

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

FILED

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Form #5

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

OFFICE OF THE WEST VIRGINIA
SECRETARY OF STATE

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

CITE AUTHORITY: W Va. Code §§ 24-1-1, -1-7, -2-1, -2-2, -6-6b, -6-7, 6-11, and 29A-1-3

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

W Va. Code §§ 24-1-7

AMENDMENT TO AN EXISTING RULE: YES _____ NO X

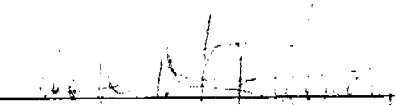
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 31

TITLE OF RULE BEING PROPOSED: Rule Governing E911 Fees

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS January 27, 2007



Authorized Signature

**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 28th day of November, 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

Following its review of comments made in writing and at a hearing, as well as in legal briefs, the Commission promulgates the attached Rules Governing E911 Fees, 150 C.S.R. Series 31, as final legislative rules.

BACKGROUND

The Commission has had rules regarding enhanced 911 (E911) fee requirements for landline and wireless telecommunications services in effect since March 6, 1998. See 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, on an emergency basis, to implement the provisions of House Bill Number 3208, which was passed by the 2005 Legislature. Among other things, House Bill 3208

1. increased the wireless E911 fee to \$3 per month,
2. created the Enhanced 911 Wireless Tower Access Assistance Fund and earmarked \$1 million in E911 fees to construct wireless towers to provide E911 service in more areas of West Virginia, and
3. earmarked ten cents of the monthly E911 fee for the West Virginia State Police.

During the 2006 session, the Legislature further amended the E911 fee statutes via Senate Bill 728. Among other things, Senate Bill 728

1. makes Voice over Internet Protocol (VoIP) services subject to the E911 fee provisions,
2. clarifies that prepaid wireless services are covered by the statute,
3. requires a character and criminal background investigation of certain persons to be employed in emergency dispatch centers and prevents persons with felony convictions from holding certain positions, and
4. assigns part of the E911 fees to West Virginia's Division of Homeland Security and Emergency Management.¹

PSC Update Order

Senate Bill 728 also required the PSC to issue an updated order by June 1, 2006, regarding wireless E911 fee collection matters. On June 1, 2006, in Case Number 06-0076-C-GI, the Commission stated that it intended to issue proposed legislative rules regarding E911 fee collection and remittance by July 1, 2006.

In the update order, the Commission reviewed Task Force reports which ultimately proposed Point-Of-Sale rules, under which the vendor, not the wireless carrier, would collect E911 fees when prepaid wireless services were purchased. The proposed Task Force rules also would allow, as an alternative, prepaid carriers to use an Average Revenue Per User approach to remit E911 fees to the Commission.

The Commission also noted that, in Case Number 06-0076-C-GI, Virgin Mobile did not support a one-size-fits-all collection and remittance mechanism. Virgin Mobile asked that prepaid providers 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, writing as follows:

¹ The Voice over Internet Protocol and Homeland Security provisions are being addressed in a separate rulemaking, General Order 187.27.

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.

Since the Legislature recently directed that cellular service be made more readily available throughout West Virginia's challenging terrain, 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.

The Commission concluded that the issues were too unsettled to immediately issue the Task Force's Point-Of-Sale draft rules as proposed rules. Although several participants jointly recommended 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.

The Commission also 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.

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 could not waive the statutory duty for wireless carriers to collect and remit E911 fees. 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.

Proposed Rules

On June 30, 2006, the Commission issued proposed rules,² in which the Commission 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 proposed to require CMRS providers to remit 10 cents a day for each day that customer service is

² The Commission issued its rules in a new series, both as proposed and as emergency rules, with a July 1, 2006, effective date. However, TracFone Wireless, Inc. objected to emergency status, and the Commission withdrew its request for emergency status. See Comm'n Order, Gen. O. No., 187.32 (July 28, 2006).

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 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 each month and state that they will continue to do so as required by law, the rules proposed that the Commission would grant an initial emergency waiver for any reasonable alternate method, pending further Commission order. See Rule 3.3 for the complete waiver provisions.

Notice of the proposed rules was published one time in newspapers across the state. See case file generally for Affidavits of Publication.

Waiver requests

The Commission's waiver provision, proposed Rule 5.2.3, requires the following:

1. *Statement that the carrier has already remitted fees to the PSC or that it is remitting fees simultaneously with the waiver request.*
2. *Statement that it will continue remitting fees on a going forward basis, as required by law.*
3. *The alternative method by which the carrier will calculate the amount of fees it owes to the PSC.*
4. *Good cause reasons for the alternative method.*
5. *The duration for which the waiver is requested.*

On July 17, 2006, TracFone Wireless, Inc. requested a waiver, because the PSC's methodology is an unworkable situation for providers whose customers purchase finite quantities of prepaid services which can be used over several months. Waiver request p. 1. It will be impractical, and in many cases impossible, to collect E911 fees under the Commission's method, TracFone wrote.

TracFone said that it has remitted \$792,988.62.³ Further, TracFone wrote, "Upon grant of the requested waiver, TracFone will continue to remit collected fees in compliance with all E911 fee requirements validly imposed pursuant to law which are applicable to it."

TracFone proposed to impose a 6% surcharge on all prepaid services which it sells directly to consumers. Thus, if a customer with a West Virginia area code buys 250 units, usable over 12 months, for \$99.99, TracFone will assess \$6 (6% of \$99.99). If the customer uses the units in one month, and buys the same plan again, TracFone said it would again impose 6%. This method is modeled after the Average Revenue Per User approach, TracFone said. It is essentially \$3 for each \$50 of service "and would permit the collection of fees directly from consumers as required by West Virginia Section 24-6-6b." Id. p. 2.

TracFone said that the "providers' obligation is to collect the fees from their consumers and remit the collected fees to the Commission. Indeed, providers are not deemed to be collection agents and are not liable for their consumers' failure to pay the E911 fees." Id. p. 3.

Waiver is also needed of the "active customer day" definition, TracFone wrote, because the language – "regardless of the amount of actual time or usage limits left on the prepaid card" – will produce economic hardship and discriminatory results. Id. p. 3. A customer's ability to use TracFone service depends on 1) the amount of service purchased, and 2) the length of the usage period. Then when TracFone sells 250 units usable over 12 months, the right to use the service ends as soon as the 250 units are used. "Accordingly, it would make much more sense to apply the E911 fee based on the value of the usage purchased," TracFone wrote. "If the consumer seeks to keep the service active by purchasing additional usage upon expiration of that supply of units, additional E911 fees could be collected at the time of the subsequent purchases." Id. p. 3.

TracFone asked for a waiver until final rules are issued.

Also on July 17, 2006, New Cingular Wireless PCS, LLC requested a waiver. Cingular wrote that it had submitted its June 2006 fees on July 15, 2006, as required by proposed Rule 4.1, and that it would continue remitting fees.

Cingular's prepaid service, including data purchases, is not based on the number of days of usage. Rather, Cingular's service is available until the amount of money in the account is exhausted or expires. This could occur during one month, 90 days, or up to a year, Cingular wrote. Waiver petition pp. 2-3. Cingular proposed to deduct the applicable E911 fee, now \$3, from the customer's account each month. Id.

³ TracFone remitted these amount to the Commission from 2000 to 2003. More recently, TracFone requested a refund of these amounts, asserting that TracFone was not obligated to remit these amounts to the PSC.

Cingular operates in 50 states, and 20 of those states require E911 fees to be collected and remitted. Cingular asked to use the same method in West Virginia that it uses in other states. Id. p. 2. Cingular sought emergency and permanent waiver of the rule.

Initial comments

On August 10, 2006, OnStar Corporation opposed \$0.10 per day as the only pre-approved method. Initial comments p. 2. OnStar sells bundled minutes to use whenever desired, and those minutes are stored in the equipment in the vehicle. Thus, OnStar said it cannot track "active customer days" to perform the Commission's calculation.

While OnStar understands that it may petition for a waiver, OnStar argued that at least one alternative should be pre-approved. Id. p. 3. It urged the Commission to also allow the Task Force's Point-of-Sale approach, which would cover most business models. Id. p. 4. OnStar also recognized the Commission's concern about PSC jurisdiction over vendors. Id.

On August 10, 2006, TracFone wrote that Senate Bill 728 amended the E911 statute to include prepaid providers within the definition of a commercial mobile radio service (CMRS) provider. Initial comments p. 1. TracFone argued that the proposed rules penalize certain providers by subjecting them to E911 fees when prepaid services are not being provided. Id.

The statute requires the PSC to provide "all relevant details of wireless enhanced 911 fee collection," and the Commission's formula contains no details regarding collection of the E911 fees by providers, TracFone wrote. Id. p. 2. The Commission's proposed rule "would stand Section 24-6-6b on its head" by converting the collection of E911 fees by carriers from customers into a fee borne directly by the carriers. Id. p. 2. Implicit in the Commission's rule is the notion that the provider is responsible for the fee, instead of the consumer, TracFone argued. Id. p. 3.

For post-paid service, the Commission specifies that the fee must appear as a line-item on the monthly bill and the provider must remit the fees it collects. Id. p. 3. For prepaid service, the provider is given a formula to remit E911 fees for all its customers, regardless of whether the customers have paid the fees, TracFone argued.

The "active customer day" definition requires E911 payments by providers when customers do not have service, TracFone argued. Initial comments p. 4. When TracFone sells 250 units usable over 12 months, the right to use the service ends as soon as the 250 units are used. Therefore, the E911 fee should be based on the value of the usage purchased. If the consumer uses all the units and then buys more, TracFone said that E911 fees would be collected with each subsequent purchase. Id. p. 5.

TracFone suggested 6%, which works out to \$3 for every \$50 purchased, and advised that \$50 was the average monthly prepaid purchase amount nationwide. West Virginia's statute requires \$3 per month, and a 6% fee would result in average monthly E911 payments of \$3. Under TracFone's proposal, if a customer buys \$50 to use in two months, he would pay \$3. If a customer buys \$100,

she would pay \$6. TracFone acknowledges that the E911 fee would work somewhat differently for prepaid and post-paid service, but said that differences between the services justified the separate approaches. Prepaid customers buy service when they need it, as much as they need; they do not buy monthly service, TracFone wrote. Initial comments p. 7.

TracFone provided rule language for prepaid purchases sold directly by the wireless provider.

Also on August 10, 2006, The Seniors Coalition wrote that the proposed rule discriminates against low-income consumers, particularly seniors on fixed incomes, who would effectively be denied access to prepaid service due to highly regressive fees. Initial comments p. 1. Similarly, the rule discriminates against wireless providers who target their services to low-income consumers. Senior citizens on fixed incomes will be placed in greater physical danger because with exorbitant E911 costs, they would no longer be able to afford prepaid wireless services, the Coalition wrote.

The Coalition addressed the historical development of the wireless market, noting the tremendous recent influence of prepaid service. It also noted that monthly subscription service is not sold in a prepaid wireless transaction. *Id.* pp. 4-5. While the technology has evolved, state and federal regulation has not, it wrote. *Id.* p. 5. Applying the monthly line item from post-paid service to prepaid service does not work today.

The Coalition asked the Commission to adopt a Point-of-Sale approach, based on the value of the prepaid purchase. "Monthly surcharges, that can quickly extinguish the minutes purchased, completely undermine the structure of the pre-paid wireless marketplace," it wrote. "Imposing the collection burden on service providers, who have no direct relationship with the customer, completely ignores the market structure and the manner in which the market has evolved." *Id.* p. 5.

Reply Comments

On August 16, 2006, Staff asked the Commission to act quickly, because until the revised fees take effect, the state's counties are losing revenue for funding of their 911 operations.

W. Va. Code § 24-6-6b(a) requires **CMRS providers to collect E911 fees from their subscribers**, Staff wrote. Reply comments p. 4 (emphasis in original). "The statute does not provide the discretion to shift the burden of collection from wireless telecommunications service providers to retail merchants. It clearly does not provide the latitude to impose a general sales or gross sales tax to be collected by the merchant." *Id.* p. 4.

Moreover, W. Va. Code § 24-6-6b(b) sets forth a monthly fee, Staff wrote. *Id.* p. 4. Some have suggested that it is unfair to charge the same monthly E911 fee to a low income, low usage subscriber as is charged to a high usage subscriber. "The rule does not do this," Staff wrote. "The rule is designed to require all subscribers to pay a fee through their purchase price that will recover the same approximate amount from prepaid wireless subscribers as post paid wireless subscribers must pay. Requiring all subscribers to pay the fee at the time they purchase the prepaid service does not collect an unduly disproportionate amount from low use, low income subscribers." *Id.* pp. 5-6.

While TracFone, OnStar and the Seniors Coalition oppose the Commission's rules, their arguments do not consider the Commission's waiver provision, Staff wrote. Id. pp. 6-7. By ignoring the possible waiver, some concerns "appear to be merely ceremonial at best, and at worst, just a delaying or misdirection tactic," Staff wrote. Id. p. 7.

Also on August 16, 2006, Cingular wrote that Senate Bill 728 established for the first time that the PSC has jurisdiction over the collection of the wireless E911 fee on prepaid service by CMRS providers. Reply comments p. 1.

