

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of TracFone Wireless, Inc.)	CC Docket No. 96-45
For Modification of Public Safety Answering)	DA 08-2779
Point Modification)	
)	
Virgin Mobile USA, L.P.'s Petition)	CC Docket No. 96-45
For Forbearance and Designation as)	DA No. 07-4983
An Eligible Telecommunications Carrier in)	
The State of New York and the)	
Commonwealths of Pennsylvania and Virginia)	

**ANSWER OF
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pursuant to 47 CFR §1.724(a), the Pennsylvania Public Utility Commission (PaPUC) files this written Answer in response to the TracFone Wireless, Inc. Motion for partial Dismissal and Response to Ex Parte Submission (TracFone Motion).¹ The PaPUC appends a Proposed Order required by Section 1.724 but seeks staff waiver for good cause shown evident in the short time for filing.

¹ TracFone Wireless, Inc. Motion for Partial Dismissal and Response to Ex Parte Submission, March 2, 2009. To their credit, TracFone provided a copy of this pleading to the PaPUC, unlike every other formal pleading filed with the FCC in this ongoing TracFone Forbearance/Pennsylvania ETC Designation case.

Summary

Pursuant to Section 1.724(j) the PaPUC also seeks staff waiver for the procedural noncompliance of any party, including the Section 1.724 obligation to append a Proposed Order and the Section 1.727(b) and (c) obligation of a party filing a Motion to append findings of fact and conclusions of law in a proposed Order with their Motion. Good cause for waiver of that rule is appropriate given the time constraints and the parties' familiarity with the issues. The PaPUC does not believe that good cause exists to waive any other noncompliance of TracFone.

The PaPUC asks the FCC to deny the TracFone Motion, deny the TracFone Modification Petition,² grant the Pennsylvania Emergency Management Agency ("PEMA") Petition addressing TracFone's "self certification" of compliance with Pennsylvania law,³ and deny the Virgin Mobile Forbearance Petition.⁴ The PaPUC asks the FCC to rescind on its own motion,⁵ or preferably after notice and comment, the 2005 Forbearance Decision⁶ because the predictive effect in 2009 is not what was anticipated in 2005.

² TracFone Wireless, Inc. Petition for Modification of Public Safety Answering Point Certification Condition, November 21, 2008; TracFone Supplement to Petition for Modification (December 23, 2008). The PaPUC has yet to receive a copy of any of these pleadings.

³ The PaPUC does not want to be accused of filing inconsistent pleadings. The PaPUC's Ex Parte Letter dated February 26, 2009 asked the FCC to deny the PEMA Petition. The PaPUC made that request so that the PaPUC can address that issue for Pennsylvania now that the PaPUC will be making wireless ETC designations in Pennsylvania. However, if the FCC decides that TracFone's ETC designation is somehow beyond consideration by the PaPUC, the PaPUC alternatively urges the FCC to grant the PEMA petition. The proliferation of procedural anomalies and inconsistent statements by TracFone throughout this entire proceeding warrants that express clarification.

⁴ The PaPUC now takes a different position on Virgin Mobile's ETC Designation petition for Pennsylvania. This action is appropriate to avoid prejudice to Virgin Mobile now that the FCC is dismissing the Virgin Mobile petition without prejudice based on the fact that Pennsylvania, like Florida in the *April 2008 ETC Order*, is asserting jurisdiction to make wireless ETC designations in Pennsylvania.

⁵ TracFone cannot be heard to raise concerns about the FCC acting *sua sponte* to remove a benefit when the benefit was obtained from *sua sponte* action. The PaPUC recognizes that notice and comment on matters of general rulemaking may warrant notice under federal law notwithstanding previous *sua sponte* action.

⁶ *In the Matter of Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. 214(e)(1)(A) and 47 CFR 54.201(i)*, Docket No. 96-45 (September 8, 2005), paragraph 6, n. 23 (*2005 Forbearance Order*).

The PaPUC also asks the FCC to hold that the April 2008 ETC Order does not apply to Pennsylvania. Item #4 on the April 3, 2008 Public Agenda Notice of the FCC addressed several pending TracFone ETC petitions although *Pennsylvania* was not listed as a jurisdiction subject to action by the FCC. The PaPUC's detailed filing addressing TracFone in Pennsylvania was not filed to avoid even the appearance of impropriety that could arise if the PaPUC submitted a pleading on a similar matter during the "blackout period" triggered by listing on the FCC's Public Agenda. However, Pennsylvania later learned, to its dismay, that the *April 2008 ETC Order* included Pennsylvania.⁷

In the alternative, if the April 2008 ETC Order is held to apply, the PaPUC asks the FCC to find that TracFone's actions warrant modifying that decision for TracFone to remove ETC designation for Pennsylvania, and that the removal contain an accompanying determination that ETC designations and related matters will be decided by the PaPUC in Pennsylvania.

1. The PaPUC's Relief is Consistent with prior FCC precedent and TracFone should not circumvent that precedent with special treatment relief.

The PaPUC's requested relief is entirely consistent with the FCC's precedent in the 2005 Forbearance Order and the April 2008 ETC Order. The 2005 Forbearance Order held that the FCC will revisit forbearance based on predictive effect.⁸ The April 2008 ETC Order was limited to the FCC's Public Agenda notice of April 3, 2008. Since that notice did not list Pennsylvania as a

⁷ Compare FCC Public Agenda Meeting Notice (April 3, 2008) with *In the Matter of Joint Board on Universal Service, TracFone Wireless Petitions for ETC Designation in New York, Florida, Virginia, Connecticut, Massachusetts, Alabama, North Carolina, Tennessee, Delaware, New Hampshire, Pennsylvania, and the District of Columbia*, Docket No. 96-45 (April 9, 2008) (*The April 2008 ETC Order*).

⁸ 2005 Forbearance Order, para. 6, n. 25.

jurisdiction subject to action, the FCC's subsequent Order should not be considered as having made any ETC designation for TracFone in Pennsylvania. Alternatively, however, if the FCC did grant any kind of ETC designation reflected in Paragraph 16 of April 2008 ETC Order, that designation imposed requirements on TracFone for Pennsylvania.

TracFone now attempts to circumvent noncompliance with those Pennsylvania requirements with yet another request seeking special relief based on unsupported allegations about "other motives" in the PaPUC's position. This is patently untrue. The PaPUC believes that TracFone's problems with Pennsylvania can be more efficiently and factually addressed in Pennsylvania by the PaPUC now that the PaPUC has asserted wireless ETC jurisdiction.

2. The FCC's 2005 Forbearance Order and the April 2008 ETC Order do not apply to Pennsylvania.

PaPUC is not convinced that the April 2008 ETC Order was intended to include Pennsylvania. As stated earlier, the April 2008 ETC Order reflected several state-specific ETC Designation petitions listed on the April 3, 2008 Public Meeting Agenda. The Public Meeting Agenda notice of April 3, 2008 did not list Pennsylvania. The subsequently issued April 2008 ETC Order, however, mistakenly included Pennsylvania, specifically in Paragraphs 15 and 16.

Were it otherwise, the inclusion of Pennsylvania with other state-specific proceedings without notice on the FCC's Public Meeting Agenda is an anomalous procedure. Equally important, as the PaPUC has reiterated a number of times, there is no evidence that TracFone has complied with the FCC requirements in the April 2008 ETC Order or that TracFone informed the PaPUC of the filing. The FCC should not attempt to rectify an understandable ministerial error that

addressed Pennsylvania in the April 2008 ETC Order by ratifying TracFone's ongoing violation of FCC filing and notice requirements.

The 2005 Forbearance Order was based on an FCC Public Notice of June 24, 2004 that focused primarily on ETC Designation in the State of New York.⁹ The public would reasonably conclude that the matter involved only New York, including the accompanying forbearance petition. Consequently, the 2005 Forbearance Order arguably limited denial of ETC Designation and the grant of forbearance to New York.

Alternatively, a determination that the forbearance granted was national in scope puts the FCC in the anomalous position of first asking for comment on a state-specific petition and then embedding an issue of national importance in the same notice. If the FCC did that, the FCC also seems to have provided a backstop option for that anomalous result by reserving the right to reconsider the forbearance decision based on predictive effect. So, even if the 2005 Forbearance Order applies outside New York, the predictive effect outside New York now warrants reconsideration of that 2005 Forbearance Order.

The PaPUC reiterates, again, that the only way the PaPUC learned about TracFone's ETC petition for Pennsylvania was based on publication in the Daily Digest of January 9, 2008. The PaPUC was unwilling to file a response because that could have violated the "black out" period triggered by listing similar ETC petitions involving TracFone on the Public Meeting Agenda dated April 3, 2008. The "black out" period prohibits filing after an item is listed on the Public Agenda.

⁹ See FCC Public Notice, *Parties are invited to Comment on TracFone Wireless' Petition for Designation as an Eligible Telecommunications Carrier in the State of New York and Petition for Forbearance From Application of Section 214*, Docket No. 96-45, DA 04-1822 (June 24, 2004).

The PaPUC anticipated submitting its views, including TracFone's apparent noncompliance with an FCC mandate to provide a copy of its FCC pleading to the PaPUC even though the FCC required TracFone to provide a copy to the PaPUC in the FCC's January 9, 2008 Public Notice. The PaPUC never anticipated that the FCC's subsequent Order following notice in the Public Meeting Agenda would include Pennsylvania. This effectively prevented the PaPUC from ever submitting any comprehensive filing on TracFone's machinations until TracFone filed the Modification Petition.

Even if the 2005 Forbearance Order and the April 2008 ETC Order apply to Pennsylvania, TracFone's reliance on noncompliance and anomalous processes to secure forbearance and ETC Designation in Pennsylvania has caused problems not otherwise predicted when the FCC issued those orders. TracFone's problems do not arise because the PaPUC has "other agendas" or because the PaPUC wants to "impede the availability of that service" as TracFone alleges.¹⁰

3. *The TracFone Allegations are Meritless and Warrant Dismissal without Discussion.*

The TracFone Motion is one more pleading that attempts to obscure TracFone's non-compliance with FCC mandates in Pennsylvania with a misrepresentation of the facts. TracFone continues to misrepresent the PaPUC's concerns as an alleged effort to "retard the certification process" with a "centerpiece" claim about "drive testing" in Pennsylvania. This is untrue.

¹⁰ *TracFone Motion for Partial Dismissal*, p. 6.

a. TracFone Violated FCC Requirements Related to ETC Designation, including any ETC Designation for Pennsylvania.

TracFone continues to blatantly ignore FCC requirements. TracFone has assiduously avoided any discussion about the PaPUC's allegations regarding their flagrant violation of several legal requirements. These include the FCC notice and consultation with state commissions imposed on carriers as preconditions to securing ETC designation from the FCC. This also includes the ongoing failure to secure the required documentation from the PaPUC or provide the PaPUC with notice and copies of TracFone's ETC machinations involving Pennsylvania.

