

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

In the Matter of	)	
	)	
Federal-State Board on Universal Service	)	WC Docket No. 09-197
	)	
TracFone Wireless, Inc.	)	

**RESPONSE OF TRACFONE WIRELESS, INC. TO OBJECTION TO SELF-CERTIFICATION IN THE STATE OF COLORADO**

TracFone Wireless, Inc. (“TracFone”) hereby responds to the “Objection” filed by three local 911 authorities from communities within the State of Colorado -- the Adams County E-911 Emergency Telephone Service Authority, the Arapahoe County E-911 Service Authority, and the Jefferson County Emergency Communications Authority (“Colorado 911 Authorities”). By public notice issued March 1, 2010, the Commission has invited comment on the Colorado 911 Authorities’ request.<sup>1</sup>

**I. TracFone is not Subject to any Commission-Imposed Condition that it Certify Compliance with Colorado 911 or E911 Laws**

The Colorado 911 Authorities purport to “object to TracFone’s self-certification that it is in compliance with basic 911 and E911 requirements of the state of Colorado.”<sup>2</sup> The Colorado 911 Authorities’ request suffers from a fundamental defect: TracFone never has self-certified that it is in compliance with basic and E911 requirements for the State of Colorado. Moreover, it is not required to do so. It appears that the Colorado 911 Authorities are confusing two separate and entirely different Commission-imposed requirements, both relating to 911 and E911 -- 1) the

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<sup>1</sup> Public Notice - Comment Sought on the Petition of Colorado E-911 Authorities to Reject TracFone Wireless’s Self-Certification of 911 and E-911 Compliance, DA 10-346, released March 1, 2010.

<sup>2</sup> Colorado 911 Authorities’ “Objection” at 1.

PSAP Certification Condition; and 2) the State 911/E911 Law Compliance Certification Condition.

**A. The PSAP Certification Condition**

In September 2005, the Commission granted TracFone's petition for forbearance from the requirement codified at Section 214(e)(1)(A) of the Communications Act<sup>3</sup> and Section 54.201(i) of the Commission's rules<sup>4</sup> that eligible telecommunications carriers ("ETCs") provide service supported by the Universal Service Fund, at least in part over their own facilities.<sup>5</sup> The Commission's grant of forbearance was made subject to several conditions. One of those conditions, often referred to as the "PSAP Certification Condition," is as follows: "*TracFone must obtain a certification from each PSAP [Public Safety Answering Point] where it provides Lifeline service confirming that TracFone provides its customers with access to basic and E911 service.*"<sup>6</sup> The PSAP Certification Condition is a Commission-imposed public safety condition. Its purpose is to ensure that all TracFone Lifeline customers, many of whom will rely on TracFone's Lifeline service as their sole connection to the public switched network, are able to access 911/E911 in emergencies. The PSAP Certification Condition has nothing to do with any other federal or state requirements such as, for example, state 911 funding laws.

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<sup>3</sup> 47 U.S.C. § 214(e)(1)(A).

<sup>4</sup> 47 C.F.R. § 54.201(i).

<sup>5</sup> 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 C.F.R. § 54.201(i), 20 FCC Rcd 15095 (2005) ("TracFone Forbearance Order").

<sup>6</sup> *Id.*, at ¶ 16.

Importantly, the PSAP Certification Condition, as modified,<sup>7</sup> is a condition of forbearance. Absent forbearance, TracFone may not be designated as an ETC either by the Commission pursuant to Section 214(e)(6)<sup>8</sup> or by a state commission pursuant to Section 214(e)(2).<sup>9</sup> Therefore, TracFone must comply with the PSAP Certification Condition wherever it seeks ETC designation, irrespective of whether the designating entity is the Commission or a state commission. TracFone has obtained PSAP Certification or has self-certified that its customers have access to 911 and E911 in accordance with the PSAP Certification Modification Order in every jurisdiction where TracFone has sought ETC designation, including Colorado.<sup>10</sup>

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<sup>7</sup> See, Federal-State Joint Board on Universal Service, TracFone Wireless, Inc. et al, 24 FCC Rcd 3375 (2009). In that order, the Commission modified the PSAP Certification Condition so as to allow TracFone to self-certify that its customers have access to 911 and E911 if, after 90 days after requesting certification from any PSAP, the PSAP has not provided the requested certification and has not made an affirmative finding that TracFone does not provide its customers with access to 911 and E911 service (at ¶ 6) (“PSAP Certification Modification Order”).

<sup>8</sup> 47 U.S.C. § 214(e)(6).

<sup>9</sup> 47 U.S.C. § 214(e)(2).

