

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of the Revocation of)
Eligible Telecommunications Carrier Designation) File No. RC-2016-0278
of Total Call Mobile, Inc.)

**TOTAL CALL MOBILE'S
ANSWER TO STAFF MOTION AND
RESPONSE TO ORDER TO SHOW CAUSE**

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COMES NOW Total Call Mobile (“Total Call Mobile” or “Company”), by its attorneys,
and responds to the Missouri Public Service Commission’s (“Commission”) April 15, 2016
Order as follows:

I. INTRODUCTION

On April 14, 2016, the Staff of the Missouri Public Service Commission (“Staff”) filed a Motion for Provisional Revocation of the ETC Designation of Total Call Mobile and Request for Order to Show Cause Why the Designation Should Not Be Permanently Revoked (“Motion”). The Motion was filed shortly after the Federal Communications Commission (“FCC”) issued a Notice of Apparent Liability for Forfeiture and Order (“NAL”) to the Company on April 7, 2016.¹ Based on the fact that allegations have been made in the NAL, the Staff’s Motion asks the Commission to: (a) recommend to the FCC and USAC that Total Call Mobile’s funding be provisionally suspended; and (b) issue a Show Cause Order as to why Total Call Mobile’s ETC designation should not be permanently revoked.

On April 15, 2016, the Commission published a Notice of Contested Case and Order Directing Filing (“Order”) under File No. RC-2016-0278. The Order designates Staff’s Motion

¹ *In the Matter of Total Call Mobile, Inc.* File No. EB-IHD-14-00017650, Notice of Apparent Liability for Forfeiture and Order, FCC 16-44 (rel. Apr. 7, 2016) (NAL).

as a complaint under the Commission's rules, and orders Total Call Mobile to file an answer and a response showing why the Commission should not recommend to the FCC and the Universal Service Administrative Company (USAC) that Total Call Mobile's federal funding be provisionally suspended. Total Call Mobile herein provides the requested answer and response.

Total Call Mobile has been an active participant in the Lifeline program nationwide since 2012, and in Missouri beginning in May 2013. Total Call Mobile is internally investigating and publicly responding to the allegations in the NAL, the vast majority of which are based on assertions by a handful of former sales agents² that they knowingly committed fraud and at the same time attempted to conceal such fraud from Total Call Mobile. Total Call Mobile has always prohibited the very actions the sales agents say they employed and believes that it took reasonable and effective measures at all times to identify, protect, detect and respond to improper conduct by field sales agents.³ Total Call Mobile is fully engaged in the process of responding to the NAL and submits that the Commission should not pre-judge the issues by recommending provisional suspension of Total Call Mobile's Lifeline funding for Missouri and should not revoke its authorization to serve customers in Missouri. As shown below, regardless of whether the NAL is justified in terms of imposing a financial penalty, it is based on actions that occurred nearly two years ago, that did not substantially affect Missouri subscribers, and that do not today affect Missouri subscribers. Therefore, Total Call Mobile should be allowed to continue operation in Missouri and continue receipt of funding for Missouri Lifeline subscribers.

² See NAL at ¶ 1.

³ Information provided by the FCC to Total Call Mobile after the NAL shows that four of the five sales agents making accusations against the company admit that they (and in some cases others as well) were caught by the company and were fired. This fact was not discussed in the NAL, however.

II. ANSWER TO STAFF MOTION

The Order treats the Staff Motion as a complaint under the Commission's rules and directs Total Call Mobile to provide an Answer to the complaint. *Order; see* 4 CSR 240-2.070(9). In response to the complaint, Total Call Mobile provides a summary of its defense to the averments of the NAL and addresses the limited and dated implications of those averments in Missouri.

Total Call Mobile admits the averments of paragraphs 1, 2, 3, 4, 5 (but note the correct citation is 130(4)(B) and note the discussion below regarding lack of FCC provisional suspension procedures), and 6 of Staff's Motion. Staff's Motion does not itself allege any misconduct by Total Call Mobile, but rather simply states that the NAL has been issued. Total Call Mobile denies any and all factual assertions of the Staff's Motion that could be construed as contending Total Call Mobile is not in compliance with FCC Lifeline rules with respect to its operations in Missouri and denies that the issuance of the NAL provides any basis for the Commission to take punitive action.

Total Call Mobile submits that the Staff incorrectly asks the Commission to take action based on the existence of an NAL. Federal law prohibits the FCC from taking any adverse action against Total Call Mobile based on the fact of the NAL, unless and until the proposed forfeiture is paid or is confirmed by a court. *See* 47 U.S.C. 504(c). Total Call Mobile therefore submits that it would likewise be improper for the Commission to take any action against Total Call Mobile just because the FCC issued the NAL. The NAL's allegations are just that: allegations. Indeed, FCC Chairman Tom Wheeler recently reminded members of Congress that:

An NAL is the Commission's charging document, akin to the filing of a complaint in a civil action. An NAL is not a final Commission action. It is the first formal step in the FCC's

adjudicatory process for enforcement matters. An NAL is not a determination of wrongdoing or liability.⁴

Total Call Mobile will respond to the NAL in a timely manner. It is confident that this response will show that the FCC's investigation got half the picture at most, and that the FCC has to date systematically ignored exculpatory evidence about the Company. Throughout the time it has provided Lifeline services, Total Call Mobile has employed systems and processes that were designed to ensure that it complied with all FCC and state rules for participation in the Lifeline Program. These processes include procedures to identify and prevent fraudulent activities, including those of the type alleged by the sales agents and described upon in the NAL. Ultimately, the FCC will have to decide whether those processes employed in 2013 and 2014 were lacking in any manner that violated FCC rules. But that determination cannot be made until all of the facts related to the Company's processes and procedures are presented and considered.

