

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #7

Do Not Mark in This Box
Filing Date

FILED

2006 JUN 30 P 1:52

Effective Date
OFFICE WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF AN EMERGENCY RULE

AGENCY: Public Service Commission of WV TITLE NUMBER: 150 C.S.R.

CITE AUTHORITY: 24-1-1, 24-1-7, 24-2-1, 24-2-2, 24-6-6b, 24-6-7, 24-6-11, and 29A-3-15.

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES _____ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: Series 31

TITLE OF RULE BEING PROPOSED: Rules Governing E911 Fees.

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

The Legislature recently amended the statutory definition of commercial mobile radio service provider to expressly state its applicability to prepaid and post-paid wireless service providers; in spite of PSC orders to the contrary, some CMRS providers have asserted that they have not been obligated to remit fees until there was clear statutory authority that prepaid services are subject to the E911 fees; and, in spite of PSC orders to the contrary, some CMRS providers have asserted that they are not obligated to remit any E911 fees for prepaid services until the Commission issues revised rules regarding E911 fees. E911 fees are dedicated to the provision of communication services for the public safety and welfare. Therefore, it is essential that revised E911 fee rules be implemented as soon as possible. The Commission proposes to implement these new rules on an emergency basis, effective July 1, 2006.

Use additional sheets if necessary


Authorized Signature

\$6.00



Public Service Commission

Richard E. Hitt, General Counsel

201 Brooks Street, P.O. Box 812
Charleston, West Virginia 25323

Phone: (304) 340-0317
FAX: (304) 340-0372

June 30, 2006

Judy Cooper, Director
Administrative Law Division
Secretary of State's Office
Building 1, Suite 157K
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0771

Re: Public Service Commission
Rules Governing E911 Fees
150 C.S.R. Series 31

Dear Ms. Cooper:

Enclosed is an emergency legislative rule-making, 150 C.S.R. Series 31, *Rules Governing E911 Fees*.

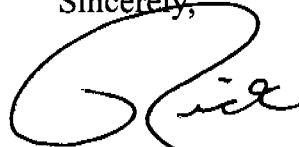
I have enclosed fifteen sets (fourteen for your office and one set to be stamped and submitted to the Legislative Rule-Making & Review Committee) of the required filings as follows: (1) Notice of Emergency Rule (Form #7); (2) Approval of filing by agency Chairman in the form of Commission General Order No. 187.32, issued June 30, 2006; (3) Emergency Rule Questionnaire; (4) Brief Summary of Emergency Legislative Rule; (5) Statement of Circumstances; (6) Fiscal Note for Emergency Legislative Rule; and (7) Emergency Legislative Rule. It is my understanding that you will assist in filing the rule with the legislative committee, and that your office will also assure that proper publication is made in the *State Register*.

Since the Commission is not part of the Cabinet structure, the Commission order is evidence of approval of the filing by the agency lead, Chairman Jon W. McKinney.

Page 2
150 C.S.R. Series 31
June 30, 2006

If you have any questions or if there are any problems, please bring them to my attention.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard E. Hitt". The signature is stylized with a large, sweeping initial "R" and a cursive "Hitt".

Richard E. Hitt
General Counsel

REH/klm
Enclosures

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 30th day of June, 2006.

GENERAL ORDER NO. 187.32

IN THE MATTER OF Rules Governing E911 Fees,
150 C.S.R. Series 31, to provide further guidance
regarding E911 fee requirements.

COMMISSION ORDER

By this order, the Commission promulgates proposed Rules Governing E911 Fees, 150 C.S.R. Series 31, to provide further guidance regarding enhanced 911 fee requirements.

As the Legislature recently amended the statutory definition of commercial mobile radio service provider to expressly state its applicability to prepaid and post-paid wireless service providers; as some carriers have asserted in earlier PSC proceedings that they have not been obligated to remit fees until there was clear statutory authority that prepaid services are subject to the E911 fees; and as some carriers have asserted in earlier proceedings that they are not obligated to remit any E911 fees for prepaid services until the Commission issues revised rules regarding E911 fees, the Commission also proposes to implement these new rules on an emergency basis, effective July 1, 2006.

BACKGROUND

Since March 6, 1998, the Commission has had in place rules regarding E911 fee requirements in the PSC's Rules and Regulations Governing Emergency Telephone Service, 150 C.S.R. Series 25 (Emergency Telephone Service Rules).

On November 1, 2005, the Emergency Telephone Service Rules were revised to implement the provisions of House Bill Number 3208.¹ See Gen. O. No. 187.29, as corrected

¹ In July of 2005, House Bill 3208 became law and modified W. Va. Code § 24-6-6b by:

1. increasing the wireless E911 fee to \$3 per month,

November 29, 2005. The revisions were promulgated as emergency rules, to be effective December 13, 2005. House Bill 3208 made the Commission's revisions to those rules subject to legislative rule review, and on April 10, 2006, the Commission issued agency-approved proposed legislative rules,² which were reviewed by the Legislative Rule-Making and Review Committee following the 2006 Legislative session. That Committee reported out the Commission's agency-approved proposed legislative rules with no changes, and the PSC's proposed legislative rules will be on the Legislature's agenda for final adoption in 2007.

Also during the 2006 session, the Legislature further amended the statutes relating to the E911 fees via Senate Bill 728. Among other things, Senate Bill 728 makes Voice over Internet Protocol (VoIP) services subject to the E911 fee provisions, requires a character and criminal background investigation of certain persons to be employed in emergency dispatch centers and precludes persons with felony convictions from holding certain positions, and assigns part of the wireless enhanced 911 fees to West Virginia's Division of Homeland Security and Emergency Management.³

Senate Bill 728 also required the Commission to issue an updated Commission order by June 1, 2006, regarding wireless enhanced 911 fee collection matters. The Commission issued its update order on June 1, 2006, in Case Number 06-0076-C-GI, and advised that it intended to issue proposed rules by July 1, 2006, and at that time begin the comment and hearing process to adopt final rules.

In the June 1, 2006, order, the Commission also recognized that a settlement conference was scheduled for June 14, 2006, in a companion E911 fee proceeding, Case Number 05-1303-C-GI. As it has long been the Commission's policy to encourage settlement, and the Commission did not wish to foreclose any possibility that the affected parties could work out an agreement

-
2. creating the Enhanced 911 Wireless Tower Access Assistance Fund to help fund wireless towers in West Virginia,
 3. allocating portions of the E911 fee to the State Police, the tower assistance fund and the counties, and
 4. authorizing the Commission to issue emergency and proposed legislative rules.

² Under the Commission's emergency rules, loans from the tower fund were anticipated. Under the agency-approved proposed legislative rules, in consideration of comments made and of lower administrative costs to handle only grants, the Commission removed the loan language and changed to a grant only approach.

³ The Voice over Internet Protocol and Homeland Security provisions also require revisions to Commission rules. Those changes will be addressed in a separate order.

among themselves, the Commission advised that it might revisit the timing of its expected July 1, 2006, order.

More specifically, in the update order, the Commission reviewed reports filed March 15, April 25, and May 16, 2006. Ultimately, the Task Force proposed rules which would primarily implement a Point-Of-Sale approach, in which E911 fees would be collected from prepaid subscribers by the vendor from whom prepaid wireless services were purchased. Upon notification to the Commission, as an alternative, the draft rules would allow prepaid wireless carriers to use an Average Revenue Per User approach to remit the E911 fees.

The Commission also noted that, in response to the May 16, 2006, report, Virgin Mobile wrote that it concurred that adoption of a one-size-fits-all collection and remittance mechanism was unwarranted. Virgin Mobile argued that prepaid providers should be able to adopt the approach that better suits their respective business, operational, and customer requirements.

Further, the Commission recognized that the issues were complex; that wireless service is provided via emerging technologies; that service is available to West Virginia subscribers via numerous providers and service permutations; that the number of service permutations increase frequently, sometimes several times a month; and that the Commission expects that the number of service permutations will continue to increase frequently for the foreseeable future. In example, the Commission wrote as follows:

Today, subscribers can prepay or postpay. They can purchase unlimited usage for a set duration of time, say a month. Or, subscribers can buy finite units of time to use over longer periods, perhaps 120 minutes to use during the next six months. They can purchase from the carrier directly via a storefront or a website. From a reseller like RadioShack, Target, or 7-11, subscribers can select among competing carriers. Today, the options are so varied that unlimited usage is available a single day at a time – if subscribers so choose.

The Commission also recognized that the Legislature recently directed that cellular service be made more readily available throughout West Virginia's challenging terrain. Accordingly, the Commission said that it expected that the competitive landscape would continue to evolve and that additional choices in carriers and service options would become available.

However, the Commission concluded that the issues were too unsettled to immediately issue the Point-Of-Sale draft rules as proposed rules. While several participants jointly recommended the Point-of-Sale as the primary approach, the Commission wrote that it was concerned about its jurisdiction over the vendors who would be obligated to collect the E911

fees. Moreover, the Commission noted that those vendors had not been offered an opportunity to comment on the Point-of-Sale proposal or yet participated in any PSC proceeding.

Upon review of the three reports, the Commission concluded that the clearest consensus to emerge was that the various carriers, each with their separate business plans, wished to be able to collect and remit the E911 fees in a manner which least affected their own business models. Such a consensus was a curious result in a proceeding in which several carriers argued that they could not be expected to comply with the statute until the Commission provided explicit guidance, the Commission wrote.

Further, the Commission restated its conclusion that wireless carriers are required by the statute to collect and remit E911 fees, regardless of the alleged incompleteness of the Commission's rules, and that the Commission was unable to waive the statutory duty to do so. Although the PSC had not developed a formula to collect and remit the fees, the Commission continued to hold that individual carriers could, and should, apply their own formulas. The Commission also wrote that it remained committed to revising its rules.

A settlement conference was conducted on June 14, 2006. However, the parties to Case Number 05-1303-C-GI have not indicated to the Commission that they were able to resolve their differences.

DISCUSSION

Upon consideration of all of the above, the Commission has determined that it is necessary to initiate a rulemaking proceeding to promulgate new rules to provide further guidance regarding E911 fee requirements.

Moreover, since the recent statutory amendment expressly states that both prepaid and post-paid wireless carriers are within the definition of a CMRS provider; since some carriers have asserted in earlier PSC proceedings that, absent clear statutory authority that prepaid services are subject to the E911 fees, they do not have to remit them; and since some carriers argued that they were not obligated to remit E911 fees for prepaid services until the Commission issued revised rules which included the mechanism to do so,⁴ the Commission concludes that it should seek to make the proposed rules effective on July 1, 2006, on an emergency basis.

⁴ The Commission wishes to make clear that such a position is contrary to the Commission's repeated statements that CMRS providers have an independent obligation to comply with the statute.

The Commission has chosen to issue new rules in a separate series to address E911 fees, because it appears that the Commission may be able to resolve the more straightforward VoIP and Homeland Security revisions to its rules, separate from the complex and contested issue regarding the remission of E911 fees for prepaid service.

The Commission also recognizes that E911 fee rules remain, at present, in the Emergency Telephone Service Rules, 150 C.S.R. Series 25. By issuing rules in the new Series 31, the Commission intends that the new rules control. Thus, in cases of conflict, the Commission intends to rely upon the provisions of Series 31. Once final rules are in place via the Series 31 process, the Commission will return to Series 25 to resolve any outdated or repetitious provisions. Eventually, the Commission intends to consolidate the two separate series.

As the background set forth above reflects, wireless service is marketed today through vehicles never contemplated when the West Virginia statutes were written, and the Commission expects that new marketing approaches will continue to evolve. The Commission also recognizes that CMRS providers depend strongly upon their individual business models and they wish to comply with the law in the manner which is least intrusive upon those various business models. The Commission also desires to provide further guidance to the CMRS community.

