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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

**POST-HEARING BRIEF OF TRACFONE WIRELESS, INC.**

TracFone Wireless, Inc. (“TracFone”), by its attorneys, hereby submits its post-hearing brief in the above-captioned administrative proceeding. Filing of this brief was directed by the Commission during the hearing in this matter held on April 25, 2013.

**Introduction**

TracFone is a reseller of commercial mobile radio service (“CMRS”), more commonly referred to as cellular service or wireless service. TracFone differs from other providers of cellular service with whom the Commission may be familiar in several respects. First, as noted, TracFone provides service solely on a resale basis. That is, it purchases finished service in large quantities at negotiated wholesale prices from underlying wireless providers and resells those purchased services to consumers at retail prices. Second, TracFone provides services to consumers only on a prepaid basis. As explained during the hearing and in prior TracFone submissions in this proceeding, consumers purchase TracFone service in the form of prepaid airtime cards, either at retail vendor locations (*e.g.*, Wal-Mart, Kroger, CVS, 7-11, Best Buy, and many others) or from TracFone through TracFone’s website ([www.tracfone.com](http://www.tracfone.com)).

As demonstrated by the record in this proceeding, TracFone – a CMRS reseller – does not own, control, operate or manage facilities for the provision of telecommunications service in the Commonwealth of Kentucky. Accordingly, it is not a utility under Kentucky law.

## I. TracFone is Not a Utility Under Applicable Kentucky Law

At issue in this proceeding is only one legal question: whether or not TracFone fits within the statutory definition of a Utility under the laws of the Commonwealth. KRS § 278.140 requires that each utility, on or before March 31 of each year file with the Commission a report of its gross earnings or receipts derived from its intrastate business the preceding year. Those gross earnings reports are for the purpose of ascertaining the amount of the assessments imposed on utilities subject to the Commission's jurisdiction. If TracFone is a utility under Kentucky law then, like other utilities, it would be subject to the gross earnings reporting requirement codified at KRS § 278.140 and to the annual assessments required by KRS § 278.130. However, TracFone is not a utility under Kentucky law and therefore is not subject either to the gross revenue reporting or annual assessment requirements, both of which are applicable only to utilities.

The statutory definition of "utility" is codified at KRS § 278.010(3). That statute 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 to the public for compensation." (emphasis added). Stated simply, in order to be a utility under Kentucky law, an entity must "own, control, operate or manage" facilities, and those facilities which it owns, controls, operates, or manages, must be used for a specific statutorily-prescribed purpose -- in connection with the transmission or conveyance of telephone or telegraph messages to the public for compensation. Since TracFone provides service only on a resale basis, it does not own, control, operate or manage any facilities used in connection with transmitting or conveying telephonic or telegraphic messages.

KRS § 278.010(11) contains a comprehensive definition of “facility”: “all property, means, and instrumentalities owned, operated, leased, licensed, used, furnished, or supplied for, by, or in connection with the business of any utility.” That broad definition of “facility” must be read in light of the more limited and specific definition of “utility.” As was explained during this proceeding, TracFone does own and lease property which it uses to conduct its business. That property includes such items as office space, furniture, office supplies, computers, coffee machines, etc. Most of those items are located at its corporate offices in Miami, FL. They are used to conduct TracFone’s business. However, those items are not used or even useable in connection with the transmission or conveyance over wire, in air, or otherwise telephonic or telegraphic messages. In short, the fact that TracFone does own, control, operate, or manage certain “facilities,” does not render it a utility under Kentucky law since none of those facilities are used to transmit or convey telephone or telegraph messages.