With respect to the Company's operations in Missouri, the allegations in the NAL are very limited. Other than the allegation relating to post-National Lifeline Accountability Database (NLAD) duplicates (discussed below), the NAL does not contain allegations of wrongdoing occurring in Missouri. None of the five sales agents interviewed by the FCC described activities in Missouri and, to the best of the Company's knowledge, none of them sold Lifeline services in Missouri.⁵ Similarly, none of the practices involving alleged use of falsified

⁴ Letter from Tom Wheeler, Chairman, Federal Communications Commission, to Honorable Ron Johnson, US Senate (Dec. 18, 2015).

⁵ The FCC has withheld the identities of these sales agents, identifying them only as "Sales Agent A, B, C, D and E" in the NAL. Total Call Mobile has asked the FCC to provide the agents' identities, but the FCC has (to date) refused to do so.

eligibility documents occurred in Missouri or involved the registration of Missouri customers.

The sales agent accused of engaging in identity theft (identified as “Sales Agent N” in the NAL) operated in Michigan, not Missouri.

The only allegation that specifically relates to Missouri is the allegation that, shortly after the implementation of NLAD, USAC identified potential duplicate subscribers in Missouri and 12 other states.⁶ Although the USAC list did include some Missouri subscribers, **** ____ **** were included in USAC’s list. This represents less than **** ____ **** of the total number of subscribers identified by USAC. (Indeed, the post-production duplicates issue was almost exclusively confined to subscribers signed up in Michigan **** ____ **** and two other states, **** ____ ****.) Moreover, these **** ____ **** subscribers include both the original and subsequent subscriber (sometimes more than one “duplicate” subscriber). As a result, the USAC list identified **** ____ **** duplicate “pairs” in Missouri. That number represents less than **** ____ **** of the subscribers that Total Call Mobile had at the time in Missouri. Total Call Mobile took prompt action – in December 2014 – to remove these potential duplicates from its Form 497 submissions upon receipt of the post-production duplicates list from USAC.

Total Call Mobile’s removal of all potential Missouri duplicates is confirmed in the NAL. Although the NAL alleges that USAC identified **** ____ **** potential duplicates,⁷ the NAL identifies **** ____ **** duplicates allegedly existing in April 2015 as the basis for its proposed penalty.⁸ Total Call Mobile disputes the FCC’s list of **** ____ **** duplicates. The principal faults in the FCC’s list are: (a) that the FCC misinterprets its own data, concluding that subscribers listed in NLAD were “duplicate” subscribers for which reimbursement was sought; and (b) that

⁶ See NAL at ¶ 89.

⁷ See NAL at ¶ 17.

⁸ See NAL at ¶ 67.

USAC, not Total Call Mobile, had to remove these particular subscribers from NLAD and USAC delayed implementing Total Call Mobile's removal request for over four months. Nevertheless, all of the subscribers in the FCC list of **____** alleged duplicates were in Michigan; none of these alleged duplicates were located in Missouri.

Thus, despite the allegations contained in the NAL, these allegations do not raise serious concerns regarding Total Call Mobile's conduct in Missouri. The NAL bases its conclusions on allegations of conduct by a handful of sales agents operating principally in Michigan in the middle of 2014.⁹ The allegations concerning Missouri are confined to the inclusion of a small number of Missouri subscribers on a "post-production" list of potential duplicates compiled by USAC, for which Total Call Mobile took prompt corrective action. There is no basis from this tangential inclusion of Missouri subscribers to conclude that Total Call Mobile's operations in Missouri did not comply with the FCC's and the Missouri Commission's Lifeline program rules.

III. RESPONSE TO ORDER TO SHOW CAUSE

In addition to directing Total Call Mobile to answer the Staff complaint, the Order directs Total Call Mobile to show cause why "the Commission should not recommend, to the Federal Communications Commission and the Universal Service Administrative Company, that Total Call Mobile, Inc.'s federal funding be provisionally suspended." For the reasons explained herein, the Commission should not take this action.

First, as discussed in the preceding section, the NAL does not substantially implicate Total Call Mobile's conduct in the state of Missouri. The Commission should not assume that the specific acts alleged – largely relating to sales made in Michigan – implicate Total Call Mobile's Lifeline support requests in Missouri.

⁹ See NAL at ¶¶ 64, 76, 95, Appendix C.

