

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

TracFone Wireless, Inc.)
)
Verified Petition for Declaratory Ruling) Docket No. 07-0023
finding that Section 17 of the)
Wireless Emergency Telephone Safety Act)
50, ILCS 751/17, does not apply to require)
TracFone Wireless, Inc. to remit)
monthly wireless carrier surcharges)
to the Illinois Commerce Commission)

MOTION FOR SUMMARY JUDGMENT

NOW COMES TracFone Wireless, Inc. (“TracFone”), by its undersigned attorneys, and hereby moves pursuant to Sections 200.190 and 200.220(a)(a) of the Rules of Practice of the Illinois Commerce Commission (the “Commission”), 83 Ill. Adm. Code 200.190 and 200.220(a), for a declaratory ruling finding that the Wireless Emergency Telephone Safety Act (“WETSA” or the “Act”), 50 ILCS 751/1 *et seq.*, did not apply to require TracFone to remit monthly wireless carrier surcharges to the State of Illinois from on or about December 22, 1999 through December 31, 2003. In support of this motion, TracFone states as follows:

I.
Introduction

TracFone asks the Commission to determine that WETSA did not apply to require TracFone to remit wireless carrier surcharges to the State of Illinois during the 1999-2003 time period. This request asks the Commission to do no more than take the Act at face value. The State of Illinois enacted WETSA in 1999 to promote the development of wireless 9-1-1 service here. P.A. 91-660, eff. Dec. 22, 1999. As originally enacted, WETSA contained no reference whatsoever to “prepaid wireless telephone service,” the only type of “wireless telephone service”

TracFone ever has provided in Illinois. WETSA's inapplicability to TracFone during the relevant time period is patent in the original Act's detailed provisions on how wireless carriers were to bill the statutory 9-1-1 surcharge to their customers—as a separate line item on each customer's monthly bill—which literally could not apply to prepaid wireless telephone service. Any other reading of the Act would render meaningless WETSA's subsequent amendments, which took effect January 1, 2004 and extended application of the 9-1-1 surcharge to prepaid wireless telephone service. P.A. 93-507, § 70, eff. Jan. 1, 2004. Even assuming the Act in its original form was ambiguous (and it was not), the legislative history demonstrates that the General Assembly amended WETSA to make the surcharge applicable to prepaid wireless telephone service for the first time. Finally, the Commission should decline any invitation to read the post-amendment meaning of WETSA into the original statute. WETSA's original text speaks for itself, and the Commission should not give subsequent changes to the law retroactive effect.

II. **Statement of Undisputed Facts**

1. TracFone is a Florida corporation that provides prepaid wireless telephone service across the United States and in the State of Illinois.
2. TracFone provides an off-the-shelf, pay-as-you-go prepaid wireless service with no long term service contracts, no monthly bills, and no activation fees. TracFone's prepaid service and pricing plans meet the needs of a variety of consumers for whom traditional wireless offerings are inadequate or unavailable, including low-income users.

3. In December 1999, the State of Illinois enacted the Wireless Emergency Telephone Safety Act, P.A. 91-660, eff. Dec. 22, 1999 (codified at 50 ILCS 751/1 *et seq.*). A copy of P.A. 91-660 is attached to this motion as Exhibit 1.

4. Through WETSA, the Illinois General Assembly intended to promote the use of wireless 9-1-1 service and wireless enhanced 9-1-1 service (including the ability to relay information about emergency calls to appropriate public safety answering points) in Illinois. P.A. 91-660, § 5 (Ex. 1).

5. WETSA defined “wireless carrier” as:

a provider of two-way cellular, broadband PCS, geographic area 800 MHz and 900 MHz Commercial Mobile Radio Service (CMRS), Wireless Communications Service (WCS), or other Commercial Mobile Radio Service (CMRS), as defined by the Federal Communications Commission, offering radio communications that may provide fixed, mobile, radio location, or satellite communication services to individuals or businesses within its assigned spectrum block and geographical area or that offers real-time, two-way voice service that is interconnected with the public switched network, including a reseller of such service.

P.A. 91-660, § 10 (Ex. 1).

6. As originally enacted, WETSA did not define or otherwise contain any reference to “prepaid wireless telephone service.”

7. WETSA required wireless carriers to impose a monthly surcharge per Commercial Mobile Radio Service (“CMRS”) connection to fund Illinois’ development of emergency telephone assistance through wireless communications. P.A. 91-660, §§ 5 and 17 (Ex. 1). Specifically, the Act directed each wireless carrier to impose a 9-1-1 surcharge as a separate line item on each subscriber’s monthly bill and to remit the amount of the surcharge collected to the State Treasurer. P.A. 91-660, § 17 (Ex. 1).

