EXHIBIT 3

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

COMPLAINT OF THE INDIANA WIRELESS ENHANCED 9-1-1 ADVISORY BOARD AGAINST TRACFONE WIRELESS, INC.	))))	**CAUSE NO. 43524** **ORDER ON MOTION TO DISMISS**
RESPONDENT: TRACFONE WIRELESS, INC.	)	**APPROVED:** AUG 0 4 2010

BY THE COMMISSION:
David Lott Hardy, Chairman
Angela Rapp Weber, Administrative Law Judge

On June 26, 2008, the Indiana Enhanced 9-1-1 Wireless Board ("Wireless Board" or "Board") filed with the Indiana Utility Regulatory Commission ("Commission") its Complaint against TracFone Wireless, Inc. ("TracFone," together with the Wireless Board, the "Parties"). According to the Complaint, TracFone, a commercial mobile radio service provider ("CMRS"), failed to remit to the Wireless Board fees used to support a statewide emergency communications network ("Wireless Fee") pursuant to Ind. Code § 36-8-16.5-30.5.[1] The Complaint also alleged that TracFone had not applied for and received from the Commission a certificate of territorial authority ("CTA"). On August 13, 2008, the Wireless Board filed a Substitute Complaint with the Commission, which redacted from the original Complaint specific information pertaining to TracFone's collection of the Wireless Fee.

In addition, on July 2, 2008 the Wireless Board filed with the Commission a Request for Confidential Treatment ,which stated that certain portions of the Complaint and Exhibits B and C attached to the Complaint ("Confidential Information") are propriety and should be treated as confidential pursuant to Indiana Code § 36-8-16.5-45. The Presiding Officers granted the Wireless Board's request for confidential treatment of the Confidential Information on a preliminary basis in a Docket Entry issued on July 30, 2008.

Based on the applicable law and evidence herein, and being duly advised, the Commission now finds:

1. **Background.** The Commission held a Prehearing Conference in this Cause on July 31, 2008 at 10:00 a.m. in Room 222 of the National City Center, 101 West Washington Street, Indianapolis, Indiana. At the Prehearing Conference, TracFone notified the Presiding Officers that it intended to file a motion to dismiss in this Cause. Therefore, the Presiding Officers established a procedural schedule pertaining to that motion. In addition, a second Prehearing Conference was scheduled for November 10, 2008 to establish a procedural schedule regarding the Parties' cases-in-chief in the event the Commission denied TracFone's forthcoming motion to dismiss. On August 26, 2008, the Parties filed a Joint Motion for Continuance of Procedural Schedule, which the Presiding Officers granted in a Docket Entry dated September 9, 2008. As a result, the second Prehearing

[1] Ind. Code § 36-8-16.5-30.5 provides generally that CMRS providers shall collect a wireless emergency enhanced 911 fee from subscribers and remit the fee to the Wireless Board.

Conference was continued to December 22, 2008 at 9:30 a.m. in Room 224 of the National City Center, Indianapolis, Indiana.

2. **Motion to Dismiss, CTA, and Administrative Notice Issues.** On October 14, 2008, TracFone filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Motion to Dismiss") in which it argued, among other things, that based on Indiana law, specifically Ind. Code § 8-1-2.6-1.1 and Ind. Code § 36-8-16.5-50, the Commission does not have jurisdiction over CMRS providers, including TracFone. On November 10, 2008, the Wireless Board filed the Wireless Board's Response to Tracfone's Motion to Dismiss ("Response"), which asserted that the Commission has jurisdiction over the issues presented pursuant to Ind. Code § 8-1-2-54. On November 24, 2008, TracFone filed Respondent TracFone's Reply on Motion to Dismiss ("Reply"). TracFone's Reply essentially repeated assertions made in its Motion to Dismiss.

