities, is not required to provide a five year plan;\textsuperscript{14}

6. Demonstrates TracFone’s ability to remain functional in emergency situations;\textsuperscript{15}

7. Demonstrates that TracFone will satisfy all consumer protection and service quality standards;\textsuperscript{16}

8. Demonstrates that TracFone will offer local usage plans comparable to those of offered by incumbent local exchange carriers;\textsuperscript{17}

9. Acknowledges that TracFone might be required to provide equal access if all other ETCs in the designated area relinquish their designations;\textsuperscript{18}

10. Demonstrates that granting TracFone ETC status (for purposes of receiving SRUSF support) is likely to result in more consumer choice;\textsuperscript{19}

\textsuperscript{12} The public interest benefits of TracFone’s petition are described elsewhere in this brief.

\textsuperscript{13} TracFone Exhibit 1 at 12-13. There, Mr. Avila explains why those requirements are applicable only to petitions for SRUSF support based on need. TracFone’s petition is not based on need.

\textsuperscript{14} Id. at 13.

\textsuperscript{15} Id. at 13-14; TracFone Exhibit 2, at 16-17 and Rebuttal Exhibit 3.

\textsuperscript{16} TracFone Exhibit 1 at 14; TracFone Exhibit 2 at 17.

\textsuperscript{17} TracFone Exhibit 1 at 14-15. Importantly, TracFone’s local usage plans must be comparable to those of incumbent local exchange carriers, not identical to those of ILECs. As described in TracFone’s petition, there are inherent differences between wireline service and wireless service. In the Commission’s 2012 Final Order designating TracFone as an ETC under the federal program, the Commission concluded that TracFone’s usage plans are comparable with those of incumbent local exchange carriers.

\textsuperscript{18} Id. at 15-16.

\textsuperscript{19} Id. at 19-20.
11. Addresses the impact of TracFone’s petition on the size of the SRUSF;\textsuperscript{20}

12. Addresses the unique advantages of TracFone’s service offerings;\textsuperscript{21}

13. Demonstrates TracFone’s willingness and ability to offer its enhanced Lifeline service supported by the SRUSF throughout its designated service area within a reasonable time frame.\textsuperscript{22}

None of the factual evidence presented by TracFone in its petition and in its testimony regarding the requirements of 17.11.10.24 NMAC has been refuted. Accordingly, based on the evidence of record, TracFone meets every enumerated requirement set forth in the Commission’s regulations for granting its petition to receive support from the SRUSF for its enhanced Lifeline service.

III. Under New Mexico Law, TracFone is Qualified for Designation as an ETC for the Purpose of Receiving SRUSF Support to Provide Enhanced Lifeline Service

New Mexico’s Low Income Telephone Assistance Program (the State’s Lifeline program) is a statutory creation. In 1998, the Low Income Telephone Service Assistance Act was enacted into law (Chapter 63, Article 9C NMSA, hereinafter referred to as the “LITAP Act”). The stated purpose of the LITAP Act is to “assure that telephone rate increases do not force many low-income New Mexicans to discontinue necessary telephone service and to

\textsuperscript{20 Id. at 16-18; see also Rebuttal Testimony of David Avila (TracFone Exhibit 2) at 2-3 where TracFone witness Avila provides updated TracFone Lifeline enrollment data which confirm that TracFone serves fewer Lifeline customers in New Mexico than indicated in his Direct Testimony and that the impact on the SRUSF would be even less than originally forecast.}

\textsuperscript{21 TracFone Exhibit 1 at 21-22; see also TracFone Exhibit 2 at 11-12 where Mr. Avila explains that TracFone will be the only Lifeline provider offering New Mexico low-income households a choice of either no charge (100% discounted) Lifeline service through its SafeLink Wireless\textsuperscript{®} offerings, or discounts on paid service through its Walmart Family Mobile\textsuperscript{®} Financial Assistance offerings. It is undisputed that no other Lifeline provider in New Mexico—wireline or wireless—offers comparable service choices to low-income consumers.}

