

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION)
 OF TRACFONE WIRELESS, INC. FOR)
 DESIGNATION AS AN ELIGIBLE)
 TELECOMMUNICATIONS CARRIER)
 IN THE STATE OF INDIANA FOR THE) CAUSE NO. 41052 ETC 54
 LIMITED PURPOSE OF OFFERING)
 LIFELINE SERVICE TO QUALIFIED)
 HOUSEHOLDS)
)
 TRACFONE WIRELESS, INC.) CAUSE NO. 43732
 APPLICATION FOR A CERTIFICATE)
 OF TERRITORIAL AUTHORITY FOR) ORDER ON REHEARING
 COMMUNICATION SERVICE)
 PROVIDERS) APPROVED: NOV 04 2010

BY THE COMMISSION:
David E. Ziegner, Commissioner
Angela Rapp Weber, Administrative Law Judge

On August 24, 2010, the Office of Utility Consumer Counselor (“OUCC”) filed with the Indiana Utility Regulatory Commission (“Commission”) its Petition for Rehearing or Reconsideration of Order on CTA Application (“Petition”). In the Petition the OUCC sought Commission clarification of the Commission’s August 4, 2010 Order on CTA Application (“CTA Order”). Specifically, the OUCC asked the Commission to explain TracFone Wireless, Inc.’s (“TracFone”) status as a public utility and TracFone’s obligation to pay certain fees listed in the CTA Order.

On September 3, 2010, TracFone Wireless, Inc. (“TracFone”) filed its Response to Petition for Rehearing or Reconsideration (“Response”). In its Response TracFone argued insufficient evidence exists to determine whether TracFone is a public utility. Further, it contended the CTA Order permitted TracFone to determine which fees it should pay, and the Commission could at a future date initiate a proceeding to determine if TracFone decided incorrectly.

On September 10, 2010, the OUCC filed its Reply in Support of Petition for Rehearing or Reconsideration (“Reply”). The OUCC stated in its Reply that sufficient evidence exists to determine TracFone’s status as a public utility. Also, the OUCC disagreed with TracFone’s assertion that the CTA Order permitted TracFone to choose which fees to pay. The Reply asked the Commission to clarify when TracFone should begin to pay the fees listed in the CTA Order.

Having considered the Petition, Response and Reply, the Commission agrees with the OUCC that the CTA Order should be clarified, based upon the existing record and without further hearing and pursuant to 170 IAC 1-1.1-22(e)(1), as addressed below.

1. TracFone's Public Utility Status. The OUCC noted in its Petition that in paragraph two of the CTA Order, TracFone's business and organization description states that "TracFone *does not* own, operate, manage or control any plant equipment or facilities in Indiana for the conveyance of telegraph or telephone messages directly or indirectly to the public." (emphasis added). The OUCC noted in its Petition that this description mirrors the definition of a public utility in Ind. Code § 8-1-2-1. The Petition also point out that the Commission in the CTA Order required TracFone to pay the public utility fee. Further, in footnote five, page five of Order in Cause No. 43524 ("Dismissal Order"), the Commission stated TracFone is a public utility. Therefore, the OUCC's Petition asked for clarification as to TracFone's status as a public utility.

The Commission first notes the issue before the Commission in Cause No. 43732 was whether to grant TracFone a CTA. Accordingly, the Commission did not directly address TracFone's status as a public utility in the Ordering Paragraphs. However, the testimony of F.J. Pollak, TracFone's President and Chief Executive Officer, provided at the Evidentiary Hearing held in this Cause supports the Commission's statement made in our Order issued in Cause No. 43524 that TracFone is a public utility.

According to Mr. Pollak, customers nationwide can buy phones and minutes directly from TracFone. (Tr. at C-91 -- C-94). Further, a customer cannot use his or her phone except to dial 911 if the balance of minutes is used, unless additional minutes are purchased. (Tr. at D-36 -- D-37). The phone also becomes inactive if a card with minutes is purchased and the minutes are not used within an allotted time, for example, ninety days. (Tr. at C-89). According to Mr. Pollak, a customer can add minutes to the TracFone phone by calling a 1-800 number, going online or through a function in the TracFone phone. (Tr. at C-49).

Based on Mr. Pollak's statements, TracFone exercises a level of control over the equipment employed for the use of TracFone's wireless service. Therefore, TracFone is a public utility with respect to Ind. Code § 8-1-2-1. Accordingly, paragraph two erroneously states, "TracFone *does not* own, operate, manage or control any plant equipment or facilities in Indiana for the conveyance of telegraph or telephone messages directly or indirectly to the public." (emphasis added). Instead, paragraph two should state, "TracFone owns, operates, manages or controls plant, equipment or facilities in Indiana for the conveyance of telegraph or telephone messages directly or indirectly to the public."

2. TracFone's Obligation to Pay Fees. The Commission agrees with the OUCC that TracFone shall pay the fees listed in Paragraphs 4a – 4j of the CTA Order. TracFone's obligation to pay such fees is not left to TracFone's discretion. After Paragraph 4j, the CTA Order states, "The Commission notes, however, that TracFone and the OUCC disagree as to whether TracFone is obligated to pay certain fees, including, for example, those relating to InTrac and the IUSF. TracFone's payment of such fees is not appropriate for our consideration in a CTA proceeding, but the Commission is not precluded from inquiring into this issue in the future." The Commission also agrees with the OUCC that this statement requires clarification.

As stated previously, TracFone shall pay the fees listed in Paragraphs 4a – 4j in the CTA Order. TracFone shall pay these fees from the date of the August 4, 2010 Order, unless the IUSF's third-party administrator determines payment of IUSF fees should have commenced from a different date. If TracFone fails to pay the fees listed Paragraphs 4a – 4j (or any other fees the Commission determines to be appropriate) under Indiana or Federal law from the date of the CTA Order (or from the date deemed appropriate by the IUSF's third-party administrator for IUSF fees), the Commission may initiate a proceeding to inquire into such failure.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. The Petition for Rehearing or Reconsideration of the Order on CTA Application is hereby granted as set forth herein.
2. This Order shall be effective on and after the date of its approval.

ATTERHOLT, LANDIS, MAYS AND ZIEGNER CONCUR:

APPROVED: NOV 04 2010

I hereby certify that the above is a true and correct copy of the Order as approved.


Brenda A. Howe
Secretary to the Commission