



FILED

01-26-11
02:47 PM

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's own motion into the alleged failure of TracFone Wireless, Inc. (U4321C) to collect and remit public purpose program surcharges and user fees on revenue from its sale of intrastate telephone service to California consumers, in violation of the laws, rules and regulations of this State; Order to Show Cause why Respondent should not immediately be ordered to pay all such outstanding sums plus interest, and be subject to penalties for such violations.

Investigation 09-12-016
(Filed December 17, 2009)

**ADMINISTRATIVE LAW JUDGE'S RULING
GRANTING, IN PART, THE MOTION FOR SUMMARY ADJUDICATION BY
CONSUMER PROTECTION & SAFETY DIVISION AND ADDRESSING
MISCELLANEOUS PROCEDURAL MATTERS**

This ruling grants, in part, the *Motion for Summary Adjudication of the Duty Issue (Motion for Summary Adjudication)* filed by Consumer Protection & Safety Division (CPSD) on September 28, 2010.¹ As a result, the issue of whether TracFone Wireless, Inc. (TracFone) is a public utility or a telephone corporation

¹ CPSD's motion was originally filed on September 17, 2010 and amended to include additional citations on September 28, 2010. The amended document was referred to by CPSD as a brief rather than a motion. All references to CPSD's motion or brief will be to the September 28, 2010 version and referred to herein as *Motion for Summary Adjudication*.

under California law will not be addressed at hearings. TracFone's obligations as a California public utility and a telephone corporation to pay the public purpose surcharges and the user fee identified in Investigation 09-12-016 will be addressed at hearings. This ruling also addresses miscellaneous motions and directs TracFone and CPSD to prepare a joint document containing legal authorities. Appendix A to this ruling sets forth certain ground rules for the upcoming hearings on February 1, 2 and 3, 2011. Appeals of the findings made by this ruling will be considered when the Commission adopts a final decision in this proceeding that specifically addresses the matters set forth herein.

1. CPSD's Motion for Summary Adjudication

After reviewing all pertinent documents filed in this proceeding related to CPSD's *Motion for Summary Adjudication and Declaration of Llela Tam-Walsh in Support of Motion for Summary Adjudication of the Duty Issue*, this ruling finds no triable issues on any material facts as to whether TracFone operates in California as a public utility or as a telephone corporation. This ruling further finds that, as a matter of law, TracFone is a California public utility and a telephone corporation under Cal. Const., art. XII, § 3; Pub. Util. Code §§ 216, 233, and 234.² The Commission's final decision in the proceeding will discuss this ruling on CPSD's *Motion for Summary Adjudication* in further detail and may also opine on some additional basis for finding TracFone a public utility and telephone corporation, as set forth in CPSD's *Motion for Summary Adjudication*.

² All statutory references are to the public utilities code unless otherwise stated.

Briefly, however, this ruling relies on the following facts. TracFone states it is a reseller of telecommunication service, specifically of Commercial Mobil Radio Service. (Pollak Declaration at 3:9-10.)³ TracFone does not dispute that these telecommunication services include California intrastate calls. (CPSD *Motion for Summary Adjudication*, Attachment Q-1 – Petition by TracFone for Designation as Eligible Telecommunications Carrier in State of California dated August 7, 2008 at 9 and 16.)⁴

TracFone states it resells the wireless services of Verizon Wireless, AT&T Mobility, and T-Mobile (Pollak Declaration at 3:20-22) and that Verizon Wireless, AT&T Mobility, and T-Mobile are all telephone corporations and public utilities under California law. (Pollak Declaration at 4:6-8.)

TracFone explains that it uses the term “resale” to mean that, among other things, under its business model, it purchases wireless telecommunication services at wholesale prices from the above-noted companies (Pollak Declaration at 4:9.) and, in what TracFone describes as a classic example of arbitrage, it resells these wireless services in the retail market. (Pollak Declaration at 4:15-17.)

Under its arbitrage business model, TracFone sets its own rate structures and, as such, does not offer its customers the exact rate structures of TracFone’s underlying carriers, Verizon Wireless, AT&T Mobility, and T-Mobile. (Pollak

³ Pollak’s testimony is contained in the document submitted in support of TracFone’s opposition to the *Motion for Summary Adjudication* and entitled *Declaration of F.J. Pollak in Support of Response of TracFone Wireless, Inc. to the Motion of Consumer Protection & Safety Division for Summary Adjudication*.

