

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition of TracFone Wireless, Inc.)	CC Docket No. 96-45
For Modification of Public Safety)	
Answering Point Certification)	
Condition)	
)	
Petitions of Virgin Mobile USA, L.P. for)	CC Docket No. 96-45
Forbearance and for Designation as an)	
Eligible Telecommunications Carrier in)	
The State of New York and the Commonwealths)	
Of Pennsylvania and Virginia)	

**MOTION FOR PARTIAL DISMISSAL AND
RESPONSE TO EX PARTE SUBMISSION**

TracFone Wireless, Inc. (“TracFone”) hereby responds to the February 26, 2009 filing of the Pennsylvania Public Utility Commission (“PaPUC”) in the above-captioned matters which the PaPUC labels as an ex parte submission. To the extent that the PaPUC submission asks the Commission to reconsider any previously-issued Commission order which is now final, or to usurp the Commission’s authority to enforce, interpret, or modify existing Commission requirements and conditions adopted in orders which have now become final, TracFone respectfully moves that such portions of the PaPUC filing be dismissed. To the extent that the PaPUC filing advocates certain action to be taken by the Commission on any other pending matters, TracFone will address those portions of the filing which would impact TracFone’s interests.

A stated purpose for the PaPUC filing is to notify the Commission that on the same day as the filing -- February 26, the PaPUC issued a notice announcing that it was claiming jurisdiction to act on requests by wireless carriers for designation as Eligible

Telecommunications Carriers (“ETCs”) in the Commonwealth of Pennsylvania. Without addressing the legal bona fides of the PaPUC’s announcement, TracFone concurs that Section 214(e) of the Communications Act of 1934, as amended (47 U.S.C. § 214(e)) authorizes state commissions to designate ETCs in their respective states. States may exercise such jurisdiction to designate ETCs who are, like TracFone, Commercial Mobile Radio Service (CMRS) providers, despite the fact that states’ jurisdiction over CMRS is otherwise limited by Section 332(c)(3) of the Communications Act (47 U.S.C. § 332(c)(3)). Commission designation of ETCs is permitted only in situations where state commissions do not claim that jurisdiction or do not have jurisdiction over certain classes of carriers.¹

In 2004 when TracFone petitioned the Commission for ETC designation in the Commonwealth of Pennsylvania, there was no dispute that the PaPUC did not claim authority to designate wireless ETCs. Indeed, the PaPUC acknowledges that fact by issuance of its February 26 notice claiming **for the first time** that the PaPUC has jurisdiction to designate wireless ETCs. TracFone does not dispute the PaPUC’s authority to designate ETCs in Pennsylvania on a prospective basis. Therefore, TracFone

¹ The circumstances surrounding the PaPUC’s February 26 announcement of jurisdiction over wireless ETCs appear to be legally questionable. According to PaPUC records, the proceeding to consider whether to designate wireless ETCs was commenced only a few days earlier, on or about February 23. Moreover, the PaPUC appears to have taken this action without benefit of public comment. There is no indication that notice of the PaPUC’s action had even been published in the Pennsylvania Bulletin at the time that it notified the Commission. Whether such decision making processes comply with the requirements of Pennsylvania’s laws governing administrative procedure or with applicable administrative regulations are questions of state law, not federal law, and like other questions of state law, including, for example, the scope of Pennsylvania’s Public Safety Emergency Telephone Act, 35 P.S. §§ 7011 *et seq.*, such questions should be resolved by Pennsylvania tribunals of competent jurisdiction, not by the Commission.

takes no position as to whether or not the Commission should act on the pending petitions of Virgin Mobile USA, in light of the PaPUC's February 26 notice.

However, the conditions imposed on TracFone by the Commission in its 2005 order granting TracFone forbearance from the facilities-based requirement for ETCs codified at Section 214(e)(1)(A) of the Communications Act and Section 54.201(i) of the Commission's rules,² and in its 2008 order designating TracFone as an ETC in several jurisdictions, including Pennsylvania,³ are beyond the jurisdiction of the PaPUC. These were Commission-imposed requirements, and were imposed by the Commission at a time when the Commission -- and only the Commission -- had jurisdiction to designate wireless carriers as ETCs in Pennsylvania. Only the Commission had the authority to impose these conditions; only the Commission has the authority to remove or modify these conditions in states where they were imposed by the Commission.