Accordingly, in the proposed rules which are promulgated today, the Commission has fashioned a mechanism to capture the E911 fee even when service is provided for a single day during a month. Generally speaking, with the current statutory fee being \$3 per month, the Commission has decided to require CMRS providers to remit 10 cents a day for each day that customer service is provided. Thus, when service is provided to a subscriber for only four days in a particular month, a CMRS provider will remit a proportionate E911, or \$0.40, fee by the 17th of the following month.

However, recognizing that many wireless providers offer service in longer increments, the Commission has simultaneously established a waiver provision. Thus, if a CMRS provider offers service by the month and prefers to calculate \$3 a month, instead of a daily amount, the CMRS may ask the Commission's permission to do so. Moreover, if a CMRS provider prefers yet another approach for its particular business model, that CMRS provider may also petition for a waiver.

In general, so long as CMRS providers remit their E911 fees by July 17, 2006, and state that they will continue to do so as required by law, the Commission will grant an initial emergency waiver for any reasonable alternate method, pending further Commission order. See Rule 3.3 for the complete waiver provisions.

In conjunction with this rule-making the Commission shall seek guidance in the form of written comments and through a hearing to allow argument and testimony by the interested parties.

ORDER

IT IS THEREFORE ORDERED that this General Order Number 187.32 is instituted.

IT IS FURTHER ORDERED that the attached Rules Governing E911 Fees, 150 C.S.R. Series 31, are promulgated as Commission proposed legislative rules and as emergency rules to become effective July 1, 2006. See Attachment A.

IT IS FURTHER ORDERED that the following procedural schedule is adopted for addressing the proposed legislative rules:

Deadline for written initial comments	August 10, 2006, 4:00 p.m.
Deadline for written reply comments	August 16, 2006, 4:00 p.m.
Public Hearing in the HMC Hearing Room 201 Brooks Street, Charleston, West Virginia	August 17, 2006, 9:30 a.m.

IT IS FURTHER ORDERED that all interested persons must set forth specific comments regarding the proposed rules. All comments should be addressed to Sandra Squire, Executive Secretary, Public Service Commission of West Virginia, P.O. Box 812, Charleston, W. Va. 25323.

IT IS FURTHER ORDERED that the Commission's Executive Secretary shall cause publication, one time, of the notice attached as Exhibit B in a newspaper, duly qualified by the Secretary of State, published and of general circulation in each of the following cities: Beckley, Bluefield, Charleston, Clarksburg, Elkins, Fairmont, Huntington, Keyser, Lewisburg, Logan, Martinsburg, Morgantown, Moundsville, Parkersburg, Point Pleasant, Weirton, Welch, Wheeling and Williamson. The Executive Secretary shall file the affidavits of publication as soon as they are received.

IT IS FURTHER ORDERED that the Commission's Executive Secretary shall file a copy of these rules with the Office of the Secretary of State (and upon the Legislative Rule-Making and Review Committee, as appropriate), both as a proposed exempt legislative rule and as an emergency rule-making.

IT IS FURTHER ORDERED that the Commission's Executive Secretary shall provide a copy of these proposed rules to any person upon request.

IT IS FURTHER ORDERED that the Commission's Executive Secretary shall serve a copy of this order by first class U.S. Mail upon all parties to this case and to Case Number 04-1285-C-GI, as well as upon all wireless carriers and resellers operating in the State of West Virginia as well as upon OnStar and similar companies that use wireless telephony in the provision of service to their customers and meet the West Virginia Code's definition of a commercial mobile radio service provider.

A True Copy, Teste:


Sandra Squire
Executive Secretary

CLW/JJW/klm
go18532c.wpd

**TITLE 150
LEGISLATIVE RULE
PUBLIC SERVICE COMMISSION**

**SERIES 31
RULES GOVERNING E911 FEES**

§ 150-31-1. General.

1.1. Scope. – These rules govern the billing, collection, and remission of wireless enhanced 911 monthly fees by telecommunications carriers subject to the jurisdiction of the Public Service Commission of West Virginia.

1.2. Authority. – W. Va. Code §§ 24-1-1, 24-1-7, 24-2-1, 24-2-2, 24-6-6b, 24-6-7, and 24-6-11.

1.3. Filing Date. – June __, 2006.

1.4. Effective Date. – July 1, 2006.

§ 150-31-2. Definitions.

2.1. Statutory definitions adopted.

The Commission adopts the definitions of "commercial mobile radio service provider or CMRS provider," "county answering point," "emergency services organization," "emergency service provider," "emergency telephone system," "enhanced emergency telephone system," "public agency," "public safety unit," "telephone company," "comprehensive plan," and "technical and operational standards," set forth in W. Va. Code § 24-6-2.

2.2. PSC rule definitions adopted.

The Commission also adopts the definitions set forth in Section 2 of the Rules and Regulations Governing Emergency Telephone Service, 150 C.S.R. Series 25.

§ 150-31-3. Billing and Collection of E911 Fees.

3.1. Post-paid service.

Each CMRS provider shall, with each bill rendered, levy an E911 fee, at the current statutory rate, on each valid retail CMRS subscription. The lawful E911 fee shall be a separate line item on the billing statement.

3.2. Prepaid service.

3.2.1 Formula.

For each month during which an account is active, CMRS service providers shall calculate the amount owed for prepaid service by multiplying the number of active customer days for that month by the amount of the current statutory fee divided by 30.

3.2.2. Active customer day.

As used in this section, an "active customer day" is a day, from activation to expiration, inclusive, associated with a prepaid service card, account or functional equivalent, which has been activated with a West Virginia NPA (area code), regardless of the amount of actual time or usage units left on the prepaid service card, account or functional equivalent, provided that no prepaid service card, account or functional equivalent shall be considered to have more than 30 active customer days for any month and that each renewal and extension shall be treated the same as is done for a new purchase.

3.3 Waivers.

3.3.1 Permanent or limited duration waivers.

A CMRS provider may petition the Commission for permission to use an alternate method to calculate the amount of E911 fees due to be remitted to the Commission. Any such petition must 1) be verified, 2) provide good cause why the CMRS provider should be permitted to use a different method, 3) state the duration for which the waiver is requested, and 4) state the alternate method by which the CMRS provider proposes to calculate the amount of fees it remits to the PSC.

3.3.2. Initial emergency waivers.

Upon filing a verified letter no later than July 17, 2006, in which the CMRS provider 1) states that it has already remitted fees to the PSC, or that it is remitting fees to the PSC simultaneously with the filing of the waiver petition, 2) states that it will continue to remit such fees on a going-forward basis, as required by law, 3) sets forth the alternate method by which the CMRS provider calculates the amount of fees it remits to the PSC, 4) sets forth good cause to permit the CMRS provider to use the alternate method, and 5) sets forth the duration for which the waiver is requested, the PSC will grant an initial emergency waiver. The initial emergency waiver will allow the alternate method to remain in effect until the PSC completes its full review of any such application, or until further Commission order. Any CMRS provider filing for an initial emergency waiver under this section does not also need to file for a permanent or limited duration waiver under the preceding section.

§ 150-31-4. Remission of E911 Fees to Commission.

4.1. When remission is due to PSC.

By no later than the seventeenth (17th) day of each month, or the first business day thereafter, each CMRS provider shall remit to the Commission a check, or appropriate financial equivalent, for the net E911 fees. If the payment is mailed, the postmark shall be used as proof when the payment was remitted. If the payment is made electronically, the date the payment is sent, as specified by the software used, shall be used as proof of when the payment was remitted.

Examples:

Monthly E911 fee appears as line item on post-paid subscriber's bill
 Post-paid subscriber pays bill & remits the monthly E911 fee to the CMRS provider on 9/15/06
 CMRS provider remits the monthly \$3.00 E911 fee to the PSC by 10/17/06

Prepaid customer activates 45 days service on 9/15/06

$$\frac{15 \times \$3}{30} = \frac{\$45}{30} = \$1.50 \qquad \frac{30 \times \$3}{30} = \frac{\$90}{30} = \$3$$

CMRS provider remits \$1.50 to PSC by 10/17/06 CMRS provider remits \$3 to PSC by 11/17/06
CMRS provider chooses how to collect the E911 fee from its subscriber

4.2. Form for fee remittals.

CMRS providers shall use P.S.C. W. Va. Form No. WLF-1, or a reasonable functional equivalent, when remitting net E911 fees to the Commission. All information requested by WLF-1 shall be provided. This may be done electronically, at the discretion of the CMRS provider.

4.3. Address to remit the net fees.

The net E911 fees shall be remitted to:

Public Service Commission of West Virginia
Administrative Services Division
P.O. Box 812
Charleston, West Virginia 25323

or

executive_director_e911@psc.state.wv.us

Information about how to remit fees electronically may also be obtained through this email address.

4.4. E911 remittals may be net of billing/collection fee.

For post-paid service, each CMRS provider shall remit to the Commission such E911 fees actually collected by the CMRS provider. Such E911 fees remitted shall include any previously unpaid E911 fees collected by the CMRS provider during the preceding monthly billing period. For prepaid service, each CMRS provider shall comply with the prepaid service fee rules set forth above. Each month before remitting the E911 fees to the Commission, for both prepaid and post-paid service, CMRS providers may retain three percent (3%) of the E911 fees as a billing and collection fee.

4.5. Same remission rules for prepaid and post-paid service.

For prepaid and post-paid service, the same fee remission rules apply.

4.6. Partial payments on post-paid subscriptions.

If a subscriber remits less than the entire amount charged for post-paid service, the partial payment shall first be applied to the monthly wireless E911 fee amount, at the current lawful rate for the E911 fee.

Example:

If a customer pays \$20 on a \$65 bill on 8/1/06, \$3 will be applied to the monthly E911 fee and \$17 will be applied to the bill for wireless services.

§ 150-31-5. Adjustments.

5.1. Authority to resolve disputes

The Public Service Commission has been empowered to resolve any conflict between providers, county commissions and emergency telephone systems.

5.2. Over/under payments

5.2.1. CMRS petitions

If a CMRS provider should discover that an amount above or below that which is required by law has been remitted to the Commission, the CMRS provider should, by petition, forthwith notify the Commission of the overpayment or forthwith remit the overdue amount to the Commission.

5.2.2. Other petitions

The Commission would also entertain petitions from third parties or Commission Staff, or upon its own motion, regarding E911 fees which have not been properly remitted.

5.2.3. Hardship waivers

If hardship results from the application of this rule, or if unusual difficulty is involved in immediately complying with it, or upon other good cause shown, application may be made to the Commission for a temporary waiver of the requirement to forthwith remit an overdue amount. A verified petition for a waiver must 1) set forth a proposed timetable for the overdue amount to be remitted, and 2) show good cause why the Commission should grant the hardship waiver and/or explain the hardship or unusual difficulty.

5.3. Content of petitions

Any petitions filed under this rule must clearly explain what happened and specify any action that is requested of the Commission. Any petition must be verified.

5.4. Credits in lieu of refunds.

Recognizing that the Commission is only a conduit of emergency 911 fees, in cases of overpayments, credits against future payments may be approved by the Commission in lieu of refunds.

5.5. Time period for credits.

Credits may be distributed over a future period equal in length to the amount of time during which the overpayments were made.

5.6. Interest

No interest shall accrue on overpayments.

5.7. Time period to request credits

As the emergency 911 systems are developed, it is anticipated that each county will either expend or encumber the emergency 911 fees during the fiscal year within which they are received. Therefore, no credits

will be approved by the Commission for commercial mobile radio service providers who request refunds more than one fiscal year beyond the date of the overpayment.