The PaPUC previously demonstrated that TracFone never consulted with the PaPUC as part of an effort to secure an ETC designation in non-tribal lands as required by Paragraph 92 of the *12th Report and Order*. The PaPUC also demonstrated that TracFone failed to attach the carrier-specific notification from a state commission, in this case the PaPUC, required by Paragraph 113 of the same *12th Report and Order*. In fact, TracFone appended a non-binding statement applicable to another carrier to mislead the FCC into concluding that the PaPUC addressed TracFone's request. This was a flagrant violation of Paragraph 113 of the same *12th Report and Order*. Paragraph 113 provides in pertinent part:

We conclude that an "affirmative statement" of the state commission may consist of any duly authorized letter, comment, or state commission order indicating that it lacks jurisdiction to perform designations over a particular carrier. Each carrier should consult with the state commission to receive such a notification, rather than relying on notifications that may have been provided to similarly situated carriers.

TracFone has yet to produce for the FCC or the PaPUC any record evidence that it complied with any of these FCC mandates. The reason is quite simple: TracFone simply ignored the FCC's requirements and preferred to rely on misleading statements. TracFone continues to do this today.

The PaPUC also notes that the FCC specifically ordered TracFone to provide a copy of their ETC Petition to the PaPUC in the FCC's Public Notice of January 9, 2008 at DA 08-57. TracFone has yet to produce any record proof that it ever complied with this specific mandate.

This is not the first time that the PaPUC raised these issues. TracFone is well aware of this evidence of substantial noncompliance with FCC mandates that involve Pennsylvania. TracFone now prefers to evade this concrete noncompliance with vague allegations about "other agendas" or statements about "drives testing" as though "drive testing" were the only concern.

b. TracFone's Pleadings on Pennsylvania Issues and the PaPUC's Actions are Contradictory, Inconsistent, and Borderline Defamatory.

Having avoided discussion about compliance with FCC legal mandates, TracFone next avoids discussion on important Pennsylvania issues with contradictory and inconsistent statements.

For example, the Pennsylvania Office of Consumer Advocate (Pa. OCA) and the Pennsylvania Chapter of the National Emergency Number Association (PaNENA) filed Comments in the ETC designation proceeding seeking to ensure

that TracFone would comply with Pennsylvania's statutory mandate to remit payments to support 911. TracFone claimed that there was no noncompliance.¹¹

Then, after TracFone faced problems complying with Pennsylvania law addressing a wireless carrier's funding obligation to support 911, TracFone submitted an Ex Parte filing on January 15, 2009. The notice vaguely referenced some discussions with FCC staff about collecting 911 fees from users of wireless services. The PaPUC raised then, and reiterates today, that TracFone's solution raise serious concerns about their compliance with the obligation under Pennsylvania law to provide funding support for 911 under 35 Pa.C.S. § 7021.4 *et seq.*

Although that statutory provision is not within the PaPUC's regulatory enforcement authority, the filing by the PEMA, a regulatory body involved with 911 in Pennsylvania, vividly illustrates TracFone's problem complying with Pennsylvania law. This is well beyond a "centerpiece" focus on drive testing as TracFone now alleges.

The current state of the pleadings demonstrate TracFone's recognition that there is a real legal dispute about TracFone's compliance with state law, effectively negating any "self certification" previously filed by TracFone. TracFone attempts to blur this issue about compliance with Pennsylvania law with borderline defamatory statements alleging that "other agendas underlie those entities' opposition and lack of cooperation in the PSAP certification process"¹² -- as though the PaPUC's filings and concerns are driven by some nefarious intent. These are unfounded allegations that attempt to undermine the credibility of state

¹¹ *TracFone ETC Designation for Pennsylvania*, Docket No. 96-45, Reply Comments (February 26, 2008), pp. 3 and 5.

¹² *TracFone Motion*, p. 6 and n. 6.

government agencies that are statutorily entrusted with the protection of the health and safety of the public.

At the very least, the “predictive effect” in the 2005 Forbearance Order did not envision flagrant noncompliance with FCC mandates, blatantly misleading statements about state commission involvement with TracFone’s ETC Designation, contradictory statements to consumers about what minutes they were getting, and scandalous allegations that impugn a regulatory agency’s credibility – especially in the absence of concrete facts to support any of them.

The predictive effect of the 2005 Forbearance Order is clearly different now than what the FCC expected in 2005, at least for Pennsylvania. The vast gap between regulatory expectations in 2005 and TracFone’s 2009 facts warrant revisiting that 2005 Forbearance Order. TracFone is well aware of the PaPUC’s view. That position is not news to TracFone.

TracFone’s reliance on the April 2008 ETC Order is equally misplaced. Pennsylvania was not included within the scope of that decision. Assuming, otherwise, *arguendo*, TracFone’s inability to comply with FCC conditions imposed in that order cannot be cured by special treatment.

TracFone is currently the *only* wireless reseller that obtained an ETC designation without owning any facilities. TracFone is currently the *only* wireless reseller that consistently demonstrates an inability to comply with state laws. This includes, but is by no means limited to, the funding obligation to support 911. Another TracFone misapprehension is the mistaken view that the PaPUC is somehow involved in ensuring PSAP certification. The PaPUC learned of this

dispute the same way it learned about TracFone's earlier ETC machinations, from the Daily Digest.

c. TracFone's claims about benefits to lower-income consumers are misleading and raise serious issues concerning Section 254.

TracFone's Motion contains effusive claims about the benefits that lower-income Pennsylvanians will obtain from TracFone's service. First, TracFone claims that it is expanding service to some of the "most economically-depressed communities in Pennsylvania" – including Pittsburgh and other portions of western Pennsylvania, Erie and the Johnstown-Altoona area.¹³ Then, TracFone claims that the Philadelphia County PSAP has somehow delegated its certification obligation to a consumer advocate, that its agreement to do testing cost a lot of money but attained no results, and that some 450,000 eligible consumers in Philadelphia are being denied the benefits of TracFone's services.¹⁴

These factual misrepresentations demonstrate a lack of understanding about how 911 operates in Pennsylvania and reinforce the wisdom of having the PaPUC address wireless ETC matters going forward.

TracFone also fails to address a legal issue, previously raised by the PaPUC, involving Section 254 of TA-96. The PaPUC has voiced concern that Section 254 may not be intended to federally fund reductions in service quality and consumer protections for lower-income consumers.

That result appears to sacrifice affordability to comparability. That would occur when a wireline Lifeline consumer choosing wireless Lifeline service gets

¹³ *TracFone Motion*, p. 7.

¹⁴ *TracFone Motion*, p. 7 and Attachment, "Free cell phone service gets static from city," www.phillytrib.com/tribune/

very limited calling, no discount on unlimited local calling plans, and no recourse to the PaPUC for inadequate service.

TracFone inconsistently informs consumers about what they actually receive from TracFone's wireless Lifeline service. TracFone tells consumers in a Press Release that they will get 68 free minutes. TracFone then tells consumers that use their website that the consumer will get 42 free minutes.¹⁵ TracFone consistently informs consumers of the right to use their very limited resources to buy more minutes. There is currently no recourse to the PaPUC because the PaPUC has refrained from exercising federally granted authority to address "terms and conditions" for wireless service at 47 USC § 332.

The PaPUC appreciates the FCC's conclusion that services providers like TracFone are desirable because they provide "increased consumer choice" and "high-quality service" and "mobility" – but those are not mandates under Section 254(b) of TA-96. The PaPUC realizes that the FCC may believe that this service provides "comparable" service for wireless Lifeline consumers compared to wireline Lifeline consumers or other non-Lifeline wireless consumers.

This conclusion, however, relies on non-statutory criteria and the result elevates the principle of "comparability" over the other universal service principles, an approach already rejected by the federal courts.¹⁶ Moreover, none of the other principles, particularly affordability, are balanced against this apparent preference for the "comparability" principle.

¹⁵ TracFone's press release touting TracFone's wireless Lifeline service in Pennsylvania states that TracFone's consumer get 68 "free" minutes of calling. A consumer that uses TracFone's www.safelink.com website, however, is told that the consumer gets 42 "free" minutes. See Attachment A to the PaPUC Answer contains this documented research.

¹⁶ *Qwest Communications v. FCC*, 398 F.3d 1222, 1234 (2005).

d. TracFone Makes Factual Misstatements About PSAP Operators And Inconsistent If Not Discriminatory Commitments to Pennsylvania PSAP Operators.

TracFone makes several inaccurate factual statements about Philadelphia. Lance Haver is currently the Director of the Mayor's Office of Consumer Affairs for the City of Philadelphia. The PaPUC is familiar with Mr. Haver given his long-standing role as a consumer advocate in the Philadelphia metropolitan area. Mr. Haver's consumer advocate office may be an administrative adjunct to the Mayor's Office but that is not the same thing as the PSAP operator for the County of Philadelphia. TracFone conflates the Mayor's Office for Philadelphia City with the Philadelphia County PSAP operator. This is a misstatement that furthers some untenable claim that the County of Philadelphia somehow improperly "delegated" PSAP certification to a "quasi governmental entity" -- the Mayor's Office.

TracFone's Attachment A to the TracFone Motion for Partial Dismissal suggests that the Philadelphia PSAP has refused to grant certification because of some failure to comply with FCC testing mandates. However, general media coverage does not accurately reflect concerns about an alleged refusal to address the requirement in Paragraph 6(a) of the 2005 Forbearance Order that requires TracFone to provide its Lifeline customers with 911 and E911 access regardless of activation status and the availability of prepaid minutes. The same general media coverage does not accurately or adequately explain the equally plausible suggestion that TracFone's failure to comply with the ancillary obligation to give its Lifeline customers E911-compliant handsets means that TracFone cannot get the PSAP certification it seeks and for a very good reason, public safety.

On the other hand, TracFone's Attachment A to their Motion contains statements alluding to TracFone's willingness to provide the County or City of

Philadelphia with their handsets and to shoulder the considerable cost to conduct the required drive tests. This stands in marked contrast to TracFone's apparent unwillingness to conduct the same kind of testing in Monroe County, Pennsylvania.¹⁷

The PaPUC's Reply Comment elaborated on the importance of drive testing. TracFone seems to recognize that for Philadelphia County but not for Monroe County.¹⁸ TracFone provides no explanation for this discrepancy nor does TracFone explain why these disparate commitments are not discriminatory.

It is inexplicable that commitments made to undertake testing to ensure public safety in Philadelphia County are less important and more burdensome, if not outright refused, in other Pennsylvania counties.

TracFone fundamentally fails to understand that individual counties and two other urban PSAPs, not the PaPUC, ensure 911 public safety. TracFone does, however, apparently understand the importance of economies of scale in numbers given their reference to 420,000 eligible consumers in Philadelphia County compared to no disclosure on the number of eligible consumers in other counties like Monroe.

e. TracFone Makes Inconsistent Statements About The Facilities That Will Be Used To Provide Wireless Lifeline Service.

Importantly, TracFone never addresses the contradictory claims about whose facilities TracFone is using in Pennsylvania. On the one hand, TracFone

¹⁷ *TracFone Modification Petition*, Docket No. 96-45, PaPUC Letter Comment (January 6, 2009), Monroe County, Pennsylvania, letter.

