



BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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COMMISSIONERS

- TOM FORESE, Chairman
- BOB BURNS
- DOUG LITTLE
- ANDY TOBIN
- BOYD DUNN

IN THE MATTER OF THE FORMAL COMPLAINT OF THE ARIZONA LOCAL EXCHANGE CARRIERS ASSOCIATION AGAINST TRACFONE WIRELESS, INC.

DOCKET NO. T-20664A-17-0017

RESPONSE TO MOTION TO DISMISS

1 The Arizona Local Exchange Carriers Association ("ALECA") hereby responds to the  
 2 Motion to Dismiss filed by TracFone Wireless, Inc. ("TracFone"). For the reasons shown below  
 3 the Motion is meritless and should be dismissed.

4 I **Legal Standard**

5 A motion to dismiss under Rule 12(b)(6) tests the formal sufficiency of a plaintiff's claim  
 6 for relief. *Moretto v. Sam. Health Sys.*, 190 Ariz. 343, 346, 947 P.2d 917, 920 (App. 1997). As  
 7 such, courts "look only to the pleading itself," and assume the truth of all well-pleaded factual  
 8 allegations contained therein. *Fidelity Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, P4,  
 9 954 P.2d 580, P4 (1998).

10 A motion to dismiss should be granted only when the complainant has pled facts that  
 11 reveal a legal bar to recovery. *Moretto*, 190 Ariz. at 346, 947 P.2d at 920, citing 5A Charles  
 12 Alan Wright and Arthur R. Miller, *Federal Practice And Procedure* § 1356, at 294 (2d ed. 1990).

13 A long as a complaint provides notice to the defendant of the basis of the claim and the  
 14 expected nature of the litigation, a motion to dismiss should not be granted. "Arizona follows a  
 15 notice pleading standard, the purpose of which is to give the opponent 'fair notice of the nature  
 16 and basis of the claim and indicate generally the type of litigation involved.'" *Cullen v. Auto*  
 17 *Owners Ins. Co.* 218 Ariz. 417, 419; 189 P.3d 344, 346 (2008), quoting *Mackey v. Spangler*, 81  
 18 Ariz. 113, 115, 301 P.2d 1026, 1027-28 (1956). Even conclusory factual statements in a

1 complaint are sufficient to withstand a motion to dismiss. *Cullen*, 218 Ariz. at 419; 189 P.3d at  
2 346.

3 **II The Commission Has Jurisdiction to Hear ALECA's Complaint**

4 As alleged by ALECA, the Commission has jurisdiction to hear and decide this  
5 Complaint pursuant to A.R.S. §40-246 and A.A.C. R14-3-106(L). ALECA also alleged that  
6 TracFone was violating a specific Commission Order: Decision No. 72222, dated March 9, 2011,  
7 in Docket No. T-20664A-09-0148.<sup>1</sup> In that Decision, TracFone was designated as an Eligible  
8 Telecommunications Carrier and provided authority for the limited purpose of offering Lifeline  
9 and Link Up services in Arizona. By means of that application, TracFone accepted the  
10 Commission's jurisdiction over its offering of Lifeline services, including the provision of these  
11 services to residents of Tribal Lands.

12 Very recently, TracFone reaffirmed its acceptance of the Commission's jurisdiction over  
13 sales of Lifeline service to Tribal members living on Tribal Lands. In Docket No. T-20664A-17-  
14 0013, TracFone has specifically asked the Commission for authority to offer Lifeline services to  
15 Tribal Land residents. Put another way, TracFone concedes that it is not presently authorized to  
16 offer or provide Lifeline services to residents on Tribal Lands.

17 **III ALECA's Complaint Provides Fair Notice of the Nature and Basis of Its Claim**

18 ALECA's Complaint satisfies Arizona's broad notice standard. It alleged (at 2:12-18):

19 Decision No. 72222 (at 13-14) approved an agreement between TracFone, ACC  
20 Staff, and ALECA, that "TracFone would not attempt to provide its SafeLink Wireless  
21 Lifeline service to eligible residents on Tribal Lands."<sup>2</sup> TracFone also agreed to  
22 implement procedural safeguards to ensure that it would not provide lifeline service to  
23 tribal residents on Tribal Lands.

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<sup>1</sup> ALECA further maintains that TracFone cannot provide *any* telecommunications services on Tribal lands without approval by Tribal authorities.

<sup>2</sup> This agreement, by and between ALECA, TracFone, and Commission Staff, was executed on September 1, 2009, and filed with the Commission as a Supplemental Joint Status Report on September 3, 2009, in Docket No T-20664A-09-0148.

1           ALECA is informed and believes that the evidence will show that TracFone has  
2           been and is violating Decision No. 72222 by actively offering and providing its lifeline  
3           service to tribal residents on Tribal Lands.

4           This certainly gave TracFone notice of an existing agreement, approved by the Commission,  
5           between TracFone and ALECA whereby TracFone agreed that it would not provide SafeLink  
6           Wireless Lifeline service on Tribal Lands.

7           ALECA then alleged that TracFone had violated that agreement and the Commission's  
8           Decision by in fact "actively offering and providing its lifeline service to tribal residents on  
9           Tribal Lands." This factual statement satisfies the *Cullen* standard.

10          Further, ALECA alleged that its members included tribal communications companies, the  
11          beneficiaries of the ALECA/TracFone agreement and the parties harmed by any breaches by  
12          TracFone of that agreement.

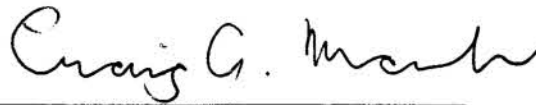
13          Concerning specific violations by TracFone, ALECA refers the Commission to Docket  
14          No. T-20664A-17-0021, the Complaint of Gila River Telecommunications, Inc. ("Gila River")  
15          against TracFone. ALECA member Gila River was the source of ALECA's information that  
16          TracFone was actively violating the ALECA/TracFone agreement and Decision No. 72222. Gila  
17          River's Complaint documents these specific, continuing violations.

18          ALECA believes, in accordance with clear Arizona precedent, that its Complaint is  
19          legally sufficient and that TracFone's Motion should be denied. However, should the  
20          Commission conclude that ALECA's Complaint does not provide sufficient notice to TracFone,  
21          then ALECA moves under Rule 15(a)(1) that the Commission allow it to amend its Complaint  
22          to incorporate these detailed allegations. Rule 15(a)(1) provides in part that: "Leave to amend  
23          shall be freely given when justice requires." Justice clearly requires that ALECA be allowed to  
24          prosecute its Complaint on behalf of its tribal members that TracFone has violated the terms of  
25          its agreement with ALECA and Decision No. 72222.

1 **IV Requested Relief**

2 ALECA asks the Commission to deny TracFone's motion to dismiss. The Commission  
3 has jurisdiction to hear ALECA's Complaint and it is legally sufficient to satisfy Arizona's broad  
4 notice pleading requirements. However, should the Commission nevertheless be inclined to  
5 grant TracFone's motion, ALECA asks for leave to amend its Complaint pursuant to Rule  
6 15(a)(1).

7 RESPECTFULLY SUBMITTED on April 7, 2017.

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21 **Original** and 13 copies **filed**  
22 on April 7, 2017, with:

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28  
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