Certainly, any interested person, including PaPUC and the Pennsylvania Emergency Management Agency ("PEMA") may comment to the Commission on requests to remove or modify those conditions, but neither they nor any other state departments have authority to reclaim supervision of Commission-imposed conditions from the Commission.

**The Commission Should Grant TracFone's PSAP Certification
Modification Petition as Soon as Possible**

Notwithstanding the procedural irregularities surrounding the PaPUC's sudden assertion of jurisdiction over wireless ETCs in Pennsylvania, TracFone deems it

² 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).

³ In the Matter of Federal-State Joint Board on Universal Service; TracFone Wireless, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of New York, et al, 23 FCC Rcd 6206 (2008).

necessary to respond to the PaPUC's latest effort to retard the PSAP certification process in Pennsylvania and, in doing so, deny TracFone's Lifeline service, including free wireless E911-compliant handsets and free airtime to low income Pennsylvania households. The PaPUC already has filed two sets of comments in opposition to TracFone's petition to modify the PSAP certification process. Neither of those prior filings offers a single substantive reason why the public interest would be served by denial of the petition, and this latest PaPUC filing offers nothing new. Once again, the centerpiece of the PaPUC's efforts to derail the PSAP certification process in Pennsylvania (or, at least in portions of Pennsylvania) is its repeated complaint about a lack of so-called "drive testing." The PaPUC persists in arguing that TracFone should be required to conduct "drive tests" as do other carriers.⁴

Drive tests involve tests conducted on wireless carriers' networks to confirm that 911 calls are routed to the serving PSAPs. Drive testing may be a sensible requirement for those carriers which own and operate wireless networks. However, as TracFone has explained repeatedly, as the Commission is well-aware, and as the PaPUC has repeatedly been told but refuses either to understand or to acknowledge, TracFone is a reseller -- IT HAS NO NETWORK, AND THEREFORE HAS NO NETWORK TO DRIVE TEST! TracFone provides service to its customers, including its Lifeline customers, by utilizing the networks of its underlying carrier vendors, all of whom are subject to applicable federal and state 911/E911 requirements; all of whose networks have been drive tested in Pennsylvania, all of which have been found to reliably deliver 911 calls to PSAPs.

⁴ PaPUC Ex Parte Submission at 6-7.

As TracFone has stated previously in this proceeding, before it would self-certify that its Lifeline customers have access to 911 and E911, it would first confirm with its underlying carriers serving the areas(s) covered by the PSAP in question that those underlying carriers route 911 calls from TracFone customers to the PSAPs' 911 call centers in the same manner that those carriers route 911 calls from their own retail customers. Moreover, all handsets provided by TracFone to Lifeline customers, in fact, all handsets made available by TracFone, are E911-compliant. Indeed, provision of E911-compliant handsets to Lifeline customers is an explicit condition imposed upon TracFone by the Commission. Finally, the Commission and the PaPUC are reminded that, during the more than ten years that TracFone has offered prepaid wireless services, it has not received a single complaint and is not aware of a single incident in which a TracFone customer was unable to connect a call to 911 from any location where wireless service is available -- not in Pennsylvania, not anywhere.

It is ironic that while PaPUC continues to oppose TracFone's reasonable and responsible proposal to modify the PSAP certification condition and while certain PSAPs in Pennsylvania continue to refuse to provide the certifications for reasons having nothing to do with 911 access (more on that below), many Pennsylvania PSAPs have provided the required certifications and have made it possible for TracFone to offer its SafeLink Wireless Lifeline service in portions of Pennsylvania. Recently, TracFone has received certification from several PSAPs in and around Pittsburgh and other portions of western Pennsylvania, including Erie and the Johnstown-Altoona area. Those communities, historically dominated by the coal and steel industries, have been among the most economically-depressed communities in Pennsylvania. In one month, TracFone has

enrolled more than 5,000 low income Pennsylvania households in its SafeLink Wireless program. Adding 5,000 new Lifeline customers in Pennsylvania in one month is a commendable achievement in a state where a decade of Lifeline service has produced only a 16.2 percent penetration rate.⁵ TracFone has every confidence that it will enroll thousands of additional low income Pennsylvanians in its SafeLink Wireless program once the PaPUC and certain local PSAPs are relieved of their ability to impede the availability of that service to those in Pennsylvania who need it most.

