

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



FILED

03-16-11
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Order Instituting Investigation on the Commission's own motion into the alleged failure of TracFone Wireless, Inc. (U-4321-C) 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.

I.09-12-016
(Filed December 17, 2009)

**MOTION OF CONSUMER PROTECTION & SAFETY DIVISION
FOR OFFICIAL NOTICE OF: DECEMBER 21, 2009 TESTIMONY OF
F.J. POLLAK BEFORE THE INDIANA UTILITY REGULATORY
COMMISSION, IN CASE NO. 43732**

Pursuant to Rules 11.1 and 13.9 of the Commission's Rules of Practice and Procedure, the Commission's Consumer Protection & Safety Division (CPSD) requests Official Notice of the December 21, 2009 Testimony of F.J. Pollak before the Indiana Utility Regulatory Commission, in Case No. 43732, *TracFone Wireless, Inc. Application for a Certificate of Territorial Authority for Communication Service Providers*. This is the same proceeding about which Mr. Pollak was cross-examined in the instant action.¹ On re-direct examination, Mr. Pollak made statements about his testimony in Indiana that were incomplete, and potentially misleading, as described below.

Rule 13.9 states that the Commission may take official notice of "such matters as may be judicially noticed by the courts of the State of California." California Evidence

¹ Hearing Transcript (Tr.) at 372 *ff.*

Code § 452 states that courts may take judicial notice of either “official acts of the legislative, executive, and judicial departments of the United States,” and/or “[f]acts and propositions that are not reasonably subject to dispute ... and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” Evidence Code §§ 452(c) and (h). Under these provisions, California courts have taken judicial notice of a wide variety of administrative and executive acts. *See, e.g., Performance Plastering v Richmond*, 153 C.A.4th 659 (2007) (transcript of a settlement conference); *Woodward Park Homeowners v. Fresno*, 150 C.A.4th 683 (2007) (agreement between Dept. of Transportation and private developer).

The transcriptions of utility commission hearings are executive acts, are not reasonably subject to dispute, and may be immediately verified. Transcripts C and D, containing the full portion of Mr. Pollak’s testimony, are attached hereto as Exhibits 1 and 2. CPSD has also included the pages from the concordance/index where the words debit (as in debit card) or phone card would have appeared. Respondent (and others) may obtain a copy of these transcripts by contacting the Court Reporting department of the Indiana Commission, at 317-232-2731 or LRuble@urc.IN.gov.

Moreover, TracFone itself put these transcripts at issue. On re-direct examination, TracFone’s counsel asked Mr. Pollak a series of questions:

MR. BRECHER: Q Yesterday during your
8 cross-examination Mr. Witteman showed you
9 testimony that you had filed before the
10 Indiana Utility Regulatory Commission. Do
11 you recall that?
12 A Yes, I do.
13 Q Did you later appear as a live
14 witness in Indiana Regulatory Commission

15 proceeding?

16 A Yes, I did.

17 Q During your appearance at the
18 Indiana Utility Regulatory Commission did you
19 describe TracFone's services?

20 A Yes, I did.

21 Q And did you describe them as
22 prepaid wireless or debit services?

23 A Yes, I did.

24 Q Did anybody at the Indiana Utility
25 Regulatory Commission question the accuracy
26 of that description?

27 A No, they didn't.

28 Q Did anybody at the Indiana Utility
505

1 Regulatory Commission question the accuracy
2 of your testimony?

3 A No, they did not.

4 Q Did anybody at the Indiana
5 Regulatory Commission question the accuracy
6 of the information contained in TracFone's

7 application for a certificate of territorial

8 authority?²

In fact, the attached transcripts show: (a) Mr. Pollak did not describe TracFone as a debit card company, or use the words phonecard or debit card; (b) Mr. Pollak described TracFone as a cellular reseller; and (c) the accuracy of Mr. Pollak's testimony was questioned.³ Moreover, the testimony concerns the same claims of impossibility advanced here, claims that the Indiana Commission has rejected.⁴

As TracFone has here put the substance of Mr. Pollak's Indiana testimony at issue, as well as the accuracy of his testimony both before that Commission and this, these matters are clearly relevant.

/s/ CHRISTOPHER WITTEMAN

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² Tr. at 504-05.

³ See Transcript C-96-97; compare Exhibit CPSD-9, Pollak Testimony before Indiana URC, attached Application at p. 2, question II(E).

⁴ See Indiana URC November 4, 2010 Order on Rehearing https://myweb.in.gov/IURC/eds/Modules/Ecms/Cases/Docketed_Cases/ViewDocument.aspx?DocID=0900b6318014ecef.