Unlike TracFone, Cingular views the proposed rules as requiring the fees to be collected from customers, not from providers. Id. p. 3. Cingular would agree that any rule requiring the remission of fees not actually collected by the carrier would be contrary to law. Proposed Form WLF-1 shows that the amount of fees remitted to the PSC is the amount of the fees actually collected, minus the 3% administrative fee. Id.

Cingular also wrote that the Commission had, through proposed Rule 4.1 and its waiver procedure, "appropriately provided a process for individual carriers to choose HOW to collect the E-911 Fee from the subscriber." Reply comments p. 3 (emphasis in original). The "net fees" language at the end of Rule 4.1 also indicates that the fee is to be collected from the subscriber, rather than the provider, Cingular wrote. Id.

Cingular does not support TracFone's proposed 6% of the purchase price. "While that approach may work for TracFone, it does not work for Cingular's method of collecting the surcharge," it wrote. Id. p. 4.

OnStar similarly proposed that its favored method be included in the rules, Cingular wrote. Reply comments p. 4. "Because of the different methods in use today, and that may be used in the future, the Commission has appropriately proposed a flexible rule which, if applied fairly, will permit carriers such as TracFone, OnStar and Cingular to choose the method that suits its individual business plan," said the carrier. Id. pp. 4-5.

Cingular agrees with The Seniors Coalition that the \$3 statutory fee is too high and that a flat fee is unfair to some consumers, but "Unfortunately, the Commission lacks the authority to reduce the fee." Id. p. 5. Cingular agrees with The Seniors Coalition that any methodology that collects an E911 fee from the provider should not be approved. Id.

Although The Seniors Coalition asked the Commission to adopt the Task Force plan, there were two reports from the Task Force. Id. pp. 5-6. Cingular supported the plan with multiple collection methods. Id. p. 6.

Cingular believes that the "Commission's proposed rules, which recognize that Carriers shall select the method of collection of fees and provides for a waiver of the method of calculation of the fee, fairly balanced the interests of all parties, so long as the Commission acts reasonably in the consideration of requests for waiver." Id. p. 6.

Hearing

The Commission conducted a hearing on August 17, 2006, and received comments, evidence and oral argument from the CAD, Commission Staff, TracFone, Cingular, OnStar, The Seniors Coalition, the Ritchie and Doddridge County E911 Council, and the West Virginia Enhanced 911 Council.

Carolyn Charnock, director of Metro 911 of Kanawha County, and vice president of the West Virginia Enhanced E911 Council, commented that, although there has been much back and forth through the years over whether prepaid wireless should be handled like postpaid wireless, the Legislature made its intent clear with the revised legislation, that effective July 1, fees from prepaid customers should be remitted and disbursed to 911 centers. Each day, the Kanawha County center dispatches 100 to 200 emergency calls, she said. Tr. pp. 13-14.

Mac Haddow, chairman of the Policy Advisory Council of The Seniors Coalition, testified that the Coalition became involved in this matter when its members complained about West Virginia's increased E911 fee. Tr. p. 17. He argued that the fee is discriminatory to fixed-income seniors and the "highly regressive" fees would effectively deny them service. Id. p. 19.

The Coalition is "astounded" that West Virginia has the highest E911 fee in the nation, and he argued that the fee cannot be justified by topography. Id. Pennsylvania's and Maryland's fees are \$1, Ohio's is 32 cents, Kentucky's is 70 cents, and Virginia's is 75 cents, and these states have similar topography. Id. pp. 19-20. "And at \$3, it's about six times higher than the national average and two to three times greater than the surrounding states," Mr. Haddow testified. Tr. p. 21.

Senior citizens are extremely price sensitive, and they avoid long-term cellular contracts and minimum usage requirements, he said. Tr. p. 21. They purchase very small increments of prepaid service for specific purposes, typically personal safety. Id.

Competition has produced a wide range of consumer options and driven down cost, opening up access to all segments of the population, including low-income groups and seniors on fixed incomes. Mr. Haddow testified. Tr. p. 24.

The Seniors Coalition is particularly opposed to any plan under which providers can automatically deduct the E911 fee from consumer accounts. Mr. Haddow urged the Commission to require the fee to be made very clear to consumers. Tr. pp. 25-27.

Mr. Haddow testified that adoption of the Commission's proposed rules would "effectively remove a very important consumer choice from the prepaid wireless competitive marketplace." Tr. p. 26. The proposed rule contemplates deductions for the E911 fee when there are no minutes left to use, he said. Id.

He urged the Commission to adopt the CAD's position. Tr. p. 29. "It goes without saying that the West Virginia Legislature needs to repeal the \$3 E911 fee and set it at a level that reflects the true costs of implementing such a system," Mr. Haddow said. Id.

"Today 911 and its compatriot E911 is the centerpiece for emergency communication systems for Homeland Security that benefits the public as a whole, not just individual telephone subscribers to service providers. Today the reality is that more than 50 percent of 911 calls come from wireless phones. One half of all wireless phone purchases are made by consumers for personal emergencies," he testified. Tr. p. 30. "A substantial number of 911 calls are from seniors who are personally experiencing a medical or family emergency . . . [Y]et if the rule proposed here today is enacted, the Public Service Commission will be using a perverse formula to strip this tool from the hands of seniors and many low-income families who would have no emergency lifeline available to them, and deny them the opportunity to be that good Samaritan when the occasion arises." Id. pp. 30-31.

The Seniors Coalition prefers 6% of the amount of service purchased, collected at the Point-of-Sale. Tr. p. 34. The Seniors Coalition did not advise the Legislature of its position, while Senate Bill 728 was pending, Mr. Haddow said. Tr. pp. 43-44.

Timothy Greenan, from the Ritchie and Doddridge E911 Council, testified that E911 centers have to provide the same services, regardless of the caller's income level. Tr. p. 53. E911 centers need the fees to provide the services, he said. Id.

F.J. Pollack, TracFone's president and CEO, testified that TracFone is a unique company, with more than seven million customers, providing low-cost service and phones to low-volume, low-income people. Tr. p. 61. He noted that West Virginia has the highest E911 fee in the nation. Id.

TracFone subsidizes the cell phone costs for its customers. Tr. p. 62. "[A] phone that we sell for \$20 costs a lot more than \$20, and the only chance that we have to make back our money is if the customer will continue to buy airtime over a period of time, which allows us to recover our money." Id. Post-paid service providers can put E911 charges on their monthly bills, but there are no bills with prepaid service, he said. Tr. p. 62.

Unlike most providers, TracFone does not own any network facilities. TracFone uses the networks of other providers. Tr. pp. 62-63, 75-76.

TracFone's average monthly revenue per user last quarter was \$13, much less than the \$50 national average per month. Id.

"TracFone's position is that E911 fees are meant to be paid by the end-user," Mr. Pollack testified. Tr. p. 63. For some transactions, the prepaid provider has direct contact with the consumer, and in those cases, the prepaid provider can collect fees from those end-users. Id. p. 64. Other times, the retailers collect money from the end-users. In this case, it seems like the prepaid carriers are being asked to pay the fees, even if they cannot collect them, he said.

With TracFone's technology, the remaining minutes are stored in the handset, and TracFone is not able to access the account to take out any money. Tr. p. 65. TracFone has become active in a lot of proceedings similar to this one because it is such a challenge to collect fees from consumers. Id. p. 66.

Prepaid providers generally sell minutes of service, not days. Tr. p. 66. Days usually designate the outward time boundary for consumers to use their minutes. Id. When consumers use all of their minutes, their cell phones are effectively off. Id. pp. 66-67. "[I]f you make the carrier pay 10 cents a day because the customer had 60 days to use their minutes, and he used them in one day, you're making the carrier pay the E911 fees. It's contrary to the rule and law, and thus is the problem." Id. p. 68. TracFone is willing to collect the E911 fee from its customers "if you got a way to do that." Id. He argued that the Commission's proposed rules were not complete, because collection rules are not included. Tr. pp. 67, 71.

TracFone prefers 6% collected at the Point-of-Sale. Tr. p. 69. As to the Commission's jurisdiction over retailers, he said, "[I]f you don't have the authority to impose a collection methodology like that on a retailer, I don't know that you would have it on a carrier." Id.

Furthermore, he testified, "I can tell you that if you have the authority to make that tax effective on us as a carrier, and said you had to pay \$3 a month, we would tell all of the customers in West Virginia that we have, that we are done in West Virginia, that we're turning your phone service off, and you could come to this office and the governor's office and they can explain to you why your phone service has been turned off, because it would make no sense. I cannot pay a \$3 tax if I have no way to collect it." Tr. p. 72.

TracFone is the largest prepaid carrier in the country. Tr. p. 75.

On cross-examination, the Staff Attorney asked Mr. Pollack how TracFone was able to call its customers to market additional minutes. Tr. p. 88. Mr. Pollack said TracFone knows the outer date and that when customers reach the outer limit of time, TracFone tries to contact its customers to offer more minutes, so that it can recover its investment. Tr. pp. 88-89.

Mr. Pollack said that TracFone was "working with many states to come up with reasonable ways to contribute, with how customers contribute to E911. Some states have very minimum E911 fees, and when they have minimal fees, we've worked out arrangements that are specific to our unique model so those fees are paid." Tr. p. 89. West Virginia has a very unique situation because it has a very high fee. Id. p. 90. TracFone submits E911 fees in some states that do not use Point-of-Sale collection methods. Id. pp. 90-91. As of the hearing date, TracFone had agreements with five to 10 states. Id. p. 98.

TracFone was directed to provide, in a post-hearing exhibit, a list of the states with which it had reached agreements to pay E911 fees. Id. pp. 99-100. The Commission also requested a form contract with a retailer and directed TracFone to apply for a protective order when it filed the contract. Id. p. 100.

Patrick Pearlman, counsel for the CAD, testified in opposition to the Commission's proposed rule and in support of the Point-of-Sale approach. Tr. pp. 104-15. The CAD wants to preserve alternate forms of service for customers and argued that the Commission's formula was regressive. For instance, if a consumer buys 300 minutes to use during 12 months, \$36 would be assessed, which is "exceedingly high for the amount of usage that the customer is paying for." Tr. p. 107.

Mr. Pearlman said the proposed rule does not specify how the E911 fee is to be collected and expressed concern about the Commission's waiver process. Tr. pp. 107-08. If many waivers are granted, the opportunity arises for inconsistent application, he argued. *Id.* p. 110.

Post-hearing Comments

On August 17, 2006, The Seniors Coalition filed a report titled "Wireless Snapshot: Facts & Tax."

On August 28, 2006, the Metro Emergency Operations Center of Kanawha County filed a letter, advising that since the E911 fee was enacted, prepaid service has been developed. "[I]t appears state law did not clearly provide for those companies to remit the 911 fee that subscription providers did." Ltr. p. 1. Kanawha County volumes have increased from 700 calls per day to 1,500 calls per day, "with the percentage of our call volume from wireless phones skyrocketing from less than 10 percent to around 50 percent." Thus, they estimate that they answer and dispatch 100 calls per day from phones that do not pay a fee. "We feel it is not fair for the 911 center in Kanawha County or in any other county to continue to pay the price for these calls without the benefit of revenue the Legislature has required them to pay."

TracFone's Post-Hearing Filings

On August 25, 2006, TracFone requested protective treatment of its sample contract. Upon entry of a protective order from the Commission, TracFone said it would file the contract. Motion pp. 1-2.

TracFone asserted that, even when redacted, the sample contract "contains extremely sensitive business information and internal proprietary information which merits protection from public disclosure." *Id.* p. 1. When provided, TracFone asked that the contract remain under seal. At the close of this case, TracFone requested 90 days to move for the return of the sealed documents, and that any remaining documents be destroyed by the Commission. *Id.* p. 2. TracFone provided a proposed protective order.

Also on August 25, 2006, TracFone responded to the inquiries made at the hearing⁴ as follows:

1. States where TracFone currently remits L911 fees – State laws impose remittance of fees on customers, who pay directly, or indirectly by remitting the fees to the provider, TracFone wrote. “TracFone’s policy has been to challenge efforts by states to transfer that fee payment obligation from customers to service providers in contravention of the provisions of applicable state law,” it

⁴ The Commission asked for additional information from TracFone, as follows:

Q. (Chairman McKinney) . . . [W]ould it be possible for you to provide that post-hearing, both of those – the questions, the ones that you do have point-of-sale in, if you perchance find one, and the ones that you don’t have point-of-sale?

A. (Mr. Pollack) It’s up to our Counsel. It’s issues that may or may not deal with any confidentiality.

Q. At least you can provide me the state that you have them, because you certainly don’t have confidentiality agreements on what states they’re in.

A. It sounds reasonable.

Q. . . . [A]fter checking with your Counsel, and if there’s no problem, could you provide us a copy of what a typical sales contract would be with, say, Wal-Mart or a reseller would be? And I understand that might be a bit ticklish, and you may have to do some things with it, but I want to – I’d like to see what that looked like.

A. Well, we could try. I don’t know that there’s any typical contract.

Q. Okay.

Mr. Brecher, TracFone’s counsel: Mr. Chairman, would it be acceptable to submit a contract like that on receipt?

