

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
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TRACFONE WIRELESS, INC.) Docket No. 11-42
Petition for Declaratory Ruling)
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CMRS BOARD'S COMMENTS TO
TRACFONE WIRELESS, INC.'S
EMERGENCY PETITION FOR DECLARATORY RULING

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Comes the Commonwealth of Kentucky Commercial Mobile Radio Service Emergency Telecommunications Board ("CMRS Board"), by counsel, and submits its comments to TracFone's Emergency Petition for Declaratory Ruling.

In 2008, the FCC designated TracFone as an Eligible Telecommunications Carrier ("ETC"), eligible only for Lifeline support, in designated service areas (FCC 08-100). The limited ETC designation was conditioned upon TracFone's certification in each state that "it is in full compliance with any applicable 911/E911 obligations, including obligations relating to the provision, and support, of 911 and E911 service." The FCC required TracFone to obtain the required certification from each PSAP where it would provide Lifeline service.

TracFone describes itself as the "nation's leading provider of Lifeline service" and now requests that the Commission issue a declaratory ruling preempting state laws and regulations that impose 911 taxes and fees on Lifeline customers. Although the petition is directed specifically at Alabama and Indiana 911 taxes, TracFone asserts that a "declaratory ruling in this proceeding should address all states' efforts to tax federal Lifeline benefits" (TracFone Petition, p. 21, f.n. 48).

Both Alabama and Indiana have enacted statutes that require retailers to collect 911 service charges from customers who purchase prepaid phones and airtime at the point-of-sale. Both states recently enacted regulations/legislation to require 911 service charges to be paid for Lifeline customers. The Alabama regulation promulgated by the state's 911 Board states that a CMRS provider who has been designated as an ETC is required to collect service charges from Lifeline subscribers [585-X-4-.05], while the

Indiana statute states that the ETC's are liable for the prepaid wireless charge with respect to prepaid wireless service [Indiana Code 36-8-16.6-11(d)].

TracFone claims that states should not be allowed to impose 911 service charges on Lifeline service because Lifeline customers receive wireless service at no charge and it is not feasible for ETC's to collect the service charges from the subscribers. Thus, TracFone asserts that state laws currently in place in Alabama and Indiana that impose 911 fees on Lifeline customers require TracFone to pay the 911 fees from its own resources. TracFone claims that other Lifeline providers who do not provide free Lifeline service are able to collect the 911 charge through billed surcharges. Since TracFone is unable to collect the 911 fees from its customers, TracFone argues that is treated differently than other prepaid providers. Therefore, TracFone alleges that the Alabama and Indiana statutes and regulations are not competitively neutral and are preempted by the Supremacy Clause and by Section 253 of the Telecommunications Act of 1996.

The CMRS Board believes that 911 service charges should be remitted by TracFone for all of its customers, including Lifeline customers, in Kentucky and in any other states that have enacted statutes and regulations requiring service charges to be remitted to support the 911 system. The Board's mantra is "every device (and technology)" capable of initiating a 9-1-1 "call" should support the providing of 911 service by paying the state 9-1-1 fee and that the fee should be uniform. In the CMRS world this means all cell phones would pay the same state 9-1-1 fee regardless of whether minutes used are provided "prepaid," "postpaid," or free. TracFone receives \$9.25 per month from the federal Universal Service Fund ("USF") for each free Lifeline

customer and is required to provide the customers with airtime minutes valued at \$9.25 per month. State statutes that require ETC's to remit 911 service charges for Lifeline customers are not preempted by the FCC rule that requires the ETC's to pass through the full amount of USF reimbursement to customers. The fact that TracFone is unwilling or unable to collect the service charge from its free Lifeline customers and is required to pay the service charges from its revenues does not meet the standard for federal preemption set forth in Section 253 of the Telecommunications Act.

A. United States Federal Courts Both District and Appellate Have Rejected TracFone's Claims That it is Treated Differently Than Other Providers Who Collect 911 Service Charges from their Customers

The CMRS Board was involved with litigation against TracFone which resulted from TracFone's attempts to avoid remitting 911 service charges to the CMRS Board. TracFone claimed that it could not collect the service charges from its prepaid customers; therefore, it was exempt from the statutory collection requirements.

The CMRS Act (KRS 65.7621 through 65.7643) enacted by the Kentucky legislature created the CMRS Board and established a CMRS Fund to be overseen by the Board. The CMRS Board is required by KRS Chapter 65 to collect a service charge from all wireless telephone connections in the Commonwealth of Kentucky and to place these surcharges in the CMRS Fund to maintain the 911 infrastructure in the Commonwealth. The CMRS Act required all providers of wireless services to collect and remit 911 service charges to the CMRS Board.

The Kentucky legislature amended the CMRS Act in 2006 to clarify that all providers, including prepaid providers, were required to remit 911 service charges [KRS 65.7635]. Under the 2006 amendment, the prepaid providers have the option of a)

collecting the service charges by decrementing airtime minutes equal in value to the fee from their customers or b) dividing their total earned prepaid wireless telephone revenue received from prepaid customers each month by \$50.00, multiplying the quotient by the service charge amount (.70 cents), and paying the resulting amount to the CMRS Board (the formula method of remittance set forth in KRS 65.7635 (b) is hereinafter referred to as "Option B" of KRS 65.7635). The provider pays the calculated amount of service charge from its own resources under Option B. TracFone at their selection pays the service charge to the Board using this option as do most prepaid service providers in Kentucky.

