

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

In the Matter of	)	
	)	
Petition of TracFone Wireless, Inc.	)	CC Docket No. 96-45
For Modification of Public Safety	)	DA 08-2779
Answering Point Modification	)	
	)	
Virgin Mobile USA, L.P.'s Petition	)	CC Docket No. 96-45
For Forbearance and Designation as	)	DA 07-4893
An Eligible Telecommunications Carrier	)	
In the State of New York and the	)	
Commonwealths of Pennsylvania and	)	
Virginia	)	

**COMMENTS ON MOTION FOR RECONSIDERATION**

On April 3, 2009, the Pennsylvania Public Utility Commission (PA PUC) filed with the Commission a pleading styled as a motion for reconsideration in the above-captioned matters. By public notice issued May 6, 2009, the Commission invited comment on the PA PUC motion.<sup>1</sup>

On April 13, 2009, prior to issuance of that public notice, TracFone Wireless, Inc. (TracFone) filed with the Commission an opposition to the PA PUC's motion for reconsideration. In that opposition, TracFone responded as appropriate to the factual and legal assertions set forth in the motion and to the relief requested by the PA PUC. Attached hereto is a copy of TracFone's April 13 opposition which is incorporated herein by reference.

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<sup>1</sup> Public Notice - Comment Sought on Pennsylvania Public Utility Commission Petition for Reconsideration of the Commission's TracFone Modification and Virgin Mobile Forbearance Orders, CC Docket No. 96-45, DA 09-1014, released May 6, 2009.

Respectfully submitted,

**TRACFONE WIRELESS, INC.**



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June 5, 2009

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 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. 07-4893

**OPPOSITION TO MOTION FOR RECONSIDERATION**

TracFone Wireless, Inc. (“TracFone”), by its attorneys, hereby opposes the motion for reconsideration filed by the Pennsylvania Public Utility Commission (“PA PUC”) in the above-captioned matters. Although PA PUC’s motion is nominally directed at the Commission’s March 5, 2009 order modifying the Public Safety Answering Point certification condition,<sup>1</sup> and the March 5, 2009 order granting a petition for forbearance and several petitions for Eligible Telecommunications Carrier designation filed by Virgin Mobile USA, L.P.,<sup>2</sup> TracFone’s opposition will focus primarily on those aspects of the PA PUC motion which seek changes to the PSAP Certification Modification Order.

**Introduction**

At the outset, it should be noted that PA PUC’s filing of its motion for reconsideration is not within the scope of its statutory responsibilities under the laws of the Commonwealth of

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<sup>1</sup> Federal-State Joint Board on Universal Service and TracFone Wireless, Inc., et al, FCC 09-17, released March 5, 2009 (“PSAP Certification Modification Order”).

<sup>2</sup> Virgin Mobile USA, L.P., et al, FCC 09-18, released March 5, 2009 (“Virgin Mobile ETC Order”).

Pennsylvania. PA PUC's statutory authority is derived from Title 66 of Pennsylvania Consolidated Statutes Annotated. That title, which embodies Pennsylvania's Public Utility Code, articulates the specific powers granted to PA PUC. In particular, the PA PUC has:

the full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders, or otherwise, all and singular, the provisions of this part, and the full intent thereof; and shall have the power to rescind or modify any such regulations or orders. (emphasis added).

66 Pa. C.S.A. § 501(a). "This part" refers to the Public Utility Code as set forth in Title 66. The PA PUC also has authority to regulate public utilities by making regulations that are necessary and proper. See 66 Pa. C.S.A. § 501(b). Title 66 provides the PA PUC with authority to perform various functions, including: initiating its own enforcement proceedings to restrain violation of PA PUC rules and provisions of the Public Utility Code (Section 503); requiring public utilities to file periodic reports (Section 504); inspecting facilities and related records of public utilities (Section 506); varying the terms of a contract between a public utility and a person or entity to ensure just and reasonable terms (Section 508); assessing fees on public utilities to cover regulatory expenses (Section 510); performing audits of telephone companies whose plant is valued at a minimum of \$10 million (Section 516).

Importantly, the statutory definition of "public utility" codified at Title 66 specifically excludes wireless telecommunications services. The Commission's attention (and PA PUC's attention) is directed to Title 66 Section 102(2) which states that the term "public utility" does not include: ". . . (iv) Any person or corporation, not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service."