5.8. Audits

Upon request from the Commission, a CMRS provider shall make available all books and records to permit the Commission, its Staff, or its designee, to conduct an audit relevant to the CMRS provider's compliance with West Virginia law. The Commission recognizes that, pursuant to W. Va. Code § 24-6-11, the Legislature has declared that information pertaining to the number of customers and revenues collected by CMRS providers is not subject to disclosure under the state Freedom of Information Act, Chapter 29B-1-1 et. seq.

**PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
WIRELESS E-911 SUBSCRIBER FEE REPORT**

P.S.C. W. Va. Form No. WLF-1 (Rev. July 1, 2006)

MONTH OF _____, 20____

Must remit to WVPSC by no later than the 17th, or the first business day thereafter

FEIN: _____
 COMPANY NAME: _____
 DBA (IF APPLICABLE): _____
 ADDRESS: _____

 CONTACT PERSON: _____ PHONE: _____
 E-MAIL ADDRESS: _____

NUMBER OF FEES COLLECTED*	_____
AMOUNT COLLECTED	\$ _____
LESS 3% ADMINISTRATIVE FEE	\$ _____
NET PAYABLE TO PSC	\$ _____

MAIL PAYMENT TO: Public Service Commission of West Virginia
 Administrative Services Division
 PO Box 812
 Charleston, WV 25323

OR, TO FILE ELECTRONICALLY: executive_director_e911@psc.state.wv.us

FAX INFO: (304) 340-3753, ATTN: E-911 Fee Report

* For prepaid service cards, accounts and functional equivalents, the "NUMBER OF FEES COLLECTED" is calculated by dividing the total number of active customer days associated with the reporting month by thirty (30).

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 30th day of June, 2006.

GENERAL ORDER NO. 187.32

IN THE MATTER OF Rules Governing E911 Fees,
150 C.S.R. Series 31, to provide further guidance
regarding E911 fee requirements.

NOTICE OF RULEMAKING, HEARING, & COMMENT PERIOD

On June 30, 2006, the Public Service Commission of West Virginia started a rulemaking to promulgate a new series of rules, Rules Governing E911 Fees, 150 C.S.R. Series 31, to provide further guidance regarding E911 fee requirements. The Commission recognized that E911 fee rules remain in the Rules and Regulations Governing Emergency Telephone Service, 150 C.S.R. Series 25. By issuing rules in the new Series 31, the Commission said that it intended that the new rules control. Once final rules are in place via the Series 31 process, the Commission will return to Series 25 to resolve any outdated or repetitious provisions. Eventually the Commission intends to consolidate the two rule series.

The Legislature recently amended the statutory definition of commercial mobile radio service provider to expressly state its applicability to prepaid and post-paid wireless service providers. In spite of Commission orders to the contrary, some carriers have asserted that they have not been obligated to remit fees until there was clear statutory authority that prepaid services are subject to the E911 fees. Also, in spite of Commission orders to the contrary, some carriers have asserted that they are not obligated to remit any E911 fees for prepaid services until the Commission issues revised rules regarding E911 fees. Therefore, recognizing that E911 services are essential to the health, safety and welfare of West Virginia citizens, and that E911 services are funded by E911 fees, the Commission also proposes to implement these new rules on an emergency basis, effective July 1, 2006.

Anyone interested may obtain a copy of the new rules from Sandra Squire, Executive Secretary, Public Service Commission of West Virginia, P.O. Box 812, Charleston, West Virginia 25323. Written comments on them may be filed with the Commission's Executive Secretary, according to this schedule:

Deadline for written initial comments	August 10, 2006, 4:00 p.m.
Deadline for written reply comments	August 16, 2006, 4:00 p.m.

Additionally, the Commission has scheduled this matter for hearing to be held on August 17, 2006 at 9:30 a.m. in the HMC Hearing Room, Public Service Commission

Building, 201 Brooks Street, Charleston, West Virginia for the purpose of allowing argument and testimony by interested entities. Any parties wishing to intervene in this matter for the purpose of appearing at the hearing should file to intervene within ten (10) days of the date of this publication.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

EMERGENCY RULE QUESTIONNAIRE

DATE: June 30, 2006

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: *(Agency Name, Address & Phone No.)* Public Service Commission of West Virginia
201 Brooks Street, Post Office Box 812
Charleston, West Virginia 25323

EMERGENCY RULE TITLE: 150 C.S.R.

1. Date of filing June 30, 2006

2. Statutory authority for promulgating emergency rule:

3. Date of filing of proposed legislative rule: (Exempt) June 30, 2006

4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule? No.

5. Has the same or similar emergency rule previously been filed and expired?
No.

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the **immediate** preservation of public peace, health, safety or welfare.
The Legislature recently amended the statutory definition of commercial mobile radio
service provider to expressly state its applicability to prepaid and post-paid wireless service
providers. In spite of Commission orders to the contrary, some carriers have asserted that they
have not been obligated to remit fees until there was clear statutory authority that prepaid
services are subject to the E911 fees. Also, in spite of Commission orders to the contrary, some
carriers have asserted that they are not obligated to remit any E911 fees for prepaid services until
the Commission issues revised rules regarding E911 fees. Therefore, recognizing that E911

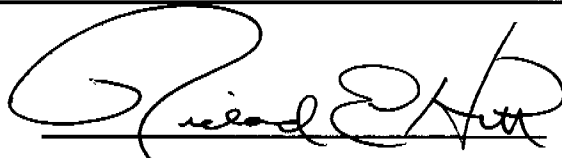
services are essential to the health, safety and welfare of West Virginia citizens, and that E911 services are funded by E911 fees, the Commission proposes the need to implement these new rules on an emergency basis.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

Not applicable.

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

As E911 services are essential to the health, safety and welfare of West Virginia citizens, and as E911 services are funded by E911 fees, the proposed rules are necessary to assure proper funding of the E911 services.



Richard E. Hitt, General Counsel

Cynthia L. Wilson, Law Clerk

Brief Summary of Emergency Legislative Rule

The Commission is proposing to issue *Rules Governing E911 Fees*, 150 C.S.R. Series 31, to provide further guidance regarding E911 fees.

The Legislature recently amended the statutory definition of commercial mobile radio service provider to expressly state its applicability to prepaid and post-paid wireless service providers. In spite of Commission orders to the contrary, some carriers have asserted that they have not been obligated to remit fees until there was clear statutory authority that prepaid services are subject to the E911 fees. Also, in spite of Commission orders to the contrary, some carriers have asserted that they are not obligated to remit any E911 fees for prepaid services until the Commission issues revised rules regarding E911 fees. Therefore, recognizing that E911 services are essential to the health, safety and welfare of West Virginia citizens, and that E911 services are funded by E911 fees, the Commission proposes to implement these new rules on an emergency basis, effective July 1, 2006.

The Commission also recognizes that E911 fee rules remain in the *Rules and Regulations Governing Emergency Telephone Service*, 150 C.S.R. Series 25. By issuing rules in the new Series 31, the Commission said that it intended that the new rules control. Once final rules are in place via the Series 31 process, the Commission will return to Series 25 to resolve any outdated or repetitious provisions. Eventually the Commission intends to consolidate the two rule series.

Statement of Circumstances Which Require the Rule

The Legislature recently amended the statutory definition of commercial mobile radio service provider to expressly state its applicability to prepaid and post-paid wireless service providers. In spite of Commission orders to the contrary, some carriers have asserted that they have not been obligated to remit fees until there was clear statutory authority that prepaid services are subject to the E911 fees. Also, in spite of Commission orders to the contrary, some carriers have asserted that they are not obligated to remit any E911 fees for prepaid services until the Commission issues revised rules regarding E911 fees. Therefore, recognizing that E911 services are essential to the health, safety and welfare of West Virginia citizens, and that E911 services are funded by E911 fees, the Commission proposes to implement these new rules on an emergency basis, effective July 1, 2006.

APPENDIX B

FISCAL NOTE FOR EMERGENCY RULES

Rule Title: 150 C.S.R. 31. Rules Regarding E911 Fees

Type of Rule: Legislative Interpretive Procedural Emergency

Agency: Public Service Commission of West Virginia

Address: Richard E. Hitt, General Counsel (340-0317); Cynthia L. Wilson (340-0302)
201 Brooks Street
Charleston, West Virginia 25301

Phone Number: 340-0302 Email: cwilson@psc.state.wv.us

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

There will be no significant implementation cost relating to this rulemaking for the State of West Virginia. The Commission already has in place a system to receive the E911 fees, and several CMRS carriers already submit such fees. The rules provide a formula for carriers to calculate the amounts to be remitted, as well as offer carriers an option of seeking approval of calculations which are relevant to the carrier's method of providing service.

This rulemaking will increase the flow of E911 fees to local emergency service providers, the State Police and the Tower Assistance Fund.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost			
Personal Services			
Current Expenses			
Repairs & Alterations			
Assets			
Other			
1. Estimated Total Revenues			

Rule Title: 150 C.S.R. 31. Rules Regarding E911 Fees

Rule Title: 150 C.S.R. 31. Rules Regarding E911 Fees

3. **Explanation of above estimates (including long-range effect):**

Please include any increase or decrease in fees in your estimated total revenues.

MEMORANDUM

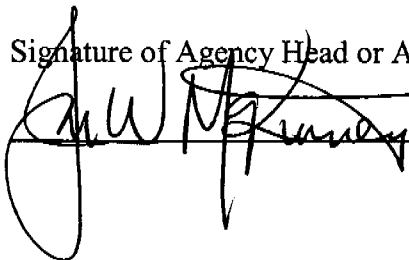
Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Although the PSC has had rules regarding E911 fees in place for several years, some CMRS providers have not remitted those fees, asserting that prepaid services were outside of the statute or that the PSC rules were not sufficient to require the fees to be remitted. Following a recent statutory amendment, the Commission has proposed revised rules to provide further guidance to Commercial Mobile Radio Service providers regarding E911 fees.

All wireless subscribers in West Virginia, as a matter of law, are subject to the E911 fees. The rules does not change this obligation. The rule addresses the mechanism by which CMRS providers remit those fees to the Public Service Commission, for pass-through to the emergency service providers.

Date: June 30, 2006

Signature of Agency Head or Authorized Representative



TITLE 150
LEGISLATIVE RULE
PUBLIC SERVICE COMMISSION

SERIES 31
RULES GOVERNING E911 FEES

FILED

2006 JUN 30 P 1:52

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§ 150-31-1. General.

1.1. Scope. – These rules govern the billing, collection, and remission of wireless enhanced 911 monthly fees by telecommunications carriers subject to the jurisdiction of the Public Service Commission of West Virginia.

1.2. Authority. – W. Va. Code §§ 24-1-1, 24-1-7, 24-2-1, 24-2-2, 24-6-6b, 24-6-7, and 24-6-11.

1.3. Filing Date. – June __, 2006.

1.4. Effective Date. – July 1, 2006.

§ 150-31-2. Definitions.

2.1. Statutory definitions adopted.

The Commission adopts the definitions of "commercial mobile radio service provider or CMRS provider," "county answering point," "emergency services organization," "emergency service provider," "emergency telephone system," "enhanced emergency telephone system," "public agency," "public safety unit," "telephone company," "comprehensive plan," and "technical and operational standards," set forth in W. Va. Code § 24-6-2.

2.2. PSC rule definitions adopted.

The Commission also adopts the definitions set forth in Section 2 of the Rules and Regulations Governing Emergency Telephone Service, 150 C.S.R. Series 25.

§ 150-31-3. Billing and Collection of E911 Fees.

