

COMMENTS OF TRACFONE WIRELESS, INC.

on the

**Report by the Maine Public Utilities Commission
to the Maine Utilities and Energy Committee**

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**Summarizing the Activities and Results
of the Prepaid Wireless Stakeholder Group**

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March 9, 2007

- I. **EXECUTIVE SUMMARY** – TracFone has no comments on the Executive Summary.
- II. **BACKGROUND** – The Report points out that postpaid wireless subscribers are contributing to the E911 Fund under current law but that prepaid customers are not. TracFone feels this merits further explanation. The reason for the disparity is that the statute provides a viable means whereby traditional local exchange telephone and wireless providers can, relatively easily, collect the fee as a separate surcharge on monthly bills to customers. The law provides that the traditional provider, i.e., a company that retails its services directly to end users through monthly subscriptions, remit the “surcharge revenues collected from its customers. . . “. Most prepaid wireless service is sold to customers through third-party retail merchants in Maine and not directly by the service provider. There is no mechanism in existing law for the unbilled prepaid wireless customer to pay a surcharge at the retail checkout counter. Merchants do collect sales taxes on prepaid wireless sales, but not E911 fees.
- III. **FORMATION AND COMPOSITION OF THE STAKEHOLDER GROUP** – TracFone has no comments on this section.
- IV. **ISSUES TO BE CONSIDERED BY STAKEHOLDER GROUP** – TracFone has no comments on this section.
- V. **COMMUNICATION WITH STAKEHOLDER GROUP** – TracFone has no comments on this section.
- VI. **MEETINGS** – TracFone has no comments on this section.
- VII. **REQUESTS FOR INFORMATION** – TracFone has no comments on this section.
- VIII. **SUMMARY OF ALTERNATIVE COLLECTION METHODS** – In subsection D., TracFone suggests that the Tennessee “ARPU” method not be referred to

as a collection method. It is a method for prepaid service providers to calculate and remit E911 fees, but it provides no method for collecting the surcharge from end users.

IX. STAKEHOLDER POSITIONS – TracFone has no comments on this section.

X. OTHER ISSUES - TracFone has no comments on this section.

XI. ANALYSIS – With regard to subsection A.3. and the discussion of decrementing, TracFone is not aware that any of the listed states have ever documented to what extent the decrementing or “sufficient positive balance” method is effective and how much revenue, if any, is being generated.

- In Nebraska, the provision does not go into effect until July 1, 2007. In the meantime, the NE legislature is already considering legislation (LB 661) to repeal the decrementing provision and to require the PSC to develop methods to collect from prepaid end users.
- South Dakota has had a decrementing law since 2006, but the director of the E911 agency in Rapid City testified before a legislative committee hearing on February 7, 2007 that only one prepaid provider was remitting in the state, indicating that the decrementing law in SD is ineffective.
- The KY law makes a special exception to the decrementing law to provide that, in the case of providers that are not technically capable of decrementing, the state may adopt a regulation to provide a way to collect from such providers’ end users. The KY CMRS Board is currently considering proposed rules on this subject.

The Report says that 18 states have enacted legislation requiring prepaid wireless *subscribers* [emphasis added] to fund the state’s E911 system. The statutes of five of the states listed – AL, MD, MN, MT, SC, and WA – do not even mention prepaid wireless and instead impose the fee only on billed subscribers. The issue is currently being litigated in WA and MT. Except in some of these states where prepaid subscribers may be subjected to decrementing, TracFone is not aware that any prepaid wireless customers are actually paying monthly 911 surcharges in any of these states. The reason is that the laws do not recognize that most prepaid wireless sales take place in retail stores and that the stores are not required to collect the fees. Thus, these state laws are not effective and are not a good model for Maine or any other state to follow.

While some states are trying to impose ineffective or discriminatory decrementing provisions or taxes on prepaid service providers, the Committee should be aware that some states are taking a different approach:

- HI, ID and VT have specifically exempted prepaid from their E911 fee laws.
- Officials in the states of AZ, NY, DE and NJ have taken the position that their E911 fee laws do not cover prepaid wireless.
- MO law allows local jurisdictions to adopt a small general sales tax surcharge (e.g., one-tenth of one percent of all retail sales) to fund E911, and this has been approved in public referenda and administered successfully in some localities.

