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BEFORE THE ARIZONA CORPORATION COMMISSION

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BOB BURNS  
Commissioner  
DOUG LITTLE  
Commissioner  
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Commissioner  
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Commissioner

Arizona Corporation Commission

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

DOCKET NO: T-20664A-17-0017

REPLY IN SUPPORT OF  
TRACFONE WIRELESS, INC.'S  
MOTION TO DISMISS

TracFone Wireless, Inc. ("TracFone") files this Reply in support of its Motion to Dismiss ("Motion") the complaint filed by the Arizona Local Exchange Carriers Association ("ALECA") in the above-captioned docket.

MEMORANDUM OF POINTS AND AUTHORITIES

I. The "Facts" As Alleged In ALECA's Complaint Are Nothing More Than Speculation And Thus Insufficient Under Rule 12(b)(6) Standards.

In opposing the Motion, ALECA argues that "conclusory factual statements in a complaint are sufficient to withstand a motion to dismiss" under Rule 12(b)(6) of the Arizona Rules of Civil Procedure ("ARCP"). ALECA's Response to Motion to Dismiss ("Response") at 1-2, citing *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 (2008). ALECA is wrong, and *Cullen* does not support its argument.

To the contrary, *Cullen* and more recent precedent make it clear that although a court considers as true **well-pled** factual allegations, it may not speculate about hypothetical facts. *Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 9; *Cullen*, 218

1 Ariz. at 420, ¶ 14. Allegations must establish a right to relief beyond guesses, for  
2 which the plaintiff hopes to find support through subsequent discovery. Moreover,  
3 conclusory statements, such as “TracFone violated its agreement with the  
4 Commission” (Complaint at 2), are also insufficient. *Coleman*, 230 Ariz. at 356, ¶ 9,  
5 citing *Cullen*, 218 Ariz. at 419, ¶ 6.

6 Here, ALECA filed a two-page complaint, in which the sole “factual”  
7 allegation identifying TracFone’s purported wrongdoing is, on its face, speculative:

8 “ALECA is informed and believes **that the evidence will show** that  
9 TracFone has been and is violating Decision No. 72222 by actively offering  
10 and providing its lifeline service to tribal residents on Tribal Lands.”

11 Complaint at 2 (emphasis added). An allegation that accuses a defendant violating or  
12 breaching an agreement is not factual in nature, but a legal conclusion. Moreover, a  
13 statement of belief about what later evidence will show, based upon information and  
14 belief, is hypothetical at best. It may only be asserted “after reasonable inquiry.”  
15 ARCP 11. ALECA does not allege any such inquiry, but effectively admits that it is  
16 awaiting discovery to investigate. Complaint at 2. The Complaint is deficient under  
17 Rule 12(b)(6) and the Commission should not allow such fishing expeditions disguised  
18 as complaints.

19 **II. TracFone’s ARCAP 12(b)(6) Motion Does Not Challenge The Commission’s**  
20 **Jurisdiction, But Rather ALECA’s Failure To State A Claim Upon Which**  
21 **Relief May Be Granted.**

22 TracFone did not move to dismiss the Complaint under ARCAP 12(b)(1) (lack  
23 of subject matter jurisdiction) or (2) (lack of personal jurisdiction). Nevertheless,  
24 ALECA argues at some length that the Commission has jurisdiction to hear the  
25 Complaint. The argument is irrelevant to an ARCAP 12(b)(6) analysis.

26

1           Certainly, the Commission has jurisdiction to enforce Decision No. 72222, and  
2 TracFone's request to expand its designation as an Eligible Telecommunications  
3 Carrier to include Tribal lands under 47 U.S.C. § 214(e)(2). And, the Motion does not  
4 challenge the Commission's jurisdiction. Instead, it asks the Commission to exercise  
5 jurisdiction and dismiss the Complaint because it fails as a matter of law. *Gatecliff v.*  
6 *Great Republic Life Ins. Co.*, 154 Ariz. 502, 506 (App. 1987) (discussing distinction  
7 between ARCAP 12(b)(1), (2) and ARCAP 12(b)(6)).

8           **III. ALECA'S Complaint Does Not Provide The Fair Notice And Specific Basis**  
9           **For Its Claim Required By Law.**

10           ALECA claims that its members might be harmed by "any breaches by  
11 TracFone" of Decision No. 72222. Response at 3 (emphasis added). It asserts that  
12 such breaches may exist based upon what may be shown in the future and upon  
13 information and belief. *Id.* (alleging "that evidence will show . . ."), quoting  
14 Complaint at 2.

15           As discussed above, such qualified allegations do not provide sufficient notice  
16 as a matter of law. See discussion at Section I *supra*. ALECA is careful to avoid  
17 alleging that TracFone is, in fact, offering and providing lifeline services to Tribal  
18 residents on Tribal lands. Grammatically, ALECA's use of conditional language  
19 reflects only possibility, not actuality.

20           ALECA attempts to cure its pleading deficiencies by referencing another  
21 complaint filed by Gila River Telecommunications, Inc. ("Gila River"), an ALECA  
22 member, in Docket No. T-200664A-17-0021.<sup>1</sup> ALECA may not rely on another

23 \_\_\_\_\_  
24 <sup>1</sup> ALECA has recently appeared in the Gila River docket, which intervention  
25 TracFone has not opposed. Notably, the only Tribe to complain that TracFone has  
26 purportedly not complied with Decision No. 72222 is Gila River. Because ALECA's  
complaint is overly broad and "factually" dependent on Gila River's allegations, there is  
no need for an additional complaint docket. The Commission should not encourage the

1 litigant's allegations brought in a separate and pending action. ALECA has no  
2 personal knowledge regarding Gila River's allegations; nor can it reassert them upon  
3 information and belief "formed after reasonable inquiry." See ARCP 11.

4 **CONCLUSION**

5 The Commission should grant TracFone's motion to dismiss.

6 Respectfully submitted,

7 

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continuation of duplicative, tag-team litigation that increases litigation costs, undercuts  
judicial economies, and creates the potential for conflicting results.

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