At the December 22, 2008 Prehearing Conference, the Presiding Officers discussed with the Parties several issues, including TracFone's failure to submit a request for a CTA to the Commission in a separate proceeding pursuant to the September 18, 2008 Docket Entry.[2] TracFone, through its legal counsel, explained that it failed to file its CTA application in a separate Cause because counsel did not understand the statement included in the September 18, 2008 Docket Entry to mean that TracFone should submit its application for a CTA in a separately docketed Cause.[3]

Consequently, in order to avoid any further confusion, the Presiding Officers issued a Docket Entry on January 16, 2009 requiring Tracfone to "submit to the Commission an application for a CTA, without alteration, in a Subdocket to this Cause, identified as Cause No. 43524-S1." The Docket Entry also provided TracFone with an alternative and stated, "If Tracfone concludes that it would like to request approval that differs from the standard streamlined form approved by the Commission, it may submit a formal Petition to the Commission requesting a CTA with modified conditions. The CTA application or the formal Petition shall be submitted to the Commission on or before January 28, 2009."

On January 26, 2009, TracFone filed an Appeal to the Full Commission ("Appeal") pursuant to 170 IAC 1-1.1-25. The Appeal argued that by requiring TracFone to apply for and possess a CTA to operate its business in Indiana, the Commission is regulating market entry, which is expressly prohibited by Federal law, specifically 47 U.S.C. 332(c)(3)(A). The Appeal reasserted TracFone's contention that the Commission is without subject matter jurisdiction to address TracFone's remittance of Wireless Fees to the Wireless Board pursuant to Ind. Code § 8-1-2.6-1.1 and Ind. Code § 36-8-16.5-50. In addition, TracFone filed a Motion to Stay Implementation of the January 16, 2009 Docket Entry. On February 2, 2009, the Wireless Board filed Wireless Board's Response to TracFone's Appeal to the Full Commission. TracFone filed a Reply on Appeal to the Full Commission on February 9, 2009.

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[2] The September 18, 2008 Docket Entry requested that TracFone produce evidence that it possessed a CTA. If TracFone did not possess a CTA, the Docket Entry explained that TracFone should apply to the Commission for a CTA by October 17, 2008 in a proceeding separate from the current Cause. TracFone failed to comply with this Docket Entry.

[3] TracFone argued in the Motion to Dismiss that the CTA issue could not serve as a basis for Commission jurisdiction over TracFone. TracFone noted that the September 18, 2008 Docket Entry requested that TracFone submit its application for a CTA in a separately docketed proceeding and, therefore, asserted that the CTA issue had been severed from the current Cause. TracFone then stated, "In compliance with the Docket Entry, TracFone will address the CTA application matter on October 17, 2008, *in a new proceeding with a separate cause number*." (Motion to Dismiss, p. 10)(emphasis added).

On February 9, 2009, the Wireless Board filed with the Commission the Wireless Board's Request for Administrative Notice ("Request for Administrative Notice"). In its Request for Administrative Notice, the Wireless Board requested that the Commission take Administrative Notice of an attached Notice of Tort Claim served on the Wireless Board by TracFone. On February 19, 2009, TracFone filed a Response to the Board's Request for Administrative Notice ("Response") requesting that the Commission deny the Request for Administrative Notice. The Wireless Board filed a Reply to TracFone's Response on February 26, 2009. Finally, on March 4, 2009, the Wireless Board filed a Supplemental Reply to TracFone's Response. The Presiding Officers granted the Request for Administrative Notice pursuant to a Docket Entry issued on March 18, 2009.

3. <u>Commission's Discussion and Analysis</u>. There are two issues to be decided by the Commission in this Cause: 1. Whether the Commission has subject matter jurisdiction to address the Complaint as filed pursuant to Ind. Code § 8-1-2 *et seq.*; and 2. Whether the Commission has personal jurisdiction over TracFone such that it may require TracFone to file a CTA with the Commission. While the Parties' submissions to the Commission on these matters were not particularly helpful in the rendering of a final decision, the Commission will discuss each issue separately.

First, the Commission considers whether it has subject matter jurisdiction to resolve the dispute raised in the Wireless Board's Complaint concerning TracFone's remittance of the Wireless Fee to the Wireless Board. The Commission notes that the Indiana Supreme Court stated, "When faced with a question of statutory interpretation, we first examine whether the language of the statute is clear and unambiguous. If it is, we need not apply any rules of construction other than to require that words and phrases be given their plain, ordinary, and usual meanings." *State v. Am. Family Voices, Inc.*, 898 N.E.2d 293, 297 (Ind. 2008)(citation omitted). Accordingly, the Commission shall examine the applicable Federal and State statutes.