- Many other states continue to collect E911 fees from billed local and wireless customers and have not addressed or resolved issues involving prepaid, yet their E911 systems are adequately funded and operating without financial difficulties.
- Several state legislatures voted down proposals in 2005-2007 to extend E911 fees to prepaid, e.g., CO, AL, MS, GA, ND, and MI.
- Some states have granted refunds or credits to prepaid wireless providers as a result of past overpayments or discriminatory practices, or are now engaged in litigation over past practices. For example, the Michigan Court of Claims ruled against the state attorney general and granted a refund to a prepaid service provider that paid E911 fees that were never collected from billed end users. The matter is now before an appellate court. One major national wireless carrier has filed refund claims in several states on grounds that the state laws did not authorize or require remittance of E911 fees with respect to prepaid wireless services.

TracFone agrees with the Report's recommendation that the Committee "adopt a surcharge mechanism that will treat subscribers of prepaid and postpaid wireless service as similarly as possible."

TracFone disagrees that the Tennessee method recommended by the Report would achieve this objective. The Tennessee method consists of two methods or options. The first is the decrementing method, which is unworkable for many of the major prepaid wireless providers and is opposed by consumers. The second is the ARPU remittance method, which is essentially a tax on the prepaid service provider and does not meet the standards called for in the Resolve (LD 2088), which are "reasonable equivalency" and competitive neutrality.

XII. RECOMMENDATIONS – TracFone has not seen a copy of the legislation the Committee plans to offer to enact the Tennessee method. However, as previously explained, TracFone does not think the Tennessee method meets the standards of the Resolve or the Commission's objective "to adopt a surcharge mechanism that will treat subscribers of prepaid and postpaid wireless service as similarly as possible."

The subscribers for prepaid and postpaid services would be treated the same or similarly if each were allowed to remit E911 fees along with the purchase price they pay for the service. Neither the existing Maine statute nor the Tennessee method, if enacted, allows this for the prepaid customers. Consumers have testified they have no objection to paying a fair fee at the point of sale. Since the only viable method for the prepaid customer to remit – paying at the retail point of sale -- has been, in effect, "taken off the table" by the Commission, the aims of the Committee in passing the Resolve will not be met if the Commission's recommended language is adopted.

SUMMARY OF TRACFONE'S POSITION

The Commission has been the national leader in researching and examining the prepaid wireless industry and how E911 surcharges apply, or should apply, to prepaid wireless

services. TracFone agrees with most of the Commission's analysis and findings. Unfortunately, TracFone believes that the Commission's conclusions and recommendations are inconsistent with its own research and analysis.

The Commission says that "[f]or equity reasons, the Commission urges the Committee to adopt a surcharge mechanism that will treat subscribers of prepaid and postpaid wireless service as similarly as possible". In analyzing the Point of Sale method, the Report says that "[s]ome of the benefits of the Point of Sale Method are that it more closely approximates the surcharge paid by postpaid wireless customers and that it is the most transparent to customers". But the Commission rejected this method primarily because retail sellers "vigorously oppose the method."

Having rejected the prepaid method "that more closely approximates" the postpaid method, the Commission instead advocates the Tennessee Model, which purportedly offers the provider two "collection" options. The first option is ARPU, which the Commission notes specifically "does not lead to parity with the collection mechanism for post-paid wireless customers". ARPU is actually *not* a collection method at all because, as the Report says, "in effect, [it] changes the surcharge from a fee on subscribers to a fee on providers".

The second option is the Decrement Method. The Commission acknowledges "customers may not know that the deduction has occurred and may view the deduction as a misrepresentation of the number of minutes they receive when they purchase the minutes." The method is opposed by the largest wireless carrier in the country (Cingular), and cannot even be done by the second largest carrier in the country (Verizon) or the largest prepaid carrier in the country (TracFone). So in essence, because of the "[absence of] cooperation from the retail sellers" which would make the Point of Sale Method workable, the fall-back position is to suggest an admittedly inferior solution that the Commission knows will create a lack of parity, an inability to collect the fee from subscribers and, quite possibly, an illegal tax on the prepaid wireless providers.

TracFone appreciates that the Committee and the Commission have performed much hard work and shown much dedication in studying these complicated issues and in preparing the Report. However, we feel that the final recommendations are not supported by the research and evidence that has been gathered. TracFone respectfully asks that the Tennessee Method not be enacted in Maine and that instead the Committee consider adopting an E911 fee on prepaid wireless services to be collected from customers at the retail point of sale by retail merchants in the state, including prepaid service providers that sell at retail either in company stores, over the Internet or by phone.

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