¹⁸ *TracFone Modification Petition*, Docket No. 96-45, PaPUC Reply Comments (January 13, 2009), pp. 4-5

alleges it uses only AT&T Facilities. TracFone now claims that it is using multiple providers.

In an AT&T Letter dated September 22, 2008 provided to unidentified “Pennsylvania” entities, AT&T stated that with respect to any TracFone customer whose service is activated on the AT&T network and who dials 911, such customer will have the same access to E911 as a retail customer of AT&T wireless services.¹⁹

On October 17, 2008, TracFone claimed, in a submission to a Pennsylvania county from its counsel, that TracFone’s supplier was AT&T. AT&T was “the sole network to be used in connection with TracFone’s Lifeline program.” This seems to be consistent with the September 22, 2008 AT&T letter.²⁰

However, on March 2, 2009, TracFone’s Motion on page 4 makes a completely different claim. Now, TracFone claims that it uses multiple networks from multiple vendors. TracFone states:

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.²¹

The PaPUC previously raised concerns regarding what facilities are being used in areas where AT&T lacks facilities. The PaPUC was concerned that claims

¹⁹ *AT&T Correspondence of September 22, 2008*, Attachment B to this PaPUC Answer.

²⁰ *TracFone Correspondence dated October 17, 2008*, Attachment B to this PaPUC Answer

²¹ *TracFone Motion*, p. 4.

to seek ETC Designation throughout Pennsylvania could be a problem, particularly in areas where AT&T does not have facilities to provide wireless service. TracFone continues to evade this issue as well.

These kinds of misstatement of facts, contradictory commitments on services provided to consumers about how many minutes they actually get, and misleading pleadings seem endemic to TracFone, at least in the absence of some formal proceeding before the PaPUC to address important public safety and FUSF matters.

The burden is on state commissions, at the very least, to undertake a detailed search and contact with multiple entities to gather the information to address these concerns. Those concerns are better presented by parties with detailed knowledge of the facts when they present their concerns to the PaPUC as opposed to the FCC.

4. The PaPUC's Secretarial Letter of February 26, 2009 Did Not Deny TracFone Due Process and Is Consistent with Pennsylvania Law.

As a last resort, TracFone raises allegations about due process and Pennsylvania law.²² This allegation is without merit.

Pennsylvania precedent distinguishes between issuing rules of general applicability (legislative rulemaking function) and case-specific determinations (adjudicatory function). *Redmond v. Commonwealth Milk Marketing Board*, 363 A.2d 840, 843 (1980).

²² *TracFone Motion*, p. 2, n. 1.

There was simply no adjudication in this proceeding. There could not have been any adjudication because TracFone never filed any petition with the PaPUC. TracFone never sought any determination on ETC Designation in Pennsylvania from the PaPUC despite an FCC mandate requiring it to do so.

TracFone fully realizes that the PaPUC and the FCC recognize the importance of avoiding the announcement of rules of future applicability in a specific adjudication. For that very reason, TracFone was required to provide the PaPUC with notice and an opportunity to be heard before filing any petition with the FCC. TracFone failed to do that. To make matters worse, TracFone failed to comply with a subsequent FCC mandate to notify the PaPUC about the pending ETC petition. The FCC imposed that in the FCC's January 8, 2008 Public Notice.

TracFone cannot be heard to complain about some alleged denial of due process. Any denial of due process is directly attributable to TracFone's actions.

Moreover, the Secretarial Letter of February 26, 2009 was in the nature of a general pronouncement on an issue of law addressed in a Declaratory Order. Section 331(f) of the Public Utility Code authorizes the PaPUC to issue declaratory orders in its sound discretion. That discretion was appropriate here.

Pennsylvania does not mandate notice and opportunity to be heard when there is no adjudication or there are no issues of fact. *Guthrie v. Borough of Wilkinsburg*, 478 A.2d 1279 (Pa. 1984); *Lehigh Valley Power Committee v. PaPUC*, 563 A.2d 548 (Pa. Cmwlth. 1989).

There was no adjudication. There were no contested facts before the PaPUC. The issue before the PaPUC was a legal issue involving the assertion of

jurisdiction to make ETC designations in Pennsylvania. The PaPUC reached a legal determination to assert jurisdiction to make wireless ETC designations. But, even assuming otherwise, *arguendo*, it was TracFone's own action that denied TracFone any right to due process that it would have had on an issue of law.

Finally, Pennsylvania law holds that a due process right to notice and an opportunity to be heard before an action is taken can be obviated based on the necessity of quick action or the impracticality of providing any meaningful opportunity to be heard. However, the action must be coupled with some meaningful means of assessing the propriety of an action after the fact. This can satisfy any procedural due process requirement. *Parratt v. Taylor*, 451 U.S. 527 (1981), quoted in *Shah v. State Board of Medicine*, 589 A.2d 783, 788-789 (Pa. Cmwlth. 1991), *appeal denied*, 600 A.2d 197 (Pa. 1991).

The PaPUC and the FCC face an impending forbearance deadline under Section 160(c) of TA-96. The FCC is jointly addressing two ETC Designation issues involving Pennsylvania. The PaPUC has expressed similar concerns in both proceedings. The need for quick action and the impracticality of a prolonged proceeding given the pending statutory deadline obviated any due process right TracFone would have even if TracFone's actions are the direct cause of the denial of any residual due process right. Most importantly, however, the PaPUC has authority under Section 703(f) and (g) of the Public Utility Code which allows TracFone to ask the PaPUC to rehear, rescind, or amend the applicability of the Secretarial Letter to TracFone.

The narrow legal issue decided by the PaPUC, TracFone's actions, and the availability of a meaningful means of assessing the propriety of the action after the fact for TracFone warrant dismissing TracFone's due process allegation.

Summary

The aforementioned concerns underscore the wisdom of having the PaPUC address all ETC designations and related matters in Pennsylvania. The FCC has national issues to manage.

TracFone's inconsistent pleadings and misstatements of fact about Pennsylvania are not matters of national importance. TracFone appears to be alone in its inability to comply with state law and FCC requirements.²³

The 2005 Forbearance Decision and the April 2008 ETC Order allow TracFone to get ETC money without bothering with the statutory and regulatory obligation to own facilities.

TracFone is currently the *only* wireless reseller provider that obtained, *sua sponte* from the FCC, forbearance from the FCC's regulations at 47 CFR 54.201(d). The rule requires a carrier to own at least some facilities as a precondition to ETC designation.²⁴

TracFone is currently the *only* wireless reseller provider who receives federal universal service (FUSF) support to provide Lifeline service without the ancillary statutory obligation under Section 214(e)(1)(A) of TA-96 to own at least

²³ Following submission of the February 26, 2008 Ex Parte, counsel for Virgin Mobile contacted the PaPUC about ETC designations. Virgin Mobile, another wireless reseller without facilities that also seeks forbearance, reiterated their willingness to conduct the PSAPs' necessary testing and to comply with the wireless carrier obligation to support 911 imposed on those carriers under Pennsylvania law. These verbal representations vividly illustrate TracFone's situation vis a vis similarly situated wireless reseller carriers even though, to be sure, the PaPUC has continued to oppose any further forbearance from the Section 254 obligation to own at least some facilities in order to get ETC designation.

²⁴ *In the Matter of Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. 214(e)(1)(A) and 47 CFR 54.201(i)*, Docket No. 96-45 (September 8, 2005), paragraph 6, n. 23

a portion of the facilities used to provide FUSF supported services. There is no reason to continue this error in perpetuity given that the predictive effect is other than what was anticipated in 2005. There is no reason to compound the error through multiple designations for carriers similar to TracFone.

The PaPUC also believes that the entire Forbearance/ETC Designation issue involving Pennsylvania and TracFone illustrate, as the PaPUC has said in the pending Forbearance NPRM, the need for regulatory requirements, including a “complete as filed” requirement, in forbearance proceedings. Other results create avoidable legal and policy issues, including TracFone’s ongoing efforts to secure benefits despite the unwillingness to comply with FCC and state requirements.

Conclusion

For the following reasons, the PaPUC asks the FCC to deny the TracFone Motion, deny the pending TracFone Modification Petition²⁵, grant the PEMA Petition on TracFone’s “self certification” of compliance with Pennsylvania law, and deny the Virgin Mobile Forbearance Petition.²⁶

The PaPUC asks the FCC to rescind or modify on its own motion,²⁷ or preferably after notice and comment, the 2005 Forbearance Decision.²⁸ In the

²⁵ TracFone Wireless, Inc. Petition for Modification of Public Safety Answering Point Certification Condition, November 21, 2008; TracFone Supplement to Petition for Modification (December 23, 2008). The PaPUC has yet to receive a copy of any of these pleadings.

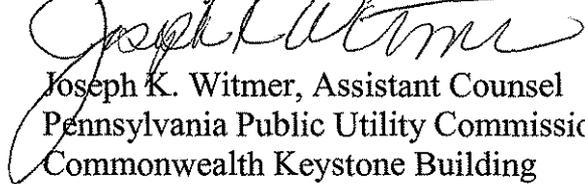
²⁶ The PaPUC takes no position on Virgin Mobile’s ETC Designation petition for Pennsylvania. This is appropriate to avoid prejudgment now that, as occurred with Florida in the *2008 ETC Order*, the FCC must dismiss without prejudice the Virgin Mobile petition for Pennsylvania now that the PaPUC has asserted jurisdiction over wireless ETC designations in Pennsylvania.

²⁷ TracFone cannot be heard to raise concerns about the FCC acting *sua sponte* to remove a benefit when the benefit was obtained from a *sua sponte* action. However, since notice and comment on matters of general importance may warrant additional due process, the PaPUC suggests denial of similar forbearance petitions until the issue is resolved following a Notice of Proposed Rulemaking.

alternative, the PaPUC asks the FCC to deny pending and future forbearance petitions similar to TracFone's until the FCC addresses the issue of Forbearance from Section 254 and 47 CFR 54.201 after a Notice of Proposed Rulemaking.

The PaPUC further asks the FCC to hold that the April 2008 ETC Order does not apply to Pennsylvania. In the alternative, if the ruling does apply, the PaPUC asks the FCC to find that TracFone's actions warrant rescission or modification of that decision to TracFone and that the PaPUC should address future ETC designations and related matters in Pennsylvania.²⁹

Respectfully submitted,



Joseph K. Witmer, Assistant Counsel
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
(717) 787-3663
Email: jowitmer@state.pa.us

Dated: March 4, 2009

²⁸ *In the Matter of Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. 214(e)(1)(A) and 47 CFR 54.201(i)*, Docket No. 96-45 (September 8, 2005), paragraph 6, n. 23 (2005 Forbearance Order).