8. As originally enacted, WETSA included a sunset provision repealing the Act as of April 1, 2005. P.A. 91-660, § 70 (Ex. 1).

9. The General Assembly subsequently amended WETSA, among other things, to extend the Act's sunset provision through April 1, 2008. P.A. 93-507, § 70, eff. Jan. 1, 2004. A copy of P.A. 93-507 is attached to this motion as Exhibit 2.

10. On May 14, 2003, the following exchange took place during floor debate on the proposed amendments to the Act:

[Rep.] Slone: "Thank you. Mr. Reitz, can you tell me whether this is an extension of what we already have or it's an additional cost, surcharge to the subscribers?"

[Rep.] Reitz: "It's an extension, leaves the monthly fee at 75 cents, that's unchanged. *It does extend it to prepaid phones and things of that nature, something that wasn't there when we first did it, but other than that it just extends the sunset on this.* But the main intent is to try to allow them to use ... basically, it extends it so we have the money to move into phase two of the 9-1-1 system."

93rd General Assembly, House of Representatives, Transcription Debate, pp. 174-75 (May 14, 2003) (emphasis provided). An excerpt of the May 14, 2003 floor debate pertaining to the WETSA amendments is attached to this motion as Exhibit 3.

11. As amended, WETSA for the first time referenced "prepaid wireless telephone service," which the Act defined as:

wireless telephone service which is activated by payment in advance of a finite dollar amount or for a finite set of minutes and which, unless an additional finite dollar amount or finite set of minutes is paid in advance, terminates either (i) upon use by customer and delivery by the wireless carrier of an agreed-upon

amount of service corresponding to the total dollar amount paid in advance [ii] or within a certain period of time following initial purchase or activation.

P.A. 93-507, § 10 (Ex. 2).

12. Additionally, the amended Act included a new definition for “wireless telephone service,” which WETSA defined as including “prepaid wireless telephone service.” P.A. 93-507, § 10 (Ex. 2).

13. Section 17 of the Act also was amended to reference “prepaid wireless telephone service” for the first time in connection with the 9-1-1 wireless carrier surcharge. As amended, the Act stated:

In the case of prepaid wireless telephone service, this surcharge shall be remitted based upon the address associated with the point of purchase, the customer billing address, or the location associated with the [mobile telephone number] for each active prepaid wireless telephone that has a sufficient positive balance as of the last day of each month, if that information is available.

P.A. 93-507, § 17 (Ex. 2).

14. TracFone provided prepaid wireless telephone service in Illinois continuously from on or about December 22, 1999 through December 31, 2003.

15. From December 22, 1999 through January 5, 2002, TracFone remitted \$359,592 to the State of Illinois in payment of the monthly 9-1-1 wireless surcharge provided for under WETSA.

16. From December 22, 1999 through December 31, 2003, TracFone remitted \$1,170,579 to the State of Illinois in payment of the monthly 9-1-1- wireless surcharge provided for under the Act.

17. TracFone made the payments referenced in paragraphs 15 and 16 above out of its own funds, not monies collected from customers pursuant to the 9-1-1 surcharge. In late 2003, TracFone discovered that it had processed and made these payments in error.

III. **Procedural Standards**

The General Assembly has designated the Commission as the primary agency responsible for implementing and enforcing WETSA. 50 ILCS 751/75. The Commission in its discretion may issue a declaratory ruling with respect to “the applicability of any statutory provision enforced by the Commission ... to the person(s) requesting a declaratory ruling.” 83 Ill. Adm. Code 200.220(a). *See generally MidAm. Energy Corp. v. Ill. Commerce Comm’n*, 367 Ill. App. 3d 163, 854 N.E.2d 238 (3rd Dist. 2006) (discussing proper declaratory ruling under Section 200.220). A declaratory action is appropriate for determining controversies relating to the construction and interpretation of statutes. *Emerald Casino, Inc. v. Ill. Gaming Bd.*, 346 Ill. App. 3d 18, 26, 803 N.E.2d 914, 921 (1st Dist. 2004); *Office of the Lake County State’s Attorney v. Ill. Human Rights Comm’n*, 200 Ill. App. 3d 151, 155, 558 N.E.2d 668, 671 (2d Dist. 1990).