Chairman McKinney: That would be perfectly acceptable. Please make the appropriate application when you do it, though. In other words, apply for a protective order when you do it.

Mr. Brecher: Okay.

Tr. pp. 99-101.

wrote. Ltr. p. 1. TracFone did not advise where it currently remits E911 fees, instead writing as follows:

[In certain states], it is in the midst of sensitive and highly proprietary negotiations. Therefore, TracFone is not at liberty to identify which states, if any, are demanding payment by it of E911 fees. Nor is it at liberty to identify which states, if any, currently are receiving E911 fee payments from TracFone. It should be noted that many states are, like West Virginia, still in the process of determining whether and how to apply state E911 fee requirements to prepaid services.

Id. p. 1. TracFone disclosed that several states have completed proceedings and that Hawaii, New Jersey, Michigan and Nebraska have concluded that E911 fees are not applicable to prepaid wireless service. Id. p. 2.

2. States which use Point-of-Sale to collect E911 from consumers – To date, Virginia and Rhode Island have implemented Point-of-Sale. TracFone anticipates other states may do so. Ltr. p. 2.

3. Provide a sample vendor contract. Simultaneously, TracFone is submitting a motion to file under seal. This is a representative agreement, not one that is used with all vendors. “[N]one of TracFone’s agreements with retail vendors would prohibit retailers from collecting E911 fees at the point-of-sale if required to do so by law,” TracFone wrote. Ltr. p. 2.

Initial briefs

On September 11, 2006, TracFone wrote that the 2006 modification of W. Va. Code § 24-6-2(1) reflects the Legislature’s intent for the first time that prepaid wireless customers must contribute to the support of E911 services. P. 1. The Commission was also directed to establish rules containing “all relevant details” to implement the expansion of the E911 fee to include prepaid wireless. Initial brief pp. 1-2. “Simply stated, generalized statements about providers’ obligations to collect and/or remit E911 fees and establishment of mathematical formulae to calculate fee amounts owed are not sufficient to comply with the legislative directives codified at Senate Bill No. 728.” Id. p. 2.

This is not the Commission’s first attempt to develop rules for prepaid services, TracFone wrote. In January, 2006, the Commission opened Case Number 06-0076-C-GI, and directed its Staff to establish a task force to propose rules. Initial brief pp. 2-3. Despite the fact that all task force participants supported the Point-of-Sale approach as at least one of several options, the Commission rejected the Task Force recommendation and offered its own proposal at the outset of General Order Number 187.32. Id.

TracFone said it does not have real time access to the amount of usage available to its customers. Initial brief pp. 3-4. While customers can learn how much usage remains by simply looking at the phone, TracFone cannot. Id. p. 4. TracFone’s service is sold largely through third-

party retail outlets. The service is not sold in monthly increments, but “by specified quantities of units of use (e.g., 60 units, 100 units, etc.) which may be used within periods of sixty days or one year.” Id. p. 4.

The Commission’s proposed rule offers no details regarding fee collection, TracFone wrote. Initial brief p. 4. The proposed rule presents a formula which requires prepaid providers to calculate how much the providers must remit to the Commission. “How prepaid providers would collect the E911 fees from their customers – indeed whether they could collect the fees at all – would be their problem,” TracFone wrote. Id. pp. 4-5. The example to Rule 4.1 states that the provider would choose how to collect the fee, instead of providing all relevant details as the statute requires. Id. p. 5.

In contrast, Rule 3.1 for post-paid service requires the fee to appear as a separate line item on each bill. And Rule 4.4 states that for post-paid service, each CMRS provider will remit to the Commission such fees as are actually collected. TracFone asserted that an “actually collected” requirement is absent for prepaid service. Thus, the Commission is requiring prepaid providers to remit the amounts determined based on Rule 3.2.1.’s formula, whether those amounts are actually collected from consumers. Initial brief pp. 5-6.

The Commission’s definition of “active customer days” in Rule 3.2.3 does not take into account the actual time remaining on the account. “Adoption of the proposed definition . . . would result in prepaid providers being responsible for payment of E911 fees for many days and perhaps months when their customers had no service available to them,” TracFone wrote. Id. p. 6. If a customer uses all minutes prior to the expiration of the outer usage period, the provider would remain liable for E911 payments even though the consumer cannot access the provider’s service again until additional usage is purchased. Id. p. 7.

At the hearing, The Seniors’ Coalition and CAD testified that the proposed rule would make prepaid service unaffordable to many consumers, and many consumers would lose access to services they rely on for safety. Initial brief pp. 7-9.

TracFone’s F.J. Pollack also testified that “It is impossible for a prepaid provider like TracFone, whose service is sold largely through retail outlets, to collect the E911 fees from the consumers who purchase the service from the retailers since it is the retailer, not the prepaid wireless provider, who receives payment from the consumer.” Id. p. 9.

No one at the Task Force level opposed the Point-of-Sale approach, TracFone argued. Id. p. 10. Although the Commission is concerned that it does not have jurisdiction over the retail vendors, “that concern is not well-grounded in law,” TracFone wrote. The statutory CMRS definition expressly “includes resellers of any commercial mobile radio service.” Id. p. 11. Thus, under West Virginia law, resellers of CMRS services – including the retail entities who resell TracFone service – are themselves CMRS service providers. Id. p. 12. Whether the PSC has jurisdiction over retail sellers for other purposes, Senate Bill 728 “provides ample authority for the Commission to

promulgate rules mandating the collection of E911 fees from consumers of prepaid wireless services at the point-of-sale,” TracFone wrote. Id.

Should the Commission not adopt the Point-of-Sale approach, TracFone proposed, in its initial comments, 6% of the purchase price. Initial brief p. 13. This 6% is based on an industry-wide monthly average revenue per user of \$50. A 6% fee on \$50 is equivalent to the monthly \$3 fee, the same amount imposed on post-paid providers, TracFone wrote. Id.

It is reasonable to provide a flat fee approach for post-paid users and a percentage approach for prepaid users because prepaid service is not offered on a monthly basis. “[I]t would defy logic to attempt to collect E911 fees on a monthly basis for a service which is not provided on a monthly basis,” TracFone wrote. Initial brief p. 14.

Staff criticizes several parties for ignoring the proposed waiver provision. Id. p. 16. However, the fact that parties may ask for a waiver does not render an otherwise improper rule acceptable, TracFone wrote. “Waivers are appropriate in those relatively rare situations where a rule, normally in the public interest, would, as a result of some unusual or unique circumstance, disserve the public interest.” Id. p. 16.

In its initial brief, OnStar noted that the Commission’s proposed rules do not provide a pre-approved alternate method, and OnStar cannot track “active customer days” under its business model. Initial brief pp. 4-5. The Commission should adopt the Task Force’s Point-of-Sale approach, which includes the Average Revenue Per User approach upon written request, OnStar wrote. At the hearing, The Seniors Coalition, TracFone and CAD testified in favor of this method. Id. pp. 5-6.

Cingular wrote, in its initial brief, that the public interest would best be served by allowing the different carriers the flexibility to handle the E911 fees however is most efficient for each carrier. Initial brief p. 1. In a footnote, Cingular suggests that the “out of proportion size of the E911 fee has contributed to the problems identified in this proceeding. Were this fee to be more in line with E911 fees imposed by other states in the country, we suspect many of the issues being debated would be less intense and important.” Id. p. 2.

Just as the prepaid service itself offers consumers an alternative to post-paid commitments for wireless services, the Sufficient Positive Balance approach offers consumers a payment alternative, Cingular wrote. Initial brief pp. 3-4. With Cingular, consumers may choose a more affordable upfront price in return for the E911 fee being decremented as it becomes due. On the other hand, if a consumer prefers to pay the E911 fee at the time of purchase, that consumer may buy prepaid service from another carrier. Id.

Cingular uses the Sufficient Positive Balance approach in Alabama, Kansas, Washington, Illinois, Tennessee, Indiana, Pennsylvania, Florida, Virginia, US Virgin Islands and Puerto Rico, and it is implementing it in others. “No state has prohibited SPB as a valid collection and remittance method for any reason,” Cingular wrote. Id. p. 4.

In its initial brief, the CAD noted that the Task Force in Case Number 06-0076-C-GI recommended a Point-of-Sale approach, whereby prepaid providers would collect from their customers 1) 6% of the purchase price for a specific amount of usage, or 2) the statutory fee when the consumer buys unlimited usage for a certain period of time. Initial brief p. 2. It was also recommended that the Commission allow, in the alternative, the Average Revenue Per User approach. The plurality of the Task Force opposed the Sufficient Positive Balance approach. Id. p. 3. However, the Commission declined to adopt any particular approach because the issues were too unsettled. Id. p. 3.

The Commission's proposed rules differed from the Task Force approach in virtually every respect, the CAD wrote. Id. p. 4. First, the Commission introduced the concept of "active customer day." Second, the Commission introduced the notion of waivers. Third, the Commission specified the calculation for the statutory fee. The CAD, though, asks the Commission to adopt the Task Force rules. Id. p. 4.

The CAD urges the Commission to abandon the "active customer day" basis to calculate the fee, because prepaid service is generally not based on days, but rather is based on usage. Initial brief p. 5. "In trying to force the statutory monthly fee onto prepaid wireless service, the Commission is essentially trying to pound a square peg in a round hole. Basing the amount of wireless E911 fees that must be remitted by prepaid carriers on a daily calculation (\$0.10 per day) is both anti-consumer and anti-competitive," the CAD argued. Initial brief p. 6. "By driving up the cost of prepaid wireless service, the Commission's proposed rules will have the perverse effect of reducing consumers' choices for wireless service, which surely does not enhance consumers' ability to take advantage of wireless competition," said the CAD. Id. p. 6.

While the Commission cannot change the fee set by the Legislature, "What the Commission can do, however, is at least recognize that the Legislature did not specifically address how the fee should be collected by prepaid wireless carriers and adopt rules that avoid imposing an unreasonable economic burden on prepaid wireless customers and limiting competitive choices in the wireless marketplace," the CAD wrote. Id. p. 6.

Prepaid customers, by and large, are very price sensitive, marginal consumers; they cannot or will not subscribe to postpaid service, due to cost, creditworthiness, or transient residence, said the CAD. Initial brief p. 7.

While the average revenue per user is roughly \$50 per month for post-paid service, the average revenue per user for prepaid customers is about \$13 per month. The impact of a \$3 monthly fee amounts to nearly 25% of the cost of prepaid service purchased but is only 6% of the cost of postpaid wireless service. The disproportionate impact makes the wireless E911 fee much more regressive than it would be under the Task Force proposal. Id. pp. 7-8 (footnote & citations omitted).

Although the Commission's \$0.10 per day approach appears reasonable, by and large prepaid wireless carriers do not offer service for a fixed period of time (*i.e.*, a day or a month). Instead, prepaid customers buy wireless usage -- a block of minutes -- that provides them with service until

their minutes are exhausted, said the CAD. Id. p. 8. The Commission's proposal ignores how prepaid wireless offerings are structured and priced, the CAD wrote. Id. p. 9.

In essence, a prepaid customer gets roughly the same amount of air-time that a postpaid wireless customer gets in one month, but the prepaid customer can use that time over a year. Id. p. 9. Under the Commission's proposal, although the prepaid customer buys the equivalent of one-month's post-paid usage, rather than paying one monthly E911 fee, the prepaid consumer pays twelve E911 fees. Id. p. 9. Thus, whatever advantages a consumer sees in prepaid service begin to evaporate under the Commission's proposal to assess the wireless E911 fee on a daily basis. Initial brief p. 9.

In a footnote, CAD also notes that "prepaid wireless customers avoid some of the billing fees and miscellaneous carrier-imposed charges that are rife in the postpaid wireless market."

Although the Commission authorized carriers to seek waivers, the process is flawed because waivers become the rule rather than the exception, the CAD wrote. Id. pp. 9-10. The CAD appreciates the Commission's effort to craft rules to accommodate various business plans, and the CAD understands that prepaid carriers could avoid the problematic results by obtaining a waiver. Id. p. 10. "With all due respect, however, CAD believes that the Commission's proposed rules -- which emphasize flexibility through individual waivers -- are antithetical to the purpose and principle of legislative rules, *i.e.*, establishing legally binding and enforceable rules of general and prospective effect." Id. p. 10. The Commission turns rulemaking on its head by proposing a method that it knows many prepaid carriers cannot comply with.

While the Commission should incorporate a waiver provision, waivers should be the rare exception, wrote the CAD. Id. p. 11. Since most prepaid carriers sell their services based on usage, the CAD predicted that most prepaid wireless carriers would seek waivers from the proposed rules. Id. The CAD also objected to the procedures to obtain a waiver. Id. pp. 11-14.

There is no denying the complexity that the Commission noted, the CAD wrote. However, the CAD still urged that adoption of Point-of-Sale rules. Id. p. 14. "Despite all the species and sub-species of prepaid wireless service available, the manner in which providers collect and remit the State's E911 fee . . . is quite simple: A prepaid wireless provider can either collect the fee at the front end -- at the point-of-sale -- or the provider can collect the fee at the back end -- after the sale of its service, for example through debiting a customer's usage after they have purchased service (the Sufficient Positive Balance approach) or by paying part of the proceeds of prepaid sales (the ARPU approach, for example). That is, in essence, what the debate is all about: Whether the Commission should require the wireless E911 fee to be collected by prepaid wireless providers up front, or at the back end." Id. p. 15.