²⁹ *In the Matter of Joint Board on Universal Service, TracFone Wireless Petitions for ETC Designation in New York, Florida, Virginia, Connecticut, Massachusetts, Alabama, North Carolina, Tennessee, Delaware, New Hampshire, Pennsylvania, and the District of Columbia*, Docket No. 96-45 (April 9, 2008) (*The April 2008 ETC Order*). The April 3, 2008 Public Agenda Notice of the FCC, however, never listed Pennsylvania as a jurisdiction subject to action by the FCC on TracFone's ETC Petitions. The PaPUC did not file a detailed response to avoid even the appearance of impropriety that could arise from filing a response during the "blackout period" on a similar issue. The PaPUC only learned later upon issuance of the *April 2008 ETC Order* that the FCC included Pennsylvania.

ATTACHMENT A

Pgh-1

Safelink Wireless - State Benefits - Microsoft Internet Explorer provided by PA Public Utility Commission

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Customize Links Free Hotmail shop and compare prices on digital cameras Welcome to the Pennsylvania Public Utility Commission Windows Windows Marketplace

Address: https://www.safelinkwireless.com/EnrollmentPublic/enroll_lifeline.aspx

Lifeline Service in Pennsylvania

Congratulations, Safelink Wireless is offering Lifeline Service in your area. Below is a summary of the benefits you can receive, how to qualify for service, and how to apply today.

Get Started Now

If you're ready to fill out your application online click the button below to get started now! If you still have questions about Safelink Wireless or the Lifeline Service please visit our [Frequently Asked Questions page here](#).

3 Easy Steps

Apply

Benefits in Pennsylvania

Qualifications in Pennsylvania

Done

start Microsoft Office Internet Explorer Document Microsoft 12:46 PM

Pgh-2

SafeLink Wireless: State Benefits - Microsoft Internet Explorer provided by PA Public Utility Commission

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Address https://www.safelinkwireless.com/EnrollmentPublic/Enroll_Lifeline.aspx Go

SafeLink
WIRELESS

Check Status Service & Support Expand GO

Learn
PROGRAM INFORMATION

Enroll
JOIN SAFELINK WIRELESS

Airtime
ADD OR BUY AIRTIME

Lifeline Service in Pennsylvania

Congratulations, SafeLink Wireless is offering Lifeline Service in your area! Below is a summary of the benefits you can receive, how to qualify for service, and how to apply today.

Get Started Now

If you're ready to fill out your application online click the button below to get started now! If you still have questions about SafeLink Wireless or the Lifeline Service please visit our Frequently Asked Questions page [here](#).

3 Easy Steps

Apply

start Microsoft Office Internet Explorer Document1 Microsoft

Pgh-3

SafeLink Wireless - Enroll in Lifeline - Microsoft Internet Explorer provided by PA Public Utility Commission

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Address: https://www.safelinkwireless.com/EnrollmentPublic/Enroll_Lifeline.aspx

SafeLink
WIRELESS

Check Status Service & Support Español GO

Learn
PROGRAM INFORMATION

Enroll
JOIN SAFELINK WIRELESS

Airtime
ADD OR BUY AIRTIME

Enroll in Lifeline

To begin receiving Lifeline Service through SafeLink Wireless, which includes benefits such as FREE cellular service, a FREE cell phone, and FREE Minutes, you must enroll in the program.

Enter Your ZIP Code

Please provide us with your home ZIP code so we can tell you exactly how to qualify and apply in your area.

15239 GO

Done

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Pgh-4

Safelink Wireless - State Benefits - Microsoft Internet Explorer provided by PA Public Utility Commission

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Back Forward Stop Refresh Home Search Favorites History Mail Print Edit Discuss Research Messenger

Links: Customize Links Free Hotmail shop and compare prices on digital cameras Welcome to the Pennsylvania Public Utility Commission Windows Windows Marketplace

Address: https://www.safelinkwireless.com/EnrollmentPublic/enroll_lifeline.aspx

today.



Get Started Now

If you're ready to fill out your application online click the button below to get started now! If you still have questions about Safelink Wireless or the Lifeline Service please visit our [Frequently Asked Questions page here](#).



Benefits in Pennsylvania opens in new window

Through Safelink Wireless' Lifeline Service you can receive:

- A FREE Safelink Wireless phone
- A FREE cellular plan that gives you 42 Minutes *every month*

Qualifying in Pennsylvania opens in new window

Done

Start

Microsoft Office 2003 Internet Explorer Document - Microsoft

Internet

12:41 PM

Cumb-2

Safelink Wireless - State Benefits - Microsoft Internet Explorer provided by PA Public Utility Commission

File Edit View Favorites Tools Help

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Customize Links Free Home! Shop and compare prices on digital cameras Welcome to the Pennsylvania Public Utility Commission Windows Windows Marketplace

Address: https://www.safelinkwireless.com/EnrollmentPublic/enroll_lifeline.aspx

PROGRAM INFORMATION JOIN SAFELINK WIRELESS ADD OR BUY AIRTIME

Lifeline Service in Pennsylvania

Congratulations, Safelink Wireless is offering Lifeline Service in your area! Below is a summary of the benefits you can receive, how to qualify for service, and how to apply today.

Get Started Now

If you're ready to fill out your application online click the button below to get started now! If you still have questions about Safelink Wireless or the Lifeline Service please visit our [Frequently Asked Questions page here](#).

3 Easy Steps

Apply

Benefits in Pennsylvania

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Safelink Wireless - State Benefits - Microsoft Internet Explorer provided by PA Public Utility Commission

File Edit View Favorites Tools Help

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Links: Customer Links Free Home Shop and compare prices on digital cameras Welcome to the Pennsylvania Public Utility Commission Windows Windows Marketplace

Address: https://www.safelinkwireless.com/EnrollmentPublic/enroll_lifeline.aspx

today

Get Started Now

If you're ready to fill out your application online click the button below to get started now! If you still have questions about Safelink Wireless or the Lifeline Service please visit our [Frequently Asked Questions](#) page [here](#).

3 Easy Steps

Apply

Benefits in Pennsylvania

Through Safelink Wireless' Lifeline Service you can receive:

- A FREE Safelink Wireless phone
- A FREE cellular plan that gives you 42 Minutes every month

Qualifying in Pennsylvania

Start

Internet

Safelink Wireless

ATTACHMENT B



Lane Mansell
Vice President
Resale and Partnerships

AT&T Mobility
1025 Lenox Park Blvd
Atlanta, GA 30319

Date: September 22, 2008
To: Pennsylvania
From: AT&T Mobility, Inc.
Re: Routing of E911 Calls from Resold Wireless Services

Reseller E911 Access. AT&T Mobility, Inc. (AT&T) provides licensed, facilities-based wireless services directly to Pennsylvania customers and routes E911 calls from such customers to the Public Safety Answering Points (PSAPs) in accordance with the law and pursuant to arrangements with PSAPs to receive such calls.

AT&T also offers wholesale wireless services to TracFone Wireless, Inc. (TracFone), which resells such services to Pennsylvania customers under its own brand on a prepaid basis.

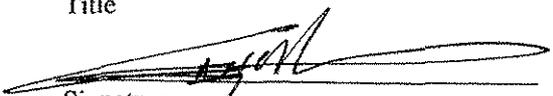
Whether a customer purchases a wireless service plan directly from AT&T or purchases resold services from TracFone using the AT&T network, any 911 call placed by such customer is processed in an identical manner – it is routed to the PSAPs over the AT&T network. If both AT&T and the PSAP have deployed Phase I or II E911 service, then the TracFone customer has E911 access.

As a wholesale customer of AT&T, TracFone has asked AT&T to certify to Pennsylvania TracFone's Lifeline customers will have access to E911. In this regard, AT&T certifies that, with respect to any TracFone customer whose service is activated on the AT&T network and who dials 911, such customer will have the same access to E911 as a retail customer of AT&T.

Thus, for a 911 call placed within the jurisdiction of any PSAP where both AT&T and the PSAP are Phase I or II compliant, the TracFone customer using AT&T's resold service should have the benefit of enhanced 911 services.

Lane Mansell
Name

Vice President, Resale & Partnerships
Title


Signature

1025 Lenox Park Blvd
Street

Atlanta, GA
City & State

404-986-1035
Phone

lm1144@att.com
Email

From: Thomas Dubas [dubast@lackawannacounty.org]
Sent: Thursday, October 16, 2008 9:01 AM
To: 'Michael J. McAllister'
Cc: Wentzel, Robert
Subject: RE: Tracfone / PSAP Certification for Lifeline Mobile Service
To Whom It May Concern:

I am Thomas K. Dubas, Director of Emergency Services for Lackawanna County PA. In that capacity I am director of 911 services for our entire county in Northeastern PA. I have been asked to "certify" TracFone for use in my county. I have been made aware that TracFone is using several other carriers in the Commonwealth and that they are all certified through Pennsylvania Emergency management Agency (PEMA) to operate Phase II in PA.

The only certification I will endorse is the fact that if TracFone is actually using a carrier certified and tested for Lackawanna County and they are using the technology which was certified for Lackawanna County and the call comes into our PSAP as a 911 Phase II call, it will be answered as we answer ALL 911 calls. If, however, TracFone does not comply with the technology or uses different technology than was accepted for use and tested in our county we cannot guarantee, nor do we accept any liability for, calls which do not make it to our PSAP or which do not contain the essential information needed for us to successfully answer the call.

If TracFone wishes to "test" their technology with our PSAP, as I believe it may not be covered under Act 56 funding, they would be required to underwrite any expenses connected with such testing.

Additionally, I am aware negotiations are underway between PEMA and TracFone regarding the surcharge placed on ALL carriers in the Commonwealth and expect Lackawanna County to be included financially in any agreement.

If there are any questions or concerns, please feel free to contact me.

THOMAS K. DUBAS
Lackawanna County Department of Emergency Services
30 Valley View Business Park
Jessup, PA 18434
(570) 307-7300
dubast@lackawannacounty.org

From: Michael J. McAllister [mailto:MMcAllister@shutts.com]
Sent: Wednesday, October 15, 2008 1:10 PM
To: dubast@lackawannacounty.org
Subject: Tracfone / PSAP Certification for Lifeline Mobile Service

Dear Mr. Dubas:

My firm represents Tracfone Wireless with respect to its PSAP (E911) certifications in the state of Pennsylvania and Lackawanna County. Tracfone is in the process of launching its Lifeline program in the State of Pennsylvania in order to offer free mobile phones and mobile telephone service to qualified individuals within the state. A formality as part of that process is that the FCC and State of Pennsylvania require certification from County coordinators that Tracfone's service is E9-1-1 compliant. A brief certification form is pasted below, which can be quickly filled out and returned by reply e-mail to me. For your information, Tracfone handsets operate on the Alltel, AT&T Mobility, T-Mobile and Verizon Wireless networks, all of which are already certified for compliance. Accordingly, 9-1-1 service operates on all Tracfone mobile phones regardless of activation status or

availability of pre-paid minutes. For your records, Tracfone has certified to this on the attached form; your authorization is simply a required formality.