Not only does PA PUC have no statutory authority over mobile domestic cellular radio telecommunications service, it also has no statutory authority over emergency communications in general or 911/E911 service in particular. Conspicuously absent from the powers enumerated

in Title 66 is anything related to emergency communications, 911 and E911 service, testing of 911 systems, etc. The omission of such powers from the Pennsylvania Public Utility Code is not surprising. The Pennsylvania laws governing emergency telephone service in general and 911/E911 in particular are codified in the Public Safety Emergency Telephone Act. 38A Pa. C.S.A. That statute authorizes another agency -- the Pennsylvania Emergency Management Agency -- to enforce the provisions of that act. Since the Public Safety Emergency Telephone Act contains no jurisdictional grant of authority or responsibility to PA PUC, it is not surprising that PA PUC has no rule governing 911/E911 service or testing and has no enforcement authority with respect to that act. To the extent that PA PUC has moved for reconsideration of the PSAP Certification Modification Order based on professed concerns about public safety in general, and 911/E911 testing and access to 911/E911 in particular, such matters are well outside the scope of its jurisdiction under Pennsylvania law. Therefore, PA PUC's filing of a motion for reconsideration based upon alleged, albeit unsubstantiated, public safety concerns, is an *ultra vires* act. Nonetheless, in this opposition, TracFone will address the assertions set forth in PA PUC's motion.

#### **I. The Motion is an Untimely Request for Reconsideration of Prior Commission Orders**

While PA PUC's motion for reconsideration is styled as a request to reconsider the PSAP Certification Modification Order and the Virgin Mobile ETC Order, in reality, PA PUC is asking the Commission to reconsider its initial order conditionally granting TracFone's petition for forbearance -- more than three and one-half years after its adoption.<sup>3</sup> PA PUC readily admits that it is really asking the Commission to reconsider the 2005 TracFone Forbearance Order:

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<sup>3</sup> Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i), 20 FCC Rcd 15095 (2005) ("TracFone Forbearance Order").

“Reconsideration is appropriate because the forbearance from the statutory obligation to own facilities is the root cause of these problems.”<sup>4</sup>

As the Commission already noted in the PSAP Certification Modification Order, Section 1.106(f) of the Commission’s rules requires that petitions for reconsideration must be filed within 30 days from the date of public notice of the final Commission action. Under Section 1.4(b)(2) of the rules, the effective date for the TracFone Forbearance Order was its release date - September 8, 2005.<sup>5</sup> Accordingly, the deadline for requests to reconsider that order was October 8, 2005. To the extent that PA PUC’s April 3, 2009 motion purports to constitute a request for reconsideration of that 2005 decision, it should be dismissed as procedurally defective and very untimely -- as the Commission previously has acknowledged.<sup>6</sup>

## **II. PA PUC Continues to Persist in its Demand that the Commission Require Resellers Such as TracFone to Engage in “Drive Testing”**

In the PSAP Certification Modification Order, the Commission denied PA PUC’s claim that TracFone has an obligation under state law to engage in what PA PUC calls “drive testing.” In that order, the Commission noted that it was unclear whether Pennsylvania law contains a “drive testing” requirement which applies to wireless resellers. What is clear is that PA PUC has yet to cite to any provision of Pennsylvania law which imposes such an inappropriate and unnecessary requirement on wireless resellers. As TracFone has explained in prior responses to PA PUC filings, there is no such “drive testing” requirement, nor would it make any sense to apply such a requirement to a wireless reseller. Drive testing, as described by PA PUC, is a test of a wireless provider’s network to determine whether the network is able to route 911 calls to

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<sup>4</sup> PA PUC Motion for Reconsideration at 3, citing to the TracFone Forbearance Order.

<sup>5</sup> PSAP Certification Modification Order at n. 15.

<sup>6</sup> *Id.*

PSAPs. Every wireless carrier used by TracFone to provide service to Pennsylvania customers has been drive tested -- a fact which PA PUC has never contested. Those carriers' networks, including those of AT&T Mobility, T-Mobile, and Verizon Wireless -- all have been shown to route 911 calls to PSAPs. TracFone, which is a wireless reseller, does not have a network. Therefore, there is no TracFone network to drive test.