⁴ TracFone states at 9 that “TracFone provides its subscribers with the ability to send and receive local phone calls wherever it provides service” and at 16 that “TracFone, through its resale of wireless services provided by its underlying vendors in California, provides service in every Zip Code in the State of California.”

Declaration at Attachment 1 (stating the customer's terms and conditions of service and rates established by TracFone); CPSD *Motion for Summary Adjudication*, Confidential Attachments S and U - Resale Service Agreements at "Resellers Obligation;"⁵ *Response of TracFone*, Exhibit A at 6.)

Moreover, in reselling its wireless services, TracFone's California customers (Pollak Declaration at 5:8) consider TracFone, not the underlying carriers, such as Verizon Wireless, AT&T Mobility, and T-Mobile, as their wireless carrier for customer service issues. (Pollak Declaration at Attachment 1 (stating the customer's terms and conditions of service and rates established by TracFone); CPSD *Motion for Summary Adjudication*, Confidential Attachments S and U - Resale Service Agreements at "Resellers Obligation;"⁶ *Response of TracFone*, Exhibit A at 6.)

It is well-established by the Commission that an entity that provides telecommunication services to customers under its own name or brand, which holds itself out as the end users' telecommunication carrier for customer service purposes, and that offers its own rate structures to such end-user customers does so as a telephone corporation and public utility under California law.

TracFone, as documented by the declarations and exhibits submitted in connection with CPSD's *Motion for Summary Adjudication*, (1) markets its telecommunication products to end user customers under its own name or brands, (2) holds itself out to its end user customers as their telecommunication

⁵ See, e.g., Confidential Attachment S at Section 5.3; Confidential Attachment U at Section 5.3.

⁶ See, e.g., Confidential Attachment S at Section 5.3; Confidential Attachment U at Section 5.3.

carrier for customer service purposes, and (3) sells services to end user customers under a rate structure it establishes, as opposed to the exact rates established by the underlying carrier. These facts establish as a matter of law that TracFone is a public utility and a telephone corporation under California law.

TracFone readily acknowledges that entities that resell landline telecommunication services, including, for example, non-dominant interexchange carriers, are public utilities and telephone corporations under California law. It argues, however, that the Commission has never explicitly found resellers of wireless services to be either California public utilities or telephone corporations. Therefore, TracFone reasons, resellers of wireless services, such as itself, are not public utilities or telephone corporations under state law.

The Commission, however, has long held that wireless service providers – in general -- are public utilities. (*See, e.g., Commercial Communications, Inc. v. PUC*, 50 C.2d 512, 523 (1958) (early “communication effected by private mobile systems” of Pacific Bell and others “is a telephone service and if dedicated to public use it is subject to the jurisdiction of the respondent commission”).) The Commission has never exempted non-facilities based wireless carriers from this rule.

Moreover, Commission precedent establishes that telecommunications entities that operate on a non-facilities basis and that resell telecommunications services to end user customers under their own name and rate structure fall within the definition of public utility and telephone corporation. (Decision (D.) 92-06-069, 1992 Cal. PUC LEXIS 972, *9, 44 CPUC2d 747; *see also* D.95-01-044.)

While Commission case law addresses landline services, the Commission's rationale for finding resellers of wireline services to be public utilities and telephone companies applies equally to the resale of wireless carriers.

This matter will be addressed in more detail in the final decision in this proceeding.

2. Miscellaneous Motions

- *CPSD's Motion for Summary Adjudication*

By this ruling, CPSD's *Motion to File under Seal Confidential Attachments S, T, U and V*, which was filed concurrently with CPSD's *Motion for Summary Adjudication* is granted. This ruling also serves to memorialize that, by electronic mail dated November 23, 2010, I authorized CPSD to file a reply in support of its *Motion for Summary Adjudication*. CPSD filed its reply on December 9, 2010.

- ***TracFone's Motion to Strike CPSD's Motion for Summary Adjudication on Procedural Grounds dated October 14, 2010***

By written ruling dated October 28, 2010, I authorized CPSD to file a response to TracFone's above-referenced motion. CPSD filed this document on December 2, 2010, entitled *Opposition of Consumer Protection & Safety Division to Motion of TracFone Wireless, Inc. to Strike CPSD's Motion for Summary Adjudication on Procedural Grounds*. By electronic mail dated December 6, 2010, I authorized TracFone to file a reply to CPSD's opposition. TracFone filed its reply on December 9, 2010.