As such, I would be grateful if you could return by reply email the certification form pasted below for Lackawanna County County to me at your earliest convenience. You need only reply to this email and fill in the highlighted areas. We apologize for the interruption and thank you very much for your time and attention. The form takes only a few moments to fill out, and as soon as we have collected all forms, Tracfone will be able to commence issuing free phones to qualified individuals. Jose Fuentes, Director of Government Relations for Tracfone (305.715.3727; jfuentes@tracfone.com) and myself will be pleased to answer any questions you may have.

Sincerely,

Michael McAllister

Michael J. McAllister, Esq.

Shutts & Bowen LLP

200 East Broward Boulevard, Suite 2100 | Fort Lauderdale, FL 33301
Direct: (954) 847-3835 | Fax: (954) 527-7935

STATE: Pennsylvania

TracFone CERTIFICATION

PSAP 9-1-1 Coordinator Name: _____

PSAP Jurisdictional Boundary Description: _____

Business address: _____

In my capacity as E911 Carrier Relations Manager, I serve as the 911 Coordinator. As 911 Coordinator, I am responsible for implementation by the Public Safety Answering Point (PSAP) of Enhanced 911 service in accordance with the rules of the Federal Communications Commission (FCC).

I am aware that, by order issued April 11, 2008, the FCC has designated TracFone Wireless, Inc. (TracFone) an Eligible Telecommunications Carrier pursuant to Section 214(e)(6) of the Communications Act of 1934, as amended (47 U.S.C. § 214 (e)(6)), for the limited purpose of providing Lifeline service in various states, including Pennsylvania. The FCC's designation of TracFone is subject to certain conditions, including a condition that TracFone obtain from each PSAP where it will provide Lifeline service certification that TracFone provides its Lifeline customers with 911 and enhanced 911 access regardless of activation status and availability of prepaid minutes.

As 911 coordinator, I hereby certify that all 911 calls, including those from TracFone customers, will be treated and responded to in the same manner regardless of carrier, activation status, or availability of prepaid minutes.

Returning the requested information by replying to this email is certification that all the information provided to TracFone Wireless, Inc. is accurate to the best of my knowledge.

IRS CIRCULAR 230 NOTICE: Pursuant to recently enacted

U.S. Treasury Department Regulations, we are now required to advise you that, unless otherwise expressly indicated, any federal tax advice expressed above was neither written nor intended by the sender or this firm to be used and cannot be used by any taxpayer for the purpose of avoiding penalties that may be imposed under U.S. tax law. If any person uses or refers to any such tax advice in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement to any taxpayer, then the advice should be considered to have been written to support the promotion or marketing by a person other than the sender or this firm of that transaction or matter, and such taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

The information in this email transmission is privileged and confidential. If you are not the intended recipient, nor the employee or agent responsible for delivering it to the intended recipient, you are hereby notified that any dissemination or copying of this transmission (including any attachments) is strictly prohibited. If you have received this email in error, please notify the sender by email reply. Thank you.

From: Wesley Hill [whill@beavercountypa.gov]
Sent: Friday, October 17, 2008 12:48 PM
To: Michael J. McAllister
Cc: Kevin Joy; Randy Dawson; Wentzel, Robert
Subject: RE: Tracfone / E911 Certification Request

Attachments: image001.png
Mr. McAllister,

In addition to the certification info requested I would like to add that the actual routing of 9-1-1 calls is dependant upon the capabilities of the users' handset, the originating carriers' network, and the PSAPs' serving telephone company, all of which are outside the control of my PASAP.

Wes Hill, Director
Beaver County Emergency Services

From: Michael J. McAllister [mailto:MMcAllister@shutts.com]
Sent: Friday, October 17, 2008 11:27
To: Wesley Hill
Subject: Tracfone / E911 Certification Request

Dear Mr. Hill:

This e-mail is a brief follow-up to our request for your assistance certifying Tracfone's Lifeline service for E911 compliance in Beaver County. Pasted below, for your reference, is the E911 certification letter provided by AT&T, Tracfone's supplier for Safelink, the sole network to be used in connection with Tracfone's Lifeline program. As indicated, Tracfone has certified to the State of Pennsylvania that it will provide its Lifeline customers with 911 and enhanced 911 access regardless of activation status and availability of prepaid minutes.

As stated in my email Wednesday, the certification process is a formality required by the FCC. Should any questions remain, please let me know when I might be able to call you to resolve any other questions you might have. The certification form is also pasted below - I would be grateful if you could fill in the three highlighted fields and return it to me by reply email. As soon as we have collected all certifications, Tracfone can begin distributing free phones and commencing Lifeline service for qualified customers.

Thank you again.

Sincerely,

Michael McAllister

Michael J. McAllister
Attorney at Law

Shutts & Bowen LLP
200 East Broward Boulevard, Suite 2100 | Fort Lauderdale, FL 33301
Direct: (954) 847-3835 | Fax: (954) 527-7935

STATE: Pennsylvania

TracFone CERTIFICATION

PSAP 9-1-1 Coordinator Name: _____ Wesley W.
Hill _____

PSAP Jurisdictional Boundary Description: _____ County of Beaver, Leet Twp, and Bell

Acres Boro which are located in Allegheny County _____

Business address: _____
_250 East End Ave. Beaver, Pa. 15009

In my capacity as E911 Carrier Relations Manager, I serve as the 911 Coordinator. As 911 Coordinator, I am responsible for implementation by the Public Safety Answering Point (PSAP) of Enhanced 911 service in accordance with the rules of the Federal Communications Commission (FCC).

I am aware that, by order issued April 11, 2008, the FCC has designated TracFone Wireless, Inc. (TracFone) an Eligible Telecommunications Carrier pursuant to Section 214(e)(6) of the Communications Act of 1934, as amended (47 U.S.C. § 214(e)(6)), for the limited purpose of providing Lifeline service in various states, including Pennsylvania. The FCC's designation of TracFone is subject to certain conditions, including a condition that TracFone obtain from each PSAP where it will provide Lifeline service certification that TracFone provides its Lifeline customers with 911 and enhanced 911 access regardless of activation status and availability of prepaid minutes.

As 911 coordinator, I hereby certify that all 911 calls, including those from TracFone customers, will be treated and responded to in the same manner regardless of carrier, activation status, or availability of prepaid minutes.

Returning the requested information by replying to this email is certification that all the information provided to TracFone Wireless, Inc. is accurate to the best of my knowledge.

IRS CIRCULAR 230 NOTICE: Pursuant to recently enacted U.S. Treasury Department Regulations, we are now required to advise you that, unless otherwise expressly indicated, any federal tax advice expressed above was neither written nor intended by the sender or this firm to be used and cannot be used by any taxpayer for the purpose of avoiding penalties that may be imposed under U.S. tax law. If any person uses or refers to any such tax advice in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement to any taxpayer, then the advice should be considered to have been written to support the promotion or marketing by a person other than the sender or this firm of that transaction or matter, and such taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

The information in this email transmission is privileged and confidential. If you are not the intended recipient, nor the employee or agent responsible for delivering it to the intended recipient, you are hereby notified that any dissemination or copying of this transmission (including any attachments) is strictly prohibited. If you have received this email in error, please notify the sender by email reply. Thank you.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of TracFone Wireless, Inc. For Modification of Public Safety Answering Point Modification)	CC Docket No. 96-45 DA 08-2779
)	
Virgin Mobile USA, L.P.'s Petition For Forbearance and Designation as An Eligible Telecommunications Carrier in The State of New York and the Commonwealths of Pennsylvania and Virginia)	CC Docket No. 96-45 DA No. 07-4983

**PROPOSED ORDER AND
NOTICE OF PROPOSED RULEMAKING**

Adopted:

Released: March 5, 2009

By the Commission:

I. INTRODUCTION

1. In this Order and Notice of Proposed Rulemaking, we grant for good cause shown a waiver from the requirement in Section 1.724 to append a Proposed Order as well as the Section 1.727(b) and (c) obligation of a party filing a Motion to append findings of fact and conclusions of law in a proposed Order. We find that good cause exists given the time constraints and the parties' familiarity with the issues. We waive no other noncompliance with the FCC requirements imposed on TracFone Wireless, Inc. (TracFone). We also deny the TracFone

Motion, deny the TracFone Modification Petition¹ and grant the PEMA Petition asking us to revoke TracFone's prior "self certification" that it is in compliance with Pennsylvania law.² In addition, we deny the Virgin Mobile Forbearance Petition and determine that TracFone's actions warrant revocation of the forbearance previously granted TracFone Wireless, Inc. (TracFone) in our 2005 Forbearance Order related to Pennsylvania because the predictive effect in 2009 in Pennsylvania is far different from what we expected in 2005. We further find that TracFone's substantial noncompliance with the requirements imposed on TracFone when the FCC granted ETC Designation for Pennsylvania in the April 2008 ETC Order warrant revocation of ETC Designation in Pennsylvania as well. Our denial does not abrogate any existing forbearance or ETC obtained in Pennsylvania that otherwise complies with our requirements as of the date of issuance of this order but where it is not in compliance, TracFone must proceed with all deliberate speed to transition wireless Lifeline consumers to an alternative Lifeline service provider. Finally, We issue a Notice of Proposed Rulemaking on Forbearance seeking comment on forbearance from the Section 254 obligation to own at least a portion of facilities to obtain ETC Designation and Federal Universal Service Fund (FUSF) support, including the parallel obligation at 47 CFR 54.201.³ We take these actions given the significant evidence of TracFone's noncompliance with FCC requirements and the fact that the predictive effect of the 2005 Forbearance Decision⁴ in 2009 is not what was anticipated in 2005.

¹ TracFone Wireless, Inc. Petition for Modification of Public Safety Answering Point Certification Condition, November 21, 2008; TracFone Supplement to Petition for Modification (December 23, 2008). The PaPUC has yet to receive a copy of any of these pleadings.

² The PaPUC does not want to be accused of filing inconsistent pleadings. The PaPUC's Ex Parte Letter dated February 26, 2009 asked the FCC to deny the PEMA Petition. The PaPUC made that request so that the PaPUC can address that issue for Pennsylvania now that the PaPUC will be making wireless ETC designations in Pennsylvania. However, if the FCC decides that TracFone's ETC designation is somehow beyond consideration by the PaPUC, the PaPUC alternatively urges the FCC to grant the PEMA petition. The proliferation of procedural anomalies and inconsistent statements by TracFone throughout this entire proceeding warrants that express clarification.

³ The PaPUC took no position on Virgin Mobile's ETC Designation petition for Pennsylvania. This is appropriate to avoid prejudgment because, as occurred with Florida in the *2008 ETC Order*, the FCC will dismiss without prejudice the Virgin Mobile petition for Pennsylvania now that the PaPUC has asserted jurisdiction over wireless ETC designations in Pennsylvania.

⁴ *In the Matter of Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. 214(e)(1)(A) and 47 CFR 54.201(i)*, Docket No. 96-45 (September 8, 2005), paragraph 6, n. 23 (*2005 Forbearance Order*).

