Greenberg Traurig

Mitchell F. Brecher
(202) 331-3152
BrecherM@gtlaw.com

April 1, 2008

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: CC Docket No. 96-45
EX PARTE PRESENTATION

Dear Ms. Dortch:

TracFone Wireless, Inc. has pending before the Commission several petitions for designation as an Eligible Telecommunications Carrier (ETC) pursuant to Section 214(e) of the Communications Act. In those petitions, TracFone seeks designation as an ETC for the sole purpose of offering Lifeline service to low income consumers. Eight of those applications (for the states of New York, Virginia, Florida, Connecticut, Massachusetts, North Carolina, Tennessee, and Alabama) have been pending since 2004. We understand that an order has been circulated to the Commissioners which would act on those applications.

Recently, it has been brought to TracFone's attention that one or more of the Commissioners may have concerns about TracFone's compliance with state E911 funding requirements. The E911 issue was raised in comments filed by the Pennsylvania Office of Consumer Advocate and the National Emergency Numbers Association, Keystone Chapter. Those comments were filed on February 8, 2008 in response to another TracFone petition filed December 11, 2007 requesting designation as an ETC in the Commonwealth of Pennsylvania. Although it is our understanding that TracFone's Pennsylvania ETC petition is not included in the order under consideration by the Commission, the purpose of this letter is to describe to the Commission the Pennsylvania E911 issue so that it not be misunderstood and so that it not cause any further delay in approval of the eight TracFone petitions filed in 2004.

Those comments alleged that TracFone was not remitting E911 fees collected from its customers as required by Pennsylvania law. Attached hereto are TracFone's reply comments to the comments which were filed by the Pennsylvania Office of Consumer Advocate and the National Emergency Numbers Association, Keystone Chapter In those reply comments, TracFone explains why

it is not in violation of the Pennsylvania Public Safety Emergency Act or any other provision of Pennsylvania law. Further, it provides information which contradicts the assertion of the commenters that all other telecommunications providers are complying with that law. The reply comments also explain that TracFone has been engaged in a dialogue with the Office of Consumer Advocate and with the Keystone Chapter of NENA and that, as a result of those discussions, the parties have agreed to work cooperatively to develop E911 fee collection methods which will enable collection of E911 fees from all customers of prepaid wireless services without unfairly burdening or disadvantaging any provider. It is important to note that the comments directed at TracFone's Pennsylvania ETC petition contained allegations regarding collection of E911 fees. No allegations have ever been made by any party that TracFone does not make available to its customers access to 911 and E911 service in accordance with applicable 911 requirements. Finally, in those reply comments, TracFone describes the difficulties which have been encountered in many states in imposing E911 fees on prepaid wireless services in a manner which conforms with the competitive neutrality and non-discrimination requirements of the Communications Act, and suggests that the question of E911 funding be addressed by the Commission in an appropriate proceeding, not in a carrier-specific ETC proceeding.

Pursuant to Section 1.1206(b) of the Commission's rules, this notice is being filed electronically in the above-captioned docket. If you have any questions regarding this letter or the attachments submitted herewith, please contact undersigned counsel for TracFone.

Sincerely,

Mitchell F. Brecher

Attachment

cc: Mr. Ian Dillner
Mr. Scott M. Deutchman
Mr. Scott Bergmann
Ms. Renee R. Crittendon
Mr. Chris Moore
Mr. John W. Hunter

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
TracFone Wireless, Inc.	)	
	)	
Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Pennsylvania	)	
	)	
	)	

REPLY COMMENTS OF TRACFONE WIRELESS, INC.

TracFone Wireless, Inc. ("TracFone"), by its attorneys, hereby submits its reply to the comments which were filed on February 8, 2008 with regard to TracFone's above-captioned petition for designation as an Eligible Telecommunications Carrier in the Commonwealth of Pennsylvania for the limited purpose of offering a prepaid wireless Lifeline service to low-income households in Pennsylvania. Comments on the petition were filed by the National Association of State Utility Consumer Advocates (NASUCA) and joint comments were submitted by the Pennsylvania Office of Consumer Advocate and the National Emergency Numbers Association, Keystone Chapter (PAOCA/NENA).