The nature of TracFone’s wireless resale service was described in detail by TracFone witness, Karen E. Levine, TracFone’s Senior Vice President, Finance. Ms. Levine testified that TracFone’s underlying carriers – companies who are utilities under Kentucky law – such as, for example AT&T Mobility, “control all aspects of [TracFone customers’] calls, including the switching and routing of the calls.”<sup>1</sup> The underlying carrier would own, control, operate or manage the towers, antennas, switches, trunks, lines, etc. used to complete those calls.<sup>2</sup> Indeed, Ms. Levine explained that TracFone does not even control the assignment of telephone numbers to its customers. Rather, it submits requests to those underlying carriers that the customers be assigned telephone numbers from the underlying carriers’ pool of telephone numbers.<sup>3</sup>

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<sup>1</sup> Testimony of Karen E. Levine at 2, lines 13-14.

<sup>2</sup> *Id.*, at 2 lines 15-16.

<sup>3</sup> *Id.*, at 3 lines 5-8.

Importantly, Ms. Levine further explained that TracFone’s agreements with its underlying service providers are wholesale service agreements. They are not leases of any network facilities owned, controlled, operated or managed by those providers. Nothing in TracFone’s wholesale service agreements afford it any rights to own, control, operate or manage any portions of the underlying provider’s facilities.<sup>4</sup>

During the hearing, Chairman Armstrong asked whether the Commission has authority to regulate “telecom companies.” The answer to that question is clear – the Commission only has authority to regulate those telecom companies who are utilities under Kentucky law. Not every entity which sells or makes available telecommunications services to consumers is a utility within the definition codified at KRS § 278.010(3). For example, retail vendors such as Wal-Mart, Best Buy, Target and others sell telecommunications services to the public. They sell services of TracFone and other providers. They even sell services of utilities.<sup>5</sup> However, those retail vendors of telecommunications services are not themselves utilities since they – like TracFone – do not own, control, operate or manage facilities used for the transmission or conveyance of telephonic or telegraphic messages. Similarly, agents, brokers, and other “middle persons” in the distribution chain participate in the sale of telecommunications services. However, those entities are not utilities since they – like TracFone – do not own, control, operate or manage facilities to be used for the transmission or conveyance of telephonic or telegraphic messages.

Commission precedent further supports the conclusion that an entity which only resells finished services of utilities and which does not itself own, control, operate or manage facilities

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<sup>4</sup> *Id.*, at 3 lines 14-18.

<sup>5</sup> For example, it is not unusual for those stores who sell TracFone services to also sell services of utilities such as AT&T Mobility, Verizon Wireless, Sprint, T-Mobile, and others.

to be used for the transmission or conveyance of telephonic or telegraphic messages is not a utility. In 1991, the Commission concluded that persons who own, control, operate or manage customer-owned, coin-operated telephones (sometimes referred to as “COCOTs”) are utilities. See In the Matter of The Investigation and Review of Customer-Owned Coin Operated Telephone Regulation, Administrative Case No. 337, Order issued October 7, 1991 (“1991 COCOT Order”). In that 1991 COCOT Order, the Commission concluded, based on record evidence before it, that COCOT providers do “own, control, operate or manage facilities used for and in connection with the transmission of telephone messages.” The Commission noted correctly that COCOT providers own and/or operate the telephone instruments used by consumers to initiate the calls, and in some cases, to provide the operator services and billing information for the calls.<sup>6</sup>

Unlike owners/operators of COCOTs, TracFone does not own, control, operate or manage the telephone instruments used to initiate calls or receive calls. As described by Ms. Levine, TracFone customers use TracFone prepaid wireless service with wireless handsets purchased from retail vendors. Once purchased, those handsets become the personal property of the customer. As the owner of the handset, the customer – not TracFone – has the sole ability to control, operate and manage the handset. The customer controls whether to turn the handset on or off, whether to program speed dial numbers, even when and where to charge the battery.<sup>7</sup> Unlike the situation before the Commission in the 1991 COCOT Order, the telephone devices used for or in connection with the provider’s service are not owned, controlled, operated or managed by the provider. They are owned, controlled, operated and managed by the consumers of the service.

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<sup>6</sup>1991 COCOT Order at 5.