Despite this uncontroverted and incontrovertible fact, PA PUC persists in its demand that the Commission impose a non-existent requirement on TracFone and other wireless resellers. The motivation for this repeated demand to impose an unnecessary network testing requirement on resellers who do not own or operate wireless networks should be seen for what it is: a dilatory tactic intended to forestall TracFone from offering its innovative SafeLink Wireless Lifeline service to low income Pennsylvania households. As the Commission noted in the PSAP Certification Modification Order, “[t]racFone’s customers should not be denied the benefits of access to Lifeline support for a prolonged period of time pending PSAP action on TracFone’s certification requests.” TracFone has been attempting to obtain certifications from Pennsylvania PSAPs since September 2008 -- nearly seven months. Some Pennsylvania PSAPs have been cooperative and have provided the requisite certifications which have enabled TracFone to bring SafeLink Wireless service to many economically suffering Pennsylvania communities, particularly in western Pennsylvania. Other Pennsylvania PSAPs have imposed roadblock after roadblock and in doing so, have denied thousands of qualified low income Pennsylvania households an invaluable benefit.

The Commission has conditioned the self-certification process set forth in the PSAP Certification Modification Order on TracFone obtaining from its underlying carriers a certification that those carriers route 911 and E911 calls from TracFone customers in the same

manner that they route 911 and E911 calls from their own customers. That is an important condition which will assure PSAPs and more importantly, TracFone Lifeline customers, that they will have access to 911 and E911. That condition and the 911/E911 access assurances which will follow from the condition obviate any need to impose upon TracFone and other wireless resellers a requirement to “drive test” networks which do not exist.<sup>7</sup>

**III. None of PA PUC’s Suggested “Clarifying Procedures” are Necessary.  
Those Procedures Should not be Adopted on Reconsideration.**

Finally, PA PUC offers the Commission a series of “clarifying procedures.” These so-called “clarifications” do not clarify anything. Rather, they would materially change the requirements established in the PSAP Certification Modification Order, would impose unnecessary delays, and would provide no public safety benefits. Each should be summarily rejected.

PA PUC’s first suggested clarifying procedure is that the 90 day period would not commence until the wireless carrier submitted to the PSAP a “complete as filed” request containing the information and handsets.<sup>8</sup> Not only has PA PUC failed to provide any definition or explanation of what it means by “complete as filed,” such an additional requirement is unnecessary. The Commission already has stated that TracFone may not make a self-certification until it has provided a PSAP with “all of the information and/or equipment requested by the PSAP in analyzing TracFone’s ability to provide 911 and E911 service to its customers.”<sup>9</sup> Every PSAP has the opportunity and the right to request such information as it

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<sup>7</sup> TracFone has been providing prepaid wireless service in Pennsylvania and other states for more than ten years, and now has approximately eleven million customers. It has never received a complaint from any customer about a failure of 911 access from any location where wireless service is available.

<sup>8</sup> PA PUC Motion, at 4.

<sup>9</sup> PSAP Certification Modification Order, ¶ 6.

deems necessary to determine whether TracFone Lifeline customers have access to 911 and E911. They also have the right to request test phones. TracFone routinely provides requested information and test phones promptly upon request. 90 days is a more than ample period for any PSAP to perform the necessary analysis.

PA PUC's second suggested clarification would not be a clarification but rather would be a fundamental and material change to the Commission's order and one that is procedurally as well as substantively improper. PA PUC asks that the 90 day period prior to self-certification not commence until the "expiration of any appeal or reconsideration."<sup>10</sup> It is well-settled that Commission orders are effective upon public notice of the order.<sup>11</sup> The PSAP Certification Modification Order and the requirements and conditions contained therein became effective on March 6, 2009 -- the release date of that order.

By asking that the effective date be postponed until some time in the future following completion of the reconsideration process and possible appellate review of the order, PA PUC is, in effect, asking the Commission to stay that order's effective date. Stays are not routinely granted, nor are they automatic. In order to justify issuance of a stay of a validly-adopted Commission order, the party requesting the stay must make the following four-part showing: 1) that it is likely to prevail on the merits; 2) that it will suffer irreparable harm, absent a stay; 3) that other parties will not be harmed if a stay is granted; and 4) that the public interest would be served by a stay. Alpine PCS, Inc., 23 FCC Rcd 10485 at ¶ 8 (2008) (citing Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n. v. FPC, 259 F.2d. 921, 925 (DC Cir. 1958); see also

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<sup>10</sup> PA PUC Motion at 5.

