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April 16, 2012

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PUBLIC SERVICE
COMMISSION

VIA HAND-DELIVERY

Mr. Jeffrey Derouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, Kentucky 40602-0615

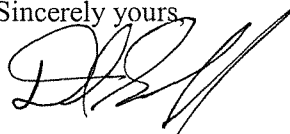
Re: *In the Matter of: Investigation of the Failure of TracFone Wireless, Inc. to File
Required Reports*, PSC Admin. Case No. 2011-00322

Dear Mr. Derouen:

Please find enclosed for filing with the Commission in the above-referenced case an original and ten (10) copies of TracFone Wireless Inc.'s ("TracFone") Response to the Commission's March 22, 2012 Order in the above-captioned proceeding as well as a Motion for Admission Pro Hac Vice for Hon. Mitchell F. Brecher, as counsel for TracFone. Please file these documents in the record and return file-stamped copies to me.

Please do not hesitate to contact me if you have any questions.

Sincerely yours,



David S. Samford

Enclosures

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PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:)

INVESTIGATION OF THE FAILURE OF)
TRACFONE WIRELESS, INC. TO FILE)
REQUIRED REPORTS)

ADMINISTRATIVE
CASE NO. 2011-00322

RESPONSE OF TRACFONE WIRELESS, INC.

TracFone Wireless, Inc. (“TracFone”), by its attorneys, hereby submits its response to the Commission’s Order entered March 22, 2012 in the above-captioned matter.

In its March 22 Order, the Commission disputed TracFone’s conclusion that it is not a “Utility” within the statutory meaning of that term under Kentucky law, specifically, KRS 278.010(3)(e), and therefore is required to submit annual reports of intrastate operating revenues pursuant to KRS 278.140. The March 22 Order is inconsistent with the Commission’s prior determination not to investigate whether resellers of wireless prepaid services such as TracFone are deemed to be utilities under Kentucky law. See Petition for an Investigation Into the Utility Assessments Paid by Kentucky RSA #3 Cellular General Partnership, Case No. 2007-00409, issued December 26, 2007. The March 22 Order was also rather unexpected since, by letter dated October 18, 2011, TracFone provided to the Commission an explanation as to why it is not a utility under applicable Kentucky law. As noted in that October 18 letter, that was the second time that TracFone provided such a written explanation to the Commission (a prior letter had been sent to Mr. Jeff D. Kline, Annual Report Branch Manager, on March 28, 2011) and the matter had been discussed orally with members of the Commission

staff. At no time was any disagreement articulated regarding TracFone's conclusion that it is not a utility. Notwithstanding those prior explanations and prior Commission precedent, and the absence of any stated disagreement with either of TracFone's letters, the March 22 Order indicates that further explanation is now necessary.

As noted in the March 22 Order, KRS 278.010(3) defines "Utility," in relevant part, as "any person who **owns, controls, operates, or manages** any facility used or to be used in connection with . . . the transmission or conveyance over wire, in air, or otherwise, of any message, by telephone or telegraph for the public, for compensation." (emphasis added). KRS 278.010(11) defines "facility" to include "all property, means, and instrumentalities owned, operated, leased, licensed, used, furnished, or supplied for, by, or in connection with the business of any utility."

TracFone offers wireless telecommunications service (sometimes called Commercial Mobile Radio Service or "CMRS") solely by reselling the finished services of wireless carriers -- companies who "own, control, operate or manage" the "facilities" for the transmission of calls and messages in Kentucky. TracFone purchases finished services in large quantities at wholesale rates from those facilities-based utilities such as, for example, AT&T Mobility, Verizon Wireless, and T-Mobile USA, and resells those utilities' services to its end user retail consumers. In short, TracFone is a wireless reseller.

The Commission's March 22 Order speculates that "TracFone must own, operate, lease, license, use, furnish, or supply some type of property, means or instrumentalities to conduct its business." There is a problem with this overly-broad and speculative statement: the statute does not confer utility status (and utility obligations) on entities

who use facilities to conduct their business. It confers utility status on those who own, control, operate, or manage any facility used for or in connection with “the transmission or conveyance . . . of any message by telephone or telegraph for the public, for compensation.”

TracFone does not use any facility, despite how broadly the term may be construed operationally or geographically, to transmit or convey messages by telephone or telegraph to the public for compensation. TracFone owns and leases items, most of which are at its headquarters in Miami, Florida. Those items include office space, furniture, computers, coffee machines, staplers, paper supplies, etc. Without question, those items are used by TracFone to conduct its business. They are used to provide work space to employees, to compile and maintain company records, to manage sales and marketing forces, to maintain the company’s financial and banking records, even to provide legal support to the company. Not a single facility located at TracFone’s headquarters or elsewhere is owned, controlled, operated, or managed by TracFone to transmit or convey calls or messages in Kentucky. As explained above, the only transmission or conveyance of calls or messages is performed by TracFone’s underlying facilities-based carriers who provide those services to TracFone on a wholesale basis for resale to end users.¹

Since TracFone is not a utility, it is not obligated to fulfill the requirements which Kentucky law imposes on those companies who are utilities, including the requirement

¹ The wireless handsets used by TracFone customers to initiate and receive phone calls are purchased by those customers from retail vendors or, in the case of TracFone’s SafeLink Wireless® Lifeline customers, are given to the customers at no charge. In all cases, those handsets are the personal property of the customer, and are not owned, controlled, operated, or managed by TracFone.

that utilities report gross operating revenues derived from their intra-Kentucky business.² TracFone acknowledges that Kentucky could enact laws which impose utility obligations on providers of specified utility services without regard to facilities ownership, control, operation or management. However, that would require revision to Kentucky Statutes. Whether to revise the statutes is a determination for the Legislature, not for the Commission.

Moreover, should the Commission determine that it has jurisdiction over TracFone as a wireless reseller, Kentucky law requires that it not be singled out and that all entities in the same situation should be treated equally under the law.

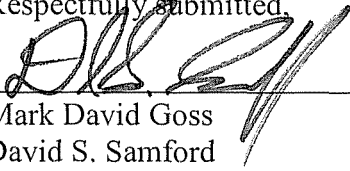
² Whether the Commission may regulate any providers of Commercial Mobile Radio Service as utilities with specific respect to requiring submission of gross revenue reports is questionable in light of the Legislature's 2005 enactment of KRS § 278.54611. That statute states that provision of such services shall be market-based "and not subject to Public Service Commission regulation." The statute does confer on the Commission limited and specified powers of CMRS providers including, *e.g.*, the authority to arbitrate and enforce interconnection agreements, and authority to resolve consumer complaints. Conspicuously absent from the statutory list of retained authority over CMRS is the authority to require submission of gross revenue reports.

CONCLUSION

For the reasons described herein, TracFone respectfully submits that it is not a “utility” as that term is defined in KRS Chapter 278. Hopefully, this additional explanation will address the Commission’s concerns and will alleviate the need for further proceedings regarding this matter. However, if the Commission desires further information or clarification, TracFone, through counsel, will appear at a hearing if the Commission deems a hearing on this matter to be necessary.

This 16th day of April 2012.

Respectfully submitted,



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and

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