<sup>7</sup> Testimony of Karen E. Levine at p. 2 line 20 through p. 3 line 11.

## **II. The Weight of Authority Nationwide is that TracFone Is not Subject to Regulation as a Utility**

During the hearing in this proceeding, Staff requested that TracFone provide as a post-hearing exhibit a list of other states where it has been found to be a utility. That post-hearing exhibit is being submitted simultaneous with this brief. As indicated by that exhibit, TracFone has been determined to be a utility pursuant to state laws only in two states – California and Indiana. That only two states have reached such a determination is significant. TracFone is a nationwide reseller of cellular service. It provides service in all 50 states, plus the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands – a total of 53 jurisdictions.<sup>8</sup> In short, 2 states out of 53 have concluded that TracFone is subject to utility regulation under state law notwithstanding the fact that it operates only as a reseller. Two out of 53 hardly reflects the weight of authority or constitutes a trend. Indeed, if the Commission were to conclude that TracFone is a utility, notwithstanding the statutory impediments to such a determination described in the preceding section of this brief, it would be only the third state to reach such a determination.

That only two states have found TracFone to be a utility is even more significant in light of the fact that TracFone operates in many states as a designated Eligible Telecommunications Carrier (“ETC”) pursuant to Section 214(e) of the Communications Act (47 U.S.C. § 214(e)). TracFone has been designated as an ETC in 43 States (including Kentucky) and currently provides Lifeline service supported by the federal Universal Service Fund in about 38 states. In

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<sup>8</sup> Pursuant to Section 3(40) of the Communications Act of 1934, as amended (47 U.S.C. § 153(40)), the District of Columbia and the Territories and possessions (including Puerto Rico and the U.S. Virgin Islands) are deemed to be “States” for purposes of that Act.

33 of those states, TracFone was designated as an ETC by the state commission.<sup>9</sup> Yet only two of those states concluded that TracFone is a utility under state law. The conclusion is inescapable: being designated as an Eligible Telecommunications Carrier under federal law does not render a company a utility under state law. A company is a utility under state law only if it falls within the definition of utility under applicable state law.

### **III. Expansion of the Definition of Utility to Include Resellers of Prepaid Wireless Service Would Require a Legislative Revision to Kentucky Statutes**

As described above, TracFone is not a utility under the laws of the Commonwealth of Kentucky and is not subject to the requirements which Kentucky law imposes on those entities which are utilities, including the obligation to submit to the Commission gross earnings reports pursuant to KRS § 278.140, and to pay utility assessments pursuant to KRS § 278.130. That said, TracFone understands why the Commission might desire that non-utilities who provide resale service in Kentucky be required to pay assessments to support the operations of the Commission. However, that would require a change in Kentucky statutory law.

In some jurisdictions, a company's status as a regulated entity does not depend on whether it owns, controls, operates or manages facilities to provide service. Rather it depends on what the company does. For example, under the Communications Act of 1934, the definition of a communications common carrier is based on whether a company holds itself to provide

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<sup>9</sup> Pursuant to Section 214(e)(2) of the Communications Act, state commissions are empowered to designate ETCs and most commissions, including the Commission, do so. However, there are several states which choose not to designate wireless ETCs and the authority to designate ETCs in those states defaults to the FCC pursuant to Section 214(e)(6) of the Communications Act.

service.<sup>10</sup> As described by the federal court of appeals in the National Association of Regulatory Utility Commissioners v. FCC case cited in n. 10, common carrier status and common carrier regulatory obligations are premised on the service provider holding itself out to serve customers indiscriminately thereby rendering its services with a quasi-public character.

The Kentucky Legislature could amend the statutory definition of utility to base utility status in Kentucky on whether an entity holds itself out to provide services which are deemed to be utility-type services (including, *e.g.*, telecommunications service) without regard to whether it provides such services using facilities which it owns, controls, operates or manages. However, that would require an amendment to the current statute. Enactment of statutes and modification of existing statutes is the province of the state legislature. The Commission has no power to revise statutory law, including the statutory definition of utility.

