

Commonwealth of Kentucky  
Before the Public Service Commission

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PUBLIC SERVICE  
COMMISSION

In the Matter of:

PETITION OF TRACFONE WIRELESS, INC. )  
FOR DESIGNATION AS AN ELIGIBLE )  
TELECOMMUNICATIONS CARRIER IN THE ) Case No. 2009-00100  
COMMONWEALTH OF KENTUCKY FOR THE )  
LIMITED PURPOSE OF OFFERING LIFELINE )  
AND LINK UP SERVICE TO QUALIFIED )  
HOUSEHOLDS )

ATTORNEY GENERAL'S  
MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

Comes now the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, and moves for leave to supplement the record in the above-captioned matter based on the following grounds.

Pursuant to the Commission's order dated September 10, 2009, the Attorney General timely filed his comments in the above-captioned matter. He referenced and provided a citation to a publicly available document in support of his motion. Specifically, in support of his comments, he discussed a complaint filed by the Commercial Mobile Radio Services (CMRS) Board against the petitioner. Although he stated that the complaint was attached, he neglected to do so<sup>1</sup>. Because he provided the necessary information to locate same which is a publicly available document and has been duly served on petitioner and about

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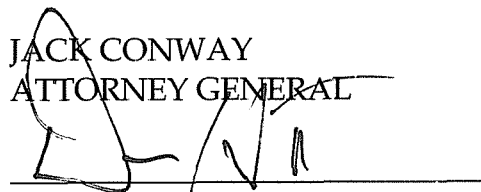
<sup>1</sup> See page 2 of the Attorney General's Motion to Intervene and Comments.

which Tracfone is obviously aware, Tracfone can not claim any undue harm or prejudice in the instant matter. Moreover, in an attempt to aid the Commission in its deliberations on the merits of the Attorney General's Comments, he respectfully moves for leave to supplement the record and file the aforementioned complaint as Attachment A which the Attorney General previously referenced in his Motion to Intervene and Comments as Attachment A.

WHEREFORE, the Attorney General requests that he be permitted to supplement the record in this matter as it will assist the Commission in its deliberations while causing no undue harm or prejudice to Tracfone.

Respectfully submitted,

JACK CONWAY  
ATTORNEY GENERAL



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*Certificate of Service and Filing*

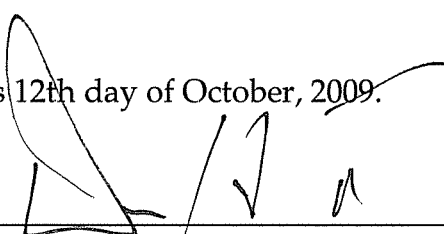
Counsel certifies that an original and ten photocopies of this Motion to For Leave to Supplement the Record were served and filed by hand delivery to Jeff Derouen, Executive Director, Public Service Commission, 211 Sower Boulevard, Frankfort, Kentucky 40601; furthermore, it was served by mailing a true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

Mitchell F Brecher  
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Debra M Mercer  
Greenberg Traurig, LLP  
2101 L Street, NW, Suite 1000  
Washington, DC 20037

this 12th day of October, 2009.

  
\_\_\_\_\_  
Assistant Attorney General

# ATTACHMENT A

REMOVED TO US DISTRICT COURT - Western District  
CASE# 3:08-cv-660 JGH  
before JUDGE HEYBURN

NO. 08-CI-\_\_\_\_\_

**08 CI 010856**

JEFFERSON CIRCUIT COURT  
DIVISION \_\_\_\_\_

COMMONWEALTH OF KENTUCKY  
COMMERCIAL MOBILE RADIO SERVICE  
EMERGENCY TELECOMMUNICATIONS BOARD  
200 Mero Street  
Frankfort, Kentucky 40601

JEFFERSON CIRCUIT COURT  
DIVISION ELEVEN (11)  
PLAINTIFF

FILED IN CLERK'S OFFICE

vs.

COMPLAINT

OCT 14 2008

TRACFONE WIRELESS, INC.  
8390 NW 25<sup>th</sup> Street  
Miami, FL 33122

DAVID L. NICHOLSON, CLERK DEFENDANT  
By \_\_\_\_\_ D.C.

Serve: CT Corporation Systems  
Kentucky Home Life Building  
Louisville, KY 40202

JEFFERSON CIRCUIT COURT  
DIVISION ELEVEN (11)

\*\*\*\* \* \* \* \* \*

Comes the Plaintiff, Commercial Mobile Radio Service Emergency Telecommunications Board (hereinafter "CMRS Board"), by counsel, and for its Complaint against the Defendant, TracFone Wireless, Inc. (hereinafter "TracFone"), states as follows:

PARTIES

1. The plaintiff, CMRS Board, was created by the Kentucky General Assembly by statute in 1998. The principal office and place of business of the CMRS Board is located at the Kentucky Office of Homeland Security, 200 Mero Street, Frankfort, KY 40601.

2. The Defendant, TracFone, is a Florida corporation with its principal office and place of business located at 8390 NW 25<sup>th</sup> Street in Miami, Florida. TracFone was authorized to do business as a foreign corporation in the Commonwealth of Kentucky as of

March 3, 1997, but is currently not in good standing with the Kentucky Secretary of State.

