

## ENHANCED 911 FEE FOR PREPAID SERVICE

General Investigation upon the Commission's motion concerning the payment by commercial mobile radio service providers and/or resellers, operating in West Virginia, of the statewide enhanced 911 fee for prepaid service and other regulatory issues related to such service

## ENHANCED 911 FEE FOR PREPAID SERVICE

General Investigation upon the Commission's motion to consider whether to revise the Commission's Rules and Regulations Governing Emergency Telephone Service, 150 C.S.R. Series 25, concerning the collection of the wireless E911 fees

CASE NO. 05-1303-C-GI; CASE NO. 06-0076-C-GI

West Virginia Public Service Commission

*2006 W. Va. PUC LEXIS 1604*

January 25, 2006

**OPINION:** [\*1]

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 25th day of January, 2006.

**COMMISSION ORDER**

The Commission concludes that it has jurisdiction over prepaid wireless providers regarding the statewide wireless enhanced 911 fee.

Further, the Commission requires stakeholders to meet and submit a report by February 3, 2006, to consider rule changes to clarify that the statutory duty to collect and remit the wireless E911 fee does not depend upon how wireless providers charge their customers for wireless services. That report will be filed in the separate proceeding which is opened today.

**DISCUSSION**

*Last year's proceeding, Case Number 04-1285-C-GI*

On August 13, 2004, the President of the West Virginia Enhanced 911 Council, Inc. asked the Commission to examine payments of the statewide wireless enhanced 911 (E911) fee by commercial mobile radio service (CMRS) providers and resellers operating in West Virginia. The petition alleged that CMRS providers and resellers were not adequately complying with state law regarding the payment of the wireless E911 fee for prepaid services.

The Commission initiated a case and referred it [\*2] to the Division of Administrative Law Judges. See Commission Order, Case No. 04-1285-C-GI (Oct. 8, 2004). In that order, the Commission identified issues that Commission Staff and the parties were to address.

Instead of addressing those issues, Staff suggested that the Legislature could provide clarity with respect to prepaid services and recommended that the general investigation be dismissed for lack of jurisdiction. Alternatively, Staff suggested that a task force be started to address the issues and work toward a consensus. No one supported Staff's suggestion for a task force and no objection was filed to Staff's recommendation to dismiss.

The ALJ determined that the statute was vague as to how providers of prepaid services would collect and remit the E911 fee. In the absence of objection to Staff's recommendation to dismiss, the ALJ concluded it was reasonable to dismiss the general investigation, without prejudice, for lack of subject matter jurisdiction. See Rec. Dec., Case No. 04-1285-C-GI (May 4, 2005). No exceptions were filed and, by operation of *W. Va. Code § 24-1-9(e)*, the Recommended Decision became a final order of [\*3] the Commission on May 19, 2005.

Thereafter, two prepaid service providers, TracFone Wireless, Inc. and Virgin Mobile, asked the Commission to refund E911 fees that they had already paid. TracFone sought a refund of fees submitted during 2000 through 2003. See TracFone ltr. (June 30, 2005). Virgin Mobile advised it was preparing amended E911 filings and would seek refunds of amounts remitted for the 2001-2004 periods. See Virgin Mobile ltr. (Aug. 5, 2005). In both instances, as justification for their requests, TracFone and Virgin Mobile cited the Staff's recommendation and the ALJ's determination that the general investigation should be dismissed for lack of jurisdiction. Both providers seemed to take the position that because of the ALJ's decision, neither provider was obligated to pay past E911 fees and both are excused from paying future fees.

*Pending proceeding, Case Number 05-1303-C-GI*

On August 31, 2005, the Commission opened a new case, noting that whether a prepaid provider submits a monthly bill to its customer does not necessarily resolve whether the prepaid CMRS provider must charge and remit a wireless enhanced 911 fee and, if not, whether the provider is entitled [\*4] to a refund for past fees remitted. The Commission also noted that the ALJ and the parties did not address the issues that the Commission set forth in the 2004 case.

The Commission opened the 2005 general investigation "to determine the extent to which providers of prepaid cellular service, whether resold or provided directly, must remit an E911 fee to the Commission. Further, the Commission expects the parties to address the refund issue and any proposed legislative amendments." The Commission ordered the parties to respond to the issues identified in the 2004 Commission order and required the Executive Secretary to publish notice one time in newspapers throughout the state. n1 Initial Comments were due October 21, 2005, and Reply Comments were due November 4, 2005.

n1 *The notice was published as follows:*

*September 2, 2005 The Herald-Dispatch, Huntington.*

*September 3, 2005 Williamson Daily News, Williamson.*

*September 5, 2005 The Exponent-Telegram, Clarksburg; Welch News, Welch.*

*September 6, 2005 The Charleston Gazette, Charleston; The West Virginia Daily News, Lewisburg; The Logan Banner, Logan; Moundsville Daily Echo, Moundsville; The Daily Times, Weirton.*

*September 7, 2005 The Register-Herald, Beckley; Bluefield Daily Telegraph, Bluefield; The Inter-Mountain, Elkins; The Dominion Post, Morgantown; Wheeling News-Register, Wheeling.*

*September 8, 2005 News-Tribune, Keyser; Parkersburg News, Parkersburg; The Point Pleasant Register, Point Pleasant.*

*September 12, 2005 Times West Virginian, Fairmont.*

*September 16, 2005 The Journal, Martinsburg.*

[\*5]

*Comments n2*

n2 *On October 21, 2005, Sprint Nextel Corporation, on behalf of Sprint Spectrum L.P., SprintCom, Inc., Wireless Co. L.P., dba Sprint PCS, and Nextel Boost of the Mid-Atlantic, LLC, advised it was not filing initial comments but reserved the right to file reply comments, and, if necessary, participate in the hearing. Sprint Nextel has an ownership interest in Virgin Mobile.*

*Sprint Nextel did not appear at the hearing, nor did it file any reply comments or briefs. From the bench at the November 9, 2005, hearing, the Commission declined to rule on the contingent petition to intervene because Sprint Nextel did not appear at the hearing or otherwise participate in the case. Tr. p. 32 (Nov. 9, 2005).*

The comments are summarized below, with responses to the Commission's questions appearing first.

**(1) Identify those entities that are failing to tender the required payments.**

TracFone advised that it did not know of any such entities.

Staff advised that for June-August 2005, TracFone and Virgin [\*6] Mobile did not pay. Staff said it could not determine from current Commission data if the wireless carriers which remit wireless E911 fees monthly to the PSC are including money collected from prepaid service users. Countless retailers, such as Wal-Mart, sell prepaid wireless service cards and none of those merchants collect or pay the wireless E911 fee to the Commission, Staff wrote.

***(2) State whether the identified entities possess authority from the Commission.***

TracFone wrote that it does not know of any such entities and that CMRS providers are not subject to PSC certificate or rate authority.

Staff also advised that the Commission does not have market entry (certificate) jurisdiction regarding wireless providers. However, the Commission has jurisdiction for service quality and customer relations matters. Staff said that retail vendors of prepaid wireless service cards do not need any authority from the Commission to sell prepaid wireless service cards.

***(3) Describe the type of business activities engaged in by the identified entities (e.g., marketer of prepaid calling cards for use with cellular phones, etc.).***

Staff advised that TracFone and Virgin Mobile provide [\*7] wireless service by selling prepaid service cards to retailers and to the public. Value may be added to the cards by paying the carrier or the retailer, or consumers may buy a new card.

***(4) How much money in E911 fees is owed by each such identified entity?***

Since prepaid wireless service is provided in a significantly different manner than traditional wireless service, Staff said the Commission must develop a methodology to apply the wireless E911 fee to prepaid services. Staff hoped that the formula could be developed in this case.

Staff also said that it does not have the data necessary to determine how much (under a given methodology) prepaid wireless service providers owe. "We expect to get that information pursuant to the October 21, 2005 statements of position . . .," Staff wrote.