In its comments, NASUCA states that its concerns about TracFone's proposed Lifeline programs have been satisfied. TracFone is gratified that it has been able to alleviate NASUCA's concerns and that NASUCA has no objections to TracFone's petition for designation as an ETC in Pennsylvania.

PAOCA/NENA's comments contain no allegations that TracFone is not qualified to be designated as an ETC or that TracFone has not satisfied any ETC requirement either codified in the Communications Act or promulgated by the Commission. Rather, PAOCA/NENA alleges that TracFone is not in compliance with Pennsylvania law regarding collection of E911 fees and that grant of TracFone's ETC petition should be conditioned upon a commitment by TracFone to comply with the Pennsylvania Public Safety Act (35 P.S. § 7011 *et seq.*).[1] As will be described in these reply comments, PAOCA/NENA has provided no legal basis either for denying TracFone's Pennsylvania ETC petition or for conditioning approval of the application. Accordingly, the petition should be granted without delay. However, PAOCA/NENA's comments raise an important public interest issue regarding state laws governing collection of E911 fees and whether those laws, as enacted and as applied by certain states, undermine the nation's telecommunications policies as reflected in the Communications Act. TracFone encourages the Commission to address these important issues in a holistic manner in an appropriate proceeding, not on a piecemeal, state-specific basis in the context of one ETC petitioner's designation proceeding.

I. THE COMMISSION HAS ARTICULATED THE PUBLIC INTEREST FACTORS TO BE CONSIDERED IN ETC DESIGNATIONS AND TRACFONE HAS DEMONSTRATED COMPLIANCE WITH EACH OF THOSE FACTORS

In Federal-State Joint Board on Universal Service (*Report and Order*), 20 FCC Rcd 6371 (2005) ("ETC Order"), the Commission established the guidelines and criteria it would apply in considering applications for designation as ETCs. In that order, the Commission held that ETC applicants must demonstrate the following: 1) a commitment and ability to provide services, including service to all customers within their proposed service areas; 2) how they will remain

[1] PAOCA/NENA Comments at 7.

functional in emergency situations; 3) that they will satisfy consumer protection and service quality standards; 4) that they will offer local usage comparable to that offered by the incumbent local exchange carriers; 5) that they understand that they may be required to provide equal access if all other ETCs in the designated service areas relinquish their designations pursuant to Section 214(e)(4) of the Communications Act.[2] In its ETC petition, TracFone demonstrated that it would conform with each of the criteria. Indeed, nothing in PAOCA/NENA's comments even alleges that TracFone has not made all the applicable showings required by the Commission.

It must be borne in mind that the Lifeline program established by the Commission is an essential component of the national universal service policy codified at Section 254 of the Act. In this regard, the Commission's (and PAOCA/NENA's) attention is directed to Section 254(b) which states, in relevant part, as follows:

> (b) UNIVERSAL SERVICE PRINCIPLES. - The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:
>
> . . .
>
> (3) ACCESS IN RURAL AND HIGH COST AREAS. Consumers in all regions of the Nation, <u>including low income consumers</u> and those in rural, insular and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.
> (emphasis added)

The Commission's establishment of the Lifeline program and TracFone's proposal to offer free prepaid wireless service to Lifeline-eligible low income consumers are in furtherance of the express statutory goal of making affordable telecommunications service available to low

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[2] <u>ETC Order</u> at ¶ 20.

income consumers. TracFone has demonstrated that it will conform with every applicable Commission requirement imposed upon ETCs and that its Lifeline offerings will make available affordable service to low income Pennsylvania households. In fact, TracFone's Lifeline plans would go beyond offering affordable service. Qualified Lifeline customers would receive specified quantities of free wireless service each month.