It has become disturbingly apparent that the reasons for PaPUC's, PEMA's, and other Pennsylvania PSAPs' continuing efforts to delay the introduction of SafeLink Wireless in Pennsylvania have nothing to do with questions as to whether TracFone Lifeline customers have access to 911 and E911 without regard to activation status or availability of prepaid minutes. Rather, it appears that other agendas underlie those entities' opposition and lack of cooperation in the PSAP certification process. It is no secret that PEMA and TracFone are engaged in a dispute over the requirements of the Pennsylvania Public Safety Emergency Telephone Act regarding E911 fees. As TracFone indicated in its February 9, 2009 opposition to PEMA's petition to reject TracFone's 911 compliance certification, that dispute is the subject of a pending law suit.⁶ Whether that law is applicable to prepaid wireless services and how providers of such services are to comply with that law if it is applicable are matters for the Pennsylvania court to determine, not for PEMA or the Commission.

⁵ Lifeline and Link-Up (*Report and Order and Further Notice of Proposed Rulemaking*), 19 FCC Rcd 8302 (2004), at Appendix K - Section 1: Baseline Information Table 1.A. Baseline Lifeline subscription information (Year 2002).

⁶ Pennsylvania Emergency Management Agency v. TracFone Wireless, Inc., No. 565 MD 2008, filed November 26, 2008 in the Commonwealth Court of Pennsylvania.

A recent news article indicates that another Pennsylvania PSAP -- the City of Philadelphia, has yet another extraneous reason for refusing to certify that TracFone Lifeline customers will have access to 911 and E911. Attached is an article from the February 22, 2009 edition of the Philadelphia Tribune. The article, entitled, "Free cell phone service gets static from city," describes the City of Philadelphia's continuing refusal to certify that TracFone Lifeline customers in Philadelphia will have access to 911 and E911. While the dispute over drive testing is mentioned, it is significant that other objections to PSAP certification in that city have been raised.⁷ The city's consumer advocate is quoted as comparing TracFone's Lifeline service to a "pay day loan" and a "trap" for low income consumers. That same consumer advocate also is quoted as saying that in order to get "his approval for certification," Philadelphia would have to require that the phones could be unlocked - freed from the TracFone system -- after six months.

The notion that any PSAP could delegate a role in the PSAP certification process to a consumer advocate or any other governmental or quasi-governmental office, or that other agencies and departments could impose conditions on PSAP certification which are unrelated to whether TracFone Lifeline customers will have access to 911 and E911 is inconsistent with the purpose for the PSAP certification requirement. Moreover, the assertion that any local government could purport to condition PSAP certification of 911 and E911 access on such irrelevant factors as one person's opinion as to the value of the service (a concern of rather dubious validity since the service is free) or a requirement

⁷ For the record, it should be noted that TracFone has provided the Philadelphia PSAP with TracFone handsets to be used by that PSAP, at its request, for 911/E911 testing. TracFone also has committed to cover the costs of those tests. Those handsets were provided to the city more than three weeks ago and to date TracFone has received no information as to whether the city has conducted the tests.

that wireless phones be unlocked is the best evidence yet that the PSAP certification requirement, however well-intentioned its purpose, is not working as intended, and is being perverted by certain local governments for reasons having nothing to do with whether customers are able to access 911. These recently-discovered factors provide ample reason why the Commission should immediately approve the alternative method for providing assurances of 911 and E911 access set forth in TracFone's petition for modification.

Respectfully submitted,

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ATTACHMENT

User Rating: ○○○○○○ / 0

Poor ○ ○ ○ ○ ● Best

News

Written by Eric Mayes

The city and cell phone provider TracFone are at odds over the telecom company's plan to give away free cell phones to low-income residents.

City officials said the company's phones have not been properly tested to make sure they meet federal standards. TracFone officials counter that the city is simply stonewalling.

Beyond that initial dispute, the city's consumer advocate compared the plan to a "payday loan" that hits the most economically vulnerable the hardest.

A company spokesman for TracFone said it has done everything the city wants to move the plan forward and that the concept provides a valuable emergency link for the poor.

"We've done everything we can on our end," said Jose Fuentes, director of government relations for TracFone.

According to data provided by TracFone, 450,000 residents would be eligible for the phones under the federally outlined Lifeline program, which would be distributed to residents who meet income requirements.

"We support the idea of giving lower-income Philadelphians better access to emergency services by providing free cell phones," Doug Oliver, a spokesman from the mayor's press office. "However, TracFone has been unwilling to rigorously test their phones' ability to access emergency services regardless of their activation status as required by the FCC to be eligible to receive a government subsidy."

