

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 October 12, 2011, the Commission ordered Tracfone Wireless, Inc., ("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 requires ("Show Cause Order"). In our Show Cause Order, we set the matter for hearing, but allowed Tracfone, in lieu of appearing at the hearing, to admit the allegations, file the required report, waive its right to a hearing, and pay a penalty of \$250.00.

On October 19, 2011 TracFone submitted a written response, by letter, to the Show Cause Order that included a payment of \$250.00 and the required report. TracFone reported 291,480 customers in Kentucky, but no gross intrastate revenues.

In its letter, TracFone argues that it is not a utility and, therefore, is under no legal obligation to submit a report of gross operating revenues. It states:

TracFone does not remit a Report of Gross Operating Revenue Derived from Intra-Kentucky Business for the Year Ended December 31, 2010 because TracFone is not a "utility" as the term is statutorily defined. . . . KRS 278.010(3)(f) defines "utility" as "any person . . . who **owns, operates, or manages** any facility used or to be used for or in connection with . . . (c) the transmission or conveyance of any message by telephone or telegraph to the public for compensation." (Emphasis added). . . . TracFone does not

own operate, or manage any facility used for the transmission of messages in Kentucky. TracFone does provide commercial mobile radio services (CMRS) to Kentucky consumers. However, it does so on a resale basis only. That is, TracFone purchases CMRS from wireless carriers who do own, operate or manage such facilities and who, therefore, are utilities under Kentucky law.

On March 22, 2012, the Commission issued an Order ("March 22, 2012 Order) in response to TracFone's letter. In the March 22, 2012 Order we found that "TracFone meets the statutory definition of a utility as set forth in KRS 278.010(3)" ¹ We also allowed TracFone an opportunity to supplement its arguments as to why it is not a utility as defined in KRS 278.010(3)(e).

On April 16, 2012, TracFone filed its response to the March 22, 2012 Order. In its response, TracFone reiterated its contention that it was not a utility under KRS 278.010(3)(e) and also argued that the Commission's determination that TracFone was a utility was inconsistent with previous Commission precedent established in Case No. 2007-00409. ² TracFone asserted that while it owns and leases certain items, such as office space and office supplies in its office in Miami, Florida, it does not own or lease any facilities in Kentucky for the transmission or conveyance of messages in Kentucky and is not a utility under state law. ³

We are still not persuaded that TracFone is not a utility subject to our jurisdiction and the requirements to file gross annual reports and pay the attendant assessments. We find, however, that because this is an issue of first impression for us, TracFone

¹ March 22, 2012 Order at 2.

² Case No. 2007-00409, *Petition for an Investigation Into the Utility Assessments Paid by Kentucky RSA #3 Cellular General Partnership*, (Ky. PSC Dec. 26, 2007.)

³ Response of TracFone Wireless, Inc., at 3.

should be afforded an opportunity to present its argument before us, in the form of oral argument and/or the presentation of evidence and witnesses.

Based on the foregoing, IT IS THEREFORE ORDERED THAT:

1. A public hearing for the purposes of hearing TracFone's oral argument shall begin on Tuesday, March 26, 2013, at 10:00 a.m. Eastern Daylight Time, in Hearing Room 1 of the Commission's offices at 211 Sower Boulevard, Frankfort, Kentucky, and shall continue until concluded.

2. On or before March 5, 2013, TracFone shall file with the Commission the direct testimony of any witnesses it may call at oral argument.

By the Commission

ENTERED ^{AK}
FEB 07 2013
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:


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