

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INVESTIGATION OF THE FAILURE OF)	CASE NO.
TRACFONE WIRELESS, INC. TO FILE)	2011-00322
REQUIRED REPORTS)	

ORDER

On December 18, 2013, the Commission issued an Order finding that, *inter alia*, TracFone Wireless, Inc. (“TracFone”) is a utility as defined by KRS 278.010(3)(e)(2), and therefore was required to file annual reports of its gross earnings from intrastate business and pay past-due and future annual assessments. TracFone, pursuant to KRS 278.410, subsequently commenced an action for review of the Commission’s Order.¹ This action recently concluded when Franklin Circuit Court approved a settlement agreement² between TracFone and the Commission and remanded the Commission’s Order of December 18, 2013, to the Commission with instructions to take all actions consistent with the settlement agreement’s provisions.³

Pursuant to the Franklin Circuit Court’s Order of April 25, 2016, the Commission finds that:

¹ *TracFone Wireless, Inc. v. Public Service Commission of Kentucky*, Civil Action No. 14-CI-00087 (Franklin Cir. Ct. Ky. Filed Jan. 17, 2014).

² A copy of the Settlement Agreement is appended to this Order.

³ *TracFone Wireless, Inc. v. Public Service Commission of Kentucky*, Civil Action No. 14-CI-00087 (Franklin Cir. Ct. Ky. Apr. 25, 2016).

1. Under current statutes and regulations, TracFone is not a utility under Kentucky law and is not subject to the Commission's jurisdiction except under federal law, 47 U.S.C. § 214(e)(2), governing eligible telecommunications carriers.

2. Under current statutes and regulations, TracFone is not subject to KRS 278.140 and 278.150, and is not required to submit annual gross revenue reports or to remit annual assessments.

3. Under current statutes and regulations, TracFone is not subject to revocation of its designation as an eligible telecommunications carrier or to any other sanction or enforcement action by the Commission due to not filing gross revenue reports and not remitting annual assessments.

4. The Commission will not in the future modify or vacate this amended Order either on its own motion or in response to a motion or other request of any person or entity, absent a change in current statutes and federal regulations, or an applicable change in TracFone's business model.

IT IS THEREFORE ORDERED that:

1. Ordering paragraphs 1, 2, 3, 4, 5, and 6 of the December 18, 2013, Order are stricken.

2. TracFone is not a utility as defined by KRS 278.010(3)(e).

3. TracFone is not subject to the reporting requirements of KRS 278.140.

4. TracFone is not subject to the annual assessment requirements of KRS 278.150.

By the Commission

ENTERED
JUN 13 2016
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:


Acting Executive Director

Case No. 2011-00322

APPENDIX

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2011-00322 DATED **JUN 13 2016**

SETTLEMENT AGREEMENT

This Settlement Agreement is made and entered into the 28th day of October, 2015, between TracFone Wireless, Inc. ("TracFone") and the Public Service Commission of Kentucky ("PSC").

WITNESSETH:

WHEREAS, TracFone is a pre-paid reseller of wholesale commercial mobile radio service ("CMRS"), that provides resold CMRS in Kentucky and other states;

WHEREAS, the PSC is a body corporate with the statutory duty to regulate utilities and to enforce the provisions of KRS Chapter 278, and has "exclusive jurisdiction over the regulation of rates and service of utilities" in the Commonwealth;

WHEREAS, in 2009, in PSC Case No. 2009-00100, *Petition of Tracfone Wireless, Inc. for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Kentucky for the Limited Purpose of Offering Lifeline and Link Up Service to Qualified Households*, TracFone petitioned the Commission to be designated as an eligible telecommunications carrier ("ETC") in order to receive support from the federal Universal Service Fund.

WHEREAS, during the proceedings in Case No. 2009-00100, TracFone, at PSC Staff's instruction, completed the telecommunications registration form, required by KRS 278.542(2), in order to register with the Commission as a telecommunications provider;

WHEREAS, on November 24, 2010, in Case No. 2009-00100, the PSC granted TracFone's petition and designated TracFone as an ETC;

WHEREAS, On December 15, 2010, the PSC provided to TracFone the standard forms for the report of gross earnings from intrastate business to be filed by December 31, 2010, as required by KRS 278.140;

WHEREAS, TracFone did not file its report of gross earnings derived from intrastate business;

WHEREAS, On October 12, 2011, in PSC Case No. 2011-00322, *Investigation of the Failure of TracFone Wireless, Inc. to File Required Reports*, the PSC ordered TracFone to show cause why it should not be penalized for its failure to file a report of its gross operating revenues derived from intra-Kentucky business for the year ending December 31, 2010, as KRS 278.140 required;

WHEREAS, TracFone asserted to the PSC that it was not a utility under KRS 278.010(3)(e) because it did not own, operate or manage any facility used or to be used for or in connection with the transmission or conveyance of any message by telephone or telegraph to the public for compensation;

WHEREAS, on December 18, 2013, in PSC Case No. 2011-00322. the PSC issued an Order where it held, *inter alia*, that: (1) TracFone is a utility as defined by KRS 278.010(3)(e); (2) TracFone was to file with the PSC its report of gross earnings from intrastate business, as required by KRS 278.140, for the fiscal years ending in 2010, 2011, and 2012; (3) TracFone was to pay its past due annual assessments, as required by KRS 278.150, for the fiscal years ending in 2010, 2011 and 2012; (4) TracFone was to comply in the future with the reporting requirements of KRS 278.140; and (5) TracFone was to comply in the future with the annual assessment requirements of KRS 278.150.