Summary judgment procedure is available in administrative actions, including before the Commission. *Bloom Twp. High School v. Ill. Commerce Comm’n*, 309 Ill. App. 3d 163, 177, 722 N.E.2d 676, 687 (1st Dist. 1999) (summary judgment in administrative setting is comparable to circuit court procedure); *Cano v. Village of Dolton*, 250 Ill. App. 3d 130, 138, 620 N.E.2d 1200, 1206 (1st Dist. 1993) (same). The standard is analogous to that applied on summary judgment in the circuit courts: “Summary judgment is proper if, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Allegis Realty Investors v. Novak*, 223 Ill. 2d 318, 330,

860 N.E.2d 246, 252 (2006). Cases turning on statutory construction, like the instant action, are particularly appropriate for summary judgment. “The interpretation and applicability of legislation present questions of law resolvable through summary judgment.” *Id.*

IV. **Argument**

A. As Originally Enacted WETSA’s 9-1-1 Surcharge Did Not Apply To Prepaid Wireless Telephone Service

This case turns on whether WETSA, as originally enacted, applied to require TracFone to collect and remit the monthly 9-1-1 wireless carrier surcharge. The rules the Commission should apply in interpreting WETSA are well established:

[T]he primary rule, to which all other rules are subordinate, is to ascertain and give effect to the true intent and meaning of the legislature. Legislative intent is best evidenced by the language used by the legislature, and where an enactment is clear and unambiguous a court is not at liberty to depart from the plain language and meaning of the statute by reading into it exceptions, limitations or conditions that the legislature did not express. Further, in ascertaining the meaning of a statute, the statute should be read as a whole with all relevant parts considered. A statute should be construed so that no word or phrase is rendered superfluous or meaningless.

Kraft, Inc. v. Edgar, 138 Ill. 2d 178, 189, 561 N.E.2d 656, 661 (1990) (citations omitted).

Here, WETSA is clear and unambiguous. As originally enacted, the General Assembly did not include any reference to prepaid wireless telephone service anywhere in the Act. Instead, the legislature limited WETSA’s application to traditional wireless carriers with the ability to bill customers on a monthly basis for the wireless carrier surcharge to be collected under the Act and to identify the surcharge for such customers as a separate item on their billing statements. P.A. 91-660, § 17 (Ex. 1). WETSA, as originally enacted, contemplates no other method for collecting and remitting the surcharge. The Commission should not invent requirements for the

collection and remittance of the surcharge under the Act, prior to its amendment, by prepaid wireless telephone service providers, such as TracFone. *See, e.g., MCI WorldCom Comm'ns, Inc. v. Metra Commuter Rail Div. of Reg'l Transp. Auth.*, 337 Ill. App. 3d 576, 582, 786 N.E.2d 621, 625 (2d Dist. 2003) (refusing to subvert legislature's "clear intention" to limit telecommunications carriers' eminent domain power over only private property by expanding Telephone Company Act provision to include certain public property); *see also Alexander v. Ill. Human Rights Comm'n*, 166 Ill. App. 3d 515, 518, 519 N.E.2d 1092, 1094 (1st Dist. 1988) (declining to broaden Illinois Human Rights Act provision permitting award of attorney fees to litigation circumstances not expressly contemplated by Act).

This construction is fully consistent with the amendments to the Act, which took effect on January 1, 2004 and made WETSA's wireless carrier surcharge applicable for the first time to "prepaid wireless telephone service." P.A. 93-507, §§ 10, 17 (Ex. 2). In amending the Act, the General Assembly added definitions for "prepaid wireless telephone service" and "wireless telephone service" (the former being a subpart of the latter). P.A. 93-507, § 10 (Ex. 2). The amended Act acknowledged that "prepaid wireless telephone service" providers collect their fees from customers differently from traditional wireless carriers and, for the first time, specified the manner in which the wireless carrier surcharge should be remitted in the case of prepaid wireless telephone service. P.A. 93-507, § 17 (Ex. 2). If WETSA, as originally enacted, already applied to prepaid wireless telephone service—*i.e.*, if the definition of "wireless carrier" impliedly encompassed "prepaid wireless telephone service" providers all along—then the 2004 amendments to the Act were merely superfluous, which cannot be a proper reading of the statute. *See, e.g., Kraft*, 138 Ill. 2d at 189, 561 N.E.2d at 661; *see also People ex rel. Ryan v. Agro, Inc.*, 214 Ill. 2d 222, 227, 824 N.E.2d 270, 273 (2005) (courts will "avoid constructions that render any term superfluous or meaningless").