Indeed the Pennsylvania Consumer Advocate, whose office has expressed misgivings about TracFone's ETC proposal, has actively supported Lifeline and has noted with justifiable concern that the Lifeline program is not benefiting the Commonwealth of Pennsylvania. For example, in July 2003, Consumer Advocate Sonny Popowsky, testified at a hearing in support of telecommunications legislation, and stated as follows:

> In the year 2001, Pennsylvania consumers paid approximately $24 million into the federal universal service fund for Lifeline, but Pennsylvania consumers received only $6 million in assistance from that fund. That is because of the very low participation rate of Pennsylvania consumers in the Lifeline program. While Pennsylvania's Lifeline participation rate improved in 2002, it is still woefully inadequate, and we are literally leaving millions of dollars in federal universal service Lifeline funds on the table.[3]

If designated as an ETC to provide Lifeline service in Pennsylvania, TracFone believes that it will be able to extend Lifeline service to some portion of the nearly eighty-four percent of low income Lifeline-eligible households not currently participating in the program.

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[3] Testimony of Sonny Popowsky, Consumer Advocate, Before the Pennsylvania House Consumer Affairs Committee, Regarding House Bill 1669, Telecommunications Legislation. State College, PA, July 11, 2003. Mr. Popowsky's concerns about Pennsylvania's low Lifeline participation rate are, unfortunately, well-founded. According to Commission data, Pennsylvania's Lifeline participation rate for 2002 was only 16.2 percent. Lifeline and Link-Up (*Report and Order*), 19 FCC Rcd 8302 (2004), at Appendix K - Section 1: Baseline Information Table 1.A. Baseline Lifeline subscription information (Year 2002).

Accordingly, there is no reason not to grant TracFone's petition for designation as an ETC in the Commonwealth of Pennsylvania.[4]

II. THE COMMISSION SHOULD CONSIDER IMPORTANT ISSUES REGARDING STATE FUNDING OF E911 IN AN APPROPRIATE PROCEEDING

Although not relevant to whether TracFone has satisfied each of the Commission's requirements for ETC designation in Pennsylvania, PAOCA/NENA allege that TracFone has not fulfilled its obligations under Pennsylvania law to collect wireless E911 fees.[5] In fact, PAOCA/NENA goes so far as to assert that TracFone is the only telecommunications company which does not comply with Pennsylvania law regarding collection of 911 fees.[6] Although E911 fee collection is an important issue, PAOCA/NANA is wrong in its assertions on that point. First, TracFone denies that it is in violation of the Pennsylvania Public Safety Emergency Telephone Act or any other provision of Pennsylvania law. Moreover, PAOCA/NENA has provided no factual basis for its assertion that every telecommunications provider except TracFone complies with that law, and there is no such factual basis as the assertion is indeed incorrect. TracFone is aware of filings made by other providers of prepaid wireless services in

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[4] In the Commission's 2005 order granting TracFone's petition for forbearance, the Commission imposed a series of conditions on its grant of that forbearance petition. In the Matter of Federal-State Joint Board on Universal Service and Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i), 20 FCC Rcd 15095 (2005). TracFone has committed to conforming with those conditions as set forth in the Compliance Plan filed with the Commission in October 2005.

[5] PAOCA/NENA Comments at 2.

[6] *Id.* at 5 (". . . all wireline local exchange carriers, competitive local exchange carriers and resellers, as well as wireless services providers, comply with the Pennsylvania Act and collect 911 fees - except TracFone.").

public forums which admit that such providers cannot and do not collect from customers E911 surcharges in Pennsylvania.[7]

What is required by that Pennsylvania statute, how it is construed, applied and enforced are, of course, questions of state law.[8] They are not matters for the Federal Communications Commission to adjudicate, nor are they matters which are in any way relevant to universal service, ETC designation and the federal Lifeline program.[9]

While not relevant to the instant ETC designation proceeding, PAOCA/NENA's comments raise an issue of importance which warrants the attention of the Commission in an

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[7] For example, in Connecticut Department of Public Utility Control Docket No. 06-12-09, in March 2007, Sprint Nextel, Verizon Wireless, Alltel, and T-Mobile submitted responses to data requests in which those carriers indicated that they do not collect E911 surcharges from their prepaid customers in any states, including Pennsylvania.

[8] As written, the provision of the Pennsylvania statute imposing the E911 surcharge on prepaid wireless services is not applicable to certain providers, including TracFone. 35 P.S. § 7021.4(b)(4) states as follows:

> In the case of prepaid wireless telephone service, the monthly wireless 911 surcharge imposed by this section shall be remitted based upon each prepaid wireless account in any manner consistent with the provider's existing operating or technological abilities, such as customer address, location associated with the MTN [mobile telephone number], or reasonable allocation method based upon comparable relevant data and associated with Pennsylvania, for each wireless customer with an active prepaid wireless account and has a sufficient positive balance as of the last day of each month, if such information is available.