***(5) Describe suggested actions that should be taken to address the problem raised by the E911 Council.***

TracFone wrote, "The 'problem' is the Commission's objection that TracFone and another provider . . . have requested refund of E911 fees which were remitted to the Commission erroneously several years ago . . ." To obtain payments from prepaid providers, legislation is needed, TracFone [\*8] also wrote, and that legislation should require that contributions be equitable and be implemented in a competitively neutral manner. TracFone said it would work with the Commission toward such legislation. TracFone suggested that the Commission collect the fee at the point of sale, which would require the retail entity to collect the E911 fee from the purchaser and remit it to the PSC for distribution to the counties. TracFone asked the Commission to approve its refund request and return the fees, which TracFone said were not owed to the Commission.

In its comments, Staff proposed changes to the Commission's Rules and Regulations Governing Emergency Telephone Service, 150 C.S.R. Series 25, and advised that the changes would not burden retailers. Staff suggested that wireless providers debit the fee each month from active prepaid accounts and remit those fees to the PSC. If there isn't enough to cover the fee, the remaining amount in the account would be debited instead.

***Additional Comments*** Metro Emergency Operations Center of Kanawha County advised that if prepaid services providers do not remit the fee, "it could have a detrimental impact upon the financial status of [\*9] this state's 911 operations." Comments p. 1. Metro of Kanawha County handles 1,400 calls a day, or about 500,000 per year. "Our latest statistics show about half of those calls come from wireless phones, and anecdotal information reveals that the incidence of 911 calls from prepaid wireless continues to grow as well." In fiscal year 2000, wireless fees were 10% of all revenues collected by Metro, and in the most recent fiscal year, it was 40%. Metro of Kanawha County urged the Commission to recover 911 fees that prepaid wireless providers have not remitted since the wireless fee began. Id. p. 2.

TracFone noted that the Commission opened two E911 fee proceedings in less than a year. In the first case, TracFone said the Commission concluded that it does not have jurisdiction and dismissed the case. In the second case, the Commission attempted to distance itself from that conclusion, TracFone wrote. However, the same question is at issue whether *W. Va. Code § 24-6-6b* applies to prepaid wireless service. "What is really at issue . . . is whether the

Commission and its Staff may change its mind regarding questions which were thoroughly addressed [\*10] in a prior proceeding."

Under the federal Telecommunications Act, n3 West Virginia can impose a fee on prepaid services only if the fee is "competitively neutral," TracFone wrote. "Imposition of an E911 fee in a manner which disadvantages some competitors such as prepaid wireless providers, and advantages other providers with whom they compete, such as post-paid providers who have the ability to recover the fee from their subscribers, is not competitively neutral."

n3 *The Telecommunications Act of 1996 is codified at 47 U.S.C. §§ 151 et seq.*

*W. Va. Code § 24-6-6b* and the Commission's rules address collection of the E911 fee from wireless providers which issue bills for their services, TracFone wrote. *W. Va. Code § 24-6-6b* states that wireless providers shall collect from their subscribers the E911 fee each month, and *W. Va. Code § 24-6-6b(d)* [\*11] allows the providers to retain a 3% billing fee. That provision is meaningless for providers who do not render bills, i.e. prepaid services, TracFone argued. Similarly, the PSC rule applies to the "billing, collection and remission" of the E911 fee, and requires that the fee appear as a separate item on the monthly billing statement. The PSC rule has no effect when services are not billed.

To extend the reach of the statute and rules to prepaid providers would convert it from a fee on users to a tax on providers, TracFone wrote. Further, extending the fee to prepaid services could "result in wireless service being priced beyond the economic reach of those users who most need available, affordable, prepaid services low income consumers, including the credit-challenged, minorities, immigrants, the unemployed, students, transients, and others to whom traditional post-paid contract-based wireless services are not available," TracFone said.

In *Appalachian Regional Health Care v. West Virginia Human Rights Commission*, 180 W. Va. 303, 376 S.E.2d 317 (1988), the West Virginia Supreme Court reversed a Human Rights decision to reopen a proceeding [\*12] which had been terminated years earlier. It follows that the PSC cannot reopen this issue, TracFone argued.

TracFone said that the Commission could not consider Staff's proposed amendments in this case. TracFone also said that Staff's proposed rules were substantively flawed because they would allow the fees to be collected back to January 1, 1998. "Except in very rare and inapplicable circumstances, administrative agencies may not promulgate rules retroactively. This is especially so in matters involving tax or fee payment obligations. See *Bowen v. Georgetown University Hospital, et al.*, 488 U.S. 204," TracFone wrote.

Although Staff proposed rule changes, TracFone said that the PSC rules cannot amend the wireless E911 statutes.

TracFone also wrote that Staff's proposal to debit active accounts is unworkable because many prepaid wireless providers cannot debit their customers' accounts. For example, TracFone customers' remaining balances are stored in their telephone handsets, not in any switch or other device accessible by TracFone.

In its additional comments, Staff said it concurred with the Commission's conclusion in the August 31, 2005, order [\*13] opening the 2005 proceeding, that a plain reading of the statute shows that the Legislature intended CMRS providers to charge and remit the E911 fee. Staff said that its conclusion in the 2004 case was premature and led to a Recommended Decision that did not assess the issues raised by the Commission. The Commission correctly asserts that these issues remain unresolved, Staff wrote. The fact that prepaid service resellers do not always bill their customers monthly, Staff said, does not resolve whether *W. Va. Code § 24-6-6b* requires the prepaid providers to charge and remit a wireless enhanced 911 fee, Staff said.

Staff adopted OnStar's suggestion for alternative methods of billing the wireless E911 fee.

The PSC "has not only a right, but a duty, to revisit a set of facts when conditions change . . . Legal treatises have long recognized that *stare decisis* does not generally apply to regulatory decision by administrative agencies," Staff wrote. The West Virginia Supreme Court recognized this principle in *Chesapeake & Potomac Tel. Co. v. Public Serv. Comm'n*, 171 W. Va. 494, 500, 300 S.E.2d 607, 613 (1982); [\*14] see also *Mellon-Stuart Co. v. Hall et al*, 178 W. Va. 291, 359 S.E.2d 124 (1987); *Central W. Va. Refuse v. Public Serv. Comm'n*, 190 W. Va. 416, 438 S.E.2d 596 (1993).

Staff noted that Metro of Kanawha Valley brought new and relevant information to the Commission's attention, when Metro advised that the number of wireless telephone customers is exploding and that half of Metro's resources are dedicated to responding to wireless calls, including prepaid callers. Staff said it would be unfair, unjust and unduly discriminatory to assess the cost of an enhanced 911 telephone system disproportionately upon other customers. Staff said

that the Commission should impose the enhanced 911 fee on all telephone companies, regardless of whether service is wireless or provided by landline, n4 and regardless of whether the provider issues a monthly bill.

n4 *For landline service, W. Va. Code § 7-1-3cc(b) authorizes county commissions to impose a fee upon consumers of local exchange service within that county for an enhanced emergency telephone system. W. Va. Code § 7-1-3cc(c) authorizes county commissions to contract with the local telephone companies to act as the billing agent of the county commission regarding the subsection (b) fee. The local exchange telephone companies bill the E911 fees to its respective customers and then remit the fees to the county commission.*

[\*15]

In its comments, OnStar Corporation said its service includes access to wireless calling via resold, prepaid minute packages. P. 1. Remaining calling minutes are accounted for at the vehicle level and are not known to OnStar, so imposing the fee on prepaid service poses unique issues, OnStar noted.