Finally, while TracFone maintains that WETSA, both as enacted in 1999 and amended effective 2004, is clear on its face, resort to extrinsic information produces the same conclusion reached by reading the plain language of the statute. *Wal-Mart Stores, Inc. v. Indus. Comm'n*, 324 Ill. App. 3d 961, 968, 755 N.E.2d 98, 103 (1st Dist. 2001) (when a statutory provision is ambiguous, courts may look to extrinsic sources to ascertain the legislature's intent, including the legislative history). During debate on the proposed WETSA amendments, one of the amending bill's sponsors in the House of Representatives, Rep. Dan Reitz, unequivocally stated that the amendments accomplished two goals: one, they extended the Act's sunset provision, and, two, they made the Act applicable "*to prepaid phones and things of that nature, something that wasn't there when we first did it.*" House of Representatives Transcription Debate, pp. 174-75 (May 14, 2003) (emphasis provided) (Ex. 3). This history could not be clearer: Because WETSA originally did not apply to prepaid wireless telephone service, the General Assembly amended the Act to make the statute applicable to such prepaid service (and to prepaid providers such as TracFone).

B. WETSA's 2004 Amendment Was A Change In The Law

Illinois law is well-settled as to whether a statutory amendment constitutes a change in the law or a clarification of the law as it already exists. An amendment is presumed to change the law when an existing statute is clear and unambiguous; an amendment only can serve to clarify a statute when the pre-existing law contains ambiguities requiring further explanation or specification. *See People v. Jones*, 233 Ill. 2d 569, 2006 WL 3741971, at *8 (Dec. 21, 2006) (attached hereto as Ex. 4) ("[A]n amendment 'gives rise to the presumption that the new legislation was intended to effect a change in the law as it formerly existed.'"); *People v. Bowden*, 313 Ill. App. 3d 666, 671, 730 N.E.2d 138, 142 (4th Dist. 2000) (same).

The Illinois courts have found that where the General Assembly amends a statute to add particular requirements—such as the definitions and procedures relating to “prepaid wireless telephone service” contained in P.A. 93-507—the pre-existing law must not have included such items or conditions. In *Garibaldi v. Applebaum*, the Illinois Supreme Court considered the effect of the legislature’s amendment of the Hospital Licensing Act (P.A. 88-654, eff. Jan. 1, 1995) to grant specific notice and a hearing rights to covered practitioners in certain circumstances. 194 Ill. 2d 438, 450-51, 742 N.E.2d 279, 285-86 (2000). The Court reasoned that because the legislature expressly added the right to notice and a hearing by amendment, the pre-existing version of the Act must not have included such rights. *Garibaldi*, 194 Ill. 2d at 451, 742 N.E.2d at 286 (“The legislature’s enactment of [a] particular requirement suggests to us that the legislation effected a change in the law.”).

The same reasoning applies in this case. The 2004 amendments to WETSA, which added definitions for “prepaid wireless telephone service” and “wireless telephone service” and, for the first time, specified requirements for remittance of the Act’s wireless carrier surcharge in the case of prepaid wireless telephone service, changed the law. Because the legislature extended WETSA to prepaid wireless telephone service through the 2004 amendments, the corollary also must be true: WETSA did not apply to TracFone prior to its amendment.

Finally, the Commission should not err by reading the post-amendment meaning of WETSA into the original statute. The Illinois Supreme Court has “never held that a subsequent amendment may replace the plain meaning as the best evidence of the legislature’s original intent.” *Agpro*, 214 Ill. 2d at 231, 824 N.E.2d at 275 (rejecting State’s argument that amendment merely “clarifie[d]” meaning of environmental statute where contrary to plain language of the

law). Here, too, WETSA's original text speaks for itself, and subsequent amendments should not be given retroactive effect.

V.
Conclusion

WHEREFORE, for all these reasons, TracFone Wireless, Inc. respectfully requests that the Illinois Commerce Commission enter a declaratory ruling finding that the Wireless Emergency Telephone Safety Act did not apply and require TracFone to remit monthly wireless carrier surcharges to the State of Illinois from on or about December 22, 1999 through December 31, 2003 and providing such other relief as is just and proper.

Dated: March 16, 2007

Respectfully submitted,

By: _____
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CERTIFICATE OF SERVICE

I, Thomas A. Andreoli, hereby certify that I caused a copy of the Motion for Summary Judgment of TracFone Wireless, Inc. to be served upon the service list in Docket No. 07-0023 by email on March 16, 2007

Thomas A. Andreoli

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