47 U.S.C. 332(c)(3)(A), provides in part:

> "[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any [CMRS] or any private mobile service, except that this paragraph shall not prohibit a State from regulating other terms and conditions of [CMRS]."

Ind. Code § 36-8-16.5-50 provides:

> The utility regulatory commission may not exercise jurisdiction over the:
> (1) rates;
> (2) terms; or
> (3) conditions;
> of CMRS service, including a CMRS mobile phone.

Ind. Code § 8-1-2.6-1.1 provides:

> The commission shall not exercise jurisdiction over:
> (1) advanced services (as defined in 47 CFR 51.5);
> (2) broadband service, however defined or classified by the Federal Communications Commission;
> (3) information service (as defined in 47 U.S.C. 153(20));

(4) Internet Protocol enabled retail services:
(A) regardless of how the service is classified by the Federal Communications Commission; and
(B) except as expressly permitted under IC 8-1-2.8;
(5) commercial mobile service (as defined in 47 U.S.C. 332); or
(6) any service not commercially available on March 28, 2006.

According to Federal law, 47 U.S.C. 332(c)(3)(A), the Commission retains jurisdiction over CMRS, but that jurisdiction pertains only to "other terms and conditions." Ind. Code § 36-8-16.5-50 goes a step further and removes terms and conditions of CMRS service from the Commission's jurisdiction. In addition, Ind. Code § 8-1-2.6-1.1 generally removes commercial mobile service from Commission jurisdiction. However, we also note that the Commission has been specifically provided with jurisdiction over certain matters in which CMRS providers may be subject to Commission jurisdiction, including Universal Service Fund, applications for a CTA, and review of applications for designation of a telecommunications provider as an Eligible Telecommunications Carrier. (See e.g., Ind. Code § 8-1-2.6-13; Ind. Code § 8-1-32.5 *et seq.*; and 47 U.S.C. § 214(e)).

The Wireless Board asserted in its Complaint, in its Substitute Complaint, and in its Response that Ind. Code § 8-1-2-54 provides the Commission with jurisdiction to address the remittance of the Wireless Fee.

Ind. Code § 8-1-2-54 provides:

> Upon a complaint made against any public utility by any mercantile, agricultural or manufacturing society or by any body politic or municipal organization or by ten (10) persons, firms, limited liability companies, corporations, or associations, or ten (10) complainants of all or any of the aforementioned classes, or by any public utility, that any of the rates, tolls, charges or schedules or any joint rate or rates in which such petitioner is directly interested are in any respect unreasonable or unjustly discriminatory, or that any regulation, measurement, practice or act whatsoever affecting or relating to the service of any public utility, or any service in connection therewith, is in any respect unreasonable, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or can not be obtained, the commission shall proceed, with or without notice, to make such investigation as it may deem necessary or convenient. But no order affecting said rates, tolls, charges, schedules, regulations, measurements, practice or act, complained of, shall be entered by the commission without a formal public hearing.

Pursuant to Ind. Code § 8-1-2-54, the Commission has jurisdiction over complaints that affect the rates or service of a public utility. While we recognize that the Wireless Board is a body politic[4] and

[4] According to Ind. Code § 36-8-16.5-18, the Wireless Board "is a body corporate and politic . . . ."

TracFone is a public utility,[5] Ind. Code § 36-8-16.5-50 specifically provides that the Commission may not exercise jurisdiction over the "rates; terms; or conditions of CMRS service . . . ." Consequently, the Commission agrees that Ind. Code § 36-8-16.5-50 and Ind. Code § 8-1-2.6-1.1 remove from the Commission's subject matter jurisdiction the specific issue raised in the Complaint regarding TracFone's remittance of the Wireless Fee to the Wireless Board.

In reaching this conclusion, the Commission notes that the legislature specifically provided the Wireless Board with avenues for relief other than the Commission. The Enhanced Wireless Emergency Telephone Act, Ind. Code § 36-8-16.5 *et seq.*, ("Act") addresses provisions surrounding an emergency telephone system and the fee associated with maintaining that system.[6] Specifically, Ind. Code § 36-8-16.5-28(a)(3) authorizes the Wireless Board to "[a]dopt rules under IC 4-22-2" to implement the provisions of the Act. In addition, Ind. Code § 36-8-16.5-28(a)(4) provides that the Wireless Board may "[t]ake other necessary or convenient actions . . . that are not inconsistent with Indiana law." Therefore, the Wireless Board has the ability to take any action it deems necessary, including a civil enforcement action, to fulfill its statutory obligations concerning the collection of the Wireless Fee.