\textsuperscript{22 TracFone Exhibit 1 at 22-23.}
increase the availability of basic telephone service to low-income New Mexicans by providing assistance to meet the cost of basic telephone service.” The enhanced Lifeline service plans proposed by TracFone will achieve that important statutory objective. The SafeLink Wireless® program will provide consumers monthly with 750 minutes (more than 12 hours) of wireless voice service, plus 1 GB of mobile broadband Internet access service at no charge to the consumer. Every New Mexico household which has a member who is Lifeline-eligible will be able to enroll in that service and will receive more than 12 hours monthly of voice telephone service and 1 GB of mobile broadband service at no charge. That service will include at no charge features often associated with wireless service, including voice mail, caller ID, three way calling, all distance calling, and roaming. It is difficult to imagine any Lifeline service offering more likely to protect low-income New Mexico households against rate increases and to prevent disconnection of service due to unaffordability than a no charge service like SafeLink Wireless®. Whether a qualified low-income consumer selects the SafeLink Wireless® 100 percent discounted no charge offering or the substantially discounted Walmart Family Mobile® Financial Assistance Lifeline options, telephone service will be available to thousands of low-income New Mexicans to whom it might otherwise be unaffordable, thereby fulfilling the explicit statutory purpose for the LITAP Act.

Nothing in the LITAP Act, the Rural Telecommunications Act of New Mexico, or in any Commission regulation, states or implies that LITAP support is only to be available to any single category of service providers, such as, for example, incumbent wireline local exchange carriers, or carriers also receiving high cost support. In his Direct Testimony, Staff witness

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23 NMSA, § 63-9C-2.
24 Every Walmart Family Mobile® plan will be discounted by $12.75 for qualifying Financial Assistance Lifeline customers.
25 NMSA, § 63-9H.
Michael S. Ripperger stated that currently, only ETCs receiving high cost support have been
approved to receive LITAP support.\textsuperscript{26} However, on cross-examination, Mr. Ripperger candidly
acknowledged that no provision of New Mexico law and no Commission regulation limit LITAP
support to those ETCs who also receive high cost support.\textsuperscript{27} More importantly, Mr. Ripperger
also acknowledged that no provision of New Mexico law limits LITAP-supported service
availability to those low-income New Mexicans who happen to receive their telephone service
from providers who receive high cost support.\textsuperscript{28} Under the LITAP Act, SRUSF-supported
Lifeline service should be available to all qualified low-income New Mexicans without regard to
whether or not they happen to receive their telephone service from a high cost recipient carrier.\textsuperscript{29}

Pursuant to Section 63-9C-4 of the LITAP Act, local exchange companies who receive
SRUSF support may provide assistance in the form of reduced rates to those low-income persons
who qualify. TracFone is such a “local exchange company” as that term is defined at Section 63-
9C-3.A of the LITAP Act. “Local exchange company” is statutorily defined as “\textit{a person not
engaged solely in interstate business that provides services or facilities for the transmission of
two-way interactive switched voice communications over a telephone line within a local
exchange area for single line customers.}” TracFone meets every prong of that statutory
definition: 1) TracFone is not engaged solely in interstate business as its service is available for
communications within New Mexico; 2) TracFone provides services for the transmission of two-

\textsuperscript{26} Staff Exhibit 1 at 14.
\textsuperscript{27} Tr. at 213.
\textsuperscript{28} Tr. at 214.
\textsuperscript{29} See, e.g., Rebuttal Testimony of David Avila (TracFone Exhibit 2) at 5: 17-23: “Some low-
income New Mexico households who need and deserve LITAP assistance reside in rural areas;
many others do not. Some low-income New Mexico households who need and deserve LITAP
assistance obtain their telecommunications service from incumbent wireline local exchange
carriers who receive high-cost support; many others choose to obtain their telecommunications
service from providers who do not receive high cost support, including, for example, commercial
mobile service providers such as TracFone.
way interactive switched voice communications over telephone lines within a local exchange area since its services can be used (and often are used) for calling within a local exchange area; 3) All TracFone customers are single line customers as all TracFone customers use wireless telephone lines exclusively available to them.