However, OnStar also wrote, "OnStar supports the use within a statute of alternative E911 assessment schemes that take into account the differing technological approaches by which prepaid services are offered." P. 1. OnStar recommended that providers be allowed to choose between two options 1) collect the fee monthly from each active balance, or 2) divide the provider's total earned prepaid revenue by \$ 50, and multiply the quotient by the E911 charge. The latter option, known as Average Revenue Per User approach, n5 is based on the assumption that a cellular bill averages \$ 50 per month. If a customer buys a large package of minutes, she may be assessed the equivalent of several months of the fee on the assumption that the minutes will likely carry over to several assessment periods, OnStar wrote. By contrast, a subscriber buying a smaller package is assessed a smaller amount, assuming [\*16] the minutes will not carry over or more minutes will be bought next period. "The intention is to insure each user pays some approximately fair amount into the E911 fund," OnStar said. "Importantly, this approach is explicit and does not impose a fee or tax on consumers who do not have active wireless interconnected calling service." Any fee should be paid by the subscriber, not the provider, OnStar said. The provider should be able to retain 1-3% to cover the administrative costs to collect/remittance fees.

n5 *OnStar provided citations to the Ohio and North Carolina statutes, which use this approach.*

Some states view prepaid service as offering wireless calling to individuals that might otherwise not have such service. Therefore, some states have exempted consumers of prepaid services from E911 fees, OnStar wrote. Other states use a tiered assessment, where consumers of resold services pay a lower rate since their provider does not own any infrastructure that is eligible for reimbursement.

New Cingular Wireless PCS, [\*17] LLC wrote that the Commission must view the May 4, 2005, Recommended Decision as the Commission's final ruling on its jurisdiction to collect the wireless E911 fee. By operation of *W. Va. Code § 24-1-9(e)*, the Commission ruled, and the industry is entitled to rely upon the Commission's decision, that the Commission lacks jurisdiction to consider the issue of the collection and remission of said past fees, New Cingular wrote. The Commission properly limited the scope of this proceeding to the collection and payment of future fees.

American Cellular Corporation wrote, "Because [prepaid] customers do not receive monthly or other periodic billings, it is not feasible to collect a monthly wireless enhanced 911 fee as contemplated by the Legislature in the enactment of *West Virginia Code § 24-6-6b(a)*." If it is ultimately determined that prepaid customers are assessed E911 fees, a flat, one-time fee should be assessed, similar to a sales or excise tax paid at the time of sale, American Cellular wrote. It also urged that, due to the substantially different circumstances relating to billing for prepaid [\*18] services, as compared to monthly billings to plan subscribers, CMRS providers cannot be compelled to collect and remit a monthly wireless enhanced 911 fee.

In response to Staff's memo, Virgin Mobile wrote that the substantive issues were addressed in the ALJ's order in Case Number 04-1285-C-GI. Should the Commission revisit the issues, though, Virgin Mobile argued that an extension of the statewide E911 fee would unduly burden Virgin Mobile, which is one of the fastest growing companies in the country, having acquired more than 3 million customers since its launch in July 2002, it wrote. It has effectively expanded wireless service to younger and lower-income customers, in part because it does not require a credit check or a credit card. Many West Virginia customers have flocked to its flat-rate service plan, which allows customers to budget their usage more effectively, Virgin Mobile said. Virgin Mobile does not provide monthly bills to its customers; instead,

customers replenish their accounts on their handsets, online or by buying a top-off card at one of nearly 60,000 stores across the United States.

As the fee is currently structured, the E911 fee must appear as a separate item [\*19] on the monthly billing statement. Thus, Virgin Mobile wrote, the ALJ recognized that the statute excludes prepaid providers. Further, requiring Virgin Mobile to collect the E911 fee monthly from its customers would contradict the customers' wishes to avoid the receipt of monthly bills and the imposition of line item fees and taxes. Ltr. p. 2. Virgin Mobile does not collect the fee from its customers, and would have to pay the fee itself, which contradicts the statutory requirement that the fee be collected from customers. Id. p. 3. Virgin Mobile argued that periodic or monthly fees are inherently regressive, particularly in comparison with fees that vary with usage. Id.

The Commission conducted a hearing on November 9, 2005, at which 14 E911 center representations commented or testified. Mitchell F. Brecher, TracFone's Washington counsel, testified on TracFone's behalf. A Staff witness also testified.

Following the hearing, the Commission allowed Initial Briefs to be filed by Monday, November 21, 2005, and Reply Briefs by Thursday, December 1, 2005. Also, within 14 days, the Commission required TracFone to file a post-hearing exhibit, with responses to six matters. The Commission [\*20] required the post-hearing exhibit because the Commission posed several follow-up inquiries to Mr. Brecher's testimony, and those inquiries were not answered at the hearing.

On November 10, 2005, TracFone's Washington counsel, Mr. Brecher, moved for admission to practice in this West Virginia proceeding. Mr. Brecher made the same *pro hac vice* motion in the 2004 PSC case, which was granted, and in an abundance of caution, even though the issues are the same in both cases, Mr. Brecher requested permission to appear in the 2005 case.

#### *Initial Briefs*

In their Initial Brief, New Cingular and American Cellular argued that whether the Commission has jurisdiction to impose the E911 fee on prepaid cellular service is a legal issue, not a factual one. Whether the E911 centers need additional money is not the issue, they wrote. The Commission must decide whether prepaid cellular service is included in the service that the Legislature subjected to the E911 fee. P. 2. New Cingular also argued that the Commission is bound by the ALJ's 2004 decision that the Commission lacks subject matter jurisdiction. Pp. 2-3.

The Legislature required the E911 fee to be collected monthly from CMRS subscribers, [\*21] and required the Commission to issue an order spelling out the details of doing that, including a definition of "valid retail service subscription," New Cingular and American Cellular wrote. P. 4. Rule 4.2 of the Commission's Emergency Telephone Service Rules discusses a billing month and statement, but prepaid wireless does not have a billing month, they noted. "As the Commission was directed to establish rules governing 'all relevant details of wireless enhanced 911 fee collection,' the only reasonable interpretation is that the E911 Fee was not to be assessed on prepaid wireless service," New Cingular and American Cellular argued. Pp. 5-6.

All parties agree that neither the Legislature nor the Commission contemplated the prepaid service model that exists today. "Thus, it is not surprising that neither the Commission nor the Legislature realized that the choice of language in the statute and in the rules promulgated thereunder would exclude prepaid service from the coverage of the E911 Fee. Nevertheless, that is the fact," they argued. P. 6. The Legislature must correct the statute, they wrote. Id.

In its Initial Brief, TracFone wrote, "This proceeding is not about whether [\*22] E911 service is important to public safety. Unquestionably it is." P. 2. "Neither is it about whether legislation and regulations should be adopted to extend the E911 fund contribution obligation to customers of prepaid wireless service. Quite possibly the legislation should be considered. However, that is a determination for the legislature, not for the Commission. Rather, this proceeding is about one issue only: whether the E911 fee as provided for under current law is applicable to prepaid wireless services." P. 2. The Commission concluded in the 2004 proceeding that the current law governing the E911 fee does not apply to prepaid wireless service, TracFone argued. P. 2.

TracFone wrote that prepaid service providers cannot collect E911 fees on a monthly basis from their customers. P. 3. With prepaid service, there is no billing mechanism to add an E911 fee onto the customer's charges because no bill is rendered. In a competitive marketplace, it is no answer to say that TracFone, or any prepaid wireless provider, can simply raise its rates and absorb the charge within the higher rates. Such an answer is unacceptable to consumers who routinely make pricing and provider selection [\*23] comparisons based on vendors' advertised rates, TracFone argued.

Further, absorbing the fee would place prepaid providers at a significant competitive disadvantage and would violate the federal Telecommunications Act, TracFone wrote. P. 3.

TracFone continued to argue that the 2004 order was a final decision that the Commission could not review. Pp. 3-4. There is nothing in the record "which provides any justification or explanation for this sudden and unexplained 'about face' by Staff on a fundamental jurisdictional issue," TracFone wrote. P. 5. The fact that TracFone would seek a refund, which the law entitles it to do, "hardly constitutes a changed circumstance warranting revisitation of a Commission legal and jurisdictional determination approved without dissent upon a substantial record which included recommendations from the Commission's own Utilities Division and its Legal Division." P. 6 n. 7.