Some providers, including TracFone, do not have available to them information as to whether any customer has a sufficient positive balance on the last day of each month. Thus, the statutory requirement as written is not applicable to such providers.

[9] Subsequent to receipt of the PAOCA/NENA comments, representatives of TracFone held a telephonic meeting with a member of the Consumer Advocate's office and one of the NENA (Keystone Chapter) members. During that meeting, it was explained that many providers of prepaid wireless service (not just TracFone) are unable to collect E911 surcharges from customers as a result of the collection methods contemplated by the statute. There was agreement to work cooperatively to develop collection methods which would enable E911 surcharges to be collected from all customers without unfairly burdening or competitively disadvantaging any provider.

appropriate proceeding. Many states, including Pennsylvania, have enacted laws to provide funding for 911 and E911 services. Ubiquitous provision of E911 service is an essential public safety matter and TracFone fully supports efforts to provide adequate funding for E911 service in every state. State laws governing E911 funding must be consistent with the requirements of the Communications Act. Section 253(b) of the Act authorizes states to impose requirements necessary to "protect the public safety and welfare."[10] However, that grant of authority is not unlimited. Such requirements necessary to protect the public safety and welfare must be imposed "on a competitively neutral basis."[11]

Most state 911 collection laws, including Pennsylvania's, impose the payment obligation on customers. Implementation of these statutory requirements for post-paid services (wireline or wireless) is relatively simple: carriers include in their periodic invoices the required surcharge or fee; collect the billed fee from customers; and remit the collected amounts to the state department or agency which administers E911. That model simply is not workable for prepaid services since there is no billing mechanism to collect the E911 surcharges and fees from customers. TracFone and others have addressed this problem in numerous states, including Pennsylvania.[12] Based on those experiences, there is only one E911 fee collection method which would result in payment by all prepaid wireless customers of state 911 fees. That method is to collect the fee from the customer at the time and place of sale of the service.

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[10] 47 U.S.C. § 253(b).

[11] *Id.*

[12] TracFone has been communicating with the Pennsylvania officials, specifically with the Commonwealth of Pennsylvania Emergency Management Agency, since 2004 regarding its concerns that the Pennsylvania Public Safety Emergency Telephone Act does not provide a workable collection mechanism for non-billed, prepaid services. Indeed, on multiple occasions, TracFone has offered to work with state officials in Pennsylvania, and in other states, to develop E911 collection and remission methods which are workable with prepaid services.

The inability of providers of prepaid wireless services to collect from customers E911 fees on purchases of service made through retail vendors is not a problem unique to TracFone. Collection of E911 fees on sales has been a problem throughout the wireless industry. In recognition of the inherent difficulties of attempting to impose E911 fee collection mechanisms designed for the post-paid portion of the industry on the prepaid industry segment, CTIA - the Wireless Association™ recently articulated a series of Wireless Principles for 9-1-1 Fees and Surcharges. A copy of those principles is attached hereto. The Commission's attention is directed to Principle No. 5. That principle states as follows:

> **Fees Should be Imposed on End-User**
>
> Wireless E911 fees were established to be imposed on the end user (the beneficiary of being able to access the 911 system) and should not be imposed on or set up in a manner that results in the fee being imposed on the communications service provider. As in the case of all other wireless services, the E911 fee on prepaid wireless service should be collected on the purchase of the service. However, unlike other wireless service, prepaid wireless services are not billed on a monthly basis and are often sold through retail channels that are not exclusive to wireless carriers. Therefore, in order to help ensure ongoing end user support of E911 funding by wireless prepaid customers, **the wireless industry maintains that it will be necessary to collect the E911 fee on all retail sales of wireless prepaid airtime whether sold by retail merchants or wireless service providers**. This could be done in an efficient and transparent method by having all retailers collect the E911 fee as percentage based equivalent of the fee on each prepaid wireless transaction. (emphasis added)

The CTIA principle stated above represents a broad recognition within the wireless telecommunications industry that E911 collection mechanisms designed specifically for billed post-paid services are not appropriate for the prepaid segment of the industry, and that state efforts to impose the fee payment obligation directly on service providers places an economic burden on those providers which is inconsistent with the concept of competitive neutrality embodied in the communications Act.