II. BACKGROUND

A. The Act

2. Section 254(e) of the Telecommunications Act of 1996 (TA-96) provides that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support. Pursuant to section 214(e)(1), a common carrier designated as an ETC must offer and advertise the services supported by the federal universal service mechanisms throughout the designated service area.

3. Section 214(e)(2) of TA-96 gives state commissions the primary responsibility for performing ETC designations. Section 214(e)(6) directs the Commission, upon request, to designate as an ETC "a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission. Under section 214(e)(6), the Commission may, with respect to an area served by a rural telephone company, and shall, in all other cases, designate more than one common carrier as an ETC for a designated service area, consistent with the public interest, convenience, and necessity, so long as the requesting carrier meets the requirements of section 214(e)(1).⁵

B. PRIOR RELEVANT COMMISSION ACTION ON ETC DESIGNATIONS.

5. On December 29, 1997, we issued a Public Notice in Docket FCC 97-419 establishing the Procedures for FCC Designation of Eligible Telecommunications Carriers (ETC) Pursuant to Section 214(e)(6) of the Communications Act (the 1997 Notice). The 1997 Notice delegated to the FCC's then-Common Carrier Bureau, now the Wireline Competition Bureau, the authority to make ETC Designations under Section 214(e)(6). The petitioner was required to attach a certification and brief statement of supporting facts demonstrating that the petition is "not subject to the jurisdiction of a state

⁵ Under section 214(e)(1)(A) of TA-96, an ETC must offer service using its own facilities or a combination of its own facilities and resale of another. We granted TracFone a waiver from that statutory obligation in the 2005 Forbearance Order. See 20 FCC Rcd 15095 (2005) (*2005 Forbearance Order*). We subsequently granted TracFone ETC designation for multiple jurisdictions, including Pennsylvania, by Order issued April 8, 2008 and released April 11, 2008. See *April 2008 Forbearance Order*, Docket No. 96-45 (April 11, 2008) (*April 2008 Forbearance Order*).

commission” and a certification that the petitioner provides all services designated for support by the Commission pursuant to Section 254(c). The petitioner also had to offer the supported services using either its own facilities or a combination of its own facilities and resale of other carriers’ services. Petition further had to provide a description of how the petitioner advertises the availability of the supported services and the charges therefore using media of general distribution. Finally, there were certain provisions applicable to rural telephone company study areas, including the obligation to identify the study area and a detailed description of the geographic service area. There were other requirements addressing compliance with Section 5301 of the Anti-Drug Abuse Act of 1988 and including the names of individuals specified by Section 1.2002(b) of the Commissions rules, issues not relevant to this proceeding.

6. On June 30, 2000, we released the Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking (the *12th Report and Order*).⁶ The *12th Report and Order* provided a more extensive enumeration of the requirements and processes for securing ETC Designation pursuant to Section 214(e)(6) in Part IV. The most salient portions of the *12th Report and Order* applicable to today’s decision are set out in paragraphs 92-93 and 113.

7. In Paragraph 92, the FCC recognized the need to provide a roadmap detailing the procedures that carriers seeking ETC Designation had to make to comply with Section 214(e)(6).

8. In Paragraph 93, we required carriers seeking ETC Designation in non-tribal lands to consult with the state commission, even if the carrier asserts that the state commission lacks jurisdiction over the case. We held that we would act on a section 214(e)(6) designation request for non-tribal lands designation only in those situations where the carrier can provide the Commission with an affirmative statement from the state commission or court of competent jurisdiction that the carrier is not subject to the state commission’s jurisdiction.

9. In Paragraph 113, we discussed the carrier’s obligations even when the carrier believes the state law precludes the state commission from exercising jurisdiction. We concluded, as a matter of federal-state comity, that the carrier should first consult with the state commission to give the state commission an opportunity to interpret state law. We also concluded that state commissions should be allowed a specific opportunity to address and resolve issues involving a state commission's authority under state law to regulate certain carriers or classes

⁶ *Twelfth Report and Order*, 15 FCC Rcd 12255 (2000), Docket No. 96-45.

of carriers. Only in those instances where a carrier provides the Commission with an affirmative statement from a court of competent jurisdiction or the state commission that it lacks jurisdiction to perform the designation will we consider section 214(e)(6) designation requests from carriers serving non-tribal lands. We further concluded that an "affirmative statement" of the state commission may consist of any duly authorized letter, comment, or state commission order indicating that it lacks jurisdiction to perform designations over a particular carrier. Each carrier should consult with the state commission to receive such a notification, rather than relying on notifications that may have been provided to similarly situated carriers.

10. On June 24, 2004, the FCC issued a Public Notice seeking Comment on TracFone Wireless' Petition for Designation as an Eligible Telecommunications Carrier in the State of New York and a secondary notice on the Petition for Forbearance From Application of Section 214(e)(1)(A) requirement that an ETC offer services support by the FUSF must use either its own facilities or a combination of its own facilities and those of another carrier. There was no reference to any FCC regulations nor was there evidence that TracFone provided the New York Public Service Commission. The FCC required TracFone to provide the New York PSC with a copy and the FCC provided a copy by overnight express to ensure notice.

11. On August 24, 2008, we issued an Order granting the petition of NPCR, Inc. d/b/a Nextel Partners (Nextel) to be designated as an eligible telecommunications carrier (ETC) for the requested service areas in Alabama, Florida, Georgia, New York, Pennsylvania, Tennessee, and Virginia, pursuant to section 214(e)(6) of the Communications Act of 1934, as amended by TA-96.⁷

12. In Paragraph 9 of the *Sprint-Nextel ETC Order*, we concluded that Sprint-Nextel demonstrated that the Commission has authority to consider the seven petitions under section 214(e)(6) of the Act, including Pennsylvania.⁸ That petition complied with the requirement to include an affirmative statement from the relevant state commissions stating that the carrier's request for designation as eligible telecommunications carriers should be sought from the Commission.

13. In Paragraph 13 of the *Sprint-Nextel Order*, we further

⁷ In the Matter of Federal-State Joint Board on Universal Service, Petition for Designation as an Eligible Telecommunications Carrier in Alabama, *et al.*, Docket No. 96-45 (August 25, 2004)(the *Sprint-Nextel ETC Order*).

⁸ AL Petition at Attachment 2; FL Petition at Attachment 2; GA Petition at Attachment 2; NY Petition at Attachment 2; PA Petition at Attachment 2; TN Petition at Attachment 2; VA Petition at Attachment 2.

concluded that the Pennsylvania Public Utility Commission (PaPUC) filed reply comments stating that although it submitted a letter stating its intent to refrain from exercising jurisdiction over Nextel for ETC designation purposes, it has not relinquished its jurisdiction altogether for all CMRS carriers. Specifically, the Pennsylvania Commission expressed concern that it did not intend its letter to operate as a pronouncement of its position on jurisdiction for future ETC designations for all wireless carriers. We further noted that subsequently, the Pennsylvania Commission filed a letter stating that it does not object to the Commission's consideration of Nextel's petition as long as the effect of its letter is limited solely to Nextel's ETC designation request. We therefore found it was appropriate to consider the request for ETC designation in Pennsylvania. As requested by the Pennsylvania Commission, we further concluded that the effect of the Pennsylvania Commission's letter indicating that it lacks jurisdiction in this proceeding is limited solely to Nextel's ETC petition.

14. September 8, 2005, the FCC released an Order denying ETC Designation in New York but conditionally granting TracFone Forbearance from Section 214(e) of the TA-96 as well as Sections 54.201(d)(1) and 54.201(i) of the Commissions rules albeit limited to Lifeline support only.⁹ The *2005 Forbearance Order* concluded at Paragraph 6 that if ultimately granted ETC status, TracFone will be eligible only for Lifeline support. As a limited ETC, TracFone would not be eligible to receive support for the other supported services under the low-income program nor would it be eligible, as an ETC, to receive support for services supported by the other universal support mechanisms. We committed to addressing TracFone's petitions for ETC designation in later orders.

15. In sum, the *2005 Forbearance Order* was conditional on TracFone (a) providing its Lifeline customers with 911 and enhanced 911 (E911) access regardless of activation status and availability of prepaid minutes; (b) providing its Lifeline customers with E911-compliant handsets and replacing, at no additional charge to the customer, non-compliant handsets of existing customers who obtain Lifeline-supported service; (c) complying with conditions (a) and (b) as of the date it provides it provides Lifeline service; (d) obtaining a certification from each Public Safety Answering Point (PSAP) where TracFone provides Lifeline service confirming that TracFone complies with condition (a); (e) requiring its customers to self-certify at time of service activation and annually thereafter that they are the head of household and receive Lifeline-supported service only from TracFone; and (f) establishing safeguards to prevent its customers from receiving multiple TracFone Lifeline subsidies at the same address. We specifically

⁹ *2005 Forbearance Order*, para. 6 and n. 4. We expressly stated our intention to address TracFone's ETC Designation petitions in subsequent orders.

recognized that the grant was conditional, that parties could file petitions if warranted by subsequent events, that we would reconsider the forbearance grant, and that any violation of the conditions could result in losing the ETC designation.¹⁰

16. The *2005 Forbearance Order* also required, within thirty days of the release of this Order, that TracFone file with the Commission a plan outlining the measures it will take to implement these conditions. TracFone filed a Compliance Plan on October 11, 2005 related to the *2005 Forbearance Order*, with several corrections thereafter, which we approved in Paragraph 23 of the *April 2008 ETC Order* as adequate.¹¹

17. On January 9, 2008, the FCC issued a Public Notice seeking Comment on TracFone's Petitions for ETC Designation as an Eligible Telecommunications Carrier throughout the entire Commonwealth of Pennsylvania.¹² The notice set Comment and Reply Comment deadlines of February 8, 2008 and February 25, 2008, respectively. There were no extensions.

18. On April 3, 2008, we issued a Commission Meeting Agenda (the April Agenda Notice) listing several pending TracFone ETC Designation petitions, Pennsylvania was not included. Item #4 listed petitions for New York, Florida, Virginia, Connecticut, Massachusetts, Alabama, North Carolina, Tennessee, Delaware, and New Hampshire.

19. On April 11, 2008, we released the *April 2008 Forbearance Order* addressing ETC Designation Petitions, including Pennsylvania and the District of Columbia.¹³ New York, Florida, Virginia, Connecticut, Massachusetts,

¹⁰ At that time, Commenters raised concerns about the administrative costs, complexities, and burdens of granting this Petition and presumably the associated ETC designation petitions. See Letter from Robin E. Tuttle, USTelecom, to Marlene Dortch, FCC, CC Docket No. 96-45 (filed August 17, 2005) (USTelecom August 17 *Ex Parte*). We believe that this conditional forbearance will serve to further the statutory goal of the providing telecommunications access to low-income subscribers while establishing the necessary safeguards to protect the universal service fund and the functioning of the low-income support mechanism. To the extent, however, that our predictive judgment proves incorrect and these conditions prove to be inadequate safeguards, the parties were instructed to file appropriate petitions with the Commission and the Commission has the option of reconsidering this forbearance ruling. We also noted that the conditions impose here would be incorporated into any grant of subsequent ETC designation petitions and any violation of such conditions may result in loss of ETC status.