The Commission's Emergency Telephone Service rules are limited to post-paid wireless providers, TracFone argued. Rule 1 governs the "billing, collection and remission of wireless enhanced 911 monthly fees," so it does not apply where no billing is involved, TracFone wrote. Other [\*24] Emergency Telephone Service rules similarly apply to billed services. P. 6. Even if the Commission could change its rules, it may do so only prospectively, TracFone argued. The law strongly disfavors retroactive rule changes. P. 7.

The Commission's selective effort to determine whether some, but not all, carriers have paid the E911 fees is arbitrary and capricious, TracFone wrote. P. 8. The Commission orders have asked to identify the entities who have not paid and how much money is owed, from which it appears that the Commission intended to conduct a comprehensive inquiry, TracFone wrote. P. 9. Instead, the Commission has concentrated on a single provider, TracFone. Id.

Earlier this year, and after Staff's recommendation in the 2004 case, the West Virginia Legislature amended the wireless E911 statute to increase the fee to \$ 3, the nation's highest, TracFone wrote. P. 11. "[T]hose entities who were concerned about a need to amend the law to encompass prepaid wireless had ample opportunity to seek such legislation. They chose not to do so. Had the Legislature perceived a need to broaden the law to encompass prepaid wireless service, it could have done so," TracFone wrote. [\*25] Id.

If, however, the Commission concludes that the law should be amended, TracFone proposed alternate paths: 1) tax all residents, not just those who use or provide wireless service, or 2) collect the E911 fee from prepaid consumers at the point of sale. Pp. 11-12. Many of those same retailers collect and remit other state-imposed taxes, such as the sales tax. Id. OnStar's Average Revenue Per User approach would convert the monthly charge to a carrier tax based on revenues. Pp. 12-13.

For companies which issue bills to their customers, the E911 fee is identified as a fee imposed by the government, not as part of the provider's charges. P. 14. If a prepaid company remits the fee, it will have to reduce its earnings or raise its rates. If it chooses the former, its profitability will be reduced solely because of a government requirement, and one not imposed on competitors providing billed services. Id. If it chooses the latter, consumers will perceive TracFone's rates as relatively higher than competitors who do not include the E911 fee. Pp. 14-15. "Such handicapping of prepaid providers hardly constitutes a 'fair and balanced legal and regulatory environment,'" TracFone [\*26] wrote. P. 15.

In its Initial Brief, OnStar noted that *W. Va. Code § 24-6-6b* requires CMRS providers to collect wireless E911 fees on a monthly basis for each of their in-state subscribers. Rule 4 of the Commission's Emergency Telephone Service Rules governs the billing and collection of the E911 fees. P. 3.

OnStar said it does not object to Commission jurisdiction. However, Emergency Telephone Service Rule 4 needs changed for the billing and collection of the E911 fees to apply to prepaid CMRS service. P. 3. OnStar has been working with Staff to propose rule changes, but there is not complete agreement yet. OnStar also noted two remaining issues. First, the CMRS prepaid provider should levy the E911 fee based upon the location where the service is primarily used. Since this may be impossible to predict, OnStar proposed that prepaid providers use the area code when the primarily location cannot be determined. Second, OnStar suggested July 1, 2006, as the effective date, given the process necessary for a rule change.

In its Initial Brief, Staff noted that prepaid wireless is a large, increasing portion of cellular service sold in West [\*27] Virginia, and the cost to operate E911 centers has exploded. P. 2. It is illogical and inequitable to assess the E911 fee for landline and billed wireless customers, but not for prepaid wireless customers, Staff argued P. 3. Prepaid phones can make 911 calls, even when there are no minutes remaining, and the State Police depends on the E911 fee to upgrade its ability to communicate and respond to emergencies, Staff wrote. Id.

*W. Va. Code § 24-6-6b* requires each CMRS provider to collect the wireless E911 fee from each of its subscribers. P. 4. Then the carriers remit the fees to the Commission. The Commission distributes the fees to county 911 centers, the State Police, and to government agencies to construct new cell towers. Pp. 5-6. "It is essential to note that this is not a discretionary duty for the wireless telecommunications providers. The statute uses mandatory language," Staff wrote. "It does not grant exceptions for prepaid wireless telecommunications providers with varying marketing strategies." P. 6.

"The issue then becomes whether the term 'collect on a monthly basis' is broad enough to include the application of a formula [\*28] to calculate the amount of the fee collected from the prepaid subscribers to be forwarded by the CMRS provider to the Commission," said Staff. P. 6. Staff recommended that the Commission clearly enunciate the existing and continuing legal responsibilities of wireless carriers and customers through a rulemaking. Id.

As to the collection method for prepaid customers, Staff recommended alternate procedures: 1) Positive Balance Debit Method carriers would debit the E911 fee monthly from each customer's account. If there was insufficient value in the account to cover the fee, the account would be debited to \$ 0. If no minutes remained, no fee would be collected; or 2) Average Revenue Per User approach when all fees and payments are collected up front or when a carrier has no access to customer accounts to determine the remaining value. Staff said it concurred with OnStar's recommendations.

Staff noted, "TracFone would not be applying for a refund of its previously collected fees if it truly were impossible to collect the fee from its subscribers. It should be noted that Mr. Brecher's statements regarding TracFone's ability to collect and pay fees are unreliable. On two occasions, he [\*29] stated under oath that TracFone paid each month's fee when the invoice was received. Tr. Pp. 43, 59. Later, he began retracting his statements by first stating that he assumed the various jurisdictions sent invoices to impose subscriber fees. (Tr. P. 59), and later admitting that he may have mis-spoken. Tr. P. 61." P. 8. "The moment that TracFone requested a refund, TracFone itself rebutted [its argument that it could not collect the fees from its customers.]. Until it stopped forwarding the subscribers' fees to the Commission, the Commission should assume that TracFone was complying with the law and collecting the fees on a monthly basis from its subscribers. When questioned upon cross-examination about how the fee had been collected by TracFone in the past, the TracFone spokesperson stated that he did not know. Tr. P. 62. When pressed on specific accounting issues, he deferred to another witness, Mr. Salzman. Tr. Pp. 41, 60. However, TracFone did not present Mr. Salzman as a witness," Staff wrote. Pp. 10-11. "TracFone also disputes this argument by asserting that it would gladly collect and pay over the fees if the statute is changed to specifically encompass its marketing strategy." [\*30] P. 12.

The E911 statute makes no mention of the billing relationship between the carrier and the customer, Staff noted. P. 11. The imposition of the fee did not and does not prevent TracFone from entering the West Virginia wireless market. Id.

"TracFone asserts that if it complies with the law in the State of West Virginia, the wireless telecommunications market would not be competitive. However, TracFone does not explain how exempting it from collection and payment of E911 fees would not reduce its cost of operations, thereby giving TracFone a competitive advantage," Staff wrote. Pp. 12-13.

Staff rejects the argument that TracFone would have to pay the E911 fee out of its own pocket, because 1) TracFone did not present any accounting witnesses, 2) TracFone supported the collection/payment in other states, and 3) TracFone ignored the average methodology which it previously used in West Virginia. Pp. 13-14.

Since no one can be sure where prepaid service will be used, the only objective criteria available for any state to assess the fees would be the area code for the telephone number, Staff wrote. P. 14.

"If TracFone nationally markets its service with a single price, that price [\*31] must anticipate the imposition of the ARPU methodology in each state in which an Enhanced 911 fee is mandated," Staff said. "One can only assume that since TracFone was previously collecting the West Virginia E911 fee and forwarding it to the Commission, the national rate was designed to accommodate the fee. To the extent now that the fee is not being forwarded to the Commission to fund the operation of the Enhanced 911 program, that pricing increment has become a windfall for TracFone . . . West Virginia customers are paying more for the same service as residents of other states with statutes found unobjectionable by TracFone." Pp. 15-16.

Staff said TracFone could inform its customers of the state fee in at least two ways: 1) through literature at the time of sale, or 2) by mailing, because TracFone gets its customers addresses at the time of sale. P. 16.