Requiring the fee to be collected at the front end -- Point-of-Sale -- is the most straightforward, consumer-friendly and pro-competitive means of collecting the fee, the CAD said. P. 15. With prepaid service, customers do not receive a monthly bill. "In the prepaid environment, the point of sale is generally the one and only time the carrier communicates with the customer. . . . Moreover,

it is at the point of sale where the prepaid customer is most likely to pay attention to the cost of service including any applicable government-imposed fees and charges. . . . In other words, if the customer is going to have an opportunity to ‘shop around’ among prepaid wireless offerings, all the price signals that the consumer should have must be available, clearly and concisely at this time,” the CAD wrote. Id. p. 16.

When the provider sells directly, the fee obviously can be collected at the Point-of-Sale. Where the service is sold through a third-party vendor, most agreements between the carrier and the vendor would allow it to be collected, the CAD said. Id. pp. 16-17.

Under the Average Revenue Per User approach, the CAD believes that prepaid carriers are likely to build their monthly E911 obligations into the price of their prepaid offerings and consumers will have that information available when they purchase service. Id. pp. 17-18.

Commission Staff did not file an initial brief, but reserved the right to reply.

Reply briefs

TracFone noted that none of the initial briefs endorsed the Commission’s rules, without qualification. Reply brief p. 1. Only Cingular articulated any support, although it insisted on being able to use the Sufficient Positive Balance approach. Everyone else supported the Task Force rules, TracFone wrote. Id.

TracFone repeated its arguments that the Commission’s rules do not set forth “all relevant details;” that the rules would be unworkable for several providers, including TracFone and OnStar; that the rules do not account for the differences between prepaid and post-paid wireless services; and that the Commission misunderstands how prepaid service is offered. Id. pp. 2-3. No one agreed with Staff’s assertion in its August 16, 2006, reply comments that the shortcomings can be overcome by the waiver provision. Id. p. 3.

The initial briefs also reflect a consensus that the Commission’s rules “would significantly raise the costs to consumers of prepaid wireless services – services which are relied upon by low income consumers, including seniors, Hispanics, and African-Americans,” TracFone wrote. Reply brief p. 4. The CAD is correct that the impact on low income consumers is “disproportionately regressive,” as well as anti-consumer and anti-competitive, it said. While the Commission has no discretion to reduce West Virginia’s \$3 monthly fee, it has broad discretion to implement rules in a non-regressive, non-discriminatory manner. Id. p. 4.

The record in this proceeding demonstrates overwhelming support for Point-of-Sale, TracFone argued. Id. pp. 4-5. The Commission’s jurisdiction concerns are misplaced, it wrote, repeating the jurisdiction arguments made in its Initial Brief. Id. p. 5.

If the Commission remains unconvinced about Point-of-Sale, TracFone continues to support its alternative proposal that prepaid customers be assessed 6% of the purchase price on all service sold directly by providers. Reply brief pp. 5-6.

Staff continued to argue that the counties are losing much needed revenue to fund their E911 operations. Reply brief pp. 2-3, and that W. Va. Code § 24-6-6b(a) requires CMRS providers to collect the fee monthly.

“The statute clearly places the burden of collecting the fee upon the wireless telecommunications service providers from each of their subscribers on a monthly basis,” Staff wrote. “The statute does not provide the discretion to shift the burden of collection from the wireless telecommunications service providers to retail merchants. It clearly does not provide the latitude to impose a general sales or gross sales tax to be collected by the merchant.” Reply brief p. 4.

W. Va. Code § 24-6-6b(b) also makes it a monthly fee, Staff noted. “While prepaid CMRS providers do not bill monthly, the statute definitely requires such providers to calculate an equivalent amount that must be collected from subscribers and to remit those fees to the Commission.” Id. p. 4.

Staff asserted that TracFone has repeatedly delayed these proceedings and stands in contempt. Id. pp. 4-6. Although TracFone strongly supports the Point-of-Sale approach, TracFone testified that it does not currently have a Point-of-Sale methodology approved by any other state. However, TracFone is remitting fees to other states. Id. p. 5. Further, “While admitting that it maintained records of active accounts with pre-determined time parameters, TracFone firmly maintained that it could not operate under the requirements of the proposed Rule. In support of this erroneous assertion, TracFone relied upon that portion of the proposed Rule made necessary by CMRS providers who sell pre-paid services in less than thirty day increments,” Staff wrote. Id. p. 5 (citations omitted). TracFone is the nation’s largest prepaid provider with 7 million customers and a billion dollars in annual revenue. Id. p. 6. TracFone testified that it has worked out arrangements to pay E911 fees in other states, and that it could remit fees based upon an average \$50 per month usage.

Although the Commission ordered TracFone to provide certain information post-hearing, TracFone did not. Instead, TracFone stated that it cannot provide the requested information because it is involved in litigation in other states, Staff wrote. Id. p. 6 (citations omitted). W. Va. Code § 24-2-10 provides that any disobedience to a Commission process can be remedied by approaching a circuit court, said Staff. Id.

TracFone’s waiver application is incomplete because TracFone must state that it is collecting E911 fees at the time of filing and during the approval process. “Not only is TracFone refusing to collect E911 fees in West Virginia at this time, it is seeking a refund of fees which it has previously collected and remitted to the Commission,” Staff wrote. Id. p. 7.

TracFone argues that the "active customer day" definition requires TracFone to pay the E911 fee rather than the customer. Id. pp. 7-8. However, as Cingular points out, Form WLF-1 clearly indicates that the fee is to be collected from subscribers. "All pre-paid CMRS providers must use some reasonable method to approximate the amount of E911 fee that the customer should pay," Staff wrote. "That approximation is contemplated by the Commission's proposed Rule. Rule 4.1 clearly states that the CMRS provider may choose how to collect the fee from the subscriber when using the active customer day methodology." Id. p. 8.

Although TracFone argues that the statute requires the Commission to provide all relevant details of wireless enhanced 911 fee collection, TracFone's position would require any statute or rule to take into consideration every existing business model, as well as anticipate all completely new business models, Staff wrote. Id. p. 8. Staff continued,

TracFone's arguments also ignore the facts. For a substantial period of time, TracFone collected and remitted E911 fees to the Commission. It has never presented evidence regarding how this was accomplished, even though asked by the Commission's Staff.

Id. p. 9.

While admitting that it had not appeared before the Legislature, The Seniors Coalition was devoted to challenging the amount of the fee, Staff wrote. Id. p. 11.

TracFone argues that it cannot implement the proposed Rule because of its business model, Staff wrote,

Yet, during testimony, it did not provide a convincing argument in support of this position. TracFone knows how many active accounts it has each month. TracFone simply does not want to lose its marketing advantage by collecting its fair share of costly E911 fees by increasing its selling price. As long as TracFone pays nothing toward this program, it retains a pricing advantage over post-paid wireless and landline telecommunications providers. The Public Service Commission has devoted far too much time to the promulgation of a rule that will adequately fund West Virginia's E911 program. TracFone's callous disregard for the health and safety of West Virginia residents, along with its greedy desire to maintain a competitive pricing advantage over other E911 participating providers, should not be allowed to delay the Commission any further. The Staff endorses the promulgation of the proposed Rule as it stands.

Id. p. 13.

Cingular noted that it was the only party who filed an initial brief to support the proposed rules. Reply brief p. 1. TracFone urged the Commission to adopt a Point-of-Sale approach from Case Number 06-0076-C-C-GI. However, while that report recommended a Point of Sale method to accommodate the interest of some carriers, it also opposed the system Cingular uses in all of the

jurisdictions where it collects and remits an E911 fee on prepaid services. Id. pp. 1-2. Cingular supports the right of CMRS providers to use their own method of collecting the fee.

The Commission recognized the complexity of this issue with the proposed rule, Cingular wrote. Id. p. 2. In Rule 4.1, the Commission specifically says, "CMRS provider chooses how to collect the E-911 fee from subscriber."

Since July 1, 2006, Cingular has remitted the amounts required under the proposed rules. Id. p. 3. Cingular notes that prepaid service is a useful alternative means for people who cannot afford, or who do not desire to use, post-paid service. "Anything that would discourage the ability of the carrier to offer such service would be contrary to an open market approach to business," it wrote. Id.

The proposed rule "does not provide for an exemption from the collection requirements. It provides for a waiver of the method set forth in [the] rule," said Cingular. Id. p. 4. The Sufficient Positive Balance approach allows Cingular to accomplish the Legislature's objectives as well as the Commission's. "Collection and remittance is what the statute contemplates. As long as the method selected by the CMRS provider does not run afoul of consumer protection laws or other grounded public policy, there is no reason to revise the rule to address a problem that has not been established." Id. pp. 4-5.

Even though the Commission has not promulgated final rules, "Cingular has determined that it should collect and remit the prepaid statewide E-911 fee. It knows how to do it in a way that has been accepted in other states in which it collects such fees, and it has been collecting and remitting such fees without adverse effect in these states," Cingular wrote. Id. p. 5.

CAD incorrectly states that Cingular opposes the Point-of-Sale collection method. Id. p. 6. Cingular has repeatedly stated that it supports the ability of a CMRS provider to use any method of collection that suits its business model. However, Point-of-Sale does not suit Cingular's business model. Likewise, the SPB method used by Cingular does not suit the business models of other CMRS providers. Unlike the CAD, Cingular is not suggesting that its model be used by all CMRS providers in lieu of Point-of-Sale.

Neither CAD nor The Seniors Coalition has established that the Sufficient Positive Balance approach is either anti-consumer or anti-competitive. Reply brief p. 6. The Coalition used hyperbolic statements at the hearing and manipulated data relating to seniors and income levels. "Merely stating that something is so, does not make it so," Cingular wrote. Id. pp. 6-7. CAD only says it has to potential to do so. Id.

Wireless service is presented in a competitive environment. If a customer does not like Cingular's method to collect the E911 fee, the customer can purchase service from another provider. Id. p. 7. "The marketplace will effectively determine whether the SPB method is anti-consumer or anti-competitive. There is no reason to believe that the customers who use prepaid service; whether they are senior citizens or low-income customers, or both, are unable to make a choice among one

of several providers that suits his or her needs,” Cingular wrote. “The CAD’s and TSC’s opposition to SPB seems to assume that customers cannot make intelligent choices. The public whom they profess to represent deserve to be given more credit than either the CAD or TSC is apparently giving them. There is no reason for the Commission to prevent Cingular from utilizing the collection method that is consistent with its business plan.”

Further pleadings

On September 21, 2006, the West Virginia State Tax Department petitioned for leave to file comments, writing as follows:

In order for the State of WV to join the Streamlined Sales and Use Tax Agreement (SSUTA),⁵ uniform definitions of telecommunications had to be adopted by the Tax Department. Although the SSUTA does not impose tax, if subject to consumers sales tax all telecommunications services/products are impacted. To pick and choose which service/products are subject to tax would seriously affect our compliance with the SSUTA and the Governing Board could either impose sanctions against us or expel us from the Agreement. Although the SSUTA does allow some exclusions/exceptions (i.e., we can impose a separate rate which may be zero on food and drugs or we may “exempt” certain items from a category, such as durable medical equipment when purchased with a prescription, or for home use), there is no such provision for telecommunications services/products.

Certain features and issues relating to the aforementioned case (PSC case # G) 187.32) may conflict with the Streamlined Sales and Use Tax Agreement in such a way as to cause the State of West Virginia to be out of compliance with the aforesaid agreement.

⁵ The Streamlined Sales Tax Governing Board, Inc.’s mission is to assist states as they administer a simpler and more uniform sales and use tax system. West Virginia Delegate John Doyle is the group’s second vice president. West Virginia is a full member state, meaning that it is in compliance with the Streamlined Sales and Use Tax Agreement through its laws, rules, regulations, and policies. The Streamlined Sales Tax Project is comprised of participating state governments and the District of Columbia. A state may participate at any time. The group organized in 2000 with 26 participating states. Consumer privacy and security concerns regarding tax collection during on-line purchases were a major initial consideration. The Project anticipated seeking input and technical assistance from both the public and private sector to address numerous issues, and a public comment period is provided at each project meeting to allow interested parties to address issues relevant to the project.

Therefore, the West Virginia Tax Department hereby files a Petition for leave to file comments in order that the matter may be more fully investigated and commented upon as necessary.

Leave to file surreply brief

On September 25, 2006, TracFone asked leave to file a surreply brief, to respond to assertions in Staff's reply brief. "Significantly, Staff elected not to submit an initial brief in this proceeding. Rather, it waited until the reply round to set forth its position. . . [A] substantial portion of Staff's reply brief is directed at TracFone. Staff's reply brief attacks TracFone's conduct, makes accusations regarding TracFone's honesty and candor, and makes factual allegations not supported by any of the record of this proceeding," TracFone wrote. Motion p. 1. Since these matters were raised for the first time in Staff's Reply Brief, TracFone asks for an opportunity to respond.