3.1. Post-paid service.

Each CMRS provider shall, with each bill rendered, levy an E911 fee, at the current statutory rate, on each valid retail CMRS subscription. The lawful E911 fee shall be a separate line item on the billing statement.

3.2. Prepaid service.

3.2.1 Formula.

For each month during which an account is active, CMRS service providers shall calculate the amount owed for prepaid service by multiplying the number of active customer days for that month by the amount of the current statutory fee divided by 30.

3.2.2. Active customer day.

As used in this section, an "active customer day" is a day, from activation to expiration, inclusive, associated with a prepaid service card, account or functional equivalent, which has been activated with a West Virginia NPA (area code), regardless of the amount of actual time or usage units left on the prepaid service card, account or functional equivalent, provided that no prepaid service card, account or functional equivalent shall be considered to have more than 30 active customer days for any month and that each renewal and extension shall be treated the same as is done for a new purchase.

3.3 Waivers.

3.3.1 Permanent or limited duration waivers.

A CMRS provider may petition the Commission for permission to use an alternate method to calculate the amount of E911 fees due to be remitted to the Commission. Any such petition must 1) be verified, 2) provide good cause why the CMRS provider should be permitted to use a different method, 3) state the duration for which the waiver is requested, and 4) state the alternate method by which the CMRS provider proposes to calculate the amount of fees it remits to the PSC.

3.3.2. Initial emergency waivers.

Upon filing a verified letter no later than July 17, 2006, in which the CMRS provider 1) states that it has already remitted fees to the PSC, or that it is remitting fees to the PSC simultaneously with the filing of the waiver petition, 2) states that it will continue to remit such fees on a going-forward basis, as required by law, 3) sets forth the alternate method by which the CMRS provider calculates the amount of fees it remits to the PSC, 4) sets forth good cause to permit the CMRS provider to use the alternate method, and 5) sets forth the duration for which the waiver is requested, the PSC will grant an initial emergency waiver. The initial emergency waiver will allow the alternate method to remain in effect until the PSC completes its full review of any such application, or until further Commission order. Any CMRS provider filing for an initial emergency waiver under this section does not also need to file for a permanent or limited duration waiver under the preceding section.

§ 150-31-4. Remission of E911 Fees to Commission.

4.1. When remission is due to PSC.

By no later than the seventeenth (17th) day of each month, or the first business day thereafter, each CMRS provider shall remit to the Commission a check, or appropriate financial equivalent, for the net E911 fees. If the payment is mailed, the postmark shall be used as proof when the payment was remitted. If the payment is made electronically, the date the payment is sent, as specified by the software used, shall be used as proof of when the payment was remitted.

Examples:

Monthly E911 fee appears as line item on post-paid subscriber's bill
 Post-paid subscriber pays bill & remits the monthly E911 fee to the CMRS provider on 9/15/06
 CMRS provider remits the monthly \$3.00 E911 fee to the PSC by 10/17/06

Prepaid customer activates 45 days service on 9/15/06

$$\frac{15 \times \$3}{30} = \frac{\$45}{30} = \$1.50 \qquad \frac{30 \times \$3}{30} = \frac{\$90}{30} = \$3$$

CMRS provider remits \$1.50 to PSC by 10/17/06 CMRS provider remits \$3 to PSC by 11/17/06
CMRS provider chooses how to collect the E911 fee from its subscriber

4.2. Form for fee remittals.

CMRS providers shall use P.S.C. W. Va. Form No. WLF-1, or a reasonable functional equivalent, when remitting net E911 fees to the Commission. All information requested by WLF-1 shall be provided. This may be done electronically, at the discretion of the CMRS provider.

4.3. Address to remit the net fees.

The net E911 fees shall be remitted to:

Public Service Commission of West Virginia
Administrative Services Division
P.O. Box 812
Charleston, West Virginia 25323

or

executive_director_e911@psc.state.wv.us

Information about how to remit fees electronically may also be obtained through this email address.

4.4. E911 remittals may be net of billing/collection fee.

For post-paid service, each CMRS provider shall remit to the Commission such E911 fees actually collected by the CMRS provider. Such E911 fees remitted shall include any previously unpaid E911 fees collected by the CMRS provider during the preceding monthly billing period. For prepaid service, each CMRS provider shall comply with the prepaid service fee rules set forth above. Each month before remitting the E911 fees to the Commission, for both prepaid and post-paid service, CMRS providers may retain three percent (3%) of the E911 fees as a billing and collection fee.

4.5. Same remission rules for prepaid and post-paid service.

For prepaid and post-paid service, the same fee remission rules apply.

4.6. Partial payments on post-paid subscriptions.

If a subscriber remits less than the entire amount charged for post-paid service, the partial payment shall first be applied to the monthly wireless E911 fee amount, at the current lawful rate for the E911 fee.

Example:

If a customer pays \$20 on a \$65 bill on 8/1/06, \$3 will be applied to the monthly E911 fee and \$17 will be applied to the bill for wireless services.

§ 150-31-5. Adjustments.

5.1. Authority to resolve disputes

The Public Service Commission has been empowered to resolve any conflict between providers, county commissions and emergency telephone systems.

5.2. Over/under payments

5.2.1. CMRS petitions

If a CMRS provider should discover that an amount above or below that which is required by law has been remitted to the Commission, the CMRS provider should, by petition, forthwith notify the Commission of the overpayment or forthwith remit the overdue amount to the Commission.

5.2.2. Other petitions

The Commission would also entertain petitions from third parties or Commission Staff, or upon its own motion, regarding E911 fees which have not been properly remitted.

5.2.3. Hardship waivers

If hardship results from the application of this rule, or if unusual difficulty is involved in immediately complying with it, or upon other good cause shown, application may be made to the Commission for a temporary waiver of the requirement to forthwith remit an overdue amount. A verified petition for a waiver must 1) set forth a proposed timetable for the overdue amount to be remitted, and 2) show good cause why the Commission should grant the hardship waiver and/or explain the hardship or unusual difficulty.

5.3. Content of petitions

Any petitions filed under this rule must clearly explain what happened and specify any action that is requested of the Commission. Any petition must be verified.

5.4. Credits in lieu of refunds.

Recognizing that the Commission is only a conduit of emergency 911 fees, in cases of overpayments, credits against future payments may be approved by the Commission in lieu of refunds.

5.5. Time period for credits.

Credits may be distributed over a future period equal in length to the amount of time during which the overpayments were made.

5.6. Interest

No interest shall accrue on overpayments.

5.7. Time period to request credits

As the emergency 911 systems are developed, it is anticipated that each county will either expend or encumber the emergency 911 fees during the fiscal year within which they are received. Therefore, no

credits will be approved by the Commission for commercial mobile radio service providers who request refunds more than one fiscal year beyond the date of the overpayment.

5.8. Audits

Upon request from the Commission, a CMRS provider shall make available all books and records to permit the Commission, its Staff, or its designee, to conduct an audit relevant to the CMRS provider's compliance with West Virginia law. The Commission recognizes that, pursuant to W. Va. Code § 24-6-11, the Legislature has declared that information pertaining to the number of customers and revenues collected by CMRS providers is not subject to disclosure under the state Freedom of Information Act, Chapter 29B-1-1 et. seq.

**PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
WIRELESS E-911 SUBSCRIBER FEE REPORT**

P.S.C. W. Va. Form No. WLF-1 (Rev. July 1, 2006)

MONTH OF _____, 20_____

Must remit to WVPSC by no later than the 17th, or the first business day thereafter

FEIN: _____

COMPANY NAME: _____

DBA (IF APPLICABLE): _____

ADDRESS: _____

CONTACT PERSON: _____ PHONE: _____

E-MAIL ADDRESS: _____

NUMBER OF FEES COLLECTED* _____

AMOUNT COLLECTED \$ _____

LESS 3% ADMINISTRATIVE FEE \$ _____

NET PAYABLE TO PSC \$ _____

MAIL PAYMENT TO: Public Service Commission of West Virginia
Administrative Services Division
PO Box 812
Charleston, WV 25323

OR, TO FILE ELECTRONICALLY: executive_director_e911@psc.state.wv.us

FAX INFO: (304) 340-3753, ATTN: E-911 Fee Report

* For prepaid service cards, accounts and functional equivalents, the "NUMBER OF FEES COLLECTED" is calculated by dividing the total number of active customer days associated with the reporting month by thirty (30).

101 South Queen Street
Martinsburg, West Virginia 25401
(304) 263-0836

7000 Hampton Center, Suite K
Morgantown, West Virginia 26505
(304) 285-2500

155 East Main Street, Suite 300
Lexington, Kentucky 40507
(859) 252-2202



McDAVID GRAFF & LOVE LLP

ATTORNEYS AT LAW

600 Quarrier Street
Charleston, West Virginia 25301

Post Office Box 1386
Charleston, West Virginia 25325-1386
(304) 347-1100

www.bowlesrice.com

19 West Cork Street, Suite 102
Winchester, Virginia 22601
(540) 723-8877

5th Floor, United Square
501 Avery Street
Parkersburg, West Virginia 26101
(304) 485-8500

July 18, 2006

Paul E. Frampton
Telephone — (304) 347-1163
Facsimile — (304) 343-2867

E-Mail Address:
pframpton@bowlesrice.com

Judy Cooper, Director
Administrative Law Division
Office of Secretary of State
Bldg. 1, Suite 157-K
1900 Kanawha Boulevard, East
Charleston, WV 25305-0771

HAND DELIVERY

Re: Emergency Rules for 150 C.S.R. Series 31
Public Service Commission
Filed June 30, 2006

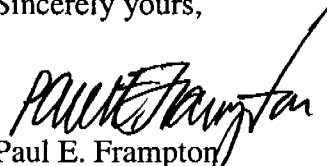
FILED
2006 JUL 18 P 1:57
OFFICE WEST VIRGINIA
SECRETARY OF STATE

Dear Ms. Cooper:

On June 30, 2006, the Public Service Commission filed with the Office of the Secretary of State proposed Emergency Rules pursuant to W.Va. Code § 29A-1-3b and 29A-15-1. TracFone Wireless, Inc., an interested party, opposes the approval of the rules and requests that the Emergency Rules be disapproved pursuant to § 29A-3-15a. Attached are Comments of TracFone Wireless, Inc., In Support of Disapproval of the Proposed Emergency Rules, for consideration by the Secretary of State.

If the Secretary would like additional information or comments concerning any issue to be considered in the approval process, please let us know.

Sincerely yours,


Paul E. Frampton

Enclosures

cc: The Honorable Betty Ireland, Secretary of State
Sandra Squire, Executive Secretary, Public Service Commission
Richard E. Hitt, Esq., General Counsel, Public Service Commission

WEST VIRGINIA SECRETARY OF STATE
ADMINISTRATIVE LAW DIVISION
CHARLESTON, WV

Title/Series: 150-31

Agency: Public Service Commission

Rule Name: Rules Governing E911 Fees

Filed: June 30, 2006

Effective ERD by August 11, 2006

FILED
2006 JUL 18 P 1:57
OFFICE WEST VIRGINIA
SECRETARY OF STATE

COMMENTS OF TRACFONE WIRELESS, INC.,
IN SUPPORT OF DISAPPROVAL OF PROPOSED PUBLIC SERVICE COMMISSION
EMERGENCY RULES FOR TITLE 150, SERIES 31

TracFone Wireless, Inc., (TracFone) hereby requests that the Secretary of State disapprove the effectiveness on an emergency basis of rules recently promulgated by the Public Service Commission nominally involving the collection and remission of funds to support E911 service by subscribers to wireless telecommunications services, including prepaid wireless services. The proposed emergency rules pertaining to Title 150, Series 31, filed by the Public Service Commission on June 30, 2006, should be disapproved by the Secretary of State. The rules were filed pursuant to W.Va. Code § 29A-1-3b and 29A-15-1. Such rules should not be approved if they exceed the authority of the law by which the rules were created and should not be approved if no real emergency exists which warrant avoiding the usual procedural requirements for issuing rules. The proposed rules filed on an emergency basis by the Public Service Commission exceed the scope of the law authorizing the collection of certain E911 fees from users of wireless telecommunications services, and are not issued pursuant to any real emergency. The emergency rules should be disapproved.