Not everyone within the administration supported the concept.

The city's consumer advocate, Lance Haver, said the plan seemed like a trap for consumers who are already at the bottom of the economic ladder.

His concerns hinged on the fact that the plan gives users 42 free minutes but after that forces customers to buy minutes for as much as 20 cents a minute.

"This is an exploitation of low-income and struggling people and it's being done at a time when many people are facing real struggles," he said. "I would say it is not a good thing. It's not a lot different than payday loans."

Fuentes disagreed.

"You have a lot of people who are in need of service," he said. "By providing a free service to them they can save a little more money."

Consumer concerns are not at the center of the city's refusal to certify the phones. Rather, as Oliver explained, the administration must ensure they work as required, which means testing.



Shown here is the Tracfone Lg 3280 on the left and LG CG 225 on the right. – FILE PHOTO

Fuentes said TracFone has turned over phones so the city can test them: "They asked us for phones. We gave them the phones."

TracFone even offered to pay for the tests, he said, declining to say what those costs were.

"It was expensive. I don't want to give the number," he said. "But, yeah it was very expensive."

Oliver, too, declined to discuss the cost of the tests.

A source within the administration said the cost was approximately \$70,000.

But, Fuentes added, the cost of testing should not be a factor for the city.

"If it's going to cost us money — fine. If it's going to cost us money we'll gladly pay for it," he said. "And we still haven't heard any thing."

According to Fuentes, TracFone turned over phones three weeks ago for testing and city officials said those tests could be completed by Friday. At Tribune press time he still had not heard from the city, he said.

"We're hoping that they can actually comply with what they said," Fuentes said.

The difficulty stems from concerns about whether the phones function as they should. Federal law states that every cell phone must be able to tap into the 911 system whether the phone is activated or not.

The FCC mandates that county 911 centers certify that TracFone's phones are able to dial 911 even when deactivated. They also must be able to identify a caller's location when a phone dials 911.

Fuentes said the phones would reach 911 whether or not the user had minutes.

Oliver said it was the city's responsibility to guarantee that for its residents. That, he said, was the reason for the testing.

"Without that reassurance, it would be irresponsible for the city to certify these phones' ability to access emergency services," Oliver said. "Our first responsibility is to the safety of Philadelphians. They deserve phones that can reliably reach 911 in case of emergency and TracFone has not yet proven to us that their phones can do so."

If the city and TracFone can reach an agreement the company would give away the 450,000 phones and users would be given 42 free minutes each month. Those minutes would rollover at the end of the month.

Once the minutes are gone users can buy more, Fuentes said. They can be purchased on standard TracFone cards or discounted SafeLink cards.

Time can be purchased in increments. A \$3 card provides 15 minutes, \$5 buys 30 minutes, \$10 buys 50 minutes — that's a per minute cost of 20 cents.

Though Fuentes would not talk about how the company made money on its phone giveaway he did acknowledge that it did.

"We are a for-profit company and we are able to make some money off of how we have the business model structured," he said.

Haver said that to gain his approval for certification the city would have to stipulate that the phones could be unlocked — freed from the TracFone system — after six months.

“The only way I would be supportive of the city approving this was if they unlocked the phones,” he said.

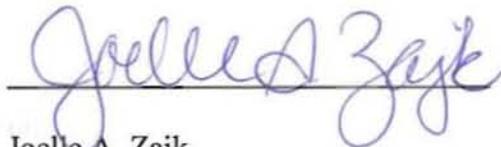
Philadelphia is not alone in not certifying the phones; 18 other Pennsylvania counties have also declined to certify the phones.

In addition, the company is involved in a suit with the state over its alleged failure to contribute to the 911 system. The system is funded through a \$1 surcharge attached to all cell phone bills. TracFone sells its minutes through cards so it does not collect that surcharge.

CERTIFICATE OF SERVICE

I, Joelle A. Zajk, a Paralegal at the law firm of Greenberg Traurig, LLP, do certify that the foregoing Motion for Partial Dismissal and Response to Ex Parte Submission was filed with the Federal Communications Commission this 2nd day of March, 2009 and by United States mail, first-class, postage prepaid to the following:

Joseph K. Witmer
Assistant Counsel
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A handwritten signature in blue ink that reads "Joelle A. Zajk". The signature is written in a cursive style and is positioned above a horizontal line.

Joelle A. Zajk
Paralegal