The LITAP program exists to ensure that all low-income New Mexicans are able to obtain affordable telephone service. That availability should not be limited to those low-income consumers served by incumbent wireline telephone companies. Indeed, the Rural Telecommunications Act specifically states that the SRUSF is to maintain and support universal service that is provided by ETCs, "including commercial mobile radio services carriers ... ."30 One commercial mobile radio service carrier – Smith Bagley – already receives LITAP support. Furthermore, the Rural Telecommunications Act explicitly requires that distribution of SRUSF funds must be competitively and technologically neutral.31 There is nothing codified in any statute or regulation which would limit receipt of LITAP support to a single category of providers such as, e.g., ILECs or telephone companies which also receive high cost support. Moreover, limiting SRUSF support to those Lifeline providers who use one specific technology (e.g. wireline circuit switched technology) or to one category of providers (e.g., those who receive high cost support) while denying SRUSF support to all competing Lifeline providers would be the antithesis of competitive and technology neutrality as required by the Rural Telecommunications Act. Neither is it competitively neutral to allow one Lifeline provider to offer Lifeline services supported by both Federal USF and SRUSF funding while denying its

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31 NMSA, § 63-9H-6.C. ("The fund shall be competitively and technologically neutral, equitable and nondiscriminatory in its collection and distribution of funds ... .")
Lifeline competitors the opportunity to provide Lifeline service supported by the same support mechanisms.

NMSA, § 63-9H-6.D(1) also requires the Commission to establish eligibility criteria for State Fund participation “consistent with federal law.” Federal law since 2008 has allowed otherwise qualified wireless Lifeline providers, including non-facilities-based wireless Lifeline providers, to provide Lifeline service supported by the federal USF.32 Any Commission action which would limit eligibility for participation in the SRUSF LITAP program to specific categories of ETCs such as incumbent wireline telephone carriers or carriers which also receive high cost support would be facially inconsistent with federal law and in violation of NMSA, § 63-9H-6.D(1).

IV. The Public Interest Benefits which will Result from Granting TracFone’s Petition Far Outweigh Staff’s Concerns About the Impact on the State Fund — Concerns Which Can Be Addressed by the Commission and by the Legislature

Staff witness Ripperger has opposed TracFone’s petition for only one reason: concerns about the impact on the SRUSF. Mr. Ripperger projects that allowing TracFone to receive $3.50 from the SRUSF for each of its New Mexico Lifeline customers would increase demand on the fund by at least $1 million per year and “open the door” for other ETCs to petition for LITAP support.33 Neither of those stated concerns warrant denial of TracFone’s petition. First, as described in TracFone witness Avila’s rebuttal testimony, TracFone’s New Mexico Lifeline customer base has been reduced from 29,150 customers (the number used by Mr. Ripperger in


33 Direct Testimony of Michael S. Ripperger, Staff Exhibit 1 at 5.
his calculations) to 21,580 as of April 1, 2018. Therefore, Mr. Ripperger’s projections as to the impact on the SRUSF are overstated. If TracFone were to receive $3.50 per month for each of those 21,580 customers for a full year, the fund impact would be $906,360 – a significant amount, but well below the “at least one million” projected by Mr. Ripperger. Moreover, as Mr. Avila explained during his cross examination by Mr. Templeman on behalf of the New Mexico Exchange Carrier Group (“NMECG”), TracFone’s Lifeline enrollment has decreased due, in large part, to several recent FCC requirements, specifically, the requirement that Lifeline consumers be de-enrolled following 30 days’ of non-usage, and the requirement that Lifeline customers re-verify annually their continuing Lifeline eligibility. Those FCC regulations have reduced Lifeline enrollments in New Mexico and nationwide. Those requirements remain in effect so it is probable that there will be continuing reductions in TracFone’s Lifeline enrollments.

As for Mr. Ripperger’s stated concern about “opening the door” to other ETCs, he mentions that there is only one other wireless ETC providing Lifeline service in New Mexico – Virgin Mobile. It is undisputed that, as of the date of the hearing in this proceeding, Virgin Mobile had not petitioned the Commission to receive LITAP support. In fact, Mr. Ripperger admitted that he has had no discussions with Virgin Mobile (or with any other authorized or potential ETC) about seeking LITAP support. However, on June 1, 2018, Virgin Mobile USA,

34 TracFone Exhibit 2 at 3.
35 Tr. at 26
36 47 C.F. R. § 54.405(e)(3).
37 47 C.F.R. § 54.405(e)(4).
38 Staff Exhibit 1 at 14.
39 Tr. at 215.
LP did petition the Commission to amend its ETC designation to receive SRUSF support.\textsuperscript{40} To date, no action has been taken regarding Virgin Mobile's application. It has not yet been assigned to a hearing examiner. Mr. Avila testified, "[t]he Commission should decide matters based on what is before it, not based on what others might -- or might not -- bring before it in the future."\textsuperscript{41} Although Virgin Mobile now has petitioned for SRUSF support, it is not known when that petition will be considered or what the state of the SRUSF will be when the petition is under consideration.