I. THE SECRETARY OF STATE IS AUTHORIZED TO DISAPPROVE EMERGENCY RULES OF THE PUBLIC SERVICE COMMISSION AND IS OBLIGATED TO DO SO IN SITUATIONS LIKE THIS, WHERE THE RULES FAIL TO MEET CERTAIN CRITERIA.

The West Virginia State Administrative Procedures Act allows for particular agencies to create emergency legislative rules. Emergency rules, however, are not routine and are subject to the approval or disapproval by the Secretary of State or Attorney General. The Attorney General may only review emergency rules when promulgated by the Secretary of State, and the Secretary of State must always review all other emergency rules. West Virginia Code allows for affected parties to challenge the emergency rules before Secretary of State approval or disapproval, and require disapproval if certain criteria are met.

Section 29A-3-15 of the West Virginia State Administrative Procedures Act (hereinafter "Act"), W. Va. Code §29A-1-1 - §29A-7-4 (2006), allows for promulgation of Emergency Legislative Rules by any agency with authority to propose legislative rules. W. Va. Code §29A-3-15(a)(2006). The rules must be filed with the Secretary of State. *Id.* The Act also provides that "such emergency rules shall become effective upon the approval of the Secretary of State in accordance with the Act...or upon the forty-second day following such filing, whichever occurs first." *Id.* Thus, the Act provides that emergency rules promulgated by an agency may only become effective in either of two ways: (1) approval by the Secretary of State, or (2) after forty-two days following filing the rules with the Secretary of State if no action is taken by the Secretary of State within that period.

Section 29A-1-3(b) has excepted out the Public Service Commission from the rule-making provisions of the Act. The section states that "except as to requirements for filing in the state register, and with the Legislature or its rule-making review committee, provided in this chapter in or other law, the provisions of this chapter do not apply in any respect whatever to...the public service commission." W. Va. Code §29A-1-3(b)(2006). However, the section places a mandatory sixty day period on the passage of rules pursuant to this exception by stating that "rules of such agencies shall be filed in the state register in the form prescribed by this chapter and be effective no sooner than sixty consecutive days after being so filed." *Id.* The section also allows for the Public Service Commission to elect to adopt emergency rules by

stating that “such agencies may promulgate emergency rules in conformity with section fifteen [§29A-3-15], article three of this chapter.” W. Va. Code §29A-1-3(b)(2006). Thus it appears that this section excepts out the Public Service Commission from the standard rulemaking provisions of the Act, but places a mandatory sixty day period before which any rules will become effective after their filing, and allows for the Commission to elect to also adopt emergency rules under limited circumstances, and then only subject to approval by the Secretary of State, in conformity with §29A-3-15. See also, State ex rel. Bowlick v. Board of Educ., 176 W. Va. 524 (1986)

The power given to the Secretary of State to approve or disapprove such rules is set forth in §29A-3-15a of the Act. This section states that “upon the filing of an emergency rule...by any agency...the Secretary of State shall review such rule or such amendments and, within forty-two days of such filing, shall issue a decision as to whether or not such emergency rules should be disapproved.” W. Va. Code §29A-3-15a(a)(2006). Such approval and disapproval by the Secretary of State is governed by two standards; a substantive standard of required disapproval set forth under §29A-3-15a(b) of the Act, and a discretionary standard of permissive disapproval set forth under §29A-3-15a(c) of the Act.

The substantive standard set forth under §29A-3-15a(b) of the Act is as follows: The Secretary of State shall disapprove an emergency rule or amendment to an emergency rule if she determines (1) that the emergency rule or an amendment to the emergency rule exceeds the scope of the law authorizing or directing the promulgation thereof; or (2) that an emergency does not exist justifying the promulgation of the emergency rule or the filing of an amendment to the emergency rule; or (3) that the emergency rule or an amendment to the emergency rule was not promulgated in compliance with the provisions of section fifteen of this article. W. Va. Code §29A-3-15a(b) (2006). Therefore, the Secretary of State is required to disapprove an emergency rule if she determines any of the three elements exists.

In addition, the Secretary of State may also disapprove emergency rules pursuant to a discretionary standard set forth under §29A-3-15a(c) of the Act. This standard provides that “if the Secretary of State determines, based upon the contents of the rule or the supporting information filed by the agency, that the emergency rule should be disapproved, he may

disapprove such rule without further investigation, notice or hearing.” W. Va. Code §29A-3-15a(c) (2006). As a result of this section, the Secretary also is given discretionary power to disapprove an emergency rule for other grounds.

The Secretary also has the authority to recognize that the information provided by the agency, the Public Service Commission in this instance, is not sufficient to determine whether the criteria for approval have been met, and to obtain additional information from the agency and from other interested parties before allowing a rule to take effect on an emergency basis. Section 29A-3-15a(c) of the Act provides that if the Secretary of State concludes that the information submitted by the agency (for approval of the emergency rule) is insufficient to allow a proper determination to be made as to whether the emergency rule should be disapproved, the Secretary “may make further investigation, including, but not limited to, requiring the agency or other interested parties to submit additional information or comment or fixing a date, time, and place for the taking of evidence on the issues involved in making a determination.” W. Va. Code §29A-3-15a(c)(2006)(emphasis added). Clearly, the West Virginia Code requires the Secretary of State to approve or disapprove these emergency rules, provides criteria under which the rules should be disapproved, and provides for opportunities for interested parties to oppose the approval of emergency rules. TracFone, Inc., an interested party, opposes the approval of the rules and requests that the Emergency Rules be disapproved pursuant to § 29A-3-15a.

II. THE EMERGENCY RULES EXCEED THE SCOPE OF THE AUTHORITY OF THE LAW ESTABLISHING THE FEES WHICH THE EMERGENCY RULES PURPORT TO ENFORCE.

An agency may only issue emergency rules which are within the scope of the law by which the rules are being established. In this case, the proposed emergency rules exceed the scope of West Virginia Code § 24-6-6b, the law authorizing the collection of fees from users of wireless services in West Virginia. That statute authorizes the Commission to promulgate rules in accordance with West Virginia Code § 29A-3-1 to “effectuate the provisions of this subsection” and adds that emergency rules may be promulgated. The problem is that the emergency rules the Commission has filed go beyond the provisions of the statute and are

inconsistent with the requirements of the statute pursuant to which those rules were ostensibly promulgated by the Public Service Commission.

A. The Statute Authorizing Emergency Rules Does Not Authorize Rules Requiring the Providers to Pay the Fee In Lieu of Remitting Fees Collected from Subscribers.

The statute establishing the wireless enhanced 911 fee specifically imposes a monthly fee upon subscribers to wireless service in West Virginia. Under the fee collection scheme created by the Legislature in § 24-6-6b, the fee is imposed upon the subscribers, i.e., the consumer of CMRS services, not on the CMRS providers. The CMRS providers are to collect the E911 fees from the subscribers, and remit to the Commission the “enhanced 911 fees collected” after retaining a 3% billing fee. W. Va. Code § 24-6-6b(d) (2006). In other words, the enhanced 911 fee is not a fee imposed on the providers, but on the consumers, or users, of the wireless service. When these fees were initially imposed by the Legislature, CMRS providers were not defined and the statute itself directed that the fee was to be paid by subscribers with a method of payment set forth which required wireless service providers to include the fee on the monthly statement to the consumers. The statute specifically added prepaid providers when amended in 2006. However, the fees still are fees imposed by statute upon consumers of the wireless services, not on the provider. While the statute, as amended by Senate Bill 728, authorizes the promulgation of emergency rules, that authorization is not without limits. In order to not exceed the scope of the authority for rules contained in the statute, the emergency rules must comport with the statute. A statute imposing fees on consumers of wireless services cannot be altered by emergency Public Service Commission rule which transfers the E911 fee payment obligation from consumers of wireless services to the service providers themselves.

The proposed emergency rules require the providers to calculate the amounts which would be owed by the consumers and remit those amounts to the Commission, without addressing the mechanism by which the fees are to be collected from consumers by service providers as specifically required by § 24-6-6b. By so doing, the Commission is imposing the requirement to pay the fees on the providers. In addition, the emergency rules do exactly what

the statute itself does not do. The statute, as enacted by the legislature, not only imposes the fees on the consumers, but directs how the fees are to be collected by providing that the charge be added to the monthly bill, and when the bill, and therefore, the fee, is paid, to simply remit that fee to the Public Service Commission. In fact, the statute even provides that the CMRS provider could keep a three percent administrative fee for being the conduit of the fees from the consumer to the Public Service Commission. The amendment of the statute to include prepaid CMRS providers does not alter the nature of the fee, nor does it change the statutory obligation for service providers to collect the fees from consumers in accordance with Public Service Commission-established rules directing them how to collect the fees. The fee is still a fee on the consumer, not on the provider. Accordingly, the Commission may not lawfully issue emergency rules which modify the E911 fee and the fee collection mechanism from that prescribed in § 24-6-6b. In particular, the failure to provide not only the amount the subscribers, or users of the services must pay, but the method by which those fees are to be collected from those subscribers, as was done for the post-paid subscribers, is contrary to the legislative scheme for these fees and inappropriately imposes the burden of payment of the fees on the CMRS providers themselves, rather than on subscribers to their services as the legislature so clearly has required. For the Commission to issue emergency rules which simply designate a method for calculation of the fees and which require providers of prepaid CMRS services to pay the fees as calculated based on their customer base, exceeds the scope of authority of the Commission in issuing the rules.

B. The Statute Under Which the Commission Has Issued the Proposed Emergency Rules Require That The Commission Receive Comments and Hold a Hearing Prior to Issuing and Order Establishing Rules.

Another respect in which the proposed emergency rules exceed the scope of authority provided in the statute under which these rules have been promulgated, is that the statute requires the Public Service Commission to receive comments and to consider evidence at a hearing on the proposed rules prior to issuing an Order. With regard to the portion of the rules for fees to be collected from consumers of prepaid wireless service, the Commission has neither solicited comment nor held a hearing on the rules. Section 24-6-6b specifically provides that the "Public Service Commission shall, after receipt of comments and the consideration of evidence

presented at a hearing, issue an updated order which directs the CMRS providers regarding all relevant details of wireless enhanced 911 fee collection, including the determination of who is considered an in-state two-way service subscriber and which shall specify how the CMRS providers shall deal with fee collection shortfalls caused by uncollectible amounts. The Public Service Commission shall solicit the views of the wireless telecommunications utilities prior to issuing the order.” The Commission essentially has done none of the above. Although the statute authorizes the issuance of emergency rules, those emergency rules cannot be used as an excuse for failing to do what the authorizing statute requires before such an order is issued.