Simultaneously, TracFone filed a Surreply Brief, arguing that Staff's position was defamatory and insulting, and its allegations were wholly unsupported and unsupportable. TracFone noted that no other party made any similar allegations. Surreply brief pp. 1-2. Staff did not address the only issue in this proceeding – what rules should be adopted to set forth "all relevant details." *Id.* p. 2.

Recently, Forbes Magazine ranked West Virginia 49th overall in business environment and 47th in regulatory environment, which should be a concern to all state government agencies, TracFone wrote. "The hostility toward one party reflected in Staff's reply brief is inconsistent with the kind of cooperative relationship between state government, the business community and consumers that all West Virginians deserve and have a right to expect." *Id.* p. 3.

Contrary to Staff's assertions, TracFone said it has been "at the forefront of efforts to modify West Virginia law." It also asserted that until July 2006, TracFone was the only party to this proceeding which ever remitted any money to the state's E911 fund for prepaid wireless services. *Id.* p. 3 (footnote omitted). Yet, Staff accused TracFone of dragging out this proceeding, while other providers were cooperating.

Whatever delay has not been caused by TracFone, it wrote. *Id.* p. 4. From 2000-03, TracFone remitted E911 payments. However, these were made in error since the statute did not then apply to prepaid wireless, as was demonstrated in Case Number 04-1285-C-GI, TracFone wrote. *Id.* "Those funds were paid by TracFone out of its own pocket since it did not have – and still does not have – any means to collect E911 fees from its customers." *Id.* "TracFone has been working diligently to have the Commission require that those entities who sell prepaid wireless services to consumers and who collect payment from those consumers also collect the E911 fee at the time of purchase, as the legislature intended." *Id.* p. 4.

In February 2006, several parties to 05-1303-C-GI submitted a proposed settlement, under which prepaid providers would have no obligation to collect and remit E911 fees until the Commission has final rules in place. *Id.* pp. 4-5. TracFone advised the Commission that it supported the settlement, so long as it applied to everyone. Had the proposed settlement agreement been

approved, it is probable that by now E911 fee collection from prepaid services would have begun, TracFone said. The delay in approval of that proposed settlement agreement cannot be blamed on TracFone.

TracFone also signed the Task Force report to adopt the Point-of-Sale method in April 2006. Although not a single participant opposed Point-of-Sale, the Commission did not accept that proposal. *Id.* pp. 5-6. TracFone participated in the Task Force with Staff and assumed a leadership role in formulating and drafting the report which was endorsed by several parties.

In the pending rulemaking, TracFone submitted comments and proposed an alternative. It appeared at the hearing and presented a witness.

Staff accuses TracFone of not providing information that the Commission requested. *Id.* p. 7. Chairman McKinney indicated that it would be appropriate for TracFone to provide the requested information with a request for a protective order. On August 25, 2005, TracFone submitted the information requested by the Chairman along with a motion for leave to file under seal and a protective order. Once the protective order has been issued, TracFone will forthwith provide the agreement "in full accord with the Chairman's request."

In footnote 14 of page 7, TracFone disputes Staff's statement that TracFone was ordered to provide certain information post-hearing, writing as follows:

Neither the Chairman nor the Commission ordered TracFone to do anything. Chairman McKinney requested that TracFone provide certain information and documentation. In the same spirit of cooperation which TracFone has demonstrated throughout this proceeding, it has complied with that request within one week of the hearing.

While Staff asserts that TracFone did not assert any legal basis for the Commission to order retailers to collect the fee, on pages 10-13 of TracFone's initial brief, TracFone provides the legal bases upon which the Commission could mandate a Point-of-Sale fee. "Staff may disagree with TracFone's legal rationale but it cannot responsibly assert that TracFone offered no legal justification for a point-of-sale fee." Further, Staff's brief does not respond to TracFone's legal analysis on this issue. *Id.* p. 8.

Although Staff now claims that TracFone's waiver application is incomplete, TracFone filed its waiver application more than two months ago and this is the first occasion any party has objected to TracFone's application. *Id.* p. 9.

Staff continues to erroneously state that TracFone has collected E911 fees from customers in West Virginia and other states, TracFone wrote. *Id.* p. 9.

Lest there be any misunderstanding, TracFone has never collected E911 fees from any customer in West Virginia and it has never stated in any proceeding that it has collected such fees from customers. What TracFone has said is that it has remitted payment to the Commission of E911 fees. Those fees have been paid by TracFone in West Virginia and other states out of its own revenues. Imposition of a point-of-sale fee would make it possible to collect the E911 fees directly from customers of prepaid wireless service as intended by the legislature and in a manner similar to how those fees are collected from post-paid customers.

Id. pp. 9-10.

Staff's suggestion that compliance with "all relevant details" would require the Commission to predict every possible business model is irrelevant, TracFone wrote. Id. p. 10. "If Staff has a concern about the statutory requirements of Section 24-6-6b, its concern is with the legislature which enacted and amended that statute, including the requirement that the collection rules provide 'all relevant details of wireless enhanced 911 fee collection.'"

On October 2, 2006, The Seniors Coalition responded to Staff's statement on its Reply Brief that the Commission should be cautious in considering the Coalition's position because the Coalition "appears to be walking a dangerous tight rope between consumers, political and industry interests." Statement in Response pp. 1-14.

The Coalition is a 501(c)(4) non-profit, non-partisan senior's advocacy organization. Id. pp. 1-2. It was formed out of frustration with the passage of the 1989 Medicare Catastrophic Care Act. Today it has more than 4 million members nationwide. Id. p. 2.

The Coalition wrote that it did not observe any bias by the Commissioners during the PSC hearing. The only unfair attacks have been initiated by Staff, it said. Id. p.3.

Although Staff suggests otherwise, there is nothing improper in TracFone and the Coalition's agreeing: 1) that West Virginia's E911 fee is too high and 2) that the federal Universal Service Fund fee is too high. Id. p. 4. Staff's proposal, in failing to allow for Point-of-Sale collection, will eliminate an important consumer choice. Id. pp. 4, 10.

Public policy deliberations always require a detailed analysis of consumer, political and industry interests, the Coalition wrote. Statement in Response p. 9. The Coalition holds a different view than Staff, that is all. Id. The Coalition asked the Commission to independently review the record, including Staff's hostile and antagonistic position. Id. p. 14.

In response to an email from TracFone to its customers, the Commission received numerous phone calls and the following letters in protest:

October 25, 2006	Mary Jane Ferrell Gloria Conrad Beverly Henderson Darrell Lee	Middlebourne Weston Fairmont Peterstown
October 26, 2006	Sandra Rosenberger Charles Hendrix Dorsey Harvey Michele M. Hall Ted and Evelyn Smith Sheila Behrens	Fairmont South Charleston Tornado Terra Alta Charleston Levels
October 27, 2006	Carolee K. Bentz	Wheeling
October 30, 2006	Walter S. Courtney Pamela L. Kirk Jim W. Crout Charles A. Sullivan	Wheeling Dawes Parkersburg Wallace
October 31, 2006	Katrina A. Dalton Patricia A. Davis Laurelle Smith	Gary Philippi Fairmont
November 1, 2006	Charles Hendrix ⁶ Russell Conklin David Thomas	South Charleston Glennville Charleston
November 2, 2006	Carol Ramser Melissa Riggs	Wheeling Wheeling
November 3, 2006	Kathleen Martin Beverly Miller	Buckhannon New Martinsville

All of these letters, relying upon language from TracFone's email, urged the PSC to reject the "proposed \$3 tax." The commentators objected to the high level of West Virginia's fee as compared to surrounding states, and to the increased cost to them to have cell phone service.

⁶ This filing is a copy of Mr. Hendrix's October 26, 2006, protest letter, which was also addressed to the Governor.

Ms. Ferrell wrote, "It would be ridiculous to ask us to pay more for a service that very likely could not be used from a cellular telephone in most places in West Virginia."

Others, such as Ms. Conrad and Mr. Harvey, noted that they already pay an E911 fee via their land line service.

Several, including Ms. Rosenberger, wrote that they buy prepaid wireless service for emergencies and they cannot afford a cell phone's monthly charges.

Mr. Hendrix noted that in 2005, he used only 42 minutes of connect time. If \$36 is assessed yearly in E911 fees, it amounts to almost \$1 a minute at his usage rate. There are months he does not use his prepaid service at all. He asked that the fee be proportional to the amount of usage. Prepaid service is especially valuable for some elderly people and for people with bad credit ratings, he said.

Mr. Conklin wrote that for \$19.99 he buys 120 minutes of service to use in two months. The \$3 monthly E911 fee would be a 30% increase.

Ms. Riggs is a single mother of three, and she bought phones to allow her two oldest children to keep in contact in case of necessity or emergency. She would have to pay \$9 more each month for these three phones. "This is \$9 that I do not have unless you would like us to eat a little less," she wrote.

Mr. and Mrs. Smith asked the Commission to make some provision for people who only use prepaid service for emergencies.

Mr. Crout noted that although there were three pay phones in a hospital, when he needed to make calls this summer, two were not working and he had to be on his knees to use the third one, which was at handicapped height. "Public payphones are going the way of B&W TVs," he wrote. He supports reasonable collections for an E911 system, but he asks that the prepaid fee be assessed to those who do not have land lines. Instead of punishing prepaid customers with additional fees, the Legislature should encourage the sale of additional devices to pay for expansion of the infrastructure for cellular service, Mr. Crout wrote.

Mr. Thomas wrote that the \$3 fee is the antithesis of the "business friendly" environment that Governor Manchin preaches.

On October 30, 2006, in a separate case,⁷ TracFone advised the Commission that it had received an email from Staff, which referenced an earlier Staff email about TracFone's email to its customers. TracFone said its email "notified those customers about proposals to impose E911 fees of \$3.00 on prepaid wireless service consumers on every purchase, including multiple 'monthly' fees when multiple purchases are made in a month." Ltr. p. 1. TracFone said it encouraged its customers

⁷ TracFone filed this response in Case Number 05-1303-C-GI.

to express their concerns to the Governor and to the Public Service Commission, and it explained as follows:

For some time, TracFone has been considering a grassroots public awareness campaign to inform consumers about the consequences of legislative and regulatory actions in West Virginia regarding E911 funding. However, a final decision to send the specific messages had not been made as of Monday, October 23. The messages were sent to certain of TracFone's West Virginia consumers due to a miscommunication between TracFone and its outside vendor.

Id. TracFone also repeated its position that W. Va. Code § 24-6-6b requires the fee to be collected from customers and that, in the rulemaking, the Commission has proposed that prepaid wireless providers be responsible to remit the fee. The Commission's proposal did not address how and whether those providers could collect the fee from their customers, it said. TracFone again criticized the Commission for not adopting the settlement proposal, under which prepaid providers would be released from the obligation to remit E911 fees until final rules are in force.

TracFone also wrote,

Moreover, the Commission proposed to calculate the fees in a manner such that West Virginia consumers of prepaid wireless services would have been obligated to make several \$3.00 fee payments per month if they made multiple purchases in a month or if they purchased prepaid service in which the quantity of prepaid usage would be usable over a period of several months. TracFone believes that its customers are entitled to know about what is happening with regard to E911 fees in West Virginia and how it could affect them.

Ltr. p. 2. Whether Staff approves of TracFone, or any other company, communicating with its customers to mobilize public opinion, TracFone has every right to do so, it wrote. Moreover, members of the public enjoy the right to communicate their concerns to their government, TracFone said.

On November 9, 2006, the West Virginia Retailers Association and the Consumer Electronics Retailers Coalition commented on the PSC's power to collect E911 fees at the Point-of-Sale. Initial Brief pp. 1-6. No statute empowers the Commission to collect a tax from retailers, they wrote. Id. p. 1.

Further, independent retailers are not "resellers" of wireless phone service, and thus they are not "commercial mobile radio service providers" who are subject to the E911 fee requirements. Id. p. 1. Although neither the state code nor the rules define "reseller," it is a well-defined term of art in the telecommunications industry, they wrote:

The federal law that regulates state taxation of mobile phone service defines a reseller as “a provider who purchases telecommunications services from another telecommunications service provider and then resells, uses a component part of, or integrates the purchased service into a mobile telecommunications service.

Id. p. 2, citing 4 U.S.C. § 124(10)(A) (2004). These statutes make clear that a “reseller” steps into the shoes of a cellular phone service providers, the Associations argued. A “reseller” is also known as a “mobile virtual network operator,” they wrote. Id., citing Mr. Pollack’s testimony before the W. Va. PSC (tr. P. 76 (Aug. 17, 2006), and TracFone’s Initial Brief p. 3 (Sept. 11, 2006). In contrast, prepaid airtime card retailers do not operate a network, virtual or otherwise. Id.