<sup>11</sup> Section 1.103(a) of the Commission's rules (47 C.F.R. § 1.103(a)) ("Unless otherwise specified by law or Commission rule, the effective date of any Commission action shall be the date of public notice of such action as that latter date is defined in § 1.4(b) of these rules.")

Hispanic Information and Telecommunications Network, Inc., 20 FCC Rcd 5471, 5479 (2005).

PA PUC has not even attempted meet a single prong of the four-part test for a stay, notwithstanding the fact that a stay is what it is requesting by asking to delay the self-certification process set forth in a validly-adopted and effective Commission order until after expiration of reconsideration and appeals -- a period which could take many months, or even years.

PA PUC's third "clarification" is that the information which must be provided to PSAPs should include the following: 1) a statement from an officer or counsel to the wireless reseller seeking PSAP Certification that the underlying facilities-based carrier can deliver or transmit 911 and E911; and 2) a statement from an officer, agent, employee or owner of the facilities-based carrier. It also asks that the reseller seeking PSAP certification provide handsets for testing.<sup>12</sup>

These suggested additional requirements should be rejected. As a condition to self-certification, wireless resellers, including TracFone, already are required to obtain certification from their underlying network providers that those carriers will route TracFone customers' 911 and E911 calls in the same manner that they route their own retail customers' 911 and E911 calls.<sup>13</sup> Those underlying carrier certifications would seem to cover all that PA PUC is suggesting in 1) and 2) above. Neither is imposition of a requirement that testing handsets be provided to PSAPs either necessary or appropriate. As many Pennsylvania PSAPs are well-aware, TracFone has provided handsets for testing to any PSAP requesting such testing devices. Those test handsets have been provided promptly by TracFone upon request by any PSAP without there being a requirement to do so.

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<sup>12</sup> PA PUC Motion at 5.

<sup>13</sup> TracFone suggested that condition in its November 21, 2008 petition for modification of the PSAP certification condition. Accordingly, it has no objection to the requirement to obtain such certifications from its underlying carriers.

Significantly, TracFone notes that has gone through the PSAP certification process in numerous states. Very few PSAPs have requested handsets for testing, and most of those few PSAPs that have requested test handsets are located in Pennsylvania. One wonders why certain Pennsylvania PSAPs have deemed it necessary to request testing handsets when other PSAPs throughout the country (including some in Pennsylvania) have been able to satisfy their concerns about TracFone customers' access to 911 and E911 without such handsets for testing. Nonetheless, there is no need for a requirement to provide handsets for testing since wireless resellers, anxious to complete the PSAP certification process, will be willing to provide test devices upon reasonable request as TracFone has been doing since being designated as an ETC in April 2008.<sup>14</sup>

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<sup>14</sup> TracFone has no objection to PA PUC's suggestion that footnote 66 of the Virgin Mobile ETC Order be applicable to all similarly situated carriers. In fact, the requirement articulated in that footnote -- that Virgin Mobile may only offer Lifeline service in areas where E911 has been deployed -- was imposed upon TracFone in the 2005 TracFone Forbearance Order. TracFone later proposed that the requirement be modified so as to allow it to offer Lifeline wherever 911 service was available, even if E911 had not yet been deployed. That request was denied in the Commission's April 2008 order designating TracFone as an ETC in several states, including Pennsylvania. See Federal-State Joint Board on Universal Service, TracFone Wireless Petition for Designation as an Eligible Telecommunications Carrier in the State of New York, et al, 23 FCC Rcd 6206 (2008) at n. 56.

**Conclusion**

For the reasons stated in this opposition, PA PUC's motion for reconsideration should be denied and the PSAP Certification Modification Order should be promptly affirmed without further modification or "clarification."

Respectfully submitted,

**TRACFONE WIRELESS, INC.**



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April 13, 2009

CERTIFICATE OF SERVICE

I, Raymond Lee, a Legal Secretary with the law firm of Greenberg Traurig, LLP, hereby certify that on April 13, 2009, a true and correct copy of the foregoing Opposition to Motion for Reconsideration was mailed via electronic mail, to the following unless stated otherwise:

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