Staff argued that *stare decisis* generally does not apply to the regulatory decisions of administrative agencies. *Id.* "The facts that two prepaid wireless providers have not only stopped paying the E911 fee, but have requested refunds of previously paid fees is a change in circumstances that requires the Commission to revisit [\*32] this issue." *Id.*

Citing Rule 3.7 of the *Rules of Professional Conduct*, n6 Staff objected to Mr. Brecher's testimony on behalf of TracFone.

n6 Rule 3.7 of West Virginia's *Rules of Professional Conduct* 10 provides in pertinent part, as follows:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

Staff argued that none of these exceptions apply, since local counsel, Paul Frampton, was present. *Id.* Staff also cited the Comment to the Rule, which recognizes that combining the witness and advocate roles can prejudice the opposing party, as follows:

*The opposing party has a proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.*

Staff's Initial Brief p. 21.

P. 21.

10 (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case;
- (3) disqualification of the lawyer would work substantial hardship on the client.

P. 21. None of these exceptions apply, since Mr. Frampton was present. *Id.* Staff properly objected to Mr. Brecher's appearance as a witness. The comments to the Rule recognize that combining the witness and advocate roles can prejudice the opposing party:

*The opposing party has a proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.*

[\*33]

Staff has continued to consult with OnStar since the hearing and has modified its proposed rule.

On November 21, 2005, the Consumer Advocate Division of the Commission petitioned to intervene, stating that although the proceeding is far advanced, the CAD believes its comments and participation will be beneficial to the Commission.

*TracFone's Post-Hearing Exhibit*

On November 21, 2005, TracFone filed its Post-Hearing Exhibit, n7 with responses to the questions the Commission posed after the hearing. Those responses are summarized below, following each Commission question.

n7 TracFone's post-hearing exhibit did not identify who prepared it. Mr. Brecher prepared the cover letter, and an executive assistant at Mr. Brecher's firm signed the certificate of service.

TracFone again complained that the Commission was looking solely at TracFone. P. 1. If the Commission's real intention is as stated, TracFone said it urged the Commission to obtain answers industry-wide. Id.

**1. List the states in which TracFone pays [\*34] any E911 fees, the amount of those fees, and provide the statutory or regulatory references for each of the listed states;**

TracFone said E911 fees are imposed on customers, not wireless carriers. TracFone offers prepaid wireless service in every state, and each state's laws are unique. P. 2. Some states, such as Hawaii, exempt prepaid wireless from E911 fee requirements. P. 2. "Other states have deemed it necessary to amend their statutes to encompass prepaid wireless service," TracFone wrote. Further, "The applicable laws of other states are matters of public record and citations to such statutes are readily available through standard legal research services." Id.

Any specific amounts TracFone remits in state taxes and fees is highly proprietary, competitively sensitive information, TracFone wrote. Moreover, fees in other states are wholly irrelevant to this proceeding. P. 2.

**2. State how TracFone sells its various services, including to whom, and when the payment for those services is received.**

TracFone sells its services at various retail outlets Wal-Mart, K-Mart, Target, RadioShack and others. When TracFone receives payment from the retailers depends on the financial [\*35] arrangements in place between TracFone and each retailer. Those arrangements differ from each other and are highly proprietary, TracFone said. P. 3. Customers may also purchase additional time at TracFone's website. TracFone provided its web address n8 and noted that internet sales are limited and represent a small portion of overall sales. Id.

n8 Under the "Questions" tab on its website, customers may link to a page called "General Information," under which visitors to the website are advised as follows:

*What is the cost of TRACFONE?*

*The digital TRACFONE wireless phones retail as low as \$ 59.99 each (MSRP) and include free voice mail, free caller ID and free call waiting. TRACFONE comes with 60 days of service and 10 units of starter airtime. You then pay-as-you-go by purchasing prepaid wireless airtime cards as you need them. **The service is as low as \$ 7.99 per month** with the purchase of a **1 year prepaid wireless service** card, which includes all wireless taxes and fees that can add up to 20% of most other wireless service plans. . . .*

*Similarly, under the "Why Go Prepaid" tab on its website, visitors are provided with lists of "everything you want" and "nothing you don't." Under "everything you want," the website states, "rates include all wireless taxes and fees." Under "nothing you don't," the website states "no hidden costs."*

*<http://tracfone.com/questions> (emphasis in original), attached as Appendix A and B.*

[\*36]

**3. How did TracFone's consultant calculate the fees which were previously submitted to the West Virginia Public Service Commission? Provide the formula for that calculation.**

Between February 2000 and October 2003, the fees were calculated as follows: monthly E911 fee x number of active West Virginia customers. P. 3. This amount was paid out of TracFone's own earnings, TracFone wrote. P. 4. TracFone never collected E911 fees from any of its West Virginia customers for remission to the Commission. Id.

**4. Provide a statement of the accounting principles used to prepare TracFone's formal financial statements, as disclosed in the footnotes to those formal financial statements.**

TracFone stated that its financial statements are prepared pursuant to Generally Accepted Accounting Principles (GAAP). TracFone did not provide the requested information from the footnotes. P. 4.

**5. In its business model, at what point does TracFone recognize the revenue from the sale of its prepaid services?**

TracFone said it operates on a deferred recognition basis, and this inquiry is irrelevant to the Commission proceeding. P. 4. "Since the E911 fee is not revenue-based, how and when [\*37] any provider, including TracFone, recognizes revenue is irrelevant to any issue before the Commission in the instant proceeding." Id.

**6. In its business model, at what point does TracFone recognize the costs to match against the revenues?**

"As noted in the response to Supplemental Inquiry No. 4, above, TracFone's accounting statements are prepared in accordance with GAAP." P. 5.

*Reply Briefs*

In its Reply Brief, TracFone wrote that the only opportunity to collect E911 fees from purchasers of TracFone prepaid service is at the retail point of sale, since TracFone does not render periodic invoices. It repeated that it would have to remit E911 fees out of its own assets since TracFone has no billing mechanism and to do so would convert the E911 fee from a fee on consumers, as envisioned by the Legislature, to a tax on the carriers' gross receipts." Pp. 1-2.

There is no basis to reverse the decision in the 2004 case, TracFone argued. P. 2. Moreover, the April 2005 amendment to *W. Va. Code § 24-6-6b* demonstrated that the Legislature was recently focused on the state's E911 funding law and saw no need to amend that section to extend [\*38] the E911 fee to prepaid wireless service. Id. TracFone again argued that the Commission's regulations are specifically applicable only to billed wireless services. P. 3.

The 2004 case would not have been reopened, had not TracFone sought a refund of the moneys it paid in error from 2000-03, TracFone said. However unpopular the request may be, it is not a valid reason to change course on a fundamental jurisdiction issue. P. 3.

In response to Staff's *stare decisis* arguments, TracFone noted that in *Appalachian Regional Health Care, Inc. v. West Virginia Human Rights Commission*, 180 W. Va. 303, 376 S.E.2d 317 (1988), the Supreme Court did not allow an agency to reopen a case which had been terminated years earlier because "administrative agencies in the state may only reopen and revisit decisions in previously-decided matters to the extent they are expressly authorized to do so by their enabling statutes." P. 4.

As to the prior payments, TracFone did not collect those monies from its customers and it remitted those payments to the PSC before realizing that *W. Va. Code § 24-6-6b* and the Commission's [\*39] implementing regulations did not apply to prepaid services. Id. "During the time that TracFone remitted those payments to the Commission, the payments were made by TracFone out of its own funds. At no time did TracFone ever collect E911 fees from its customers." Pp. 7-8.

If the Legislature wishes to broaden the E911 fee to cover prepaid wireless, it can do so. As enacted, however, and as implemented by the Commission's rules, the E911 fee is imposed only on billed wireless services, TracFone wrote. Id.

TracFone continued to argue that six months ago the Commission concluded that *W. Va. Code § 24-6-6b* was vague and unenforceable. P. 10.