They argued that common usage of “reseller” in the telecommunications industry confirms the definition used in federal law. For instance, the Verizon Wireless customer service website notes that resellers set rates, handle customer service and market wireless service as their own product. However, retailers such as Wal-Mart, K-Mart, Family Dollar, Dollar General and Radio Shack do not sell wireless phone service under their own brand names, nor do they provide customer service for mobile phone. “These stores merely provide the convenience of replenishing the airtime balance of a TracFone handset while shopping for household goods,” the Associations wrote. Id. pp. 2-3. If these stores were “resellers” as TracFone argues, they would have to register with the PSC as telecommunications providers, and receive permission from the Federal Communications Commission to operate within a specified area, which would be absurd, they wrote. Id. p. 3.

To support its position that drugstores and other retailers are telecommunications “resellers,” TracFone relied on W. Va. Code § 24-6-2(1), but the “reseller” definition in federal law and trade usage, as well as the state rules, clearly exclude independent retailers. Id. p. 3.

The Commission has no statutory authority to collect a tax from retailers at the Point-of-Sale, they wrote. Id. p. 4. The Commission’s power is limited to regulating public utilities, including the transmission of messages by telephone. The PSC has no inherent power or authority, the Associations said. Although E911 clearly is a public service, the Commission is not able to regulate any business that is remotely connected to the provision of E911 service. Id. In City of Kenova v. Bell Atlantic West Virginia, Inc., 196 W. Va. 426, 473 S.E.2d 141 (1996), the West Virginia Supreme Court held that a statute giving the PSC authority to hear disputes regarding emergency telephone service involving counties did not also give the PSC authority to hear such disputes involving municipalities. Similarly, they wrote, W. Va. Code §§ 24-2-1 (authority over utilities, including telecommunications) and 24-6-6B (authority regarding E911 service) cannot extend PSC jurisdiction to retailers who are not CMRS providers. Id. p. 4.

TracFone would imply a power to collect from retailers, ignoring W. Va. Code §24-6-6B’s wording which applies only to CMRS providers, or their equivalent (resellers). Id. p. 5. In West Virginia Highlands Conservancy, Inc. v. Public Service Commission, 206 W. Va. 633, 637-38, 527 S.E.2d 495, 498-99 (1998), the West Virginia Supreme Court held that the Commission had no jurisdiction over a land sale by an entity affiliated with a utility.

“Regarding E911 fees, Section 24-6-6B empowers the Commission to collect fees from CMRS providers only,” the Associations wrote. Following the Highlands Conservancy case, the Commission cannot collect E911 fees from independent consumer electronics and other retailers based only on its general jurisdiction over telecommunications, they argued. Id. p. 6.

On November 13 and 14, 2006, Commission Staff replied to these commentors,⁸ writing that West Virginia law has required TracFone to collect and remit E911 fees since 1998. Ltr. p. 1. The Legislature increased the E911 fee to \$3 per month and the Commission was complying with a legislative mandate. Id. Staff said it supported the Legislature and agrees that it is in the public interest to shorten the time required for a citizen to request and receive emergency aid, through an E911 system.

DISCUSSION

Post-hearing filings

TracFone and The Seniors Coalition asked permission to respond to assertions made in Staff’s Reply Brief. They correctly state that they have not had an opportunity to respond to matters raised for the first time in Staff’s Reply Brief. Accordingly, the Commission finds those requests to be reasonable. The Commission will consider TracFone’s and the Coalition’s responsive pleadings.

The Commission also will consider the comments that TracFone customers made to the PSC in response to TracFone’s recent unauthorized email, as well as the comments of the West Virginia Retailers Association and the Consumer Electronics Retailers Coalition.

Several of the parties complain about the conduct of other parties. A review of the case file establishes that there has been sufficient hyperbole around. The Commission will not separately address the various complaints. Instead, to resolve this matter, the Commission will focus upon the facts presented. If any further pleadings are necessary in this proceeding, the parties’ documents shall reflect a polite give-and-take to assist the Commission in evaluating the different positions.

E911 Fee Amount

The Commission agrees with several of the commentors, who have noted that much of the concern raised in this proceeding is directed at the amount of the E911 fee and the Commission is not authorized to change that amount. The \$3 per month fee was established by the Legislature in House Bill 3208 in 2005. Contrary to the suggestion in TracFone’s recent communication to its customers, which TracFone characterized as unauthorized, the E911 fee is neither newly increased,

⁸ Staff sent separate letters to Sandra Rosenberger, Carol Ramser, Melissa Riggs, Kathleen Martin, Laurelle Smith, Patricia Davis, Katrina Dalton, Beverly Miller, Ted and Evelyn Smith, Sheila Behrens, Michelle Hall, Dorsey Harvey, David Thomas, Charles Hendrix, Charles Sullivan and Walter Courtney.

nor proposed. Although the Commission recognizes that many would like the fee for low-income customers to be less than \$3 per month, the statute does not provide that flexibility. Requests to change the fee must be directed to the Legislature. The Commission's task is to develop rules regarding the collection and remission of the statutory fee.

In addition to frustrations about the amount of the E911 fee, several of the TracFone customers were concerned about matters of safety and the availability of wireless service. TracFone, The Seniors Coalition and CAD also expressed these concerns in their testimony and pleadings. It is helpful, then, to review how these concerns have been recently addressed by the Legislature through the E911 fee:

- In 2005, in House Bill 3208, the Legislature designated \$1 million in E911 fees for the Enhanced 911 Wireless Tower Access Assistance Fund, to speed up the construction of wireless towers to provide E911 service in more areas of West Virginia.
- The Legislature also earmarked ten cents of the monthly E911 fee for the West Virginia State Police's communication needs, through House Bill 3208.
- In 2006, in Senate Bill 728, the Legislature assigned part of the E911 fees to West Virginia's Division of Homeland Security and Emergency Management.

Pleadings in this case compare West Virginia's E911 fee with the lower E911 fees of surrounding states. However, the pleadings do not address whether, and if so, how, surrounding states fund safety matters similar to the ones listed above. For instance, the record does not disclose whether any other state has created a fund to encourage cell tower construction. Nor does the record disclose how surrounding states fund their state troopers' communications needs or their Homeland Security offices. Thus, although West Virginia's E911 is undisputably higher than the E911 fee of surrounding states, the comparison set forth in the record may be oversimplified.

Several commentators suggested that the E911 fee should not apply when they were already paying an E911 fee for their land line service. However, different technology and services are required to provide E911 service for land line, wireless and VoIP platforms. Since the Legislature made VoIP services subject to the E911 fee provisions in 2006, it is reasonable to conclude that the Legislature intends that customers of the various platforms shall participate in the funding necessary to provide E911 service to each platform. The Commission appreciates that multiple E911 fees may strain a family budget and that many prepaid wireless users have limited incomes. However, the existing statutory language does not permit the Commission to allow persons who subscribe to multiple platforms to contribute a single E911 fee. Those who can call for emergency services through more than one platform and who object to paying multiple E911 fees need to take those concerns to the Legislature.

Final rules

Staff recommends that the Commission adopt the proposed rules. Cingular supports the broad approach the Commission designed, which establishes one method, yet allows providers to request other methods to accommodate their various business models. The Seniors Coalition, CAD and TracFone urge the Commission to adopt a Point-of-Sale approach, as the Task Force suggested.

The Commission has repeatedly made clear its concern about PSC jurisdiction over retail stores. OnStar acknowledged the Commission's concern, but, without providing legal authority, urged the Point-of-Sale approach. TracFone argued that the E911 statute covers "resellers" and that retail stores are "resellers" within the meaning of the statute.⁹ The state Retailers Association and the Consumer Electronics Retailers Coalition both oppose TracFone's view, arguing that they are not "resellers" of wireless phone service, and thus they are not "commercial mobile radio service providers" who are subject to the E911 fee requirements. They note that "reseller" is a well-defined term of art in the telecommunications industry.

The Commission often turns to *Newton's Telecom Dictionary*, the most commonly used source, regarding technical terms of the telecommunications industry. As to this proceeding, *Newton's* provides the following guidance:

reseller A company which purchases a block of cellular numbers from a cellular carrier for resale to its customers. Or a company which purchases a big block of long distance calling minutes for resale in smaller blocks to its customers. See Aggregator.

aggregator A breed of long distance reseller. An aggregator is essentially a sales agent for a long distance company. . .

* * *

The panoply of companies in the long distance business – not only aggregators – has expanded dramatically. And confusion between companies and what they did became rife. All, of course, purport to save you money on your long distance bills. And many do. Here's a simple explanation of the major categories:

⁹ Amended W. Va. Code § 24-6-2 defines a CMRS provider as follows:

(1) "Commercial mobile radio service provider" or "CMRS provider" means cellular licensees, broadband personal communications services (PCS) licensees and specialized mobile radio (SMR) providers, as those terms are defined by the Federal Communications Commission, which offer *on a post-paid or prepaid basis or via a combination of those two methods*, real-time, two-way switched voice service that is interconnected with the public switched network, and includes resellers of any commercial mobile radio service. (additions italicized).

FACILITIES BASED CARRIER. Owns most of its own circuits. Has own sales force and possibly independent sales agents. Best examples: AT&T, WorldCom, Allnet and Sprint.

TRADITIONAL RESELLER. Rents/leases most circuits or buys bulk time from carrier. Resells under own brand name, has published prices, sends its own bills. Appears to be (and for all practical purposes is) same as the carriers.

AGGREGATOR. "Sponsor" who buys carrier's (typically AT&T) multi-location 800 or out-bound service; enrolls other businesses as sites; volume discounts for all based on total calling at all sites. End user is still the carrier's, not the aggregator's. The carrier typically does the billing.

REBILLER: (also called "Switchless Reseller"). Buys service as multi-location customer from carrier. Signs up individual sites (just like aggregator). Generates own end-user bills. No switch or network, but does sales, customer service, billing for long distance calls. Sometimes the rebiller's bills are more detailed than the bills you get directly from the carrier.

SALES AGENTS: Businesses or groups who are not direct employees of carrier, but who receive sales commissions from carrier. Customers belong to carrier and carrier does billing.

OTHER THIRD-PARTY MARKETERS. Buying co-ops, user groups, long distance brokers, groups (like college alumni and church congregation groups).

Newton's Telecom Dictionary pp. 55-56 & 710 (21st ed. 2005) (CMP Books) (emphasis in original).

In addition to being known as a reseller, TracFone is known as a mobile virtual network operator,¹⁰ which Newton defines as follows:

¹⁰ Upon cross-examination by the CAD, TracFone's CEO, Mr. Pollack, testified as follows:

A. (Mr. Pollack) Over the last few years, the term MVNO, mobile virtual network operator, has replaced what used to be called resellers.

Q. (Mr. Pearlman) But that's if you were saying reseller or MVNO, we'd be talking about the same thing?

A. Yes.

Q. Okay. And certainly, TracFone is not the only MVNO providing prepaid service?

MVNO A mobile virtual network operator (MVNo) is an organization that buys minutes and services wholesale from an existing carrier (or carriers) and resells them under its own brand. Under GSM, for example, it may issue its own SIM card. A MVNO is basically a reseller. IT does not have radio frequency (spectrum), it doesn't have its own communications plant. It usually has its own billing system. See SIM card.

Newton's Telecom Dictionary p. 559 (21st ed. 2005) (CMP Books) (emphasis in original).

Moreover, the retailer associations cite 4 U.S.C. § 124 (2004), which defines reseller in regard to the federal law that regulates state taxation of mobile phone service as follows:

(10) Reseller. - The term "reseller" -

(A) means a provider who purchases telecommunications services from another telecommunications service provider and then resells, uses as a component part of, or integrates the purchased services into a mobile telecommunications service; and

(B) does not include a serving carrier with which a home service provider arranges for the services to its customers outside the home service provider's licensed service area.

The associations note that, under the federal law, a reseller buys telecommunications services from another telecommunications provider and then resells, uses a component part of, or integrates the purchased service into a mobile telecommunications service.

These definitions relating to wireless service, including the analogous definitions from long distance service also listed above, all require a reseller to provide telecommunications services. The retailer associations correctly state that retailers such as Wal-Mart, K-Mart, Family Dollar, Dollar General and Radio Shack do not sell wireless phone service under their own brand names, nor do they provide customer service for mobile phones. Instead, these stores offer the convenience of replenishing airtime while shopping for household goods. We agree and conclude that retail establishments, such as 7-11 or Target, do not provide telecommunications services. Retailers serve as sales agents for the prepaid service providers. Had the Legislature intended for each of the individual sales agents to collect and remit the E911 fees, it would have so provided.

We also agree with the retailer associations that if these stores were "resellers" as TracFone argues, the stores would have to register with the PSC as telecommunications providers and receive permission from the FCC to operate within a specified area.

A. That's correct. We're not.

Tr. p. 76; see also TracFone's Initial Brief p. 3 (Sept. 11, 2006).

Furthermore, we note that in TracFone's motion for protective treatment of the sample contract, TracFone described the outlets as "retailers who sell TracFone products." Thus, even in TracFone's own description, the retail outlets are not telecommunications providers. See TracFone's Motion p. 1 (Aug. 25, 2006).

TracFone correctly states that the West Virginia statutory definition of "commercial mobile radio service provider" includes resellers of commercial mobile radio service, but TracFone's argument blends together "reseller" and "retailer." The definitions above, though, establish that telecommunications terms are quite specialized, and that a reseller provides telecommunications services. Thus, consistent with the well-established rule of statutory construction, we conclude that a more specialized application should prevail over a generalized statement. Thus, we reject TracFone's argument which equates "reseller" and "retailer."