¹¹ *April 2008 ETC Order*, paras. 8 and 23.

¹² *Comment Sought on TracFone Wireless Petitions for Designation as an ETC in the Commonwealth of Pennsylvania*, Docket No. 96-45, DA 08-57 (January 9, 2008).

¹³ *In the Matter of Federal-State Joint Board on Universal Service, TracFone Wireless Petitions for Designation as an ETC Carrier in the State of New York, et al.*, 23 FCC Rcd 6206 (2008) (*April 2008 ETC Order*).

Alabama, North Carolina, Tennessee, Delaware, New Hampshire, Pennsylvania, and the District of Columbia were included.

20. The FCC concluded that, except for Florida, the relevant state commissions lack authority to perform the requested limited ETC designations and that therefore the Commission had the authority to make those designations under Section 214(e)(6) of TA-96. We dismissed without prejudice the Florida ETC petition given the change in Florida law and instructed TracFone to re-file a petition with the Florida Public Service Commission.¹⁴

21. In Paragraphs 15 and 16 of the *April 2008 ETC Order*, respectively, we found that TracFone's Lifeline offering will provide a variety of benefit including increased customer choice, high-quality service, and mobility. In addition, the prepaid feature, which essentially functions as a toll control feature, may be an attractive alternative to Lifeline-eligible consumers who are concerned about usage charges or long-term contracts. Finally, we disagreed with TracFone that compliance with 911/E911 requirements was not relevant to the public interest. We conditioned TracFone's ETC designation as an ETC eligible for Lifeline support in each state on TracFone's certification that it is in full compliance with any applicable 911/E911 obligations, including obligations related to the provision, and support of, 911 and E911 service.

22. In Paragraphs 22 and 23 of the *April 2008 ETC Order*, respectively, we reiterated TracFone's obligation to obtain a certification from each Public Safety Answering Point (PSAP) where TracFone provides Lifeline service confirming that TracFone complies with condition (a). Condition (a) requires TracFone to provide its Lifeline customers with 911 and enhanced E911 access regardless of activation status and availability of prepaid minutes.

23. On May 1, 2008, we issued an order granting NEP Cellcorp, Inc. (NEP) ETC Designation premised, in part, on NEP's securing a carrier-specific statement from the PaPUC declining to exercise jurisdiction.¹⁵

C. THE PENDING MATTERS

24. On December 5, 2007, by Virgin Mobile USA, L.P. (Virgin Mobile), a reseller of commercial mobile radio services filed a petition requesting that the Commission forbear from applying the requirement in section 214(e)(1)(A) of the Act that an eligible telecommunications carrier (ETC) offer services supported by the universal service fund using either its own facilities or a

¹⁴ 2005 Forbearance Order, para. 9.

¹⁵ *In re: Federal-State Universal Service and ETC Designation Petitions*, Docket No. 96-45 (May 1, 2008), Appendix B, n. 30.

combination of its own facilities and resale of another carrier's services. In addition, Virgin Mobile asked the Commission to grant designation as an ETC in the state of New York and the Commonwealths of Pennsylvania and Virginia.

25. On December 13, 2007, we published Notice of the Virgin Mobile Petitions seeking Comments and Reply Comments on January 14, 2008 and January 29, 2008, respectively. That matter is currently pending with a statutory deadline for action on the forbearance by March 5, 2009. The PaPUC, among others, has filed in this proceeding.

26. On November 21, 2008, TracFone filed the pending Petition for Modification of Public Safety Answering Point Certification Condition (TracFone Modification Petition) with the FCC. The TracFone Modification Petition raises concerns with the time and cost to obtain PSAP certification. The TracFone Modification Petition also makes several allegations about delay, revocation, or refusal to provide PSAP Certification in Georgia, the District of Columbia, and Pennsylvania. There is no evidence that TracFone provided a copy to any party, including the PaPUC.

27. On December 24, 2008, we published notice of the TracFone Modification Petition issued on December 23, 2008. Comments and Reply Comments deadlines were January 14, 2009 and January 29, 2009, respectively. That notice was published on December 24, 2009. Several parties, among them the PaPUC, filed Comments and Reply Comments.

28. On December 23, 2008, TracFone filed a Supplement to the TracFone Modification Petition reiterating problems with obtaining PSAP certification from the District of Columbia, the City of Bethlehem, and inaction in New Hampshire. There is no evidence that TracFone provided a copy to any party, including the PaPUC.

29. On January 29, 2009, the Pennsylvania Emergency Management Agency (PEMA) filed a Petition to Reject TracFone's self-certification that TracFone is in full compliance with applicable Commonwealth of Pennsylvania 911 and enhanced 911 (E911) obligations, including obligations relating to the provision and support of 911 and E911 service pursuant to paragraph sixteen (16) of our order No. 08-100.

30. On March 2, 2009, TracFone filed a Motion for Partial Dismissal and Response to Ex Parte (the TracFone Motion). The TracFone Motion is limited to the PaPUC's Ex Parte filing of February 26, 2009. TracFone provided the PaPUC with an electronic copy.

III. DISCUSSION

A. The Virgin Mobile and TracFone Forbearance Issues.

31. *The Virgin Mobile Forbearance Petition.* 47 USC § 160 requires the Commission to act on a forbearance petition by a date certain, in this case March 5, 2009, or the matter is deemed granted as a matter of law. Virgin Mobile's petition must be addressed no later than March 5, 2009 and Virgin Mobile relies on the *2005 Forbearance Order* for TracFone to obtain similar forbearance. Given their interconnection, we must deny the Virgin Mobile Petition for two primary reasons. First, we expressly noted in n. 25 of the *2005 Forbearance Order* which Virgin Mobile relies on to secure this relief that we would revisit forbearance from the Section 254(b) mandate on the ownership of facilities and the ancillary Commission regulations based on the predictive effect. The record in this case amply demonstrates that the predictive effect in 2009 on the one forbearance we did grant to TracFone in the *2005 Forbearance Order* is substantially different from the effect anticipated when we granted TracFone that forbearance in 2005.

32. TracFone has not complied with the obligation to obtain PSAP certification, a condition imposed in the *2005 Forbearance Order*. The pleadings of the parties, particularly the PaPUC and PEMA, demonstrate that TracFone has misrepresented the facts and made inconsistent statements about compliance with the *2005 Forbearance Order* conditions. The importance of public safety emphasized in the *2005 Forbearance Order* is not a matter we take lightly on compliance with public safety mandates. Given these evident problems, we see no reason to expect a different result with a grant of forbearance to other similarly situated carriers. This includes Virgin Mobile.

33. The denial of forbearance to Virgin Mobile is not in perpetuity, however. We are today issuing a Notice of Proposed Rulemaking on Grants of Forbearance from the Section 254(b) obligation on ownership as well as any ancillary Commission regulations. We recognize, in hindsight, that the anomalous process used to seek Comment on the then-pending TracFone petition resulted in less comment than would have been received by a better process, including a Notice of Proposed Rulemaking. We also recognize that a more detailed consideration of forbearance from this Congressional mandate warrants reconsideration. Indeed, denial of similar forbearance petitions and issuance of Notice of Proposed Rulemaking gives us a unique opportunity to address what

appears to be a major problem with forbearance from a carrier's obligation to own at least some facilities given the predictive effect in Pennsylvania.

34. Today's action will be retroactive for TracFone as well. We remove TracFone's forbearance for Pennsylvania because TracFone is the only entity that benefited from the *2005 Forbearance Order*. Affirmation of that forbearance is in Pennsylvania given the substantial change in predictive effect, particularly the changes outlined in the filings of the PaPUC and PEMA. Denial of that same precedent to similarly situated carriers is equally warranted to avoid compounding the evident predictive effects in Pennsylvania. But, to avoid disruptions in service to lower-income wireless Lifeline customers in jurisdictions where TracFone already has uncontested compliance with FCC mandates sufficient to market TracFone's wireless Lifeline service, we see no reason to disturb those uncontested operations or support at this time. We will address that issue as a final reconsideration in the Facilities Forbearance NPRM.

35. *The TracFone Forbearance*. The predictive effect of the *2005 Forbearance Order* in 2009 is markedly different compared to what we anticipated in 2005. As we noted in the *2005 Forbearance Order*, the Commission could, and does, reconsider that forbearance grant for TracFone albeit limited to Pennsylvania.

36. Pennsylvania's regulatory agencies have filed voluminous and credible facts and documentation amply demonstrating that TracFone is not in compliance with the mandate to "self certify" compliance with applicable Pennsylvania law. TracFone is not able to secure PSAP certification more as a result of TracFone's behaviors than any alleged unreasonable refusal, arbitrary delay, or capricious revocation. The PaPUC and PEMA filings demonstrate that TracFone is simply unable to obtain the prerequisite PSAP certifications, and for good reason. TracFone said at first that TracFone would only use AT&T Facilities but then capriciously reversed course and made contradictory claims that it actually uses multiple vendors. TracFone arbitrarily refused to conduct reasonable testing in some counties while apparently agreeing to undertake similar if not identical testing in Philadelphia County. TracFone made undocumented claims that unnamed counties revoked PSAP certifications. TracFone made unsubstantiated claims about "other agendas" driving the PaPUC and PEMA concerns with TracFone's operations, including the mandate to comply with state law and the accompanying obligation to secure PSAP certification.

37. We do not agree with TracFone that this is the result of some "other agenda" or unreasonable delays or revocations by PSAP operators or the

PaPUC or PEMA. To the contrary, TracFone's problems are largely self-created. TracFone makes inconsistent commitments to county PSAPs, such as Philadelphia and Monroe counties. TracFone makes inconsistent statements about what facilities TracFone intends to use when it seeks PSAP certification. Finally, TracFone's refusal to comply with state law addressing wireless support for 911 is evident in the fact that regulatory agencies are currently pursuing TracFone in state court for violation of state laws.

38. Unlike the situation in Pennsylvania, however, we are more reluctant to revoke forbearance based on predictive effect in other jurisdictions.

39. We are reluctant to do that given the harm to wireless Lifeline consumers currently receiving TracFone's wireless Lifeline service.

40. TracFone, as a the only carrier that currently benefits from the *2005 Forbearance Order* waiving the statutory obligation to own at least some facilities as a precondition to ETC designation and FUSF support, should be allowed to continue to provide FUSF supported wireless Lifeline services in study areas where the predictive effect is other than that evident in Pennsylvania.

41. Absent evidence that the predictive effect from forbearance is different from what we anticipate (as is the case in Pennsylvania) or that challenges to TracFone's "self-certification" are outstanding (again, as is the case in Pennsylvania) and that PSAP operators are truly acting unreasonably when refusing to provide PSAP certification (again, not the case in Pennsylvania), we see no reason to revoke forbearance.