No one questions the importance of reliable and ubiquitous E911 service, TracFone wrote, and the importance of that funding is not at issue. P. 12. "At issue in this case is what is required under existing law, not what some might like the law to be," TracFone said. Pp. 12-13. TracFone noted that no one responded to its proposals to fund E911 services through general tax revenues since everyone benefits, or to recover the E911 fees from the customer at the point of sale. Id. TracFone said both [\*40] proposals were reasonable and responsible.

How other states act may guide the Commission in how it interprets and applies West Virginia's E911 fee law, TracFone wrote. P. 13. On November 22, 2005, the Nebraska Public Service Commission determined that Nebraska's law, which is similar to *W. Va. Code § 24-6-6b* in material respects, does not apply to prepaid wireless providers. Pp. 13-14. Nebraska's statute clearly contemplates providers who have subscriber lists and issue monthly bills, the Nebraska PSC held. P. 14. Nebraska concluded the prepaid carriers should collect and remit E911 fees, but they could not be compelled to do so under existing law. It instructed its staff and industry to draft appropriate legislation. Id. TracFone urged the West Virginia Commission to do the same. Id.

E911 fees are flat charges, not based on consumption or ability to pay. The fee disproportionately impacts lower volume, lower income customers, TracFone argued. When the 2004 case started, West Virginia's fee was \$ 1.43, higher than any state except New York, which was between \$ 1.20 and \$ 1.50. With the enactment of House Bill 3208, West Virginia's [\*41] \$ 3 fee is now the nation's highest fee by a considerable margin. P. 16.

TracFone service can be purchased for as little as \$ 8, and a \$ 3 E911 tax on an \$ 8 purchase would be a tax rate of 37.5 percent, TracFone said. Such a regressive tax on West Virginia's poorest citizens can hardly be said to be in the 'general interests of West Virginia's economy and welfare,'" TracFone wrote. P. 17. Given that in the 2004 case, the Commission concluded that the statute was too vague to apply to prepaid wireless service, TracFone said it was difficult to imagine that the Legislature intended to impose such a regressive tax burden on West Virginia's most economically vulnerable citizens. P. 17.

In its Reply Brief, the CAD disagreed with any suggestion that the Commission is bound by the result of the 2004 case. P. 2. The ALJ dismissed the proceeding after noting that the E911 Council failed to respond to Staff's recommendation to dismiss, the CAD wrote. *Id.* Moreover, the dismissal was expressly without prejudice. P. 3. The ALJ made no conclusion regarding the applicability of *W. Va. Code § 24-6-6b* to prepaid wireless providers, the CAD wrote. [\*42] *Id.* And, Staff is correct that the applicability of *stare decisis* to Commission decisions is subject to question. P. 4.

*W. Va. Code § 24-6-6b(a)* "casts a broad net, applying to 'all CMRS providers . . .,'" the CAD wrote. *Id.* P. 4. TracFone and New Cingular claim that the Legislature could not have intended prepaid wireless within the wireless E911 fee because 1) the statute requires CMRS carriers to collect from "subscribers," and 2) the E911 fee is to be collected monthly. *Id.* However, neither *W. Va. Code § 24-6-2* nor *§ 24-6-6b* define subscriber, said the CAD. P. 5. Further, the statute is not contingent upon the wireless carrier having a billing relationship. P. 7. Instead, the statute requires carriers to collect the fee monthly, specifies the fee amount, and requires the carriers to send the fees monthly to the PSC, argued the CAD. *Id.*

"This effort to discern the Legislature's intent, or to suggest that the Legislature did not intend to include prepaid wireless service within the wireless E911 statute, is misguided," the CAD wrote. P. 8. "It is a fundament of statutory construction [\*43] that, when a statute's language is clear, courts and administrative bodies should refrain from attempting to construe the statute and should instead apply it." *Id.*

The problem does not lie with the statute, but with the Commission's regulations, which are tailored to postpaid wireless service, the CAD argued. P. 9. Since the problem lies in the Commission's regulations, not the statute, the remedy is administrative not legislative, the CAD said.

CAD agreed with Staff and OnStar that the Commission should open a rulemaking. *Id.* Given the amount of the fees that are at stake, and the public safety purposes to which wireless E911 fees are put, CAD asked that any amendments to the Commission's rules be adopted on an emergency basis. P. 10.

The CAD argued that TracFone's concerns about the federal Telecommunications Act are unfounded because the fee applies equally to prepaid and postpaid service. "Section 24-6-6b of the *Code* does not favor, either by intent or effect, one species of wireless carriers over another," the CAD wrote. "The fact that prepaid carriers may have to alter their business plans in order to collect and remit the wireless E911 fee does not convert the statute [\*44] into a barrier to entry." Pp. 10-12.

The CAD generally supports the ARPU approach, which has been adopted by several other states, including Tennessee, Virginia, and Ohio. P. 13. However, the CAD is firmly opposed to the "sufficient positive balance" or decrementing approach suggested by OnStar and Staff. P. 14. "CAD can conceive of few measures that would frustrate and irritate consumers more than a regulatory provision that 'docks' their usage without warning or explanation. When consumers buy a block of usage . . ., they expect to get that usage. The price of service and the amount of usage being purchased are basic determinants of consumers' prepaid wireless decisions. The 'decrementing' approach would alter both criteria *after* the consumer makes his or her decision, without any warning. Consumer choice is thus frustrated." *Id.*

Instead, CAD recommends an alternate approach collect \$ 3 at the point of sale, and state in the literature that it is for the E911 fee. Pp. 15-16. Under this approach, the CAD recognizes that for a block of time that extends over several months, \$ 3 one time would be insufficient, and that if customers buy time more than once a month, they would [\*45] pay more than a monthly fee. Thus, the CAD recommended that the Commission set upper and lower limits on the amount of usage subject to the E911 fee, i.e. the fee would apply to every increment of 500 minutes purchased. P. 16.

In its Reply Brief, Staff argued that the lack of a PSC rule which expressly addresses prepaid service "does not remove a prepaid wireless provider's duty to comply with a controlling statute." P. 1. It is the statute which imposes the duty, Staff wrote. P. 2. No prepaid carrier has applied to the Commission to clarify the procedures by which prepaid carriers were to collect from their subscribers on a monthly basis. *Id.*

Staff noted that an administrative body cannot issue a regulation "which is out of harmony with, or which alters, or limits, the statute being administered." Pp. 2-4, citing *Eastern Gas & Fuel Assoc. v. WV Dept. of Employment Security*, 144 W. Va. 229, 107 S.E.2d 618 (1959); *Ney v. State Workmen's Comp. Comm'r*, 171 W. Va. 13, 297 S.E.2d 212 (1982); *Rowe v. WV Dept. of Corrections*, 170 W. Va. 230, 292 S.E.2d 650 (1982). [\*46] The PSC cannot restrict the application of a statute, Staff wrote. P. 3.

In these cases, "there was created by statute a reasonable expectation to: (1) the refund of overpayments without an applicable statute of limitations; (2) reimbursement of travel expenses by injured workers; and (3) the granting of parole by the Parole Board. The High Court held in all three instances that administrative agencies could not eliminate that reasonable expectation by promulgating a rule or regulation which restricted a reasonable expectation of a broader statutory right. In the instant case, the various county commissions within the State of West Virginia, all those agencies through whose efforts the E911 program has become a reality, and the residents of the State of West Virginia have a reasonable expectation that those prepaid wireless providers will collect the E911 fees from their subscribers, regardless of the failure of the Commission to enact a rule which expressly addresses the methodology by which the prepaid wireless providers must collect E911 fees from their subscribers," Staff wrote. P. 4.

Staff argued that the wireless providers could not have it both ways demand that the statute [\*47] expressly include them, while ignoring the fact that the statute does not expressly exclude them. Pp. 4-5.

In their Reply Brief, New Cingular & American Cellular write that Staff has incorrectly argued that the PSC has jurisdiction to revisit the issue and that the Commission has been presented with new and relevant information. P. 1. The starting point in this case is the May 24, 2005, ALJ order, upon which the industry is rightly entitled to rely, they wrote. P. 2.