CONCLUSION

As explained in these reply comments, PAOCA/NENA's assertions regarding TracFone's compliance with Pennsylvania's 911 statute involve questions of state law and have no bearing on TracFone's qualifications to be designated as an ETC in the Commonwealth of Pennsylvania based upon the Commission's ETC criteria. Accordingly, TracFone's ETC petition should be promptly granted. However, the PAOCA/NENA comments have brought to the Commission the manner in which certain states have attempted to impose their E911 collection requirements on prepaid services. That is an important matter which involves issues of public safety and competitive neutrality which should be addressed on a national level.[13]

Respectfully submitted,

TRACFONE WIRELESS, INC.

By: _____
Mitchell F. Brecher
GREENBERG TRAURIG, LLP
2101 L Street, NW
Suite 1000
Washington, D.C. 20037
(202) 331-3100

Its Attorneys

February 25, 2008

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[13] In its initial E-911 proceeding more than a decade ago, the Commission acknowledged that it has jurisdiction over E911 funding but declined to preempt the states or to impose a uniform national E911 funding mechanism based on circumstances which existed at that time. See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems (*Report and Order and Further Notice of Proposed Rulemaking),* 11 FCC Rcd 18676 (1996), at ¶¶ 88-89, Order on Reconsideration, 12 FCC Rcd 22665 (1997), at ¶¶ 143-146. At that time, prepaid wireless service had not been introduced in any significant manner and few states had yet adopted E911 collection laws. Thus, the issues of discriminatory treatment and competitive neutrality described herein had not yet emerged.

Wireless Principles for 9-1-1 Fees and Surcharges

The goal of the wireless industry is to work with state policymakers and public safety officials to ensure that E911 service is a coordinated and collaborative operation between the private and public sector to provide quality E911 service at a reasonable cost. Wireless consumers provide significant capital to support public safety, through their payment of taxes, fees and surcharges. This funding is extremely critical to our nation's public safety systems, making it possible to obtain the necessary infrastructure to receive and act on wireless calls to emergency responders. These wireless calls help to save lives, locate missing children and prevent numerous crimes.

Wireless carriers annually collect nearly $2 billion dollars of dedicated taxes, fees and surcharges from wireless consumers for the purpose of supporting and upgrading the technical capabilities of the 6,174 Public Safety Answering Points (PSAPs) that exist across the country. In addition to the nearly $2 billion dollars annually collected from consumers and remitted to state and local governments, wireless service providers have also expended billions to modify their networks to enable them to identify and locate wireless 911 callers.

The taxes and fees collected from wireless consumers at the state and local level under the auspices of E911 deployment were collected to advance these stated public policy goals and must be solely dedicated to the advancement of E911. To that end, the wireless industry endorses the following principles concerning revenue collection and disbursement relative to E911 statutes in the states:

1. **Funds Should be Spent on E911 Systems**
2. **Need for Accountability and Audits**
3. **Justify Costs or Reduce Imposition**
4. **Funds Should Not be Raided or Diverted**
5. **Fees Should be Imposed on End-User**
6. **Collection at the State Level, Not Locality by Locality**
7. **Funding Should Ultimately be from General Revenue**

1400 16th Street, NW Suite 600 Washington, DC 20036 Main 202.785.0081 Fax 202.785.0721 www.ctia.org

Funds Should be Spent on E911 systems

The intent of E911 fees is to specifically support the costs to establish and maintain the emergency communications systems so that PSAPs have the ability to call back wireless 911 callers and pinpoint their location within FCC prescribed guidelines. Unfortunately, many policymakers incorrectly believe that E911 fees should be used for all sorts of basic public safety services. An emerging trend in multiple states is to ignore the intended purpose of E911 fees and instead use government imposed 911 fees to support general government services. These services that benefit all constituents are important. However, government services that are not directly related to establishing and maintaining emergency communications systems should be funded through general revenue funds that are raised by broad-based taxes and not through E911 fees imposed on users of communications services.