We also agree with Staff that W. Va. Code § 24-6-6b(a)¹¹ requires CMRS providers to collect E911 fees from their subscribers, and that the statute does not provide the discretion to shift the collection burden to retail merchants.

The PSC has only those powers delegated to it by the Legislature. Thus, we agree with the retailers associations that although E911 clearly is a public service, the Commission cannot regulate any business that is remotely connected to E911 service. In City of Kenova v. Bell Atlantic West Virginia, Inc., 196 W. Va. 426, 473 S.E.2d 141 (1996), the West Virginia Supreme Court held that a statute¹² giving the PSC authority to hear disputes regarding emergency telephone service among counties did not also give the PSC authority to hear such disputes involving a county commission

¹¹ W. Va. Code § 24-6-6b requires wireless providers to collect the E911 fee as follows:

(a) Beginning on the first day of July, two thousand six, all CMRS providers as defined in section two of this article shall, on a monthly basis or otherwise for good cause and as directed by order of the Public Service Commission, collect from each of their in-state two-way service subscribers a wireless enhanced 911 fee. . .

¹² W. Va. Code § 24-6-7 addresses the PSC's authority to resolve conflicts, in pertinent part, as follows:

In the event that a conflict arises between county commissions, between telephone companies, between a telephone company or companies and a county commission or commissions, or between the department of public safety [West Virginia state police] and any of the foregoing entities concerning an emergency telephone system or systems or an enhanced emergency telephone system or systems, the public service commission, upon application by such county commission, telephone company or department of public safety [West Virginia state police], shall resolve such conflict. . .

and a municipality. Applying this law, we agree with the retailers associations that W. Va. Code § 24-6-6B, regarding E911 fees to be collected by wireless providers, cannot extend PSC jurisdiction to independent retailers who do not provide telecommunications services.

TracFone repeatedly asserts that the Commission's definition of "active customer days" will require wireless providers to collect and remit an E911 fee when prepaid customers have used all of their minutes. The Commission disagrees. The rule is clear that service must be active from the customer's perspective for the provider to calculate "active customer days." No provider is required to collect and remit fees related to an account that is not capable of making a non-emergency¹³ call. To clarify any misconception, the Commission will revise the rule as follows:

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; and which has useable available calling time during the month for which the applicable E911 fee is being calculated. ~~p~~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.

The Commission also shall make minor changes to clarify the examples set forth in Rule 4.1 and the waiver provisions in Rule 3.3.

Cingular supports the Commission's approach in providing a method to collect and remit the fee, and also allowing carriers to petition for alternate methods which take into account their particular business models. The CAD and the Seniors Coalition argue that the Commission's approach would result in more exceptions to the rule than in applications of the Commission's method.

Initially, the Commission concludes that such arguments are speculative. In fact, only two waiver petitions have been filed to date.

Moreover, the Commission has developed a rule which will apply to the briefest of wireless subscriptions – for a single day's service, as well as apply to subscriptions of several months duration. Thus, the Commission's rule has very broad applicability in this very complex environment.

¹³ Per FCC requirements, all cell phones must be able to make 911 calls, even when there are no more minutes remaining. This FCC requirement offers a level of safety to wireless users, but it is not relevant to the West Virginia's E911 fee statute or the PSC's E911 fee rules.

The record in this case, as well as the previous related proceedings, makes clear that the telecommunications landscape is ever evolving. The Commission has repeatedly stated that it expects service offerings to continue to expand and evolve, and no party has disagreed with the Commission in that respect. Therefore, the Commission has reasonably built into its rule an avenue for telecommunications carriers to comply with the statute in a manner convenient to the carrier's particular business model. That the Commission has allowed multiple waivers to be considered does not thwart the \$0.10-per-day rule of general application. Ten cents a day applies until the Commission rules otherwise. The Commission will consider each waiver petition on a case-by-case basis.

TracFone argues that the Commission's rules are insufficient because the Commission does not provide "all relevant details" as to the collection and remission of the E911 fee. The Commission has set forth how to calculate its \$0.10-a-day method. The Commission has also allowed the wireless providers to choose how to collect the E911 fee from their subscribers. It is a reasonable exercise of discretion, based upon the Commission's expertise in this area, and in recognition of the myriad service offerings and payment methods available today and the different ones available next month, to allow providers flexibility in how to collect the E911 fee from their subscribers. Indeed, the collection details for service A would be irrelevant to service B. Accordingly, the Commission concludes that its final rules provide all relevant details, as the statute requires.

TracFone also argues that the rules require the wireless provider to pay the fees instead of the customer. The Commission disagrees. W. Va. Code § 24-6-6b(a) provides, in pertinent part, as follows:

(a) Beginning on the first day of July, two thousand six, *all CMRS providers* as defined in section two of this article *shall*, on a monthly basis or otherwise for good cause and as directed by order of the Public Service Commission, *collect from each of their in-state two-way service subscribers* a wireless enhanced 911 fee. . .

Similarly, W. Va. Code § 24-6-6b(d) provides, in pertinent part, as follows:

The CMRS providers shall, after retaining a three percent billing fee, *send the wireless enhanced 911 fee moneys collected*, on a monthly basis, to the Public Service Commission. . .

Consistent with these statutes, Rule 4.1 states, "CMRS provider chooses how to collect the E911 fee from its subscriber." Nothing in the Commission's rules requires the wireless carrier to pay the E911 fee on behalf of its customers.

Because TracFone does not always sell its products directly to the consumer, TracFone asserts that it cannot collect the E911 fees. The Commission disagrees. To the extent that the E911 fee is not already reflected in a purchase price, any wireless carrier may charge the fee. A wireless carrier may amend its vendor agreement to collect the fee. Indeed, the Commission agrees with The Seniors

Coalition and with the CAD that it is in the public interest for consumers to know up front the total cost of prepaid wireless service.

The Commission is aware that fees can feature prominently in prepaid wireless marketing. On TracFone's website, for instance, under the heading "How it Works," with a subhead "No surprises," customers are advised that "TracFone Prepaid Wireless Airtime cards do not require any additional wireless taxes or fees." Regardless of what TracFone advises its customers, the West Virginia statute requires the payment of E911 fees each month by subscribers, as well as TracFone's remission of those fees to the PSC. The Commission cannot waive those obligations because TracFone has developed a unique business model, or because of TracFone's marketing statements.

Finally, the Commission is aware that not all prepaid providers are yet submitting E911 fees. While prepaid providers do not have any discretion regarding remission of the E911 fees to the PSC, it is entirely within the discretion of prepaid carriers whether to absorb the E911 fee, for a while or for longer, within the present charges for the service. TracFone, for instance, said it did not collect the fee from its customers when it submitted the amounts to the PSC in 2000 to 2003.

With the revision noted above, the Commission concludes that it is in the public interest to issue these final rules.

Waiver requests

In support of its waiver request, TracFone said that it has remitted \$792,988.62, and that upon grant of the requested waiver, TracFone would continue to remit collected fees in compliance with all valid E911 fee requirements.

Among other things, Rule 5.2.3 requires a statement that the wireless carrier has already remitted fees to the PSC or that it is remitting fees simultaneously with the waiver request. The Commission requires this statement as a demonstration that the waiver applicant is currently complying with the law. Instead, TracFone relies upon fees that it submitted in 2000-2003, and which it seeks to have refunded because TracFone argues it was not obligated to remit them. Moreover, TracFone has not established that the Commission's formula would impose a hardship; TracFone simply wants to use a different method. Since TracFone has not demonstrated that it is currently in compliance with the law, or that a hardship exists, the Commission should deny TracFone's request.

Furthermore, TracFone seeks a waiver of rules that are not yet in effect. Due to TracFone's objection to the emergency designation of the proposed rules, the Commission withdrew its request for emergency designation and the proposed rules are not in effect.

Cingular also requested a waiver, asking to use the Sufficient Positive Balance method that it uses in other states, whereby Cingular deducts the applicable E911 fee, now \$3, from each customer's account each month. Cingular advised that it had submitted its June 2006 fees on July 15, 2006, and that it would continue remitting fees. As good cause, Cingular noted the economies

and efficiencies of using the same method in many states. Cingular sought emergency and permanent waiver of the rule.

Cingular has provided the information required to request a waiver. Moreover, the Commission is inclined to agree that Cingular has established good cause because it would be a hardship to use the Commission's formula in West Virginia when Cingular already has a nationwide plan in place. However, as noted above, the proposed rules are not yet in effect. Cingular should renew its request when these rules take effect.

Protective order

At the hearing, the Commission required TracFone to provide a sample contract and to request protective treatment when it filed the contract. See transcript excerpt at n. 4 p. 14. Instead, TracFone filed a motion without the contract, thus asking the Commission to grant protective treatment of a contract the Commission had never seen.

TracFone acknowledges this when it writes, "Chairman McKinney indicated that it would be appropriate for TracFone to *provide the requested information with a request for a protective order.*" Surreply Brief p. 7 (emphasis added). However, TracFone continues by writing that it would provide the information *after* a protective order was entered. Id. (emphasis added). Similarly, in footnote 14 on page 7 of its Surreply Brief, TracFone wrote,

Neither the Chairman nor the Commission ordered TracFone to do anything. Chairman McKinney requested that TracFone provide certain information and documentation. In the same spirit of cooperation which TracFone has demonstrated throughout this proceeding, it has complied with that request within one week of the hearing. Chairman McKinney indicated that it would be appropriate for TracFone to provide the requested information with a request for a protective order.

It is common practice at the PSC for confidential information to be provided to parties, pursuant to an interim protective agreement among the parties. Thereafter, a motion is filed, along with the confidential document, for the Commission to consider whether to accord permanent protected treatment to the information. Any such motion and the alleged confidential document remain under seal, until the Commission acts on the motion.

In this case, the information was not exchanged among the parties first. It was not even provided to the Commission with the motion. It is essential for the Commission to review an alleged confidential document before it rules on a motion for protected treatment. Given the presumption of public access to PSC documents, it would be arbitrary and capricious to grant TracFone's motion without first reviewing the vendor contract.

FINDINGS OF FACT

1. Wireless providers are required to collect an enhanced 911 fee each month from their subscribers and then to remit those fees, net of a billing/collection fee, to the PSC. W. Va. Code §§ 24-6-6b(a), 24-6-6b(d).

2. The Commission has had E911 fee rules for landline and wireless telecommunications services in effect since March 6, 1998. See Emergency Telephone Service Rules, 150 C.S.R. Series 25.

3. On November 1, 2005, the Emergency Telephone Service Rules were revised, on an emergency basis, to implement the provisions of House Bill Number 3208, which was passed by the 2005 Legislature. Among other things, House Bill 3208,

- a. increased the wireless E911 fee to \$3 per month,
- b. created the Enhanced 911 Wireless Tower Access Assistance Fund and earmarked \$1 million in E911 fees to construct wireless towers to provide E911 service in more areas of West Virginia, and
- c. earmarked ten cents of the monthly E911 fee for the West Virginia State Police.

4. During the 2006 session, the Legislature further amended the E911 fee statutes via Senate Bill 728. Among other things, Senate Bill 728

- a. makes Voice over Internet Protocol (VoIP) services subject to the E911 fee provisions,
- b. clarifies that prepaid wireless services are covered by the statute,
- c. requires a character and criminal background investigation of certain persons to be employed in emergency dispatch centers and prevents persons with felony convictions from holding certain positions, and
- d. assigns part of the E911 fees to West Virginia's Division of Homeland Security and Emergency Management.

5. On June 30, 2006, the Commission issued proposed rules, in which the Commission fashioned a mechanism to capture the E911 fee even when service is provided for a single day during a month. With the current statutory fee being \$3 per month, the Commission proposed to require CMRS providers to remit 10 cents a day for each day that customer service is provided. However, recognizing that many wireless providers offer service in longer increments, the Commission 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.

6. The Commission requested emergency designation for the E911 fee rules, when it filed the proposed rules with the Secretary of State. However, due to TracFone's objection to the emergency designation, on July 28, 2006, the Commission withdrew its request. Accordingly, the E911 fee rules are not yet in effect.

7. TracFone remitted E911 fees to the PSC from 2000 to 2003. TracFone's June 30, 2005 ltr., Case No. 05-1303-C-GI (filed Sept. 1, 2005).

8. TracFone has asked to have those fees refunded, because it was not required by law at that time to remit them to the PSC. TracFone's June 30, 2005 ltr., Case No. 05-1303-C-GI (filed Sept. 1, 2005).

9. Some other prepaid wireless carriers have not remitted E911 fees to the PSC because they believed the statute was not applicable to prepaid service.

10. Since the 2006 amendment, there is agreement that the E911 fee applies to prepaid wireless carriers and their customers, from July 1, 2006, forward.

11. TracFone remits E911 fees in other states. TracFone's post-hearing exhibit pp. 1-2 (Aug. 25, 2006).

12. TracFone does not have real-time access to the time remaining on its customers' accounts. TracFone's initial brief pp. 3-4.