Staff has not presented any evidence that was not available when Staff filed its memo in the 2004 case or at the time of the ALJ's order, and the Legislature has not acted since then to revise the statute regarding the Commission's jurisdiction, New Cingular & American Cellular wrote. P. 3.

In 2001, the West Virginia Supreme Court provided substantial guidance when another administrative agency attempted to change course in mid-stream, they argued, citing *Coordinating Council for Independent Living et al. v. Palmer*, 209 W. Va. 274, 546 S.E.2d 454 (2001). The Court found it was inappropriate for the Tax Commissioner to apply a tax to homemaker and case management services, after [\*48] not applying the tax to such services for five years. The court noted that when interpreting a tax statute, "we usually construe the tax law in a manner that is favorable to the subject taxpayer." P. 5. As a general rule, tax statutes are to be construed strictly against the taxing authority. *Id.*

There has been no new and relevant information presented, New Cingular & American Cellular argued. P. 6. Anecdotal statements by the E911 community "as to an undocumented need for additional financial support" are not relevant to the focus of this proceeding. The needs of E911 centers are properly the subject of the Legislative process and are not properly before the PSC, they wrote. P. 6. The E911 centers have not yet determined the impact of the recent E911 fee increase, so their claims of financial need should be given little, if any, weight, they argued. Pp. 6-7.

In its Reply Brief, OnStar said that whatever rule changes are made should place prepaid wireless customers in a similar position to post-paid customers. P. 1.

OnStar suggested that its Average Revenue Per User proposal be slightly modified. P. 2. If an OnStar customer bought three 1000-minute packages a year, she would pay [\*49] \$ 54 in E911 fees (\$ 299.99/50 x 3 a month x 3 packages). Yet a billed CMRS subscriber would pay \$ 36 (\$ 3 a month x 12 months). P. 2. For heavier users, the results are more disparate. For example, if a subscriber buys five such packages, the E911 fees would total \$ 90 annually, about 250% more. Pp. 2-3.

Any formula to calculate the fee on pre-paid service should mirror as closely as possible the flat monthly E911 fee on billed service, OnStar said. P. 3. To do this, the Commission could limit the E911 fees per transaction in various ways, including 1) apply the calculation to the first \$ 50 of a transaction, 2) increase the Average Revenue Per User amount, to \$ 100 or \$ 150, for instance, or 3) cap the fee at \$ 3 per transaction. P. 3.

On December 9, 2005, TracFone moved the Commission to compel production of evidence on the PSC listed issues and defer resolution of this proceeding until a complete evidentiary record has been compiled. P. 1. For the Commission to open this case, then not resolve the issues, would be inconsistent with the order opening the case, TracFone wrote. P. 2.

#### FINDINGS OF FACT

1. Prepaid wireless providers, including TracFone and Virgin Mobile, sometimes [\*50] sell their services at retail outlets, including Wal-Mart, K-Mart, Target, RadioShack and others. E.g., tr. p. 35 (Nov. 9, 2005) (TracFone witness Brecher); Virgin Mobile's Response p. 1 (Nov. 9, 2005).

2. Sometimes prepaid wireless providers sell their services on their websites. E.g., [www.tracfone.com/purchase\\_airtime](http://www.tracfone.com/purchase_airtime). See also TracFone's Post-Hearing Exhibit p. 3.

3. Sometimes prepaid wireless customers can replenish their accounts, or purchase additional minutes, through their handsets. Virgin Mobile's Response p. 1 (Nov. 9, 2005).

4. Some prepaid cellular service providers, including TracFone and Virgin Mobile, do not issue monthly bills to their subscribers. E.g., tr. p. 35 (Nov. 9, 2005) (TracFone witness Brecher); Virgin Mobile's Response p. 1 (Nov. 9, 2005).

5. Some prepaid cellular service providers do not collect West Virginia's wireless E911 fee each month, from their customers. E.g., TracFone's Post-Hearing Exhibit p. 4 (Nov. 21, 2005); Virgin Mobile's Response p. 3 (Nov. 9, 2005).

6. Some resellers, including OnStar, do not have access to information regarding the balance remaining on prepaid service accounts. In OnStar's case, the remaining calling [\*51] minutes are accounted for at the vehicle level. OnStar's Response p. 1 (Oct. 21, 2005).

7. Usage information for TracFone customers is stored in the handset. TracFone has no real time ability to identify a customer's remaining balance. Tr. p. 35 (Nov. 9, 2005) (TracFone witness Brecher).

8. Other prepaid service providers may know each customer's remaining minutes at the end of a month. OnStar's Response p. 1 (Oct. 21, 2005).

9. TracFone's services are entirely prepaid. Tr. p. 35 (Nov. 9, 2005) (TracFone witness Brecher). TracFone's services are offered on a pay-as-you-go, no-contract basis. Id.

10. TracFone believes consumers routinely make pricing and provider selection comparisons based on vendor's advertised rates. TracFone Initial Brief p. 3 (Nov. 21, 2005).

11. TracFone's charges to its subscribers contain all wireless taxes and fees. See TracFone's Post-Hearing Exhibit p. 3, citing TracFone's website.

12. TracFone remitted E911 fees to the PSC during 2000 through 2003. See TracFone ltr. (June 30, 2005).

13. Between February 2000 and October 2003, TracFone calculated the West Virginia wireless E911 fees as follows: monthly E911 fee x number of active West Virginia [\*52] customers. TracFone's Post-Hearing Exhibit p. 3.

14. TracFone's attorney testified that these amounts were remitted from TracFone's own earnings. Tr. p. (Nov. 9, 2005); See also TracFone's Post-Hearing Exhibit p. 4.

15. Since TracFone markets its charges as including all government fees and taxes, it is reasonable to reject TracFone's position that the E911 fees it has remitted to the PSC came not from its subscribers but from TracFone's own earnings.

16. Although TracFone argues strenuously that it is not able to calculate the wireless E911 fee because TracFone does not have access to real time data regarding its subscribers, the Commission should reject this position because TracFone was able to calculate and remit the fee between February 2000 and October 2003.

17. Virgin Mobile remitted E911 fees to the PSC from 2001 to 2004. See Virgin Mobile ltr. (Aug. 5, 2005).

18. Case Number 04-1285-C-GI was dismissed without prejudice, upon the ALJ noting that the E911 Council failed to respond to Staff's recommendation to dismiss the proceeding. Rec. Dec. pp. 2-3 (May 4, 2005, final May 24, 2005).

19. Case Number 05-1303-C-GI was opened to examine the issues raised in Case Number [\*53] 04-1285-C-GI, including the Commission's jurisdiction.

20. In the pending case, OnStar, the E911 centers, the CAD and Commission Staff do not object to Commission jurisdiction. TracFone, Virgin Mobile, New Cingular and American Cellular object to Commission jurisdiction.

21. The Commission's Emergency Telephone Service Rules describe how the wireless E911 fee is to be collected from customers and remitted to the Commission. Rule 4.3 requires each provider to "bill the currently applicable E911 fee to each valid retail CMRS subscription monthly." Rule 4.4 requires the E911 fee to appear as a "separate line item on the monthly billing statement." Rule 5.1 requires the providers to remit the E911 fees, minus 3% as a billing and collection fee, to the Commission around the 25th of each month. Rule 5.4 requires the CMRS provider to file a report reflecting the total E911 fees billed and collected, when the CMRS provider remits the E911 fees each month.

22. To the extent that the wireless providers do not provide monthly billings, they argue that they are exempt from the statutory requirement to collect the wireless E911 fee from their customers.

### CONCLUSIONS OF LAW

1. The Commission [\*54] granted the *pro hac vice* motion of TracFone's Washington counsel in the 2004 case, and it is reasonable to also grant the motion in this proceeding.

2. Rule 12.6 of the Commission's Rules of Practice and Procedure permits intervention, in pertinent part, as follows:

(a) Any person having a legal interest in the subject matter of any hearing or investigation pending before the Commission may petition . . . for leave to intervene in such proceeding . . . Leave will not be granted except on allegations reasonably pertinent to the issues already presented. . . .