**JURISDICTION AND VENUE:**

3. This is an action to recover CMRS service charges owed by TracFone to the CMRS Board pursuant to KRS Chapter 65. KRS 65.7635(5) allows the Commonwealth of Kentucky, on behalf of the CMRS Board, to initiate collection actions to recover service charges owed by providers such as TracFone in the Jefferson Circuit Court. Therefore, subject matter jurisdiction and venue is properly in this Court and the amount in question exceeds the minimum jurisdictional amount required for this Court.

4. TracFone is authorized to do business in the Commonwealth of Kentucky and is currently doing business in the Commonwealth. Consequently, this Court has personal jurisdiction over TracFone under the Kentucky Long-Arm Statute, KRS 454.210(2)(a),

**GENERAL FACTS**

5. In 1998, the Kentucky General Assembly, like the legislatures in many other states, enacted legislation creating the CMRS Board to fulfill the Federal Communication Commission's mandate (94-102) that wireless carriers connect wireless callers to the public safety 911 system.

6. The Kentucky Office for Homeland Security provides staff services and carries out administrative duties and functions for the CMRS Board as directed by the CMRS Board. The CMRS Board is attached to the Kentucky Office for Homeland Security for administrative purposes only and operates as an independent entity within state government.

7. The CMRS Board manages a CMRS Fund to reimburse wireless carriers

and local governments for their expenses in providing a 911 service for Kentucky's wireless telephone customers.

8. Pursuant to KRS 65.7629, the CMRS Board has the authority to collect a \$.0.70 per month surcharge (the "911 service charge") from CMRS providers for each CMRS connection. KRS 65.7621 (9) as enacted in 1998 defined a "CMRS provider" as "a person or entity who provides CMRS to an end user, including resellers". A "CMRS connection" is defined as a "mobile handset telephone number assigned to a CMRS customer" [KRS 65.7623(6)]. A "CMRS customer" is defined by KRS 65.7621(7) as "a person to whom a mobile handset telephone number is assigned and to whom CMRS is provided in return for compensation".

9. All CMRS providers including TracFone are required to collect the service charge from each CMRS connection to whom the provider provides CMRS and to remit the service charge, less a 1.5% administrative fee, to the CMRS Board on a monthly basis. KRS 65.7635.

10. The CMRS Board then utilizes those funds to provide for a 911 and E911 infrastructure throughout the Commonwealth.

#### **FACTUAL ALLEGATIONS REGARDING TRACFONE**

11. TracFone is the leading provider of pre-paid wireless telephone services to customers throughout the United States, including the Commonwealth of Kentucky.

12. TracFone does not have its own wireless network but "resells" wireless service to more than thirty providers as a mobile virtual network operator. In the United States, Tracfone operates on the AT&T, Verizon Wireless, Sprint, Clario and T-Mobile wireless networks.

13. TracFone handsets and airtime service are available in tens of thousands of retail locations throughout the United States, including Wal-Mart, K-Mart and Target stores.

14. TracFone requires its customers to activate a cellular telephone before use. The customer redeems airtime units by entering a validation code or by redeeming an airtime option.

15. TracFone has in excess of 200,000 subscribers each month in the Commonwealth of Kentucky.

16. TracFone remitted the 911 service charge on a monthly basis to the CMRS Board from 1999 until October 2003.

17. Beginning in November, 2003, TracFone ceased remitting the 911 service charge to the CMRS Board claiming that the 911 service charge did not apply to prepaid service providers, as the statute required providers to collect the CMRS service charges from its customers as part of the provider's monthly billing process. Tracfone argued that it did not send monthly bills to its customers; therefore, it was not required to remit CMRS 911 service charge to the CMRS Board.

18. TracFone suggested to the CMRS Board that Kentucky adopt a model known as the "Tennessee Model" or another appropriate methodology for collecting 911 service charges from end user customers of prepaid wireless services.

19. In 2005, the Kentucky legislature amended KRS 65.7621 to clarify the definition of a "CMRS provider". The prior statute specifically included "resellers", such as TracFone, in the definition of provider. The new statute provided even more detail, including "facilities-based resellers and non-facilities based resellers" in the definition of a "CMRS provider".



20. In addition, KRS 65.7635 was amended to expressly address the means by which prepaid providers can collect and remit the 911 service charge. The statute states that:

- a. The CMRS provider shall collect, on a monthly basis, the CMRS service charge ... from each active customer whose account balance is equal to or greater than the amount of the service charge ..., or
- b. The CMRS provider shall divide its total earned prepaid wireless telephone revenue received with respect to its prepaid customers in the Commonwealth within the monthly 911 emergency telephone service reporting period by fifty dollars (\$50), multiply the quotient by the service charge amount, and pay the resulting amount to the board; or
- c. In the case of CMRS providers that do not have the ability to access or debit end-user accounts, and do not have retail contact with the end user or purchaser of prepaid wireless airtime, the CMRS service charge and collection methodology may be determined by administrative regulations promulgated by the board to collect the service charge from such end users.