Notwithstanding the fact that Mr. Ripperger's calculations about SRUSF impact are based on incorrect TracFone enrollment data, the Commission should be concerned about fund impact. However, those concerns need to be balanced with other considerations. As important as is the concern about the impact on the SRUSF -- a fund currently capped at $30 million per year,\textsuperscript{42} is the concern about the purposes for the fund. In short, in considering TracFone's petition, the Commission must address a more fundamental question -- what are the public interest purposes for having a LITAP program funded by the SRUSF and would those public interest purposes be advanced by approving TracFone's petition?

As described in Section III of this brief, the Legislature enacted into law the LITAP Act for an important public interest purpose: to ensure continued access to affordable telephone service -- wireline or wireless -- by low-income New Mexicans, and to prevent low-income consumers from losing their telephone service because it is no longer affordable. TracFone has been advancing that statutory objective by enrolling more low-income New Mexicans in its Lifeline program than any other Lifeline provider -- wireline or wireless. If its petition is

\textsuperscript{40} Case No. 18-00159-UT.
\textsuperscript{41} TracFone Exhibit 2 at 5.
\textsuperscript{42} NMSA, § 63-9H-6(O).
granted, those low-income households will have access to more robust Lifeline service options than any currently available in New Mexico. The result will be more affordable telephone service available to low-income New Mexico households and fewer unaffordability-caused service disconnections, thereby advancing the statutory goal of the LITAP Act. In deciding whether to allow a fully qualified petitioner to receive SRUSF support to provide Lifeline service through the LITAP program, the Commission needs to resolve a public interest question of critical importance: What is the primary purpose for the SRUSF and for the LITAP program? Specifically, it must resolve whether that purpose is to promote affordable service and keep low-income New Mexicans connected – as explicitly set forth in the LITAP Act, or whether the purpose is to subsidize the operations of a single category or service providers? Based upon the statutory purpose for the LITAP Act as set forth at NMSA, § 63-9C-2, TracFone respectfully submits that it is the former.

Despite the stated purpose for the LITAP Act, LITAP payments have been declining. In other words, the SRUSF is actually providing less LITAP support than in the past and, more importantly, the State Fund is benefitting fewer low-income New Mexico households than in the past. In short, the data indicate that the LITAP program is not fulfilling the statutory objective codified in the LITAP Act. This was cogently explained by Staff witness Ripperger in what is perhaps the most important statement made during the hearing. Mr. Ripperger explained the decline in LITAP support as follows: “...there has been a migration from wirelines to wireless, and once the option of wireless Lifeline became available, a lot of Lifeline customers started to jump from the wirelines offer to the wireless offer.”43

43 Tr. at 255.
As noted by Mr. Ripperger, today, the only way that low-income New Mexico consumers can obtain Lifeline service supported by the SRUSF is to obtain service from a provider currently receiving SRUSF high cost support (wireline telephone companies and Smith Bagley). If low-income New Mexico consumers prefer wireless Lifeline-supported services (as the vast majority of New Mexico Lifeline customers have chosen), then those low-income consumers are forced to forfeit their access to LITAP support (unless they reside in that very rural, lightly-populated portion of New Mexico served by Smith Bagley). In short, the migration from wireline Lifeline to wireless Lifeline described by Mr. Ripperger has had the perverse and unintended consequence of causing most New Mexico Lifeline consumers to lose LITAP-supported Lifeline service. That is not fair; that is not competitively or technologically neutral; that is not nondiscriminatory; that is not in the public interest. That certainly was not the intent of the Legislature in enacting the LITAP Act.

Maintaining a sufficiently funded SRUSF is important and Staff’s concerns about the impact on the SRUSF, even if exaggerated and based on incorrect data, must be acknowledged and addressed. Granting TracFone’s petition is likely to increase disbursements from the State Fund, albeit by less than the amount projected by Staff. However, the Commission and the Legislature have available remedies to address funding concerns and have ample time to implement those remedial actions. Pursuant to 17.11.10.22(C) NMAC, only carriers holding ETC status as of October 1 are eligible to receive disbursements during the year that begins the following January. In order for TracFone to be eligible to receive SRUSF support during 2019, its petition must be approved by the Commission not later than October 1, 2018. TracFone is hopeful that the Commission will act favorably on its petition by October 1. Whether that will
occur by that date is not certain. Therefore, the earliest that TracFone could have any impact on the SRUSF would be in 2019.\textsuperscript{44}