The PSC did none of the things mandated by the Act before attempting to impose the emergency rules on CMRS prepaid providers. It did not receive comments or hold any hearings on this matter subsequent to the passage of the amendments to § 24-6-6b cited above; it did not address who is considered an in-state two way service subscriber; and it certainly did not address fee collection shortfalls caused by uncollectible accounts -- specifically in the case of prepaid services. The PSC's only hearing involving prepaid and E911 was its November, 2005, hearing in Case No. 05-1303-C-GI. That hearing was held before enactment of Senate Bill 728 and it did not address any of the issues set forth in the bill. Moreover, the "emergency rule" adopted in the June 30 Order (which did not follow the requisite receipt of comments or hearing) contains no details of enhanced 911 fee collection. It only contains a formula for how prepaid providers are to calculate how much they owe and how much they should themselves remit to the PSC -- collection is left to the providers to figure out, and if they can't collect since the PSC adopted no rules governing collection, then the providers must, according to the commission, pay anyway -- out of their own pockets. Nothing in the emergency rule or the order accompanying the emergency rule even mentions collection shortfalls caused by uncollectible accounts, despite the fact that it is a specific statutory requirement. By promulgating these emergency rules without following the procedures and requirements of the law which authorizes the promulgation of emergency rules, the Commission has further exceeded the scope of authority in that law and the emergency rules should be disapproved.

III. NO EMERGENCY EXISTS TO WARRANT THE IMPOSITION OF EMERGENCY RULES WHICH WOULD PERMIT THE PUBLIC SERVICE COMMISSION TO IMPOSE PREMATURE RULES.

The proposed emergency rules would, if allowed to become effective, impose overreaching and unfair burdens on providers of prepaid wireless service while proper rules are duly promulgated after public comment and input as required. To the extent any “emergency” situation exists here at all, it is an emergency self-created by the Commission and comes literally on the heels of and in the midst of the process for establishing permanent rules.

The Secretary of State is required to disapprove the Commission’s emergency rules because no emergency exists which would justify the promulgation of such rules on an emergency basis. West Virginia Code §29A-1-3(b) states that the Public Service Commission may promulgate emergency rules in conformity with §29A-3-15 of the Administrative Procedures Act. W. Va. Code §29A-1-3(b)(2006).¹ Section 29A-3-15 states that an agency with authority to propose legislative rules may find that an emergency exists requiring that emergency rules be promulgated and promulgate the same in accordance with this section. W. Va. Code §29A-3-15(a)(2006). Further, the section requires that such emergency rules, together with a statement of the facts and circumstances constituting the emergency, shall be filed with the secretary of state. *Id.* Section 29A-3-15a of the Act requires that the Secretary of State either approve or disapprove of the filed emergency rules. W. Va. Code §29A-3-15a(a)(2006). Disapproval may be required under §29A-3-15a(b), which states that the Secretary of State shall disapprove an emergency rule if she determines that an emergency does not exist justifying the promulgation of the emergency rule. *Id.* at subsection (b). Thus, not only must an emergency exist as determined by the facts and circumstances laid out in the Commission’s Order filed with the Secretary, but such emergency must justify the promulgation of the emergency rules, otherwise the Secretary of State is required by statute to disapprove the emergency rules. The facts and circumstances stated in the General Order of the Commission filed with the Secretary

¹ There is no independent authorization in the statute for the filing of emergency rules following the amendment to the law which added prepaid CMRS providers and service to the scope of the statute. The provision in the statute authorizing the promulgation of emergency rules was an old provision, not a provision added with the amendments to include prepaid service. In other words, the statute amendments in 2006 did not contain any recognition that any emergency promulgation of rules was necessary to put into place the rules for collecting the fees from consumers of prepaid services.

of State fail to constitute an emergency justifying promulgation of emergency rules as required by §29A-3-15 to promulgate emergency rules, and by §29A-3-15a(b) to survive disapproval of such rules, and thus these emergency rules should be disapproved by the Secretary of State.

The Commission gives three reasons for an emergency in its General Order submitted to the Secretary of State. These conditions are as follows: (1) The recent statutory amendment expressly states that both prepaid and post-paid wireless carriers are within the definition of a CMRS provider; (2) some carriers have asserted in earlier Commission proceedings that, absent clear statutory authority that prepaid services are subject to the E911 fees, they do not have to remit them; and (3) some carriers argued that they were not obligated to remit E911 fees for prepaid services until the Commission issued revised rules which included the mechanism to do so. All three conditions are not sufficient for an emergency justifying the promulgation of emergency rules.

The statutory amendment stating that prepaid wireless carriers are within the definition of a CMRS provider provides statutory authority that prepaid services are subject to the E911 fees, and no emergency rule is necessary to establish or clarify that point. The second point is just a different way of making the first point, and, again, with the passage of the amendment to the legislation this year, is moot and no justification for imposing emergency rules. The third point is inapposite because the issue there is how the fees are to be collected from the consumers who use the prepaid wireless services, and the emergency rules still do not address that issue. That is, the emergency rules fail to provide the mechanism for how the fees are to be collected from the consumers of prepaid wireless services. To say that there is an emergency which warrants emergency rules because the prepaid CMRS providers say there has been no method set forth for collecting the fees from those consumers, is not support for an emergency rule which still fails to provide a method for collecting the fees from the people who are supposed to pay the fees. All of the reasons given for alleging emergency rules are necessary in this situation are not valid for demonstrating the requisite emergency.

In addition, no emergency justifying emergency rules exists because E911 fees already are, and will continue to be, remitted to the Commission prior to the establishment of permanent rules. A fee remittal provision is already in place by which fees are currently being

remitted to the Commission, thus not precluding 911 councils or organizations from receiving fees until the passage of the permanent rules. The fact that a fee remittal statute and scheme is already in place, and that other CMRS providers are currently remitting these fees suggests that no collapse in funding will occur. The fact is that there is no showing nor even any allegation that there is an E911 funding problem in West Virginia or that the availability of statewide E911 is imperiled without these "emergency" rules. West Virginia already has by a considerable factor the highest E911 fees in the nation. Of the other 49 states which have E911 fees, the rates range from about \$0.25 to about \$1.00 per month -- no other state comes close to West Virginia. The Commission does not allege that even a single local government or E911 administration has provided any information that it lacks funds for E911. The E911 councils are being funded and fees are being remitted and sent to them in accordance with the previous legislation, such that no emergency exists justifying promulgation of emergency rules. Certainly no emergency has been established to warrant these "emergency" rules.

The statute requires the Commission to receive comments and hold a hearing prior to the issuance of any updated Order establishing all relevant details of wireless enhanced 911 fee collection. That procedure with regard to prepaid CMRS providers has not yet happened but is scheduled to happen in the near future. In fact, comments on the proposed rules are to be filed in three weeks and the hearing is scheduled to take place in less than thirty days. Whatever perceived need there is to impose emergency rules, is thus sought in circumstances in which the actual hearing on the rules is to be held in a relative short period of time. This is not a situation at this point in which rules will not be promulgated until the distant future; it is a situation in which rules are likely to be established in the near future. In that situation, the Secretary should find that no emergency exists to warrant imposing these emergency rules prior to the time that interested parties can submit comments and participate in a hearing designed to result in rules acceptable to all parties.

CONCLUSION

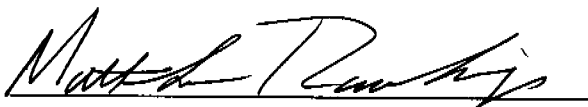
The proposed emergency rules filed by the Public Service Commission with the Secretary of State on June 30, 2006, should be disapproved. The rules exceed the scope of authority of § 24-6-6b and the procedural and substantive requirements contained in that statute.

In addition, the Commission has established a comment and hearing schedule which will take place in the near future and makes representations of an emergency situation which is inconsistent with its Order of June 30, 2006. As such, the Secretary should find that an emergency does not exist as required under the statute permitting emergency rules, and should disapprove the justification. In the event the Secretary is unsure as to the approval or disapproval of the rules, the Secretary is authorized to initiate an investigation in which the Commission and other interested parties submit additional information and comments, and may hold a hearing for such purposes. At the least, the Secretary should refuse to approve the emergency rules at this time and establish a procedure for interested parties to present additional comments or information relevant to these issues. However, the comments made above should sufficiently establish that the emergency rules as promulgated and presented do not meet the standard for approval, and the Secretary is requested to disapprove these rules, and allow the Commission and all interested parties to move forward with the comment and hearing schedule established by the Commission. Under those procedures, the hearing will actually be held just 30 days from today. No emergency rules are necessary or warranted.

Respectfully submitted,

TRACFONE WIRELESS, INC.,

By counsel



Paul E. Frampton (WVSB#1272)
Matthew R. Rawlings (WVSB#9618)
Bowles Rice McDavid Graff & Love LLP
600 Quarrier Street
P. O. Box 1386
Charleston, WV 25325-1386
304/347-1100


Mitchell F. Brecher
Greenberg Traurig, LLP
800 Connecticut Avenue, NW
Washington, DC 20006
(202) 331-3152

CERTIFICATE OF SERVICE

I, Paul E. Frampton, counsel for TracFone Wireless, Inc., do hereby certify that I have served the foregoing Comments of TracFone Wireless, Inc., In Support of Disapproval of Proposed Public Service Commission Emergency Rules For Title 150, Series 31, upon the Public Service Commission by placing true copies thereof in first class mail, postage prepaid, on this 18th day of July, 2006, addressed as follows:

Richard E. Hitt, Esquire
General Counsel
Public Service Commission
201 Brooks Street
P.O. Box 812
Charleston, WV 25323

Sandra Squire, Executive Secretary
Public Service Commission
201 Brooks Street
P.O. Box 812
Charleston, WV 25323

 *for Paul Frampton*
Paul E. Frampton

101 South Queen Street
Martinsburg, West Virginia 25401
(304) 263-0836

7000 Hampton Center, Suite K
Morgantown, West Virginia 26505
(304) 285-2500

155 East Main Street, Suite 300
Lexington, Kentucky 40507
(859) 252-2202

B
Bowles Rice
McDAVID GRAFF & LOVE LLP
ATTORNEYS AT LAW

600 Quarrier Street
Charleston, West Virginia 25301
Post Office Box 1386
Charleston, West Virginia 25325-1386
(304) 347-1100

www.bowlesrice.com

July 18, 2006

Paul E. Frampton
Telephone — (304) 347-1163
Facsimile — (304) 343-2867

19 West Cork Street, Suite 102
Winchester, Virginia 22601
(540) 723-8877

5th Floor, United Square
501 Avery Street
Parkersburg, West Virginia 26101
(304) 485-8500

COPY

E-Mail Address:
pframpton@bowlesrice.com

Judy Cooper, Director
Administrative Law Division
Office of Secretary of State
Bldg. 1, Suite 157-K
1900 Kanawha Boulevard, East
Charleston, WV 25305-0771

HAND DELIVERY

FILED
2006 JUL 18 P 1:57
OFFICE WEST VIRGINIA
SECRETARY OF STATE

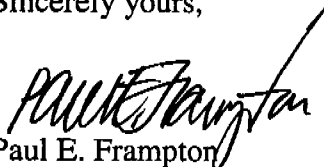
Re: Emergency Rules for 150 C.S.R. Series 31
Public Service Commission
Filed June 30, 2006

Dear Ms. Cooper:

On June 30, 2006, the Public Service Commission filed with the Office of the Secretary of State proposed Emergency Rules pursuant to W.Va. Code § 29A-1-3b and 29A-15-1. TracFone Wireless, Inc., an interested party, opposes the approval of the rules and requests that the Emergency Rules be disapproved pursuant to § 29A-3-15a. Attached are Comments of TracFone Wireless, Inc., In Support of Disapproval of the Proposed Emergency Rules, for consideration by the Secretary of State.

If the Secretary would like additional information or comments concerning any issue to be considered in the approval process, please let us know.