13. TracFone knows the outer time limit when its customers may use their minutes, and TracFone often contacts customers near the outer time limit to invite them to renew their service. Tr. pp. 88-89 (Aug. 17, 2006) (Mr. Pollack).

14. Cingular remits E911 fees in other states via a Sufficient Positive Balance approach, whereby it deducts the required fees from its customers' accounts. Cingular's waiver petition pp. 1-2 (verified) (July 17, 2006).

15. TracFone and Cingular each requested a waiver of the Commission's method to collect and remit the E911 fee.

16. Different technology and services are required to provide E911 service for land line, wireless and VoIP platforms

17. Notice was published statewide of the Commission's proposed rule, opportunity to comment and the hearing date. July 5, 2006 – *The West Virginia Daily News, The Journal, Moundsville Daily Echo*; July 6, 2006 – *News-Tribune, The Dominion Post, Wheeling News-Register,*

Williamson Daily News; July 7, 2006 – *The Register-Herald*, *The Inter-Mountain*, *Times West Virginian*, *The Herald-Dispatch*, *The Logan Banner*, *The Daily Times*, *Welch News*; July 8, 2006 – *Bluefield Daily Telegraph*; *The Charleston Gazette*, *The Exponent-Telegram*, *The Parkersburg News*; July 10, 2006 – *The Point Pleasant Register*.

18. A hearing was conducted on August 17, 2006.

19. In addition to the information received at the hearing, the Commission has considered initial and reply comments, initial and reply briefs, and additional filings made after the briefs.

20. Several commentators asked the Commission to adopt a Point-of-Sale method, whereby the E911 fee would be collected by independent retailers. See e.g., CAD (Mr. Pearlman Tr. pp. 104-15); The Seniors Coalition (Mr. Haddow Tr. pp. 43-44); TracFone (Mr. Pollack Tr. p. 69); & OnStar (Initial Comments p. 4, Aug. 10, 2006).

21. Independent retailers oppose the Point-of-Sale method because the Commission does not have jurisdiction and because they are not telecommunications resellers, as that term is used in the statute. WV Retailers Ass'n & Consumer Electronics Retailers Coalition Initial Brief pp. 1-6.

22. The majority of commentators stated that West Virginia's E911 fee was too high.

23. A telecommunications reseller, as defined by *Newton's Telecom Dictionary* and 4 U.S.C. § 124 (2004), provides telecommunications services, must register with the PSC as a telecommunications provider, and must receive FCC permission to operate within a specified area.

24. A retailer serves as a sales agent for a telecommunications reseller, but a retailer does not provide telecommunications services.

25. The Commission believes that wireless telecommunications offerings will continue to expand and evolve, and no party has disagreed with the Commission in this respect.

26. At the hearing, the Commission required TracFone to provide a sample contract and to request protective treatment when it filed the contract. See transcript excerpt at n. 4 p. 14. Instead, TracFone filed a motion without the contract.

CONCLUSIONS OF LAW

1. Prepaid wireless providers were subject to the E911 fee requirements prior to the 2006 statutory amendment. The amendment clarified the statute; it did not establish a new duty.

2. The Commission does not have authority to waive a statutory responsibility.

3. TracFone and The Seniors Coalition asked permission to respond to assertions made for the first time in Staff's Reply Brief. Those requests are reasonable and should be granted.

4. For a fuller understanding of the issues, the Commission should also consider recent pleadings filed by TracFone customers, the West Virginia Retailers Association and the Consumer Electronics Retailers Coalition.

5. Several of the parties complain about the conduct of others. Resolving each of those various conduct complaints will not provide the Commission with a fuller understanding of the issues to be resolved. The Commission should focus upon the facts presented and require, if any further pleadings are necessary in this proceeding, the parties' documents to reflect a polite give-and-take to assist the Commission in evaluating the different positions.

6. Many have commented that the E911 fee is too high. Although the Commission recognizes that many would like the fee for low-income customers to be less than \$3 per month, the statute does not provide that flexibility. Requests to change the fee must be directed to the Legislature.

7. Pleadings in this case compare West Virginia's E911 fee with the lower E911 fees of surrounding states. However, it is unknown whether, and if so, how, surrounding states fund safety matters similar to West Virginia's. Thus, although West Virginia's E911 is undisputably higher than the E911 fee of surrounding states, the comparison appearing in the record may be oversimplified.

8. Several commentators suggested that the E911 fee should not apply when they were subject to an E911 fee for land line service. However, since different technology and services are required to provide E911 service for land line, wireless and VoIP platforms, and since the Legislature made VoIP services subject to the E911 fee provisions in 2006, it is reasonable to conclude that the Legislature intends that customers of the various platforms shall participate in the funding necessary to provide E911 service to each platform. The existing statutory language does not permit the Commission to allow persons who subscribe to multiple platforms to contribute a single E911 fee. Those who can call for emergency services through more than one platform and who object to paying multiple E911 fees need to take those concerns to the Legislature.

9. The Commission has repeatedly made clear its concern about PSC jurisdiction over retail stores. A telecommunications reseller, as defined by *Newton's Telecom Dictionary* and 4 U.S.C. § 124 (2004), provides telecommunications services, must register with the PSC as a telecommunications provider, and must receive FCC permission to operate within a specified area. In contrast, a retailer serves as a sales agent for a telecommunications reseller, but a retailer does not provide telecommunications services. Thus, the Commission should not equate "reseller" and "retailer."

10. W. Va. Code § 24-6-6b(a) requires CMRS providers to collect E911 fees from their subscribers, and that statute does not provide the Commission with discretion to shift the collection burden to retailers.

11. The PSC has only those powers delegated to it by the Legislature. Thus, consistent with City of Kenova v. Bell Atlantic West Virginia, Inc., 196 W. Va. 426, 473 S.E.2d 141 (1996), the Commission should not interpret W. Va. Code § 24-6-6B, regarding E911 fees to be collected by wireless providers, to extend PSC jurisdiction to independent retailers.

12. The Commission's definition of "active customer days" requires service to be active from the customer's perspective. Since some have argued that the definition would require the E911 fee to be collected when a consumer had used all of the minutes she had purchased, the Commission should revise Rule 3.2.2.

13. Suggestions that the waiver provision will result in more exceptions to the rule than in applications of the Commission's method are speculative and should be rejected.

14. The Commission's method for prepaid service is reasonable because it encompasses the briefest of wireless subscriptions – for a single day's service, as well as subscriptions of several months' duration. Thus, the Commission has designed a rule with broad applicability for the very complex environment of wireless telecommunications services.

15. Since it is reasonable to expect that service offerings will continue to expand and evolve, it is reasonable for the Commission to provide a waiver provision.

16. The general rule of \$0.10-per-day is not thwarted because the Commission may consider multiple waivers. Ten-cents-a-day applies until the Commission rules otherwise.

17. It is a reasonable exercise of discretion, based upon the Commission's expertise in this area, and in recognition of the myriad service offerings and payment methods available today and the different ones available next month, to allow providers flexibility in how to collect the E911 fee from their subscribers. Indeed, the collection details for service A would be irrelevant to service B. Accordingly, the Commission's final rules provide all relevant details, as the statute requires.

18. Rule 4.1 states that a CMRS provider chooses how to collect the E911 fee from its subscriber. Nothing in the Commission's rules requires the wireless carrier to pay the E911 fee on behalf of its customers.

19. If the E911 fee is not now reflected in the purchase price, any wireless carrier may increase the price to collect the E911 fee. Or, a wireless carrier may amend its vendor agreement to collect the fee. The Commission offers these options by way of example and recognizes that there may be other valid collection methods, due to the wide variety of service offerings.

20. It is in the public interest for consumers to know up front the total cost of prepaid wireless service, including West Virginia's E911 fee.

21. The West Virginia statute requires the payment of E911 fees each month by subscribers, regardless of whether those fees are noted in a telecommunications providers' advertising.

22. The Commission cannot waive the statutory E911 fee obligations because a telecommunications provider operates via a unique business model.

23. The attached final rules, and attached Form WLF-1, reflect sound policies, serve the public interest and reasonably resolve the issues raised by the parties.

24. TracFone and Cingular requested waivers, pursuant to Rule 5.2.3. However, the proposed rules did not take effect on an emergency basis as the Commission initially intended. When the E911 fee rules do take effect, TracFone and Cingular may renew their requests.

25. At the hearing, the Commission required TracFone to provide a sample contract and to request protective treatment when it filed the contract. See transcript excerpt at n. 4 p. 14. Instead, TracFone filed a motion without the contract, thus asking the Commission to grant protective treatment of a contract the Commission had never seen. TracFone's Motion for Protective Order (Aug. 25, 2006). Given the presumption of public access to PSC documents, it would be arbitrary and capricious to grant TracFone's motion without first reviewing the vendor contract.

ORDER

IT IS THEREFORE ORDERED that all motions to file additional pleadings are granted.

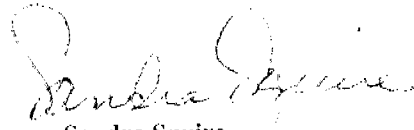
IT IS FURTHER ORDERED that the attached Rules Governing E911 Fees, 150 C.S.R. Series 31, and attached Form WLF-1, in both versions, are adopted as final legislative rules, to become effective 60 days from the date of this order, or on **January 27, 2007**. The strike-through version appears as Attachment A; the clean line version appears as Attachment B.

IT IS FURTHER ORDERED that TracFone's motion for a protective order is denied.

IT IS FURTHER ORDERED that the Commission's Executive Secretary shall file a copy of this order and the rules with the Secretary of State of West Virginia.

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-G1, 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/sek
go18532ed.wpd

TITLE 150
LEGISLATIVE RULE
PUBLIC SERVICE COMMISSION

FILED

2006 NOV 28 PM 3: 21

SERIES 31
RULES GOVERNING E911 FEES

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. -- November 15, 2006.

1.4. Effective Date. -- January 27, 2007.

§ 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.

150CSR31

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, and which has useable available calling time during the month for which the applicable E911 fee is being calculated.~~ ~~p~~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 Non-emergency waivers. 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 the date of the first E911 fee remittance following the effective date of these rules 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. The Commission will consider any emergency filing made under this rule also as a filing under Rule 3.3.1, so long as the applicant advises the Commission how long the non-emergency waiver is proposed to be in effect.~~

§ 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:

Post-paid service

Monthly E911 fee appears as line item on post-paid subscriber's bill

150CSR31

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 service

Prepaid customer activates 45 days service on 9/15/06 and service remains active for 45 days

$$\begin{array}{rcl} \frac{15 \times \$3}{30} & = & \frac{\$45}{30} = \$1.50 \\ \frac{30 \times \$3}{30} & = & \frac{\$90}{30} = \$3 \end{array}$$

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.

150CSR31

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

150CSR31

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).

**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. - November 15, 2006.

1.4. Effective Date. - January 27, 2007.

§ 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.

150CSR31

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), and which has useable available calling time during the month for which the applicable E911 fee is being calculated. 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 Non-emergency 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 the date of the first E911 fee remittance following the effective date of these rules, 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. The Commission will consider any emergency filing made under this rule also as a filing under Rule 3.3.1, so long as the applicant advises the Commission how long the non-emergency waiver is proposed to be in effect.

§ 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:

Post-paid service

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

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Prepaid service

Prepaid customer activates 45 days service on 9/15/06 and service remains active for 45 days

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

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

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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).

FISCAL NOTE FOR PROPOSED RULES

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

Type of Rule: Exempt Legislative Interpretive Procedural Emergency

Agency: Public Service Commission of West Virginia

Address: 201 Brooks Street
Charleston, West Virginia 25301

Phone Number: Cindy Wilson, 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 Wireless Tower Access 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: 11/28/06

Signature of Agency Head or Authorized Representative

[Handwritten Signature]

Brief Summary of Rule

The Commission is issuing final rules, *Rules Governing E911 Fees*, 150 C.S.R. Series 31, to provide guidance regarding enhanced 911 (E911) fees.

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 proposed 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 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.

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.

*Public Service Commission
Of West Virginia*

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

Phone: (304) 340-0300
FAX: (304) 340-0325

November 28, 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

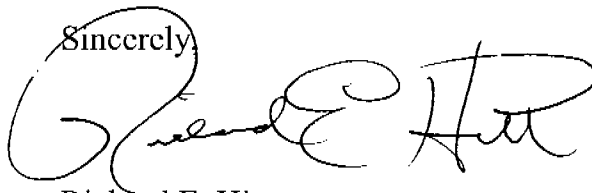
Dear Ms. Cooper:

Enclosed is a copy of the Commission's final rule in the above-referenced series, as well as a notice of adoption, a fiscal note, a summary of the rule, and the statement of circumstances. Since the Commission is not part of the Cabinet structure, the Commission order is evidence of approval of the filing by the agency head, Chairman Jon W. McKinney.

In addition, a diskette has been enclosed containing the final rules in both the strike-through and underlined version as well as a clean version. If there are any problems with the submittal, please bring them to my attention immediately. Thank you for your consideration.

If you have any questions or if there are any problems, please bring them to my attention. You may reach me at 340-0317.

Sincerely,



Richard E. Hitt,
General Counsel

REH/sek
Enclosures