WHEREAS, on January 17, 2014, TracFone brought in Franklin Circuit Court an action for review of the PSC's Order of December 18, 2013 and that action was docketed as 14-CI-00087.

WHEREAS, on March 20, 2015, the Franklin Circuit Court entered an Opinion and Order in Civil Action No. 14-CI-0087, in which it reversed the PSC's Order of December 18, 2013 and held that: TracFone was not a utility as defined by 278.010(3)(e); KRS 278.54611 exempted TracFone from the requirements of KRS 278.140 and KRS 278.150; and, the PSC exceeded its statutory authority by requiring TracFone to file past-due gross revenue reports;

WHEREAS, the PSC appealed the Franklin Circuit Court's Opinion and Order of March 20, 2015 to the Kentucky Court of Appeals;

WHEREAS, the PSC's appeal has been docketed as Appeal No. 2015-CA-00496;

WHEREAS, the PSC and TracFone have reached an agreement to resolve the appeal and the underlying dispute regarding TracFone's status as a utility as defined by Kentucky law and TracFone's obligations to remit annual assessments and gross revenue reports;

NOW THEREFORE, the PSC and TracFone agree that:

1. The Franklin Circuit Court Opinion and Order of March 20, 2015 in Civil Action No. 14-CI-00087 should be withdrawn and the PSC's Order of December 18, 2013 should be remanded to the PSC with instructions to amend that Order to remove any finding that, under current statutes and regulations, TracFone is a utility as defined by KRS 278.010(3)(e), or other provisions of KRS Chapter 278.

2. The PSC shall include in its amended Order a statement that under current statutes and regulations TracFone is not a utility under Kentucky law and not subject to the PSC's jurisdiction except under federal law; specifically, 47 U.S.C. § 214(e)(2) governing eligible telecommunications carriers.

3. The PSC shall include in its amended Order a statement that under current statutes and regulations TracFone will not be subject to requirements requiring it to submit annual gross revenue reports and to remit annual assessments.

4. The PSC shall include in its amended Order a statement that under current statutes and regulations TracFone will not be subject to revocation of its designation as an eligible telecommunications carrier or to any other sanction or enforcement action by the PSC due to not filing gross revenue reports and not remitting annual assessments.

5. The PSC shall include in its amended Order a statement that the PSC will not in the future modify or vacate its amended Order either on its own motion or in response to a motion or other request of any person or entity, absent a change in current statutes and Federal regulations or an applicable change in TracFone's business model.

6. The parties shall jointly move the Kentucky Court of Appeals to remand Appeal No. 2015-CA-00496 to the Franklin Circuit Court with instructions to consider this Settlement Agreement.

7. If the Kentucky Court of Appeals remands Appeal No. 2015-CA-00496 to the Franklin Circuit Court for the lower court's consideration of this Settlement Agreement, the parties shall request that Franklin Circuit Court approve the terms of this

Settlement Agreement, withdraw its Opinion and Order of March 20, 2015 in Civil Action 14-CI-00087, and remand the PSC's Order of December 18, 2013 with instruction to amend the Order to conform to the terms of this Settlement Agreement.

8. If the Kentucky Court of Appeals denies the parties' joint motion to remand Appeal No. 2015-CA-00496 to the Franklin Circuit Court or if the Franklin Circuit Court considers this Settlement Agreement and does not approve it in its entirety, to include the withdrawal of its Opinion and Order of March 20, 2105, neither the terms of this Settlement Agreement nor any matters raised during settlement negotiations shall be binding on either signatory or to be construed against either TracFone or the PSC.

9. The parties shall take all necessary actions to bring Appeal No. 2015-CA-00496 before the Kentucky Court of Appeals for that Court's full consideration if the Franklin Circuit Court considers this Settlement Agreement and does not approve in its entirety, to include the withdrawal of the Opinion and Order of March 20, 2015.

IN WITNESS WHEREOF, TracFone and the PSC have executed the Settlement Agreement the day and year first about written by and through their duly authorized attorneys.

PUBLIC SERVICE COMMISSION OF KENTUCKY

BY: _____

TITLE: _____

TRACFONE WIRELESS, INC

BY: _____

TITLE: _____

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