Furthermore, the $30 million statutory cap codified in the Rural Telecommunications Act at 63-9H-6(O) is not intended to be a permanent cap. That provision states, in part, as follows: “The commission shall evaluate the amount of the cap in an appropriate proceeding to be completed by June 30, 2019 and consider whether, based on the then-current status of the fund, the cap should be modified, maintained or eliminated.” If the Commission were to approve TracFone’s petition either before or after October 1, 2018, the Commission will have until June 30, 2019 to consider the need for changes to the State Fund.

In addition to recommending necessary legislative changes, the Commission has available to it means for addressing funding changes deemed necessary by approval of TracFone’s petition. As Mr. Ripperger described in his testimony, in November 2017, the Commission approved a 2018 SRUSF surcharge rate of 6.06 percent. That Commission-approved rate was almost one percentage point below that recommended by Solix – the Commission’s SRUSF administrator at the time.\textsuperscript{45} The surcharge rate is set by the Commission on an annual basis. Thus, the Commission has authority to approve a higher surcharge rate if needed to generate funding sufficient to achieve the SRUSF’s statutory goals, including the LITAP goals. Therefore, concerns about impact on the fund must be evaluated based upon what funding is necessary to achieve the State Fund’s goals, including the goals of the LITAP program, and upon the means available for the Commission and for the Legislature to make

\textsuperscript{44} Virgin Mobile’s June 1 petition has not even been assigned to a hearing examiner and no procedural schedule has been established. Thus, it seems improbable that it could possibly be acted on before October 1, 2019. If so, Virgin Mobile would not be allowed to receive SRUSF support until 2020 at the earliest.

\textsuperscript{45} Staff Exhibit 1 at 10. GVNW Consulting is the current administrator.
adjustments to the State Fund needed to achieve those goals. 46

V. Low-Income New Mexico Consumers Should be Allowed to Select the Lifeline Program Option Which Best Meets their Needs Without Having to Sacrifice Access to LITAP Support

As noted above, increasing consumer choice is one of the statutory criteria to be addressed by the Commission in considering petitions by ETCs for LITAP support. 47 Consumer choice means that consumers, specifically, consumers of LITAP-supported Lifeline service, should have the opportunity to choose from among multiple available Lifeline providers’ offerings which Lifeline offerings best meet their needs and which deliver the greatest perceived value. This important point seems to be lost on certain parties to this proceeding. For example, counsel for the NMECG commented to TracFone witness Avila that “wireline ETCs offer unlimited local calling to their Lifeline customers.” 48 In contrast, TracFone’s Lifeline plans as described in its amended petition and in its testimony, provide specified quantities of all distance voice minutes (in the case of the SafeLink Wireless® plans) or specified discounts on the price of Walmart Family Mobile® services (in the case of the Walmart Family Mobile® Financial Assistance plans).

Contrary to that colloquy between Mr. Templeman and Mr. Avila which occurred during the hearing, the relevant issue before the Commission is not which Lifeline service is “better.” Lifeline consumers should determine which plans best meet their needs and preferences. Some consumers may opt for Lifeline plans which include discounts on local exchange telephone service which allow for unlimited calling within the local exchange area but nothing else. Other

46 If, at some time in the future, the Commission were to favorably consider Virgin Mobile’s June 1, 2018 petition, the Commission and the Legislature could consider further changes to the SRUSF as needed to achieve all of the fund’s statutory purposes, including those purposes set forth in the LITAP Act.
47 17.11.10-24(A)(10) NMAC.
48 Tr. at 54.
Lifeline consumers may prefer Lifeline service which provides specified quantities of all distance calling, including calling beyond the local exchange, and the convenience of service mobility. Those choices should be made by consumers. Those choices should not be made for consumers by the Commission. Limiting LITAP support to incumbent local exchange carriers’ basic local exchange service would deprive Lifeline-eligible low-income New Mexicans of the very consumer choice contemplated by 17.11.10-24.A(10) NMAC.