21. The collection option in subsection (b) of the above statute describes the "Tennessee Model" that TracFone encouraged the CMRS Board to adopt in Kentucky.

22. Even though TracFone specifically requested that Kentucky adopt the "Tennessee Model" and the Kentucky legislature ultimately included that model in the statute, TracFone continued to refuse to remit the 911 service charge to the CMRS Board.

23. TracFone has engaged in a pattern and practice of intentionally failing to remit 911 service charges to other states throughout the United States.

24. The CMRS Board has made numerous demands to TracFone to remit the 911 service charges to the CMRS Board as required by statute.

24. TracFone has failed to comply with the CMRS Board's requests and has not remitted 911 service charges from November, 2003 through the current date.

25. TracFone owes the CMRS Board in excess of \$6,000,000.00 for monthly 911 service charges due and owing through the date of filing of this Complaint.

### COUNT I

#### DECLARATORY JUDGMENT

26. The CMRS Board restates and reiterates each and every allegation in paragraphs 1 through 25 as though fully set forth herein.

27. Pursuant to KRS 65.7635 as enacted in July, 1998 and as amended in July, 2006, each CMRS provider, including TracFone, is required to act as a collection agent for the CMRS Fund.

28. The definition of CMRS provider in KRS 65.7621 (9) as enacted in July, 1998 and in effect through July, 2006 included resellers.

29. It is undisputed that TracFone is a reseller of wireless services.

30. TracFone is required to collect the CMRS service charges levied upon CMRS connections.

31. KRS 65.7635 enacted in July, 1998 and amended in July, 2006 required TracFone to remit to the CMRS Board a monthly 911 service charge of \$.70 for each CMRS connection.

32. TracFone remitted the monthly 911 service charges through October, 2003.

33. In October, 2003 TracFone claimed that it was not required to continue remitting service charges, as KRS 65.7635 required CMRS providers to collect the 911

service charges as part of the provider's normal monthly billing process. TracFone argued that it did not bill its customers on a monthly basis, therefore, it was not required to pay the service charge.

34. After KRS 65.7635 was amended in July, 2006, TracFone continued to refuse to remit 911 service charges to the CMRS Board. Although the statute as amended provides three alternative methods for CMRS prepaid providers to determine and collect service charges from its customers, and it is undisputed that TracFone is a prepaid provider, TracFone continues to claim that KRS 65.7635 does not require it to remit monthly 911 service charges to the CMRS Board.

35. The CMRS Board requests a declaratory judgment from this Court that KRS 65.7635, in effect from July, 1998, through July, 2006 applied to TracFone as a CMRS provider and reseller of prepaid wireless services and required TracFone to remit a monthly service charge of \$.70 per connection to the CMRS Board.

36. In addition, the CMRS Board requests a declaratory judgment from this Court that KRS 65.7635 as amended effective July, 2006, and in effect through the current date, applies to TracFone as a CMRS provider and reseller of prepaid wireless services and requires TracFone to remit a monthly service charge of \$.70 per connection to the CMRS Board, which obligation will continue as long as the statute remains in effect and TracFone continues to provide prepaid wireless services in the Commonwealth of Kentucky.

37. Pursuant to KRS 418.040, a plaintiff may ask for a declaration of rights, either alone or with other relief, if an actual controversy exists.

38. An actual controversy exists between the parties. CMRS has taken the position that KRS 65.7635 applies to TracFone and all other prepaid providers and

TracFone claims that the statute is not applicable to prepaid providers and has refused to remit the monthly 911 service charge to the CMRS Board.

## COUNT II

### COLLECTION OF SERVICE CHARGES

39. CMRS restates and reiterates each and every allegation set forth in Paragraphs 1 through 38 as though fully set forth herein.

40. TracFone is required by KRS 65.7635 to act as a collection agent for the CMRS Fund and collect monthly service charges of \$.70 from each of its customers.

41. TracFone is required to remit the service charges, less a 1.5% administrative fee, to the CMRS Board on a monthly basis on or before sixty days after the end of each calendar month.

42. TracFone has not remitted monthly 911 service charges to the CMRS Board since October, 2003.

43. Pursuant to KRS 65.7635, the Commonwealth on behalf of the CMRS Board may initiate a collection action to recover the 911 service charges owed by TracFone, along with reasonable costs and attorneys' fees incurred in connection with any such collection action.

WHEREFORE, the CMRS Board prays for the following relief:

1. That the Court enter a declaratory judgment finding that TracFone is a CMRS provider as defined by KRS 65.7621 and is required to remit monthly 911 service charges to the CMRS Board beginning with the month of November, 2003 and continuing as long as KRS 65.7635

remains in effect and TracFone continues to provide CMRS in the Commonwealth of Kentucky;

2. That the CMRS Board recover all monthly 911 service charges owed by TracFone to the CMRS Board from November, 2003 through the date of trial;
3. That the CMRS Board recover attorneys' fees, costs and pre-judgment and post-judgment interest on amounts due; and
4. That CMRS recover all other relief to which it is entitled both at law and equity.

Respectfully submitted,

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