<sup>10</sup> TracFone’s January 13, 2010 letter from Jose A. Fuentes, its Director of Government Relations, to the Adams County E911 Advisory Board, attached to the Colorado 911 Authorities’ “Objection,” is an exercise of the self-certification process established by the Commission in the PSAP Certification Modification Order. At no time have the Colorado 911 Authorities nor anyone else ever questioned the fact that TracFone customers in Colorado have access to 911 and E911. Further, TracFone’s self-certification as described in Mr. Fuentes’ letter, conforms with the PSAP Certification Modification Order in that it is supported by statements from TracFone’s underlying network providers in Colorado that those providers treat 911 calls from TracFone customers in the same manner as they treat 911 calls from their own retail customers.

**B. The State 911/E911 Law Compliance Certification Condition**

In an order issued in April 2008, the Commission designated TracFone as an ETC in ten states and the District of Columbia for the limited purpose of providing Lifeline service.<sup>11</sup> The TracFone ETC Designation Order included a provision which conditioned TracFone's designation by the Commission as an ETC in those eleven jurisdictions on "TracFone's certification that it is in full compliance with any applicable 911/E911 obligations, including obligations relating to the provision, and support of 911 and E911 service."<sup>12</sup> That requirement is referred to as the "State 911/E911 Law Compliance Certification." TracFone has submitted to the Commission the requisite self-certifications of compliance with state 911/E911 laws for each of those eleven jurisdictions in which it has been designated as an ETC by the Commission.

The State 911/E911 Law Compliance Certification requirement is a condition of the Commission's ETC designation of TracFone. As such, it is, by its terms, applicable only to those jurisdictions for which the Commission has designated TracFone as an ETC pursuant to Section 214(e)(6). Colorado is not one of those jurisdictions. In short, while the PSAP

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<sup>11</sup> Federal-State Joint Board on Universal Service, TracFone Wireless, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of New York, et al, 23 FCC Rcd 6206 (2008) ("TracFone ETC Designation Order"). The jurisdictions in which TracFone was designated as an ETC by the Commission include New York, Virginia, Connecticut, Massachusetts, Alabama, North Carolina, Tennessee, Delaware, New Hampshire, Pennsylvania, and the District of Columbia.

<sup>12</sup> TracFone ETC Designation Order at ¶ 16. As noted in that order, the State 911/E911 Law Compliance Certification Condition was imposed by the Commission in response to factual assertions made in a pleading by the Pennsylvania Office of Consumer Advocate and the National Emergency Numbers Association Keystone Chapter regarding TracFone's compliance with Pennsylvania 911 law. In the course of subsequent litigation, it was discovered that those factual assertions were false when made and were acknowledged as false by the person who made them. Upon confirming the falsity of those statements, TracFone filed a Petition to Rescind State 911/E911 Condition on July 16, 2009. A transcript of the deposition acknowledging the false statements is attached to that petition. Since the basis for imposition of the State 911/E911 Law Compliance Certification Condition was a false statement submitted to the Commission, it would be appropriate for the Commission to rescind that condition.

Certification Condition is a condition of forbearance applicable to all jurisdictions where TracFone seeks ETC designation, the State 911/E911 Law Compliance Certification Condition is a condition of ETC designation by the Commission and is applicable only to those jurisdictions where TracFone has been designated as an ETC by the Commission pursuant to Section 214(e)(6).

## **II. TracFone is not in Violation of any Colorado 911/E911 Law**

The entirety of the Colorado 911 Authorities “Objection” is the unsupported and incorrect assertion that TracFone is in violation of Colorado law regarding 911 fees. Not only is that assertion factually incorrect and unsupported, it is contrary to prior filings made in public proceedings by the very same Colorado 911 Authorities. As noted by the Colorado 911 Authorities, those entities intervened in a proceeding before the Colorado Public Utilities Commission for the purpose of opposing TracFone’s ETC application. In their motion to intervene, the Colorado 911 Authorities accused TracFone of violating Colorado law regarding 911 fees. They later changed their mind, acknowledging (albeit reluctantly) that, despite the assertions in their motion to intervene, the law in Colorado was unsettled. Specifically, the Colorado 911 Authorities stated as follows:

No court has ever determined whether C.R.S. 29-11-102 applies to prepaid wireless for TracFone’s regular customers. It is a pure question of law whether C.R.S. 29-11-100.5 *et seq.* applies to service suppliers and service users in the prepaid wireless arena.<sup>13</sup>

The Colorado 911 Authorities have misled the Commission by asserting in their “Objection” that “TracFone admitted that no court had ever determined that the Colorado 911 fee

