COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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	)))))))	CASE NO. 2009-00100

O R D E R

This matter arises upon the motion of the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention ("Attorney General"), filed October 2, 2009, pursuant to KRS 367.150(8), for full intervention in the above proceeding. The Commission recognizes that a procedural schedule was established in this proceeding by Order dated September 10, 2009 and that the Attorney General should abide by that schedule.

Finding that such intervention is authorized by statute, and being otherwise sufficiently advised, the Commission HEREBY ORDERS that the Attorney General's motion is granted and that he shall accept the existing procedural schedule.

By the Commission

ATTEST:

Executive Director

ENTERED
OCT 12 2009
KENTUCKY PUBLIC
SERVICE COMMISSION

Commonwealth of Kentucky
Before the Public Service Commission

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ATTORNEY GENERAL'S
MOTION TO INTERVENE AND COMMENTS

MOTION

Comes now the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, pursuant to KRS 367.150(8), and moves to intervene in the above-styled proceeding. The Attorney General requests that he be permitted to intervene as a party to the fullest extent permitted by law in order to execute his statutory duties pursuant to KRS 367.150(8).

COMMENTS

In addition to the aforementioned motion, the Attorney General offers the following comments for consideration by the Commission pursuant to its order dated September 10, 2009.

At the outset the Attorney General notes that his comments will be limited to the issue of whether Tracfone should be granted status as an Eligible

Telecommunications Company (ETC) based on its apparent non-compliance with KRS 65.7621 et seq. In particular, Tracfone has allegedly neglected to remit its Commercial Mobile Radio Service (CMRS) surcharge of $0.70 per month for each CMRS connection to the CMRS Board from on or about November, 2003 through the present as required by KRS 65.7635. See *Commonwealth of Kentucky Commercial Mobile Radio Service Emergency Telecommunications Board v. Tracfone Wireless, Inc.*, Jefferson Circuit Court, Division 11, Case No. 08-CI-010856, removed to Untied States District Court, Western District of Kentucky, Case No. 3:08-CV-660. (See original Complaint as Attachment A.)

In its petition, Tracfone asserts that it meets the "statutory and regulatory requirements for designation as an ETC in the Commonwealth of Kentucky."[1] In making its argument, the company acknowledges that "Section 214(e)(1)(A) of the Communications Act states that ETCs shall offer services, at least in part, over their own facilities and Section 54.201(i) of the FCC's Rules (47 C.F.R. §54.201(i)) prohibits state commissions from designating as an ETC a telecommunications carrier that offers services exclusively through the resale of another carrier's services.[2]" The company maintains that it petitioned and was granted forbearance from this requirement by FCC order dated September 8, 2005[3] and subsequently was granted ETC status by the FCC in the company's then-pending petitions for designation.

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[1] See PSC Petition at p.1, which references Exhibit 1, a "Declaration of Tracfone Wireless, Inc."
[2] PSC Petition at page 4.
[3] PSC Petition at pages 4 and 5.

A close reading of the FCC's September 8, 2005 Order, however, illuminates a fatal flaw in Tracfone's reasoning and representations to the Commission. The forbearance was predicated upon the company meeting "911 and E911 conditions".[4] Specifically, the FCC ordered at paragraph 16 as follows:

> Given the importance of public safety, we condition this grant of forbearance on TracFone's compliance with the E911 requirements applicable to wireless resellers, as modified below, for all Lifeline customers. In light of the condition discussed below, that TracFone ensure its customers receive only one Lifeline-supported service, we find it essential that TracFone's Lifeline-supported service be capable of providing emergency access. Given the possibility that this Lifeline-supported service will be the customers' only means of accessing emergency personnel, we require that TracFone provide its Lifeline customers with access to basic and E911 service immediately upon activation of service.[41] We note that this condition is consistent with TracFone's representation that its Lifeline customers will be able to make emergency calls at any time.[42] To demonstrate compliance with this condition, TracFone must obtain a certification from each PSAP where it provides Lifeline service confirming that TracFone provides its customers with access to basic and E911 service. TracFone must furnish copies of these certifications to the Commission upon request.[43] As an additional condition, TracFone must provide only E911-compliant handsets to its Lifeline customers, and must replace any non-compliant handset of an existing customer that obtains Lifeline-supported service with an E911-compliant handset, at no charge to the customer. **The Commission has an obligation to promote "safety of life and property" and to "encourage and facilitate the prompt deployment throughout the United States of a seamless, ubiquitous, and reliable end-to-end infrastructure" for public safety.**[44] The provision of 911 and E911 services is critical to our nation's ability to respond to a host of crises, and this Commission has a longstanding and continuing commitment to a nationwide communications system that promotes the safety and welfare of all Americans, including Lifeline customers.[45] We believe that these conditions are necessary to ensure that TracFone's Lifeline customers have meaningful access to emergency services. We reiterate that, with the possibility that the Lifeline service will be the customer's only access to emergency services and given the potential gravity of harm if such Lifeline customers cannot obtain such access, we believe that these conditions will further the protection of such Lifeline customers.
> (Emphasis added, footnotes omitted.)