B. The TracFone and Virgin-Mobile ETC designations.

42. *TracFone's ETC Designation.* We also see no reason to continue ETC designation for TracFone in Pennsylvania. The PaPUC and PEMA filings amply demonstrate that TracFone is not in compliance with state laws. Those state filings demonstrate that TracFone's inability to obtain PSAP certification in some counties is not the result of arbitrary, capricious, or unreasonable refusals or revocations by the PSAP operators. To the contrary, their actions are reasonable and responsive to TracFone's own actions. This includes inconsistent statements about what facilities are being used and where they are being used, contradictory commitments to undertake testing in some counties while refusing to do similar if not identical testing in other counties. This also includes substantial failure to comply with the fundamental notice provisions the FCC imposed on TracFone when TracFone sought ETC designation in the first

place. That noncompliance is aggravated by the fact that TracFone continued to ignore the obligation to provide the PaPUC with relevant filings, including the TracFone Modification Petition and the December Supplement.¹⁶

43. We rescind our ETC Designation for Pennsylvania and direct TracFone to proceed with all deliberate speed to transition wireless Lifeline customers to other wireless Lifeline service providers currently designated to provide similar Lifeline service to lower-income Pennsylvanians in Pennsylvania.

44. TracFone is prohibited from continuing or expanding its services in contested jurisdictions (again Pennsylvania) until we further resolve the pressing issue of forbearance from the facilities requirement. This includes the outstanding issues on the process for certifying compliance with state laws and the process for managing PSAP certification. We intend to resolve those issue in the Facilities Forbearance NPRM issued today.

45. However, for jurisdictions other than Pennsylvania that have not demonstrated noncompliance with the conditions outlined in the *April 2008 ETC Order*, we see no need to reach a different result on ETC Designations for TracFone different from that determined in that *April 2008 ETC Order*. This is warranted by the paucity of evidence on allegations about TracFone's behavior in those jurisdictions compared to Pennsylvania.

46. Moreover, we actively solicit comment and reply comments on whether, and how, forbearance petitions on the Section 254(b) ownership obligation and the ancillary FCC regulations should be considered and granted. We also seek comment and reply comments on our ETC Designation determinations made under Section 214(e)(6). Finally, we solicit comments and replies on any other related matters identified by a party.

47. *The Virgin Mobile ETC Designation Petitions.* Virgin Mobile requests ETC designation in several jurisdictions under Section 214(e)(6). We conclude that ETC designation is appropriate for the requested jurisdictions except Pennsylvania. The PaPUC's recent assertion of jurisdiction warrants dismissal

¹⁶ TracFone relied on our prior action granting ETC Designation to Nextel in Pennsylvania by Order issued August 25, 2004 even though Paragraph 10 of that Order clearly ruled that the PaPUC determination for Nextel was carrier-specific and of no precedential value and despite the fact that Paragraph 113 of our *12th Report and Order* directed carriers to consult with the state commission and to not rely on prior state commission determinations issued to similarly situated carriers. TracFone also failed to comply with our January 8, 2008 directive to provide the PaPUC with a copy of their ETC Designation petition. This procedural noncompliance is not the only instances where noncompliance supports rescission of ETC Designation in Pennsylvania given TracFone's apparent inability to meet FCC mandates and conditions.

without prejudice with instructions to re-file the petition at the PaPUC using the process and expectations we set out in the *April 2008 ETC Order* for the State of Florida. The PaPUC, like the Florida PSC, asserted jurisdiction and under the “primary jurisdiction” precedent, we will dismiss the matter without prejudice.¹⁷

C. The TracFone Modification Petition.

48. We deny TracFone’s Modification Petition. TracFone’s problems with PSAP certification in multiple jurisdictions is largely unsubstantiated and relies on anecdotal evidence. TracFone recognizes that Georgia granted PSAP certification for far more PSAP operators than it denied.¹⁸ The fact that TracFone has problems with a few of the remaining PSAP operators does not necessarily establish that Georgia is acting unreasonably, arbitrarily refusing to grant PSAP certification, or capriciously revoking PSAP certifications previously granted.

49. The holds true for the other jurisdictions identified in TracFone’s filings, most particularly for Pennsylvania in light of the PaPUC and PEMA filings. TracFone had ample opportunity to refute the facts and documents supporting those regulatory bodies concerns with TracFone. The fact that TracFone failed to do so is not a problem with state law or state regulators but reflects, instead, a problem with TracFone’s ability to comply with reasonable FCC mandates.

D. The PEMA Rejection Petition.

50. We grant PEMA’s Petition to Reject TracFone’s Self-Certification that it is in compliance with Pennsylvania law. This condition was imposed on TracFone in the *April 2008 ETC Order* as a critical component that ensured that TracFone was actually in compliance with state law.

51. While we reject the PaPUC’s ancillary claim that the *April 2008 ETC Order* did not include Pennsylvania, the PaPUC outlines several

¹⁷ We note that Virgin Mobile’s ETC Designation Petition for Pennsylvania filed in December 2007 relies on the PaPUC’s carrier-specific decision made to refrain from exercising jurisdiction over NEP’s ETC petition even though we never granted the NEP Petition until May 1, 2008 and despite the fact that Paragraph 113 of the *12th Report and Order* directing carriers to consult with state commissions and not rely on previous state commission determinations made for similarly situated carriers. To the extent this noncompliance retains any relevance, we consider this noncompliance to be a solid basis for denying Virgin-Mobile ETC Designation if we were to act, which we need not do given Pennsylvania’s action.

¹⁸ TracFone Modification Petition, p. 7. TracFone concedes that it secured PSAP certification in 137 out of 164 PSAPs in Georgia.

anomalous and disturbing procedures that lead to including Pennsylvania within the ambit of our *April 2008 ETC Order*.

52. Those anomalies left the Commission with two options. The FCC could have found that Pennsylvania was not included despite extensive discussion about Pennsylvania in that order. That requested result was reasonable but ultimately unpersuasive given that the major concern of the PaPUC and PEMA appears to be TracFone's compliance with the conditions attached to ETC Designation. Their filings amply demonstrate that TracFone's problems are largely self-created, are substantial, and cannot be rectified by a revocation premised on procedural anomalies.

53. We conclude that revocation of ETC Designation in Pennsylvania is better premised on the factual record outlined in the PaPUC and PEMA filings. This includes inconsistent statements about what whose facilities are being used to provide 911, contradictory commitments on testing made to the counties charged with certifying PSAP compliance, and misleading refusals to address substantial compliance with FCC notice and pleading requirements. This includes the order to provide the PaPUC with a copy of TracFone's ETC pleadings, the duty to consult with the PaPUC on ETC Designation, the obligation to seek some kind of "affirmative statement" from the PaPUC addressing ETC designation, and violation of the prohibition against relying on prior "affirmative statements" made to similarly situated carriers as the basis for securing ETC designation.

E. The Tracfone Motion For Partial Dismissal.

54. For the reasons outlined in detail above, we conclude that denial of TracFone's Motion for Partial Dismissal is appropriate. TracFone limits the TracFone Motion to the PaPUC's subsequent Ex Parte letter although the PaPUC clearly reiterated other concerns in filed Comments and Reply Comments as well.

55. TracFone misrepresents the PaPUC's concerns as focusing on a "centerpiece" reliance on "drive testing" as though that were the only issue in the proceeding. The PaPUC filings demonstrate that "drive testing" is an important and critical component of the PaPUC's concerns but is far from the only one. The PaPUC raised substantial concerns about significant noncompliance with FCC notice and pleading requirements. The PaPUC amply documented TracFone's practice of making inconsistent statements, misleading commitments on important

issues like testing, and providing contradictory information on what facilities TracFone would use to deliver supported Lifeline Service in Pennsylvania.

56. We see no reason to grant the TracFone Motion given the factual considerations outlined in this Order and Notice of Proposed Rulemaking.

IV. ORDERING CLAUSES

57. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Section 214(e)(6) and consistent with prior Commission precedent including, but not limited to, the *2005 Forbearance Order* and the *April 2008 ETC Order*, TracFone Wireless, Inc. IS NO LONGER DESIGNATED AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER in the Commonwealth of Pennsylvania.

58. IT IS FURTHER ORDERED that, pursuant to the authority contained in Section 214(e)(6) and consistent with prior Commission precedent including, but not limited to, the *2005 Forbearance Order* and the *April 2008 ETC Order*, TracFone Wireless, Inc. is hereby directed to proceed with all deliberate speed to transition current wireless Lifeline eligible customers in Pennsylvania to similarly situated wireless carriers that currently are DESIGNATED AS AN ELIGIBLE TELECOMMUNICATIONS CARRIER.

59. IT IS FURTHER ORDERED that, pursuant to 47 USC § 160 and consistent with prior Commission precedent including, but not limited to, the *2005 Forbearance Order* and the *April 2008 ETC Order*, TracFone Wireless, Inc.'s prior forbearance granted in the *2005 Forbearance Order* is revoked upon reconsideration based on predictive effects in 2009 that substantially differ from those anticipated in 2005 in the Commonwealth of Pennsylvania.

60. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1-4, 201-205, 218-220, 254, 303(r), and 214 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, this FURTHER NOTICE OF PROPOSED RULEMAKING IS ADOPTED.

61. IT IS FURTHER ORDERED that Virgin Mobile's Petition for Forbearance under 47 CFR § 160 is denied consistent with this ORDER and FURTHER NOTICE OF PROPOSED RULEMAKING.

62. IT IS FURTHER ORDERED that Virgin Mobile's Petition for ETC Designation under Section 214(e)(6) IS DISMISSED WITHOUT

PREJUDICE to the extent consistent with this ORDER and FURTHER NOTICE OF PROPOSED RULEMAKING.

63. IT IS FURTHER ORDERED that the Pennsylvania Emergency Petition for Rejection is GRANTED consistent with this ORDER and FURTHER NOTICE OF PROPOSED RULEMAKING.

64. IT IS FURTHER ORDERED that the TracFone Wireless, Inc. Motion for Partial Dismissal is denied consistent with this ORDER and FURTHER NOTICE OF PROPOSED RULEMAKING.

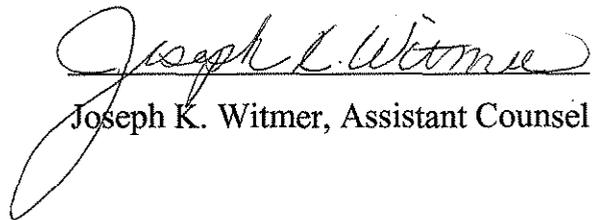
65. IT IS FURTHER ORDERED that this ORDER and FURTHER NOTICE OF PROPOSED RULEMAKING shall be effective as a final order upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas,
Secretary

CERTIFICATE OF SERVICE

I, Joseph K. Witmer, Assistant Counsel for the Pennsylvania Public Utility Commission, do certify that the forgoing Answer of the Pennsylvania Public Utility Commission was filed electronically with the Federal Communications Commission this 4th day of March, 2009 and was provided to the Movant, TracFone Wireless, Inc. and Virgin Mobile, an interested party, electronically on the same day and was followed up by United States mail, first-class, postage prepaid.


Joseph K. Witmer, Assistant Counsel