Section 17.11.11.10(A) NMAC describes Lifeline benefits as follows: “Lifeline benefits provided by ETCs shall consist of basic service, or its functional equivalent, and usage charges, less a discount of not less than $3.50 ….” During the hearing, Mr. Templeman, on behalf of NMECG, asserted in questioning TracFone witness Avila, that using LITAP funds to provide additional no charge voice minutes was not a “discount” within the ambit of Section 17.11.11.10.A NMAC, and that TracFone was seeking to modify the rule.49 Mr. Avila refuted that assertion and testified that the use of SRUSF funds to provide additional minutes would be used for a discount.50 Mr. Avila is correct. The term “discount” is nowhere defined in the LITAP Act or in Title 17, Chapter 11 Part 11 NMAC (Lifeline and Linkup Benefits). In the absence of such a definition, a “discount” could be any amount below the retail price. As Mr. Avila explained, a discount could be 10 percent, 15 percent, 50 percent, or even 100 percent below the retail price.51 What matters is that the ETC provides the Lifeline consumer with not less than $3.50 of service subsidy. This is about consumer choice. For those Lifeline-eligible New Mexicans who prefer a Lifeline benefit in the form of a stated discount below the retail price of local exchange service, such service options are available and should remain available.

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49 Tr. at 47-49.
50 Tr. at 49.
51 Tr. at 199-200.
For other Lifeline-eligible New Mexicans who would prefer to receive their LITAP discount in the form of additional minutes of wireless service, they too should have the option to select such offerings.

VI. Unproven Allegations Regarding TracFone’s Third Party Agents, Company Ownership, and Certain Civil and Administrative Litigations are Wholly Irrelevant to the Issues Before the Commission in this Proceeding

During the hearing, several intervenors, each of whom is an existing or potential Lifeline competitor of TracFone, raised various issues and made unproven allegations regarding TracFone’s ownership, its supervision of agents, and certain litigation matters. None of those allegations bear any relevance to the issues before the Commission, specifically, whether TracFone is qualified to be designated as an ETC for purposes of receiving SRUSF support pursuant to the LITAP Act, and whether approval of TracFone’s petition would serve the public interest. Those issues are addressed in the preceding sections of this brief. Nonetheless, the intervenors’ allegations and insinuations warrant brief response.

TracFone’s ownership: As TracFone described in its amended petition (and as was the case when the Commission unanimously designated TracFone as an ETC in 2012), TracFone is a subsidiary of América Móvil, S.A.B. de C.V., a corporation organized under the laws of Mexico and controlled by the family of Carlos Slim Helu. TracFone’s ownership by América Móvil is a matter of public record, and has been approved by the Federal Communications Commission which has authorized TracFone to provide interstate and international telecommunications services pursuant to Section 214 of the Communications Act.52 During the hearing, counsel for

52 47 U.S.C. § 214. See Public Notice – International Authorizations Granted, DA No. 03-1478, released by the Federal Communications Commission May 1, 2003 (File No. ITC-214-2003030401-000162, Application of TracFone Wireless, Inc. for authority to resell the international switched services of unaffiliated international facilities-based carriers, either directly or indirectly through the resale of another U.S. resale carrier’s international switched services, pursuant to Section 63.18(e)(2) of the rules).
Smith Bagley introduced into evidence a June 2016 order issued by the Chief of the FCC’s Enforcement Bureau approving a consent decree entered into between the FCC Enforcement Bureau and América Móvil.\textsuperscript{53} The consent decree resolved an investigation into whether the Slim Family’s ownership of another América Móvil subsidiary – Puerto Rico Telephone Company, Inc. – exceeded foreign ownership limits on entities holding radio spectrum licenses under Title III of the Communications Act, specifically, Section 310 of that act.\textsuperscript{54} Unlike Puerto Rico Telephone Company, TracFone holds no Title III FCC radio spectrum licenses and the foreign ownership limitations codified at Section 310 are not applicable to TracFone. More importantly, neither Smith Bagley nor any other party has produced a scintilla of evidence either that there is anything unlawful or even improper about TracFone’s foreign ownership or that the Slim Family ever has attempted to control TracFone’s day-to-day operations as an authorized U.S. telecommunications carrier.

**TracFone’s agents:** Smith Bagley – a competing Lifeline provider – questioned TracFone’s supervision of its Lifeline marketing agents. In this regard, Smith Bagley introduced into evidence several responses to data requests about how TracFone trains and supervises agents.\textsuperscript{55} At no time was any evidence offered which demonstrates either that TracFone failed to properly train and supervise agents or that TracFone agents committed violations of federal or state laws or regulations governing the Lifeline program. To the extent that agent supervision is a concern notwithstanding that lack of evidence, the Commission should be aware that TracFone does not utilize field agents to solicit Lifeline consumers in New Mexico and it has no plans to do so if its petition for LITAP support is approved.