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<sup>13</sup> Colorado 911 Authorities Response to TracFone Wireless, Inc.’s Motion to Set Aside Interim Order and Alternative Motion to Certify Interim Order as Immediately Appealable, filed November 23, 2009 with the Colorado Public Utilities Commission in Docket No. 09A-393T (In the Matter of the Application of TracFone Wireless, Inc. for Designation as an Eligible Telecommunications Carrier in the State of Colorado for the Limited Purpose of Offering Lifeline Service to Qualified Households).

statutes do not apply to TracFone, and no court has ever excused TracFone from collecting and remitting the fee.”<sup>14</sup> As illustrated by the above quotation from a filing of the Colorado 911 Authorities with the Colorado Public Utilities Commission, the opposite is correct -- no court has ever determined that Colorado’s 911 fee laws are applicable to TracFone or to any other provider of prepaid wireless service. Moreover, neither the Colorado Public Utilities Commission, nor the 911 Authorities themselves, nor anyone else ever has commenced any legal action to attempt to apply or enforce Colorado’s law governing 911 funding to prepaid wireless services.

Not only have the Colorado 911 Authorities retreated from their unsupported and insupportable public accusations that TracFone is in violation of Colorado law, that unsupported assertion is directly contrary to filings made with the Commission. On March 23, 2009, the Colorado 9-1-1 Resource Center submitted information to the Commission as required by the New and Emerging Technologies 911 Improvement Act of 2008.<sup>15</sup> That report was prepared by the Colorado 9-1-1 Resource Center at the request of the Colorado Public Utilities Commission and the Governor of Colorado. That report on file with the Commission contains the following statement:

There is currently no mechanism in place in Colorado for collecting surcharges from individuals using pre-paid cell phone plans. Although these individuals use their prepaid service to call 911, they are not contributing to the revenues used to defray the cost of providing 911 services. It is anticipated that the number of pre-paid wireless use of 911 will increase over the coming years causing further erosion of surcharge revenue without an associated reduction in 911 call load.<sup>16</sup>

In short, not only have the Colorado 911 Authorities acknowledged that Colorado’s 911 funding law never has been determined to be applicable to prepaid wireless services such as

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<sup>14</sup> Colorado 911 Authorities Objection at 2.

<sup>15</sup> Pub. L. No. 110-283, 122 Stat. 2620 (2008) (“NET 911 Act”).

<sup>16</sup> Report of Colorado 9-1-1 Resource Center, filed March 23, 2009, at 3.

those provided by TracFone, the state of Colorado through the Colorado 9-1-1 Resource Center on behalf of the Colorado Public Utilities Commission and the Governor have told the Commission the same thing -- that under current Colorado law there is no mechanism for collecting 911 surcharges from consumers of prepaid wireless services. In fact, on February 1, 2010 -- several days after the Colorado 911 Authorities filed their "Objection" with the Commission, Senate Bill 120 was introduced in the Colorado Senate. That bill has already been passed by the Colorado Senate. If enacted into law, Senate Bill 120 would expand Colorado's 911 surcharge to be applicable to prepaid wireless services, and would implement a workable mechanism for collection 911 surcharges from consumers of such services. It is difficult to imagine any clearer indication that Colorado's current 911 surcharge law does not cover prepaid wireless than the introduction of a bill which, in enacted, would do just that. Accordingly, the assertion of the Colorado 911 Authorities that TracFone is not in compliance with Colorado law governing 911 funding is unsupported, insupportable, inconsistent with prior statements of the Colorado 911 Authorities and other Colorado public officials, and incorrect factually and as a matter of law.<sup>17</sup>

### **III. The Colorado 911 Authorities Misstate the Reasons for TracFone's Withdrawal of its Application for ETC Designation in Colorado**

TracFone applied to the Colorado Public Utilities Commission for designation as an ETC pursuant to Section 214(e)(2) of the Communications Act on June 1, 2009. As noted by the Colorado 911 Authorities, TracFone subsequently withdrew its ETC application. The statement

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<sup>17</sup> Not only is collection and remittance of 911 surcharges on unbilled services such as prepaid wireless not required under current Colorado law, as a matter of practice, telecommunications companies do not collect and remit surcharges on unbilled lines. For example, Qwest Communications, the primary incumbent local exchange carrier in Colorado, has acknowledged in public proceedings that it does not collect and remit 911 surcharges on any of its internal lines which, like lines provided to prepaid wireless customers, are unbilled lines.

in the 911 Authorities “Objection” that the reason for TracFone’s withdrawal was “the intervention by the 911 Authorities”<sup>18</sup> is factually incorrect. As noted above, the current Colorado 911 fee law has never been held by any court or other tribunal to be applicable to prepaid wireless services, and the law would not be workable to recover 911 fees from customers of such services if it were determined to be applicable. In recognition of that unassailable fact, TracFone has committed to working with other stakeholders in Colorado, including the Public Utilities Commission’s 911 Task Force (whose membership includes the Colorado 911 Authorities’ counsel), and with the Colorado 911 Authorities to develop a legislative solution which would include a mechanism for collection 911 fees from consumers of all wireless services, including prepaid services. Senate Bill 120 is an example of those efforts.