We agree with the CAD that its input may be beneficial to the Commission in this case and that this proceeding may affect wireless telecommunications customers. Thus, the CAD has a legal interest in this case. We also find that the CAD's alleged interests, as stated in the petition to intervene, are reasonably pertinent to the issues already presented. Therefore, we will grant the CAD's petition to intervene.

3. The Commission has reviewed the statute which has been in effect since the fees were established, including who the statute is intended to cover and the relevant definitions. In particular, the Commission notes [\*55] that *W. Va. Code § 24-6-6b(a)* requires all commercial mobile radio service providers to collect wireless enhanced E911 fees from each subscriber on a monthly basis, as follows:

Beginning on the first day of January [1998], all CMRS providers, as defined in section two n9 [§ 24-6-2] . . . shall, on a monthly basis, collect from each of their in-state two-way service subscribers a wireless enhanced 911 fee . . . *W. Va. Code § 24-6-6b(d)* requires all CMRS providers to submit those fees to the Public Service Commission, 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 . . .

n9 *W. Va. Code § 24-6-2(1)* defines a CMRS provider as follows:

*"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 real-time, two-way switched voice service that is interconnected with the public switched network, and includes resellers of any commercial mobile radio service.*

[\*56]

Upon a plain reading of the statutes, the Commission concludes that the Legislature intended each CMRS provider to charge its customers, including those who subscribe to prepaid services, the E911 fee and to remit the same to the Commission. The wireless carriers' duty to collect and remit the E911 fee does not turn upon the particular billing or collection mechanism that the wireless carrier employs with respect to its customers. Thus, all wireless providers are

statutorily required to collect West Virginia's wireless E911 fee each month from their subscribers and to remit those fees to the PSC.

4. The E911 statute applies equally to prepaid and postpaid service.

5. The E911 statute applies without regard to the technology used to provide wireless service.

6. The Legislature's imposition of the wireless E911 fee did not and does not prevent TracFone from entering the West Virginia wireless market.

7. TracFone is correct that Commission rules cannot amend the wireless E911 statutes. TracFone's Initial Brief p. 8 (Nov. 21, 2005). Similarly, Staff is correct that an administrative body cannot issue a regulation which limits the statute being administered. See *Eastern Gas & Fuel Assoc. v. W. Va. Dept. of Employment Security*, 144 W. Va. 229, 107 S.E.2d 618 (1959); [\*57] *Ney v. State Workmen's Comp. Comm'r*, 171 W. Va. 13, 297 S.E.2d 212 (1982); *Rowe v. W. Va. Dept. of Corrections*, 170 W. Va. 230, 292 S.E.2d 650 (1982). Therefore, the Commission must reject the wireless providers' arguments that they are not required to collect the E911 fees from their customers and remit those fees to the PSC because the Commission's rules address monthly bills. The lack of a PSC rule which expressly addresses prepaid service does not remove a prepaid provider's duty to comply with the statute.

8. The Commission will consider revising its rules to clarify that the statutory duty to collect and remit the wireless E911 fee does not depend upon how the providers charge their customers for wireless services. The first step in those deliberations should be a meeting of stakeholders to attempt to develop consensus language to revise the rules. The Commission appreciates the several proposals which were made in this proceeding, but, to date, the Commission notes that a consensus has not emerged.

9. TracFone and Virgin Mobile have stopped remitting their customers' wireless E911 fees [\*58] to the Commission. As TracFone and Virgin Mobile have been and continue to be required to collect and remit the wireless E911 fees, pursuant to *W. Va. Code § 24-6-6b(a)*, TracFone and Virgin Mobile are not entitled to any refund of the amounts they have previously remitted to the PSC.

10. To the extent that any wireless carrier has not remitted to the Commission the wireless E911 fees, such carrier shall promptly remit the fees to the Commission. Moreover, such carriers shall collect and remit those statutorily-required fees on a going-forward basis.

11. It is not necessary to accumulate all of the data requested in the Commission's questions to consider the legal question of whether the Commission has jurisdiction over prepaid wireless providers regarding the statewide wireless enhanced 911 fee. Therefore, the Commission should deny TracFone's motion to compel.

12. The Commission rejects the providers' arguments that the issue of the Commission's jurisdiction was settled in Case Number 04-1285-C-GI because that case was expressly dismissed without prejudice and because the law is well settled, as Staff and the CAD point out, that *stare* [\*59] *decisis* is of limited application in administrative proceedings. Furthermore, the issue of whether TracFone and Virgin Mobile were entitled to refunds was not before the Administrative Law Judge. Finally, the Commission has an on-going obligation to evaluate regulatory policies, in terms of serving the public interest, in the performance of its duties.

13. The Commission does not agree that it is prevented from considering its jurisdiction unless there has been a substantial change in circumstances. However, if that were required, there has been a substantial change in circumstances because of the exploding nature of cell phone usage for regular and emergency calls and because two CMRS providers have ceased paying the wireless E911 fee and are seeking refunds of the fees which have been remitted, either circumstance alone being significant enough to allow the Commission to consider its jurisdiction.

14. In this case, representatives of county commissions and a state police officer have urged the Commission to require CMRS providers, including prepaid providers, to collect and remit the E911 fees. Pursuant to *W. Va. Code § 24-6-7*, the Commission [\*60] is authorized to resolve conflicts between county commissions, the state police and telephone companies as follows:

In the event that a conflict arises between . . . a telephone company or companies and a county commission or commissions, or between the department of public safety and any of the foregoing entities . . . the public service commission, upon application by such county commission, telephone company or department of public safety shall resolve such conflict.

**ORDER**

IT IS THEREFORE ORDERED that TracFone's *pro hac vice* motion is granted.

IT IS FURTHER ORDERED that the CAD's motion to intervene is granted.

IT IS FURTHER ORDERED that TracFone's and Virgin Mobile's motions for refunds are denied.

IT IS FURTHER ORDERED that TracFone's motion to compel is denied.

IT IS FURTHER ORDERED that stakeholders shall meet and discuss language to revise the Commission's Rules and Regulations Governing Emergency Telephone Service, 150 C.S.R. Series 25, concerning the collection of the wireless E911 fees from subscribers.

The stakeholders shall file a report on or before February 10, 2006, which, at a minimum shall identify the participants and state whether the parties [\*61] have been able to reach consensus on revised rule language to propose to the Commission. If agreed rule language has been developed, the report shall contain such proposed language. If agreement has been reached only in principle, the shareholders may request additional time to develop agreed language. If agreement has not been reached, the report shall contain the respective minority and majority positions, including proposed language from each position. The task force shall also develop a mechanism to identify the carriers who are subject to the E-911 fee provisions of the statute. Dannie Walker of Commission Staff shall coordinate the initial meeting and chair the election of a group leader. The Commission expects, at a minimum, that all county commissions, all E911 centers, Commission Staff, the Consumer Advocate Division of the Commission, and all telecommunications providers operating in West Virginia will be provided notice of the initial meeting and an opportunity to participate in the stakeholders meeting(s) and report.

IT IS FURTHER ORDERED that Case Number 05-1303-C-GI is removed from the Commission's docket.

IT IS FURTHER ORDERED that Case Number 06-0076-C-GI is opened [\*62] to consider, among other things, a stakeholder report regarding revisions to the Commission's Emergency Telephone Service Rules to clarify that the statutory duty to collect and remit the wireless E911 fee does not depend upon how wireless providers charge their customers for wireless services.

IT IS FURTHER ORDERED that the Commission's Executive Secretary shall serve a copy of this order by first class U.S. Mail upon all parties to this case and to Case Number 04-1285-C-GI, as well as upon all wireless carriers and resellers operating in the State of West Virginia as well as upon On Star 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.

IT IS FURTHER ORDERED that the Commission's Executive Secretary serve a copy of this order upon Commission Staff by hand delivery.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Communications Law Telephone Services Wireless Services Communications Law U.S. Federal Communications Commission Jurisdiction Energy & Utilities Law Administrative Proceedings Public Utility Commissions Authority