\textsuperscript{53} Smith Bagley Exhibit 10.
\textsuperscript{54} 47 U.S.C. § 310.
\textsuperscript{55} Smith Bagley Exhibit 7.
Prior Litigations: Smith Bagley has moved for admission into evidence as Smith Bagley Exhibit 11, TracFone’s response to a data request about whether TracFone has been subject to a *qui tam* action.\(^{56}\) It is not known what, if anything, Smith Bagley sought to demonstrate by inclusion of that discovery response in the record. However, since the question about the *qui tam* litigation has been raised by Smith Bagley, the Hearing Examiner and the Commission deserve an explanation.

On June 13, 2014, Clifford L. Tubbs, a former employee of a company operating under the name Social Mobile Telecommunications, filed a complaint in the United States District Court for the Southern District of Florida. The complaint was captioned *United States of America, ex rel. Clifford L. Tubbs v. TracFone Wireless, Inc. d/b/a SafeLink Wireless, MW Ventures, LLC d/b/a Social Mobile Telecommunications, Total Consulting Group, Inc. d/b/a Total Mobile, Get If For Free, LLC*, Case No. 14-22192. The complaint was brought under the False Claims Act.\(^{57}\) The False Claims Act allows individuals to file “whistleblower” complaints against entities accused of defrauding the government. Filers of such complaints, called relators, may receive a portion of any proceeds awarded in such cases. The U. S. Department of Justice may investigate and determine whether to intervene in a *qui tam* case. Attached to this brief as

\(^{56}\) Motion for Clarification or, in the Alternative, to Admit SBI Exhibit 11 Into the Record Without Qualification, filed June 1, 2018. TracFone, through counsel, notified all parties and the Hearing Examiner that it did not object to Smith Bagley’s motion.

\(^{57}\) 31 U.S.C. § 3729 *et seq.*
Attachment 1 is a certified copy of the docket report from that case. Qui tam cases filed under the False Claims Act are filed under seal and remain under seal until the court orders them unsealed and orders that they be served on the defendants. As indicated by the docket entry dated April 5, 2017 the Department of Justice notified the court that it had not chosen to intervene. When the Department of Justice does not intervene in a qui tam case, the relator may still pursue the case, but without the participation of the United States Government. The court ordered that the complaint be unsealed and served on defendants. Docket entries dated June 30, 2017 and July 14, 2017 indicate that the court extended the deadline for serving the complaint on defendants. On September 26, 2017, relator Tubbs filed a notice of voluntary dismissal of his qui tam complaint. On October 4, 2017, the court issued a final order of dismissal.

As is reflected in the court’s docket entries, the complaint was never served on TracFone and was subsequently dismissed at the request of the relator. Those facts demonstrate only that a relator such as Mr. Tubbs may file a complaint, that the Department of Justice did not deem the complaint worthy of intervening; and that TracFone was never served with the Tubbs complaint which was dismissed.

A filed but unserved and subsequently dismissed qui tam complaint has no relevance to any issue before the Commission in this proceeding. Nor does a filed, but later dismissed, complaint support a conclusion that any aspect of TracFone’s operation as a Lifeline provider

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58 Those docket sheet pages were not admitted into evidence at the hearing in this matter. However, they are official records of a United States District Court. The Hearing Examiner and the Commission may take administrative notice of such court records pursuant to the Commission’s rules of evidence, specifically, 1.2.2.35(D)(1) NMAC; see United States v. Mendoza, 698 F.3d 1303, 1306-07 (10th Cir. 2012) (dockets re public records). By Order issued in this proceeding June 25, 2018, the Hearing Examiner granted TracFone’s Motion to Take Administrative Notice of Docket Sheet. Pursuant to the Hearing Examiner’s Order and Rule 1.2.2.35(D)(5), the docket sheet, as noticed, is admitted into evidence in the record of this matter to the same extent as other relevant evidence.
has violated federal or state law. What is relevant is that TracFone is the nation’s largest provider of Lifeline service and has provided Lifeline service since 2008, and in New Mexico, since 2012. During that decade, there has not been a single adjudication by any federal or state court or regulatory tribunal that TracFone’s conduct as a Lifeline provider has been in violation of any applicable law or regulation.