Need for Accountability and Audits

E911 operations and expenditures should not only be efficient, but also transparent and accountable to an oversight board and to the public through annual reports to the legislature and/or Governor. Annual reports should contain information regarding collections and expenditures and progress toward the goal of statewide deployment.

Justify Costs or Reduce Imposition

E911 services must be periodically reviewed and E911 fees shall be adjusted based on actual direct costs of achieving statewide deployment of wireless E911 service. As with any system implementation, funding requirements should decrease as soon as states become Phase I and Phase II compliant. Accordingly, E911 fees should be eliminated or substantially reduced once Phase I and Phase II compliance is achieved. The funding for the recurring costs of operating the system and providing emergency services to the general public should be provided from general revenue funds that are raised by broad-based taxes and not through E911 fees.

Funds Should not be Raided or Diverted

The capital provided in good faith by wireless consumers through 911 fees or surcharges has been and continues to be extremely critical in supporting public safety in a given state. However, the taxes and fees collected from wireless consumers at the state and local level under the auspices of E911 deployment need to be solely dedicated to the advancement of E911 deployment and not used for other revenue purposes.

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Fees Should be Imposed on End-user

Wireless E911 fees were established to be imposed on the end user (the beneficiary of being able to access the 911 system) and should not be imposed on or set up in a manner that results in the fee being imposed on the communication service provider. As in the case of all other wireless services, the E911 fee on prepaid wireless service should be collected on the purchase of the service. However, unlike other wireless service, prepaid wireless services are not billed on a monthly basis and are often sold through retail channels that are not exclusive to wireless carriers. Therefore, in order to help ensure ongoing end user support of E911 funding by wireless prepaid customers, the wireless industry maintains that it will be necessary to collect the E911 fee on all retail sales of wireless prepaid airtime whether sold by retail merchants or wireless service providers. This could be done in an efficient and transparent method by having all retailers collect the E911 fee as percentage based equivalent of the fee on each prepaid wireless transaction.

Collection at State level, not Locality by Locality

Wireless E911 fees should be established and collected on a statewide basis, with a single centralized collection agent and a single statewide E911 fee rate. Collection of a single, statewide fee reduces administrative burdens imposed upon communication service providers related to sourcing E911 fees to the proper local jurisdictions. Collecting fees at different rates which can change with little notice, and remitting multiple tax returns to local jurisdictions is onerous and time consuming. The centralized collection agent would then be properly positioned to determine a fair and equitable distribution to local jurisdictions. In those states where the wireless E911 fee is now locally administered, every effort should be made to transition toward an efficient statewide system as quickly as possible.

Funding Should Ultimately be from General Revenue

Sound tax policy supports the principle that government costs related to providing a common public service, such as E911 service, should be funded from general revenue. E911 services benefit all Americans and in the 21st Century the need for a transparent, fully functioning, fully funded, efficiently run system is critical, the cost of which should be borne by all constituents. However, the industry recognizes that migrating from the fee structure that exists today to full funding for these costs from general revenues will take time and is recognized as a long-term goal of the industry.

1400 16th Street, NW Suite 600 Washington, DC 20036 Main 202.785.0081 Fax 202.785.0721 www.ctia.org

CERTIFICATE OF SERVICE

I, Michelle D. Guynn, a Legal Secretary with the law firm of Greenberg Traurig, LLP, hereby certify that on February 25, 2008 a true and correct copy of the foregoing Reply Comments of TracFone Wireless, Inc., was mailed to the following:

Charles A. Acquard, Executive Director
National Association of
State Utility Consumer Advocates
8380 Colesville Road
Suite 101
Silver Spring, MD 20910

Barrett C. Sheridan, Esq.
Assistant Consumer Advocate
Pennsylvania Office of Consumer Advocate
555 Walnut Street
5th Floor Forum Place
Harrisburg, PA 17101-1923

Timothy W. Baldwin, ENP
Deputy Director
Lancaster County-Wide Communications
Post Office Box 487
Manheim, PA 17545-0487

Michelle D. Guynn