#### **IV. Nothing Has Changed since 2007**

This is not the first time that the question whether resellers of prepaid wireless services are utilities under Kentucky law has been before the Commission. In 2007, the Commission denied a petition filed by Kentucky RSA #3 Cellular General Partnership to investigate whether resellers who provide prepaid wireless services are utilities under Kentucky law.<sup>11</sup> In denying that request to investigate, the Commission noted that such an investigation would “require this

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<sup>10</sup> Under the Communications Act, providers of telecommunications services are not categorized as utilities. Rather, they are called common carriers and are subject to the common carrier regulatory scheme set forth at Title II of that Act (47 U.S.C. § 201 *et seq.*). Title II of the Communications Act is similar to and modeled on many states’ utility laws. Section 3(10) of that Act (47 U.S.C. § 153(10)) defines common carrier as follows: “The term ‘common carrier’ or ‘carrier’ means any person engaged as a common carrier for hire, interstate or foreign communications by wire or radio . . . .” See also National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir. 1976).

<sup>11</sup> In the Matter of Petition for an Investigation Into the Utility Assessments Paid by Kentucky RSA #3 Cellular General Partnership, Case No. 2007-00409, Order issued December 26, 2007.



Commission to delve into uncharted waters whose depth is completely unknown.”<sup>12</sup> In short, the Commission concluded in December 2007 that it had no basis upon which to embark upon an inquiry into a determination of whether such companies which do not own, operate, control or manage facilities for the transmission or conveyance of telephonic or telegraphic messages are utilities.

There would be no reason for the Commission to reverse course now and pursue an inquiry into whether such companies are utilities unless changes have occurred since 2007 which warrant that the question be revisited. If anything has changed since 2007, it is that TracFone, and possibly other resellers of prepaid wireless services, have grown. They have added customers and expanded the scope of their resale service offerings. More importantly, however, is what has not changed since 2007. Two things of great importance which have not changed are 1) the law; and 2) the facts.

The law has not changed as there have been no modifications to Kentucky Revised Statutes since that time. The statutory definition of “utility” set forth at KRS § 278.010(3) has not changed. Neither has the scope of the annual gross earnings reporting requirement set forth at KRS § 278.140 been changed. Nor have the relevant facts changed since 2007. TracFone has grown significantly since then. However, its method of providing service and its business model have not changed. It continues to provide service solely on a resale basis by purchasing finished service from utilities at negotiated wholesale rates and reselling that purchased service to retail consumers. Customers continue to access TracFone’s prepaid wireless services using wireless handset devices which they own, control, operate, and manage. TracFone no more owns, controls, operates or manages any facility for the provision of telephonic or telegraphic messages

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<sup>12</sup> *Id.*, at 2.

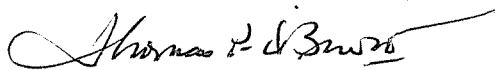
today than it did on December 26, 2007 – the date of the Commission’s order declining to investigate whether it is a utility.

**Conclusion**

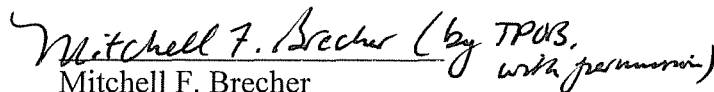
For the reasons stated in this brief, as well as those presented previously by TracFone in this proceeding, including in the testimony of Karen E. Levine, TracFone’s April 16, 2012 response to the Commission’s March 22, 2012 Order, and its October 1, 2012 Response to Commission Staff’s First Request for Information (all of which are incorporated herein by reference), TracFone respectfully urges the Commission to conclude that it is not a utility under Kentucky law and that it has no obligation under Kentucky law to submit gross earnings reports.

Respectfully submitted,

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