Conclusion

For the reasons described herein, TracFone meets all requirements governing the LITAP program. Designation of TracFone as an ETC for purposes of receiving SRUSF support to enhance its Lifeline service would be in full conformance with the requirements of the LITAP Act, the Rural Telecommunications Act, and all applicable Commission regulations. Moreover, approval of TracFone’s First Amended Petition would serve the public interest since it would enable TracFone to provide low-income New Mexicans with the most generous, feature rich Lifeline service options ever offered in New Mexico, would not adversely impact the SRUSF and any impact on the SRUSF could be redressed by the Legislature and/or by the Commission; and grant of TracFone’s petition would increase consumer choice.
Respectfully submitted,

TRACFONE WIRELESS, INC.

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mercerdm@gtlaw.com

Counsel for TracFone Wireless, Inc.

June 28, 2018
U.S. District Court  
Southern District of Florida (Miami)  
CIVIL DOCKET FOR CASE #: 1:14-cv-22192-JEM
Internal Use Only

Tubbs et al v. Tracfone Wireless, Inc. et al
Assigned to: Judge Jose E. Martinez
Cause: 31:3729 False Claims Act

Date Filed: 06/13/2014
Date Terminated: 10/17/2014
Jury Demand: Plaintiff
Nature of Suit: 376 Qui Tam (31 U.S.C. § 3729(a))
Jurisdiction: U.S. Government Plaintiff

Plaintiff
Clifford L. Tubbs
Relator

represented by Roberto Martinez
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255 Alhambra Circle
Penthouse
Coral Gables, FL 33134-2351
305-476-7400
Fax: 476-7444
Email: bob@colson.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

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ATTORNEY TO BE NOTICED

Plaintiff
United States of America
Ex Rel.

represented by James Alan Weinkle
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305.961.9290
Fax: 305.530.7139
Email: James.Weinkle@usdoj.gov
ATTORNEY TO BE NOTICED

Attachment 1

V.

**Defendant**

Tracfone Wireless, Inc.  
*doing business as*  
Safeline Wireless

**Defendant**

MW International Ventures, LLC  
*doing business as*  
Social Mobile Telecommunications

**Defendant**

Total Consulting Group, Inc.  
*doing business as*  
Total Mobile

**Defendant**

Get It For Free, LLC

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<td>QUI TAM COMPLAINT JURY TRIAL DEMANDED against All Defendants. Filing fees $400.00 Receipt #: FLS 100081143, filed by Clifford L. Tubbs, Relator and on behalf of the United States of America. (Attachments: #1 Civil Cover Sheet)(nc) (Entered: 06/13/2014)</td>
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<td>32 ORDER re 31 Notice That It Is Not Intervening At This Time filed by United States of America. It is ORDERED and ADJUDGED that The Complaint be unsealed and served upon the Defendant by the Relator. All other contents of the Court's file in this action remain under seal and not be made public or served upon the Defendant, except for this Order and the Notice of Elections to Decline Intervention at this Time, which the Relator will serve upon the Defendant only after service of the complaint. The seal be lifted as to all other matters occurring in this action after the date of this Order. Signed by Judge Jose E. Martinez on 4/4/2017. (See Order for full details) (nc) (Entered: 04/05/2017)</td>
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<td>35 Paperless ORDER granting 34 Motion for Extension of Time. The time to serve the Complaint on Defendants is extended to August 2, 2017. Signed by Judge Jose E. Martinez on 7/14/2017. (tde) (Entered: 07/14/2017)</td>
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<td>10/04/2017</td>
<td>38 FINAL ORDER of DISMISSAL WITHOUT PREJUDICE AND ORDER DENYING ALL PENDING MOTIONS AS MOOT. ADJUDGED that this action is DISMISSED without prejudice. ADJUDGED that a11 pending motions in this case are DENIED AS MOOT, and this case is CLOSED. Signed by Judge Jose E. Martinez on 10/4/2017. (jas) (Entered: 10/04/2017)</td>
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CERTIFICATE OF SERVICE

I certify that on this date, June 28, 2018, I sent via email to the individuals listed below a true and correct copy of Post-Hearing Brief of TracFone Wireless, Inc.:

Carol Clifford  carol@thejonesfirm.com
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/s/ Raymond Lee
Raymond Lee