Second, Total Call Mobile's activities in 2016 are far different than its activities in 2014, the time period of the conduct alleged in the NAL. Put simply, one cannot draw any proper inference from the alleged 2014 activities to Total Call Mobile's current activities. In June 2014, Total Call Mobile's three biggest states were **. In April 2016, by contrast, its three biggest states are **. This reflects a shift by Total Call Mobile toward activities in states that have eligibility administrators or eligibility databases. **, for example, has a neutral administrator that receives applications from ETCs and determines eligibility. ** has an eligibility database that must be consulted prior to submission of an order, while ** (like other states) has a database that verifies eligibility of subscribers under at least some of the qualifying programs.

With respect to Missouri, Total Call Mobile has seen its number of subscribers drop substantially. As part of the shift in resources, Total Call Mobile substantially curtailed new sales activity in Missouri starting in late 2014, while continuing to serve its existing subscribers. These subscribers have declined over time, due to transfers to other Lifeline providers, subscriber dropouts and other factors. As a result, in April 2016, Total Call Mobile only served approximately ** in Missouri. In Missouri, as in other states, Total Call Mobile's current activities are far different than its activity in 2014.

Fourth, Total Call Mobile has in place current policies and procedures that are intended to comply with the Lifeline program rules. These policies and procedures are detailed in depth in Attachment A (Proprietary). Total Call Mobile is confident that review of these policies and procedures will show that they are comprehensive and that they address all of the requirements to provide Lifeline services, in Missouri and elsewhere. There is no basis from these policies and procedures to conclude that current funding should be suspended.

Finally, there is no vehicle for the FCC or USAC to provisionally suspend Total Call Mobile's Lifeline funding. The FCC has established specific rules for the suspension or debarment of a person or entity from the Universal Service programs.¹⁰ Under these rules, the FCC can suspend a provider from participation in a Universal Service Fund program only upon a specific predicate that is not present here. Moreover, suspension requires a formal process that the FCC stated in paragraph 102 of the NAL is was merely considering whether to invoke at this time, not one which is underway.

Section 54.8 of the FCC's rules governs the suspension or debarment of a person from a Universal Service program. A "suspension" under the rules is "an action taken by the [Federal Communications] Commission ... that immediately excludes a person from activities associated with or related to ... the low-income support mechanism"¹¹ "Activities associated with or related to" a program "include the receipt of funds ... through one or more of [the] support mechanisms."¹² Any order to USAC to withhold Lifeline program reimbursements would amount to a "suspension" as defined in these sections. Thus, the FCC may suspend Total Call Mobile's reimbursements only through the procedures outlined in Section 54.8 of its rules. There is no provision in the FCC's rules to "provisionally" suspend a participant or funding to a participant. There is likewise not a vehicle for the FCC to act on such a recommendation from this Commission.

¹⁰ See *In the Matter of Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Second Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 9202, ¶¶ 64-77 (rel. Apr. 30, 2003); see also *In the Matter of Comprehensive Review of the Universal Service Fund Management, Administration, and Oversight*, WC Docket No. 05-195 et al., Report and Order, 22 FCC Rcd 16372, Appendix C (rel. Aug. 29, 2007).

¹¹ See 47 C.F.R. § 54.8(a)(7) ("definition of "suspension").

¹² See *id.*, § 54.8(a)(1).

Section 54.8, moreover, reserves suspension for narrow circumstances. Section 54.8 stipulates that the FCC “shall suspend and debar a person for any of the causes in paragraph (c) of this section using procedures established in this section, absent extraordinary circumstances.”¹³ The FCC may “suspend and debar” a person that is convicted or found civilly liable of fraud, embezzlement, and other fraud or criminal offenses associated with the low-income support program.¹⁴ None of these predicates have occurred with respect to Total Call Mobile (nor would any such action be permissible). Because Total Call Mobile has not been convicted or found civilly liable for fraud, etc., the FCC may not initiate suspension procedures at this time.¹⁵

As a result, this Commission should not recommend a provisional suspension of Total Call Mobile’s federal funding at this time. Total Call Mobile’s current activities are significantly different than those alleged in the NAL, particularly as they relate to activities in Missouri. Total Call Mobile also has in place current policies and procedures that are designed to implement the FCC’s rules, and there are no grounds for the FCC to provisionally suspend a provider such as Total Call Mobile.

IV. CONCLUSION

Total Call Mobile is confident that full consideration of the NAL will show that the FCC’s investigation got half the picture at most, and that it has to date systematically ignored exculpatory evidence about the Company. The Commission should not draw conclusions from the NAL’s allegations, particularly where the allegations relate to conduct allegedly occurring in states other than Missouri. When Missouri subscribers and Total Call Mobile’s Missouri

¹³ *Id.* § 54.8(b).

¹⁴ *See id.* § 54.8(b)-(c).

¹⁵ Nor would a Forfeiture Order be sufficient to invoke suspension under the rules.

activities are considered, prudence should rule the day. The Commission should refrain from taking any action now, and instead should monitor the progress of the FCC NAL proceeding.

Respectfully submitted,

By: /s/ Carl J. Lumley

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Counsel to Total Call Mobile

Dated: May 16, 2016

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was served upon the parties listed below on this 16 day of May, 2016, by either e-mail or U.S. Mail, postage prepaid.

____/s/ Carl J. Lumley_____

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