Sincerely yours,


Paul E. Frampton

Enclosures

cc: The Honorable Betty Ireland, Secretary of State
Sandra Squire, Executive Secretary, Public Service Commission
Richard E. Hitt, Esq., General Counsel, Public Service Commission

WEST VIRGINIA SECRETARY OF STATE
ADMINISTRATIVE LAW DIVISION
CHARLESTON, WV

Title/Series: 150-31

Agency: Public Service Commission

Rule Name: Rules Governing E911 Fees

Filed: June 30, 2006

Effective ERD by August 11, 2006

COMMENTS OF TRACFONE WIRELESS, INC.,
IN SUPPORT OF DISAPPROVAL OF PROPOSED PUBLIC SERVICE COMMISSION
EMERGENCY RULES FOR TITLE 150, SERIES 31

TracFone Wireless, Inc., (TracFone) hereby requests that the Secretary of State disapprove the effectiveness on an emergency basis of rules recently promulgated by the Public Service Commission nominally involving the collection and remission of funds to support E911 service by subscribers to wireless telecommunications services, including prepaid wireless services. The proposed emergency rules pertaining to Title 150, Series 31, filed by the Public Service Commission on June 30, 2006, should be disapproved by the Secretary of State. The rules were filed pursuant to W.Va. Code § 29A-1-3b and 29A-15-1. Such rules should not be approved if they exceed the authority of the law by which the rules were created and should not be approved if no real emergency exists which warrant avoiding the usual procedural requirements for issuing rules. The proposed rules filed on an emergency basis by the Public Service Commission exceed the scope of the law authorizing the collection of certain E911 fees from users of wireless telecommunications services, and are not issued pursuant to any real emergency. The emergency rules should be disapproved.

I. THE SECRETARY OF STATE IS AUTHORIZED TO DISAPPROVE EMERGENCY RULES OF THE PUBLIC SERVICE COMMISSION AND IS OBLIGATED TO DO SO IN SITUATIONS LIKE THIS, WHERE THE RULES FAIL TO MEET CERTAIN CRITERIA.

The West Virginia State Administrative Procedures Act allows for particular agencies to create emergency legislative rules. Emergency rules, however, are not routine and are subject to the approval or disapproval by the Secretary of State or Attorney General. The Attorney General may only review emergency rules when promulgated by the Secretary of State, and the Secretary of State must always review all other emergency rules. West Virginia Code allows for affected parties to challenge the emergency rules before Secretary of State approval or disapproval, and require disapproval if certain criteria are met.

Section 29A-3-15 of the West Virginia State Administrative Procedures Act (hereinafter "Act"), W. Va. Code §29A-1-1 - §29A-7-4 (2006), allows for promulgation of Emergency Legislative Rules by any agency with authority to propose legislative rules. W. Va. Code §29A-3-15(a)(2006). The rules must be filed with the Secretary of State. *Id.* The Act also provides that "such emergency rules shall become effective upon the approval of the Secretary of State in accordance with the Act...or upon the forty-second day following such filing, whichever occurs first." *Id.* Thus, the Act provides that emergency rules promulgated by an agency may only become effective in either of two ways: (1) approval by the Secretary of State, or (2) after forty-two days following filing the rules with the Secretary of State if no action is taken by the Secretary of State within that period.

Section 29A-1-3(b) has excepted out the Public Service Commission from the rule-making provisions of the Act. The section states that "except as to requirements for filing in the state register, and with the Legislature or its rule-making review committee, provided in this chapter in or other law, the provisions of this chapter do not apply in any respect whatever to...the public service commission." W. Va. Code §29A-1-3(b)(2006). However, the section places a mandatory sixty day period on the passage of rules pursuant to this exception by stating that "rules of such agencies shall be filed in the state register in the form prescribed by this chapter and be effective no sooner than sixty consecutive days after being so filed." *Id.* The section also allows for the Public Service Commission to elect to adopt emergency rules by

stating that “such agencies may promulgate emergency rules in conformity with section fifteen [§29A-3-15], article three of this chapter.” W. Va. Code §29A-1-3(b)(2006). Thus it appears that this section excepts out the Public Service Commission from the standard rulemaking provisions of the Act, but places a mandatory sixty day period before which any rules will become effective after their filing, and allows for the Commission to elect to also adopt emergency rules under limited circumstances, and then only subject to approval by the Secretary of State, in conformity with §29A-3-15. See also, State ex rel. Bowlick v. Board of Educ., 176 W. Va. 524 (1986)

The power given to the Secretary of State to approve or disapprove such rules is set forth in §29A-3-15a of the Act. This section states that “upon the filing of an emergency rule...by any agency...the Secretary of State shall review such rule or such amendments and, within forty-two days of such filing, shall issue a decision as to whether or not such emergency rules should be disapproved.” W. Va. Code §29A-3-15a(a)(2006). Such approval and disapproval by the Secretary of State is governed by two standards; a substantive standard of required disapproval set forth under §29A-3-15a(b) of the Act, and a discretionary standard of permissive disapproval set forth under §29A-3-15a(c) of the Act.

The substantive standard set forth under §29A-3-15a(b) of the Act is as follows: The Secretary of State shall disapprove an emergency rule or amendment to an emergency rule if she determines (1) that the emergency rule or an amendment to the emergency rule exceeds the scope of the law authorizing or directing the promulgation thereof; or (2) that an emergency does not exist justifying the promulgation of the emergency rule or the filing of an amendment to the emergency rule; or (3) that the emergency rule or an amendment to the emergency rule was not promulgated in compliance with the provisions of section fifteen of this article. W. Va. Code §29A-3-15a(b) (2006). Therefore, the Secretary of State is required to disapprove an emergency rule if she determines any of the three elements exists.

In addition, the Secretary of State may also disapprove emergency rules pursuant to a discretionary standard set forth under §29A-3-15a(c) of the Act. This standard provides that “if the Secretary of State determines, based upon the contents of the rule or the supporting information filed by the agency, that the emergency rule should be disapproved, he may

disapprove such rule without further investigation, notice or hearing.” W. Va. Code §29A-3-15a(c) (2006). As a result of this section, the Secretary also is given discretionary power to disapprove an emergency rule for other grounds.

The Secretary also has the authority to recognize that the information provided by the agency, the Public Service Commission in this instance, is not sufficient to determine whether the criteria for approval have been met, and to obtain additional information from the agency and from other interested parties before allowing a rule to take effect on an emergency basis. Section 29A-3-15a(c) of the Act provides that if the Secretary of State concludes that the information submitted by the agency (for approval of the emergency rule) is insufficient to allow a proper determination to be made as to whether the emergency rule should be disapproved, the Secretary “may make further investigation, including, but not limited to, requiring the agency or other interested parties to submit additional information or comment or fixing a date, time, and place for the taking of evidence on the issues involved in making a determination.” W. Va. Code §29A-3-15a(c)(2006)(emphasis added). Clearly, the West Virginia Code requires the Secretary of State to approve or disapprove these emergency rules, provides criteria under which the rules should be disapproved, and provides for opportunities for interested parties to oppose the approval of emergency rules. TracFone, Inc., an interested party, opposes the approval of the rules and requests that the Emergency Rules be disapproved pursuant to § 29A-3-15a.

II. THE EMERGENCY RULES EXCEED THE SCOPE OF THE AUTHORITY OF THE LAW ESTABLISHING THE FEES WHICH THE EMERGENCY RULES PURPORT TO ENFORCE.

An agency may only issue emergency rules which are within the scope of the law by which the rules are being established. In this case, the proposed emergency rules exceed the scope of West Virginia Code § 24-6-6b, the law authorizing the collection of fees from users of wireless services in West Virginia. That statute authorizes the Commission to promulgate rules in accordance with West Virginia Code § 29A-3-1 to “effectuate the provisions of this subsection” and adds that emergency rules may be promulgated. The problem is that the emergency rules the Commission has filed go beyond the provisions of the statute and are

inconsistent with the requirements of the statute pursuant to which those rules were ostensibly promulgated by the Public Service Commission.

A. The Statute Authorizing Emergency Rules Does Not Authorize Rules Requiring the Providers to Pay the Fee In Lieu of Remitting Fees Collected from Subscribers.

The statute establishing the wireless enhanced 911 fee specifically imposes a monthly fee upon subscribers to wireless service in West Virginia. Under the fee collection scheme created by the Legislature in § 24-6-6b, the fee is imposed upon the subscribers, i.e., the consumer of CMRS services, not on the CMRS providers. The CMRS providers are to collect the E911 fees from the subscribers, and remit to the Commission the “enhanced 911 fees collected” after retaining a 3% billing fee. W. Va. Code § 24-6-6b(d) (2006). In other words, the enhanced 911 fee is not a fee imposed on the providers, but on the consumers, or users, of the wireless service. When these fees were initially imposed by the Legislature, CMRS providers were not defined and the statute itself directed that the fee was to be paid by subscribers with a method of payment set forth which required wireless service providers to include the fee on the monthly statement to the consumers. The statute specifically added prepaid providers when amended in 2006. However, the fees still are fees imposed by statute upon consumers of the wireless services, not on the provider. While the statute, as amended by Senate Bill 728, authorizes the promulgation of emergency rules, that authorization is not without limits. In order to not exceed the scope of the authority for rules contained in the statute, the emergency rules must comport with the statute. A statute imposing fees on consumers of wireless services cannot be altered by emergency Public Service Commission rule which transfers the E911 fee payment obligation from consumers of wireless services to the service providers themselves.

The proposed emergency rules require the providers to calculate the amounts which would be owed by the consumers and remit those amounts to the Commission, without addressing the mechanism by which the fees are to be collected from consumers by service providers as specifically required by § 24-6-6b. By so doing, the Commission is imposing the requirement to pay the fees on the providers. In addition, the emergency rules do exactly what

the statute itself does not do. The statute, as enacted by the legislature, not only imposes the fees on the consumers, but directs how the fees are to be collected by providing that the charge be added to the monthly bill, and when the bill, and therefore, the fee, is paid, to simply remit that fee to the Public Service Commission. In fact, the statute even provides that the CMRS provider could keep a three percent administrative fee for being the conduit of the fees from the consumer to the Public Service Commission. The amendment of the statute to include prepaid CMRS providers does not alter the nature of the fee, nor does it change the statutory obligation for service providers to collect the fees from consumers in accordance with Public Service Commission-established rules directing them how to collect the fees. The fee is still a fee on the consumer, not on the provider. Accordingly, the Commission may not lawfully issue emergency rules which modify the E911 fee and the fee collection mechanism from that prescribed in § 24-6-6b. In particular, the failure to provide not only the amount the subscribers, or users of the services must pay, but the method by which those fees are to be collected from those subscribers, as was done for the post-paid subscribers, is contrary to the legislative scheme for these fees and inappropriately imposes the burden of payment of the fees on the CMRS providers themselves, rather than on subscribers to their services as the legislature so clearly has required. For the Commission to issue emergency rules which simply designate a method for calculation of the fees and which require providers of prepaid CMRS services to pay the fees as calculated based on their customer base, exceeds the scope of authority of the Commission in issuing the rules.

B. The Statute Under Which the Commission Has Issued the Proposed Emergency Rules Require That The Commission Receive Comments and Hold a Hearing Prior to Issuing and Order Establishing Rules.

