Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
TracFone Wireless, Inc.	)	WC Docket No. 11-42
Petition for Declaratory Ruling	)	
	)	

COMMENTS OF NTCA–THE RURAL BROADBAND ASSOCIATION

I. INTRODUCTION AND SUMMARY

NTCA–The Rural Broadband Association[1] ("NTCA") submits these comments in response to the Wireline Competition Bureau's request for comment[2] on TracFone's Wireless, Inc.'s ("TracFone's") Emergency Petition for Declaratory Ruling filed October 23, 2014 (the "Petition"). In its Petition, TracFone requests that the Commission issue a declaratory ruling on an emergency basis that state laws and regulations that impose 911 taxes and fees on low-income Lifeline customers who receive non-billed wireless Lifeline service funded exclusively by the federal Universal Service Fund violates federal law. TracFone asks the Commission to issue a declaratory ruling preempting enforcement of such laws and regulations pursuant to the Supremacy Clause of the U.S. Constitution and Section 253 of the Communications Act of 1934, as amended. TracFone has offered no convincing argument or legal support for its assertion that

[1] NTCA represents nearly 900 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service local exchange carriers and broadband providers, and many provide wireless, video, satellite, and/or long distance services as well.
[2] Wireline Competition Bureau Seeks Comment on TracFone Wireless Inc.'s Emergency Petition for Declaratory Ruling, DA 11-1624, WC Docket No. 11-42 (Rel. Nov. 7, 2014).

the Commission should preempt the state's authority to tax or implement fees for 911 service and its petition should be rejected.

TracFone, unlike many other providers who offer service to low-income Lifeline consumers at a discounted rate, makes the affirmative choice to offer its Lifeline wireless service at no cost to its customers,[3] supporting its Lifeline business entirely through the federal Universal Service Fund. TracFone also offers a prepaid wireless telecommunications service. While TracFone does not currently bill any of its customers on a monthly basis, nothing other than its own business decision prevents it from doing so – and to allow TracFone to dodge 911 assessments while others remain subject to such assessments would represent a substantial and one-sided regulatory "thumb on the scale" in an otherwise competitive marketplace.

Beyond the competitive issues that are entirely of TracFone's own making, there is the essential question of the underlying purpose of the assessments. Alabama and Indiana have determined that it is appropriate to impose a 911 tax or fee on all consumers who benefit from the availability of wireless 911 service, including TracFone's subscribers. TracFone asserts that the state determinations should be preempted under two legal theories: 1) they violate the Supremacy Clause of the U.S. Constitution, because they conflict with Commission rules; and 2) they are contrary to Section 253 of the Communications Act, as amended (the "Act").[4]

Under the Supremacy Clause, a state law that conflicts with a federal law is preempted.[5] Conflict arises when it is impossible to comply with both the state and federal regulations (*i.e.*, state law forbids something that federal law requires), or when the state law imposes an obstacle

[3] Petition, p. 3.
[4] Petition, pp 12- 21.
[5] *Gibbons v. Ogden*, 22 U.S. 1 (1824).

to the achievement of Congress's discernible objectives.[6] TracFone argues that the 911 tax conflicts with Section 54.403 of the Commission's rules[7] and with the Congressional objective of Section 254(b) of the Communications Act.[8]

The Commission's rules regarding the Lifeline program stem from Section 254(b) of the Act. This section of the law codifies universal service principles enacted by Congress, including that "[c]onsumers in all regions of the nation, including low-income consumers . . . have access to telecommunications and information services, . . .that are reasonably comparable to rates charged for similar services in urban areas."[9] The Commission implemented this section of the law by creating the Lifeline program which offers a discount to make service more affordable for low-income consumers. There is no provision in the law or regulation that mandates that providers of Lifeline service offer the service for free. Instead, providers who offer Lifeline receive a payment for each qualified Lifeline consumer from the Universal Service Fund and that payment is to be passed on to the eligible consumer in the form of a discounted service.

Section 54.403 of the Commission's rules require that the "full amount" of the federal Lifeline support provided to Lifeline providers is to be passed through to each of their qualifying low-income consumers.[10] TracFone asserts that it might pay the state fee by reducing the free monthly airtime minutes afforded each customer per month, but that would violate Commission regulation because the full amount of support would not be passed on. But there is no Commission rule or regulation that prevents TracFone from collecting fees from its subscribers or developing other practical ways to pay the state tax consistent with law and regulation, so long

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[6] *Gate v. National Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 89 (1992).
[7] 47 C.F.R 54.403
[8] 47 U.S.C. § 254(b)(3).
[9] 47 U.S.C. §254(b)(3)
[10] 47 C.F.R. § 54.403.

as the federal benefit is passed through. The fact that TracFone does not collect a fee from its subscribers does not make it impossible to do so, nor does the imposition of the nominal 911 fee make it impossible for TracFone to offer a Lifeline supported service. Many other wireless carriers offer Lifeline supported services AND pay state mandated 911 fees. Arguably, it is impossible for TracFone to comply with the state laws under its current business model, but because federal law does not mandate "free" service of the kind that TracFone chooses solely of its own accord to offer, there exists no conflict between federal law or its intent and state law that would warrant federal preemption under the Supremacy Clause.

Alternatively, TracFone argues that Section 253 of the Act preempts the state 911 fees and taxes because they limit TracFone's ability to fairly compete in the Lifeline service market.[11] Section 253(a) of the Act proscribes state or local laws that "may prohibit or have the effect of prohibiting the ability of any entity to provide an interstate or intrastate telecommunications service."[12] TracFone's argument appears to be that because it does not directly bill its customers, it would have to pay any 911 fees itself. Therefore, it would be at a competitive disadvantage to other Lifeline providers who also pay the fees, but pass the costs on to their customers through surcharges on the bills. Contrary to TracFone's convoluted assertions, every other provider would be at a competitive disadvantage if TracFone is exempt from the 911 fees and taxes simply because of its pricing strategies while all other providers remain subject to such assessments. According to TracFone's scenario – it, and its Lifeline subscribers, are entitled to a benefit for which no other (equally qualified) provider or low-income consumer could receive.

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[11] Petition, p. 19.

[12] *See Qwest Corporation v. City of Portland, et.al*, 385 F.3d 1236, at 1240-1241 (9th Cir 2004).

Even the most creative mind will have difficulty describing TracFone's desired result as "competitively neutral."

TracFone's argument is further weakened by language in Section 253(b) that provides an exception from federal preemption any requirement imposed by a state to protect the public safety and welfare – including funding mechanisms to support 911 service.[13] While such exception must be competitively neutral, [a state applying the same level of assessment to all providers can hardly be deemed "competitively [un]neutral." TracFone's competitive neutrality claims under Section 253 are outlandish and worthy of no consideration.

TracFone has offered no plausible legal or policy argument to support its assertion that the Commission should preempt a state's imposition of 911 taxes or fees because such imposition conflicts with TracFone's choice of business plan. As such, the emergency petition for declaratory ruling should be denied.

Respectfully submitted,

By: /s/ Jill Canfield
Jill Canfield
Vice President, Legal & Industry
Assistant General Counsel

4121 Wilson Boulevard, Suite 1000
Arlington, VA 22203
jcanfield@ntca.org
703-351-2000 (Tel)
703-351-2001 (Fax)

[13] 47 U.S.C. § 253(b)