Further, while Ind. Code § 36-8-16.5 *et seq.* pertains generally to the creation of the Wireless Board, the creation of an emergency system for CMRS subscribers, and the remittance of the Wireless Fee by CMRS providers to the Wireless Board, Ind. Code § 36-8-16.5-16(2) explains that an emergency telephone system is one that "is complimentary to a wireless enhanced emergency telephone system (as defined in [Ind. Code §] 36-8-16-2)." Ind. Code § 36-8-16-3 defines "exchange access facility" to include "a mobile telephone system trunk, whether the trunk is provided by a telephone company or a *radio common carrier*. . . ." (emphasis added). Accordingly, the Wireless Board may be able to address TracFone's failure to remit the Wireless Fee pursuant to Ind. Code § 36-8-16-19, which states, "A service supplier that intentionally fails to collect or remit the enhanced emergency telephone system fee as required by this chapter commits a Class A infraction."

In accordance with Ind. Code § 36-8-16.5-50, Ind. Code § 8-1-2.6-1.1, and the findings above, the Commission hereby grants TracFone's Motion to Dismiss as it pertains to the Commission's authority to resolve a dispute regarding the remittance of the Wireless Fee to the Wireless Board. The Commission now turns to the issue of TracFone's failure to possess a CTA.

TracFone argued in its Appeal that pursuant to Ind. Code § 36-8-16.5-50 and Ind. Code § 8-1-2.6-1.1 the Commission lacks jurisdiction to require TracFone to file an application for a CTA. During the pendency of this proceeding, the statutory requirements pertaining to the application of a CTA changed. Ind. Code § 8-1-32.5 *et seq.* sets forth the statutory requirements that apply to CTAs after June 30, 2009. Specifically, Ind. Code § 8-1-32.5-6 states that communications service providers who

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[5] Ind. Code § 8-1-2-1 defines "public utility" as "every corporation, company, partnership, limited liability company, individual, association of individuals, their lessees, that may own, operate, manage or control any plant or equipment within the state for the (1) Conveyance of telegraph or telephone messages . . . ." The Commission notes that in footnote four on page four of the Motion to Dismiss, TracFone stated, without citing to a specific statutory definition, that it is not a public utility for the purposes of Ind. Code § 8-1-2-54 and explained, "TracFone does not own, manage or operate any facilities or network in Indiana." TracFone omitted the word "control" and "equipment," which are specifically listed in Ind. Code § 8-1-2-1 and added the words "facilities" and "network." In order to provide CMRS services, TracFone would undoubtedly control equipment to do so, and therefore falls with the definition of a public utility.

[6] Ind. Code § 36-8-16-2 generally defines "enhanced emergency telephone system" as one that uses 911 to report automatic location and numerical identification information in various emergency situations.

wish to provide communications services in the state of Indiana shall submit an application for a CTA to the Commission. Ind. Code § 8-1-32.5-6 also details the information that a communications service provider shall report to the Commission. Ind. Code § 8-1-32.5-4 states that the definition of communications service provider includes providers of CMRS services.

On July 10, 2009, TracFone filed its application for a CTA in Cause No. 43732. Therefore, the Commission finds that all issues concerning TracFone's possession of a CTA will be considered in Cause No. 43732, which has subsequently been consolidated with Cause No. 41052 ETC 54. Furthermore, as a result of the requirements of Ind. Code § 8-1-32.5-6 and TracFone's submission of its CTA application, the Commission finds it unnecessary to address TracFone's Appeal to the full Commission as it is now moot.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. TracFone's Motion to Dismiss is hereby granted as it pertains to the Wireless Board's Complaint.

2. TracFone's application for a CTA shall be addressed in Cause No. 43732.

3. This Order shall be effective on and after the date of its approval.

LANDIS, MAYS AND ZIEGNER CONCUR; HARDY AND ATTERHOLT ABSENT:

APPROVED: AUG 0 4 2010

I hereby certify that the above is a true and correct copy of the Order as approved.

Brenda A. Howe

Brenda A. Howe
Secretary to the Commission