Another respect in which the proposed emergency rules exceed the scope of authority provided in the statute under which these rules have been promulgated, is that the statute requires the Public Service Commission to receive comments and to consider evidence at a hearing on the proposed rules prior to issuing an Order. With regard to the portion of the rules for fees to be collected from consumers of prepaid wireless service, the Commission has neither solicited comment nor held a hearing on the rules. Section 24-6-6b specifically provides that the "Public Service Commission shall, after receipt of comments and the consideration of evidence

presented at a hearing, issue an updated order which directs the CMRS providers regarding all relevant details of wireless enhanced 911 fee collection, including the determination of who is considered an in-state two-way service subscriber and which shall specify how the CMRS providers shall deal with fee collection shortfalls caused by uncollectible amounts. The Public Service Commission shall solicit the views of the wireless telecommunications utilities prior to issuing the order." The Commission essentially has done none of the above. Although the statute authorizes the issuance of emergency rules, those emergency rules cannot be used as an excuse for failing to do what the authorizing statute requires before such an order is issued.

The PSC did none of the things mandated by the Act before attempting to impose the emergency rules on CMRS prepaid providers. It did not receive comments or hold any hearings on this matter subsequent to the passage of the amendments to § 24-6-6b cited above; it did not address who is considered an in-state two way service subscriber; and it certainly did not address fee collection shortfalls caused by uncollectible accounts -- specifically in the case of prepaid services. The PSC's only hearing involving prepaid and E911 was its November, 2005, hearing in Case No. 05-1303-C-GI. That hearing was held before enactment of Senate Bill 728 and it did not address any of the issues set forth in the bill. Moreover, the "emergency rule" adopted in the June 30 Order (which did not follow the requisite receipt of comments or hearing) contains no details of enhanced 911 fee collection. It only contains a formula for how prepaid providers are to calculate how much they owe and how much they should themselves remit to the PSC -- collection is left to the providers to figure out, and if they can't collect since the PSC adopted no rules governing collection, then the providers must, according to the commission, pay anyway -- out of their own pockets. Nothing in the emergency rule or the order accompanying the emergency rule even mentions collection shortfalls caused by uncollectible accounts, despite the fact that it is a specific statutory requirement. By promulgating these emergency rules without following the procedures and requirements of the law which authorizes the promulgation of emergency rules, the Commission has further exceeded the scope of authority in that law and the emergency rules should be disapproved.

III. NO EMERGENCY EXISTS TO WARRANT THE IMPOSITION OF EMERGENCY RULES WHICH WOULD PERMIT THE PUBLIC SERVICE COMMISSION TO IMPOSE PREMATURE RULES.

The proposed emergency rules would, if allowed to become effective, impose overreaching and unfair burdens on providers of prepaid wireless service while proper rules are duly promulgated after public comment and input as required. To the extent any "emergency" situation exists here at all, it is an emergency self-created by the Commission and comes literally on the heels of and in the midst of the process for establishing permanent rules.

The Secretary of State is required to disapprove the Commission's emergency rules because no emergency exists which would justify the promulgation of such rules on an emergency basis. West Virginia Code §29A-1-3(b) states that the Public Service Commission may promulgate emergency rules in conformity with §29A-3-15 of the Administrative Procedures Act. W. Va. Code §29A-1-3(b)(2006).¹ Section 29A-3-15 states that an agency with authority to propose legislative rules may find that an emergency exists requiring that emergency rules be promulgated and promulgate the same in accordance with this section. W. Va. Code §29A-3-15(a)(2006). Further, the section requires that such emergency rules, together with a statement of the facts and circumstances constituting the emergency, shall be filed with the secretary of state. *Id.* Section 29A-3-15a of the Act requires that the Secretary of State either approve or disapprove of the filed emergency rules. W. Va. Code §29A-3-15a(a)(2006). Disapproval may be required under §29A-3-15a(b), which states that the Secretary of State shall disapprove an emergency rule if she determines that an emergency does not exist justifying the promulgation of the emergency rule. *Id.* at subsection (b). Thus, not only must an emergency exist as determined by the facts and circumstances laid out in the Commission's Order filed with the Secretary, but such emergency must justify the promulgation of the emergency rules, otherwise the Secretary of State is required by statute to disapprove the emergency rules. The facts and circumstances stated in the General Order of the Commission filed with the Secretary

¹ There is no independent authorization in the statute for the filing of emergency rules following the amendment to the law which added prepaid CMRS providers and service to the scope of the statute. The provision in the statute authorizing the promulgation of emergency rules was an old provision, not a provision added with the amendments to include prepaid service. In other words, the statute amendments in 2006 did not contain any recognition that any emergency promulgation of rules was necessary to put into place the rules for collecting the fees from consumers of prepaid services.

of State fail to constitute an emergency justifying promulgation of emergency rules as required by §29A-3-15 to promulgate emergency rules, and by §29A-3-15a(b) to survive disapproval of such rules, and thus these emergency rules should be disapproved by the Secretary of State.

The Commission gives three reasons for an emergency in its General Order submitted to the Secretary of State. These conditions are as follows: (1) The recent statutory amendment expressly states that both prepaid and post-paid wireless carriers are within the definition of a CMRS provider; (2) some carriers have asserted in earlier Commission proceedings that, absent clear statutory authority that prepaid services are subject to the E911 fees, they do not have to remit them; and (3) some carriers argued that they were not obligated to remit E911 fees for prepaid services until the Commission issued revised rules which included the mechanism to do so. All three conditions are not sufficient for an emergency justifying the promulgation of emergency rules.

The statutory amendment stating that prepaid wireless carriers are within the definition of a CMRS provider provides statutory authority that prepaid services are subject to the E911 fees, and no emergency rule is necessary to establish or clarify that point. The second point is just a different way of making the first point, and, again, with the passage of the amendment to the legislation this year, is moot and no justification for imposing emergency rules. The third point is inapposite because the issue there is how the fees are to be collected from the consumers who use the prepaid wireless services, and the emergency rules still do not address that issue. That is, the emergency rules fail to provide the mechanism for how the fees are to be collected from the consumers of prepaid wireless services. To say that there is an emergency which warrants emergency rules because the prepaid CMRS providers say there has been no method set forth for collecting the fees from those consumers, is not support for an emergency rule which still fails to provide a method for collecting the fees from the people who are supposed to pay the fees. All of the reasons given for alleging emergency rules are necessary in this situation are not valid for demonstrating the requisite emergency.

In addition, no emergency justifying emergency rules exists because E911 fees already are, and will continue to be, remitted to the Commission prior to the establishment of permanent rules. A fee remittal provision is already in place by which fees are currently being

remitted to the Commission, thus not precluding 911 councils or organizations from receiving fees until the passage of the permanent rules. The fact that a fee remittal statute and scheme is already in place, and that other CMRS providers are currently remitting these fees suggests that no collapse in funding will occur. The fact is that there is no showing nor even any allegation that there is an E911 funding problem in West Virginia or that the availability of statewide E911 is imperiled without these "emergency" rules. West Virginia already has by a considerable factor the highest E911 fees in the nation. Of the other 49 states which have E911 fees, the rates range from about \$0.25 to about \$1.00 per month -- no other state comes close to West Virginia. The Commission does not allege that even a single local government or E911 administration has provided any information that it lacks funds for E911. The E911 councils are being funded and fees are being remitted and sent to them in accordance with the previous legislation, such that no emergency exists justifying promulgation of emergency rules. Certainly no emergency has been established to warrant these "emergency" rules.

The statute requires the Commission to receive comments and hold a hearing prior to the issuance of any updated Order establishing all relevant details of wireless enhanced 911 fee collection. That procedure with regard to prepaid CMRS providers has not yet happened but is scheduled to happen in the near future. In fact, comments on the proposed rules are to be filed in three weeks and the hearing is scheduled to take place in less than thirty days. Whatever perceived need there is to impose emergency rules, is thus sought in circumstances in which the actual hearing on the rules is to be held in a relative short period of time. This is not a situation at this point in which rules will not be promulgated until the distant future; it is a situation in which rules are likely to be established in the near future. In that situation, the Secretary should find that no emergency exists to warrant imposing these emergency rules prior to the time that interested parties can submit comments and participate in a hearing designed to result in rules acceptable to all parties.

CONCLUSION

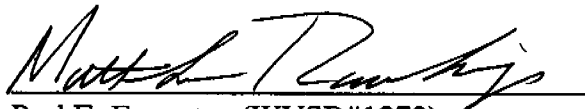
The proposed emergency rules filed by the Public Service Commission with the Secretary of State on June 30, 2006, should be disapproved. The rules exceed the scope of authority of § 24-6-6b and the procedural and substantive requirements contained in that statute.

In addition, the Commission has established a comment and hearing schedule which will take place in the near future and makes representations of an emergency situation which is inconsistent with its Order of June 30, 2006. As such, the Secretary should find that an emergency does not exist as required under the statute permitting emergency rules, and should disapprove the justification. In the event the Secretary is unsure as to the approval or disapproval of the rules, the Secretary is authorized to initiate an investigation in which the Commission and other interested parties submit additional information and comments, and may hold a hearing for such purposes. At the least, the Secretary should refuse to approve the emergency rules at this time and establish a procedure for interested parties to present additional comments or information relevant to these issues. However, the comments made above should sufficiently establish that the emergency rules as promulgated and presented do not meet the standard for approval, and the Secretary is requested to disapprove these rules, and allow the Commission and all interested parties to move forward with the comment and hearing schedule established by the Commission. Under those procedures, the hearing will actually be held just 30 days from today. No emergency rules are necessary or warranted.

Respectfully submitted,

TRACFONE WIRELESS, INC.,

By counsel



Paul E. Frampton (WVSB#1272)
Matthew R. Rawlings (WVSB#9618)
Bowles Rice McDavid Graff & Love LLP
600 Quarrier Street
P. O. Box 1386
Charleston, WV 25325-1386
304/347-1100

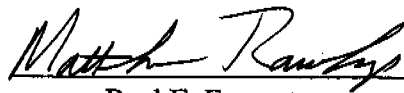
Mitchell F. Brecher
Greenberg Traurig, LLP
800 Connecticut Avenue, NW
Washington, DC 20006
(202) 331-3152

CERTIFICATE OF SERVICE

I, Paul E. Frampton, counsel for TracFone Wireless, Inc., do hereby certify that I have served the foregoing Comments of TracFone Wireless, Inc., In Support of Disapproval of Proposed Public Service Commission Emergency Rules For Title 150, Series 31, upon the Public Service Commission by placing true copies thereof in first class mail, postage prepaid, on this 18th day of July, 2006, addressed as follows:

Richard E. Hitt, Esquire
General Counsel
Public Service Commission
201 Brooks Street
P.O. Box 812
Charleston, WV 25323

Sandra Squire, Executive Secretary
Public Service Commission
201 Brooks Street
P.O. Box 812
Charleston, WV 25323

 *Matthew Ramsey* for Paul Frampton
Paul E. Frampton

Judy Cooper

From: Secretary Ireland
Sent: Monday, July 17, 2006 9:00 AM
To: Judy Cooper
Subject: FW: URGENT phone message

Judy, please keep this with the proposed PSC rules. Thanks.

From: Vicki Pendell
Sent: Monday, July 17, 2006 8:29 AM
To: Secretary Ireland
Subject: URGENT phone message

Paul Frampton of Bowles Rice McDavid Graff & Love (347-1163) left the following message:

"Secretary Ireland has in front of her right now some proposed emergency rules from the Public Service Commission under Title Series 150-31, and Bowles Rice is preparing comments that will be filed with our office early this week". Mr. Frampton ask that you please take no action on these rules until you have received their comments.

FILED
2006 JUL 17 A 9 17
OFFICE WEST VIRGINIA
SECRETARY OF STATE

Vicki L. Pendell
Executive Assistant to the Secretary
Office of the Secretary of State
1900 Kanawha Boulevard, East
Building 1, Suite 157-K
Charleston, WV 25305
Phone: 304-558-6000
Fax: 304-558-0900
Email: vpendell@wvsos.com