[4] See FCC Order at page 10, paragraph 22. (Tracfone's Exhibit 2 to its PSC Petition.)

Moreover, in the final Order granting Tracfone's ETC status dated April 11, 2008, the FCC made it abundantly clear that the 911/E911 conditions did in fact include compliance with all state laws and obligations – including any that relate to the support of the services[5]:

> We disagree with TracFone and find compliance with 911/E911 requirements relevant to the public interest in this instance. In the *Forbearance Order,* the Commission expressly conditioned its grant of forbearance from the facilities requirement of section 214(e) of the Act on TracFone's compliance with E911 requirements applicable to wireless resellers. [43] The Commission adopted these conditions because of the unique circumstances presented by TracFone's petitions for limited ETC designation for Lifeline support. [44] The Commission further required TracFone to submit a plan outlining measures to implement the conditions imposed in the *Forbearance Order,* and stated the Commission would consider the plan in deciding whether to grant TracFone's petitions for limited ETC designation. [45] Given these circumstances, and in light of the concerns raised by NENA and the Pennsylvania Office of Consumer Advocate, **we condition TracFone's designation as an ETC eligible for Lifeline support in each state on TracFone's certification that it is in full compliance with any applicable 911/E911 obligations, including obligations relating to the provision, and support, of 911 and E911 service.** [46] Subject to this condition, we find, on balance, that the advantages of designating TracFone as a limited ETC in the designated service areas outweigh any potential disadvantages. [47]
> (Emphasis added, footnotes omitted.)

In order to obtain the deployment of a reliable end-to-end infrastructure for any 911 system, the Kentucky General Assembly enacted KRS 65.7621 et seq. It is axiomatic that for the deployment and continuing existence to be self-sustaining, financing must be established. Accordingly, the General Assembly created a funding mechanism by way of KRS 65.7635(1) wherein the CMRS

[5] The FCC Order is found at Exhibit 3 to Tracfone's PSC Petition.

provider collects the CMRS connections under KRS 65.7629(3) and remits same to the CMRS Board. The statute provides:

> (1) Each CMRS provider shall act as a collection agent for the CMRS fund. From its customers, the provider shall, as part of the provider's billing process, collect the CMRS service charges levied upon CMRS connections under KRS 65.7629(3) from each CMRS connection to whom the billing provider provides CMRS.

But for the collection of this surcharge, the CMRS backbone would not be funded in its current form. Indeed, KRS 65.7627 states as follows:

> There is established the commercial mobile radio service emergency telecommunications fund, the "CMRS fund," an insured, interest-bearing account to be administered and maintained by the CMRS Board. The CMRS service charge shall have uniform application within the boundaries of the Commonwealth. No charge other than the CMRS service charge is authorized to be levied by any person or entity for providing wireless 911 service or wireless E911 service. The board shall deposit all revenues derived under KRS 65.7635 into the fund, and shall direct disbursements from the fund according to the provisions of KRS 65.7631. Moneys in the CMRS fund shall not be the property of the Commonwealth and shall not be subject to appropriation by the General Assembly. Moneys deposited or to be deposited into the CMRS fund shall not:
>
> > (1) Be loaned to the Commonwealth or to any instrumentality or agency thereof;
> >
> > (2) Be subject to transfer to the Commonwealth or any agency or instrumentality thereof, except for purposes specifically authorized by KRS 65.7621 to 65.7643; or
> >
> > (3) Be expended for any purpose other than a purpose authorized by KRS 65.7621 to 65.7643.

Thus, without Tracfone being responsible for collecting the surcharge, remitting it to the Board, and allowing the Board to then fund the 911 system, the infrastructure as contemplated by the FCC in its Orders would not survive. To

do otherwise, the Commission could very well open up the proverbial barn door and let all the bulls out if Tracfone is allowed to ignore its statutorily mandated financial responsibility. Accordingly, Tracfone has not complied with the FCC's 911 conditions to become eligible for ETC status.

The Attorney General makes no comment on the remaining issues in this instant matter. Rather, Tracfone's petition contains a fundamental flaw in that the company has failed to comply with that portion of Kentucky law as it relates to participation in an enhanced 911 service. By apparently neglecting to remit the statutorily based surcharge, Tracfone attempts to by-pass an integral part of telephony service by evading financial contribution to the backbone or infrastructure necessary to fund the enhanced 911 service. Accordingly, its petition should be denied[6].

Respectfully submitted,

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ATTORNEY GENERAL

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[6] While the Attorney General commends Tracfone's purported attempt to increase the Lifeline program by qualified low income households, the assistance must be substantive which includes the enhanced 911 service, a service that is not free of charge.

Certificate of Service and Filing

Counsel certifies that an original and ten photocopies of this Motion to Intervene and Comments were served and filed by hand delivery to Jeff Derouen, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601; furthermore, it was served by mailing a true and correct of the same, first class postage prepaid, to:

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