- ***CPSD's Motion to Strike Portions of the Testimony of Messrs. Pollak and Salzman***

The January 10, 2011 Motion of CPSD to Strike Portions of the Testimony of Messrs. Pollak and Salzman is denied. CPSD makes this motion because the testimony it seeks to strike is largely "barely disguised legal argument and legal conclusions rather than evidentiary facts, or is irrelevant to the inquiry at hand."

(CPSD *Motion to Strike* at 1.) While CPSD's motion has merit, TracFone might properly expand upon some of these matters at hearing. For this reason, the motion to strike is denied.

3. Joint Document of Legal Authorities

TracFone and CPSD are directed to submit a Joint Document of Legal Authorities setting forth copies of statutes and regulations pertinent to public purpose surcharges and the user fee effective during the period of time period subject to this investigation. The due date for this submission will be established at the upcoming hearings.

4. Hearing Room Ground Rules

The Hearing Room Ground Rules set forth at Appendix A are intended to promote fair, courteous and orderly hearings and the efficient use of hearing time.

IT IS RULED that:

1. The *Motion for Summary Adjudication of the Duty Issue* filed by Consumer Protection & Safety Division on September 28, 2010 is granted, in part.
2. This ruling finds no triable issues on any material facts as to whether TracFone Wireless, Inc. operates in California as a public utility or as a telephone corporation under Cal. Const., art. XII, § 3; Pub. Util. Code §§ 216, 233, and 234.
3. Parties are directed to submit a Joint Document of Legal Authorities.
4. The Hearing Room Ground Rules set forth at Appendix A are adopted.

Dated January 26, 2011, at San Francisco, California.

/s/ REGINA M. DEANGELIS

Regina M. DeAngelis
Administrative Law Judge

APPENDIX A

HEARING ROOM GROUND RULES

Witnesses

Parties must decide themselves how to fit all witnesses within the scheduled time. If parties fail to resolve this matter, the Presiding Officer will act pursuant to Rule 13.5. Parties are directed to provide the Presiding Officer with the agreed upon order of witnesses at least one day before the first day of hearings, January 31, 2011.

Exhibit Format

All exhibits must be in a format consistent with Rule 13.7(a).

Parties often fail to include a blank space two inches high by four inches wide to accommodate the Presiding Officer's exhibit stamp. If necessary, add a cover sheet to the front of the exhibit. The common practice of pre-printing the docket number, a blank line for the exhibit number, and witness names(s) is acceptable, but it is not a substitute for the required two by four inch blank space to accommodate the exhibit stamp.

In addition, all exhibits should be bound on the left side or upper left-hand corner. Rubber bands and paper clips are unacceptable. All excerpts from lengthy documents should include the title page and, if necessary for context, the table of contents of the document. Parties are asked to use a font no smaller than 12 points unless impracticable.

Exhibit Copies

In accordance with Rule 13.7(b), the original and one copy of each exhibit shall be furnished to the Presiding Officer and a copy shall be furnished to the reporter and to each party. The copy furnished to the Presiding Officer may be

the mailed copy. Except for exhibits that are served prior to the hearing, parties are responsible for having sufficient copies available in the hearing room for the court reporter and each party in attendance.

Cross-Examination Exhibits

Allowing witnesses time to review new or unfamiliar documents can waste hearing time. The general rule is that a party who intends to introduce an exhibit in the course of cross-examination should provide a copy to the witness and the witness' counsel before the witness takes the stand on the day the exhibit is to be introduced. Documents in excess of two pages should be provided the day before. Generally, parties need not provide advance copies of documents to be used for impeachment or to obtain the witness' spontaneous reaction (although this practice is not encouraged).

Corrections to Exhibits

The practice of making extensive oral corrections to exhibits on the witness stand, requiring lengthy dictation exercises, causes delays. To the extent possible, corrections to testimony should be in the form of errata exhibits.

Cross Examination Time

As set forth in Rule 13.5, parties are placed on notice that it may be necessary to limit and allocate cross-examination time as well as time for redirect and recross-examination.

Court Reporters

Common courtesy should always be extended to the hearing room reporters. Counsel should wait for witnesses to finish their answers, and witnesses should likewise wait for the whole question to be asked before answering. Counsel shall refrain from simultaneous arguments on motions and objections. Conversations at the counsel table or in the audience can be

distracting to the reporter and other participants. Such distractions shall be avoided.

General Hearing Room Decorum

Parties are expected to act with the highest level of decorum, consideration and respect when addressing the Presiding Officer, opposing party, and witnesses.

(END OF APPENDIX A)