To facilitate those legislative efforts, TracFone concluded that its resources would be better expended working cooperatively with others, including the Colorado 911 Authorities, to craft a legislative solution than to continue to litigate its ETC application while the debate over 911 fee collection went unresolved. As TracFone stated in its notice of withdrawal, it plans to refile its ETC application with the Colorado Commission following enactment and implementation of such legislation.

Currently, TracFone has been designated as an ETC to provide Lifeline service in twenty-seven jurisdictions, and it is providing its SafeLink Wireless® Lifeline service to more than 3 million low income households in those jurisdictions. It is unfortunate that the continued bickering by the Colorado 911 Authorities has forced TracFone to delay bringing that important service to Colorado. It is further unfortunate that the Colorado 911 Authorities whose stated mission supposedly is to provide reliable 911 services to Colorado residents is wastefully

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<sup>18</sup> Colorado 911 Authorities’ Objection at 3.

misusing 911 resources to oppose TracFone's efforts to provide Lifeline service to low income Colorado households and to insert itself in proceedings before the Colorado PUC and the Commission which are not proceedings about 911 service. The Colorado 911 Authorities' resources would be better spent to deploy and improve E911 service in Colorado rather than engaging in costly, wasteful, and irrelevant litigation before the Colorado PUC and the Commission.<sup>19</sup> Notwithstanding the tactics of the Colorado 911 Authorities, TracFone remains confident and hopeful that a workable legislative solution will be enacted and that TracFone will be able to provide low-income Coloradans Lifeline service as an ETC.<sup>20</sup>

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<sup>19</sup> Use of 911 funds to litigate against TracFone both at the Colorado PUC and the FCC is especially troubling in light of representations to the Commission made by the Colorado 9-1-1 Resource Center. In its March 23, 2009 report to the Commission pursuant to section 6(f)(2) of the NET 911 Act, the Resource Center (whose membership includes representatives of the Colorado 911 Authorities) that the "Governor's office is not aware of any funds that are being used for other than the purposes set forth within, and that have been used or set aside for other than the purposes set forth within." Engaging in multiforum litigation against TracFone and impeding TracFone's efforts to provide Lifeline service to low income Colorado households hardly is use of funds consistent with that representation.

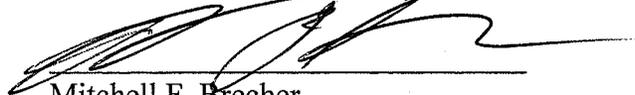
<sup>20</sup> At pp. 4-5 of their "Objection," the Colorado 911 Authorities offer a lengthy, strained argument to support their view that the Colorado 911 fee law is applicable to prepaid services such as those provided by TracFone. The Colorado 911 Authorities' argument is curious in light of their prior acknowledgement to the Colorado Public Utilities Commission that the law has never been held to be applicable (see p. 5 of this Response). It is not the role of the Commission to interpret or attempt to apply or enforce state laws. However, if the Commission has concerns about state 911 fee collection laws, then TracFone respectfully suggests that the Commission commence a proceeding to examine all states' 911 fee collection laws and whether such laws comply with the requirements of Section 253 of the Communications Act that such laws be equitable, nondiscriminatory and competitively neutral. The Commission should also be aware that Colorado is not the only state where attempts have been made to use TracFone ETC proceedings to force TracFone to subject itself to obligations which, under the states' laws, have never been determined to be applicable to it. Given the Commission's statutory responsibility for implementation of the Universal Service provisions of the Communications Act, it may behoove the Commission to address such misuse of state ETC proceedings by entities who wish to advance agendas having nothing to do with universal service or the Lifeline program.

**Conclusion**

For the reasons set forth in this response, TracFone respectfully urges the Commission to deny the "Objection" of the Colorado 911 Authorities.

Respectfully submitted,

**TRACFONE WIRELESS, INC.**



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March 31, 2010

**CERTIFICATE OF SERVICE**

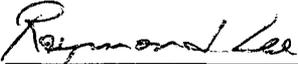
I, Raymond Lee, a Legal Secretary with the law firm of Greenberg Traurig, LLP, hereby certify that on March 31, 2010, a true and correct copy of the foregoing Response of TracFone Wireless, Inc. to Objection to Self-Certification in the State of Colorado was sent via electronic-mail to the following:

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