TracFone is the largest provider of prepaid wireless telephone services to customers in the Commonwealth of Kentucky and throughout the United States. TracFone initially paid 911 service charges to the CMRS Board but stopped paying those service charges prior to the 2006 amendments to the CMRS statutes, claiming that since TracFone could not collect the service charges from customers, it should not be required to remit those service charges to the CMRS Board. TracFone continued to refuse to remit service charges even after the CMRS Act was revised in 2006 to state specifically that prepaid providers were required to remit 911 service charges.

The CMRS Board filed a lawsuit against TracFone in Kentucky seeking to recover unpaid 911 service charges that TracFone had failed to remit to the CMRS Board. TracFone claimed in the lawsuit, as it does in its Emergency Petition, that it should not be required to remit 911 service charges because it was unable to collect the service charges from its customers. The U.S. District Court for the Western District of Kentucky disagreed with TracFone's position, finding that TracFone was required by

Kentucky statute to remit service charges for prepaid providers, regardless of whether TracFone had the ability to collect the service charges from its customers. *Commonwealth of Kentucky Commercial Mobile Radio Service Emergency Telecommunications Board v. TracFone Wireless, Inc.*, 735 F.Supp.2d 713 (W.D. Ky. 2010) (A copy of the Opinion is attached hereto as Exhibit "1"). The Court rejected TracFone's argument that it did not receive due process or equal protection because it was treated differently than providers who chose to bill on a monthly basis and collect the service charges from their customers.

The District Court reasoned that the Kentucky statutes require all providers of wireless service to pay 911 service charges to the CMRS Board. The statute did not provide an exemption for prepaid providers. Therefore, TracFone was not excused from remitting those service charges to the CMRS Board merely because it chose to operate under the prepaid business model, rather than billing customers on a monthly basis.

The United States Court of Appeals for the Sixth Circuit upheld the trial court's decision that TracFone was required to remit 911 service charges pursuant to Kentucky statute which required all providers to remit service charges, regardless of its ability to collect the service charges from its prepaid customers. TracFone could choose whether to collect the service charges from customers or remit from revenues based on the formula in Option B. *Commonwealth of Kentucky Commercial Mobile Radio Service Emergency Telecommunications Board v. TracFone Wireless, Inc.*, 712 F.3d 905 (6th Cir. 2013) (A copy of the Opinion is attached hereto as Exhibit "2").

The Kentucky federal court cases are instructive and the reasoning of the courts is pertinent to TracFone's Emergency Petition filed with the FCC. TracFone essentially is making the same argument it has made in the Federal District and Appellate Courts where it failed to remit 911 service charges: TracFone is unable to collect 911 service charges because of its business model and is treated differently than other ETC's who are able to bill their customers for the charges because it is required to pay these charges from its revenues. This argument should be rejected by the FCC, as there is no basis in federal or state law for exempting providers such as TracFone from remitting 911 fees for their Lifeline customers.

B. State Statutes Requiring 911 Service Charges for Lifeline Customers Are Not Preempted by Federal Law

TracFone argues in its Emergency Petition that 911 service charges should not be imposed upon low-income consumers who receive free Lifeline services. TracFone asserts that Lifeline is provided to low income adults and children and that these low-income consumers are adversely affected by the 911 charges.

Although TracFone implies in its Emergency Petition that its Lifeline customers who receive free service are required to pay the 911 service charges, this is not true. TracFone acknowledges in footnote 24 that in Alabama, ETC's are required to collect the 911 charge from customers and in Indiana, the ETC's are liable for paying the charges. TracFone and other prepaid providers typically do not collect service charges from their customers because they chose a prepaid model rather than billing

customers on a monthly basis.¹ If TracFone and other prepaid providers choose to use a portion of the federal \$9.25 monthly benefit to pay 911 charges, rather than providing the full amount of the benefit in airtime for their customers, then TracFone is in violation of the Commission's rules which require ETC's to pass through to the customer the entire monthly Lifeline benefit of \$9.25. If the Lifeline benefits to TracFone's customers are "unlawfully decreased" below the federally mandated benefit, the action is being taken by TracFone and not the state entities to which the 911 service charges are remitted.

TracFone claims that state laws which "undermine the delivery of a federal benefits program" should be preempted based on the Supremacy Clause. TracFone's argument is based upon a false premise. The state laws do not undermine delivery of a federal benefits program. Free Lifeline subscribers are required to receive the full benefit of the \$9.25 monthly reimbursement to ETC's. These subscribers receive their benefits – it is TracFone and other ETC's that may be required to pay 911 service charges from revenues. The Lifeline program was not enacted to provide benefits to ETC's but was enacted to provide benefits to low-income consumers who cannot afford to pay for wireless service. Therefore, state laws that impose 911 charges for Lifeline subscribers do not undermine the federal benefits provided to those subscribers.

TracFone also asserts that Section 253 of the Communications Act (47 U.S.C. §253) preempts state laws and regulations imposing a 911 charge on Lifeline service

¹ TracFone claims that it has attempted to collect 911 service charges from its Lifeline customers in Alabama by billing those charges and has only been able to collect from less than 10 percent of those customers (TracFone Petition, p. 20 f.n. 46). However, TracFone does not identify how it attempted to "bill" 911 taxes to its Alabama "no charge, non-billed" Lifeline customers.

because the state laws limit the ability of ETC's offering free Lifeline service to fairly compete in the Lifeline service market. Section 253(a) of the Communications Act provides that no state statute or regulation "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Section 253 further provides the following safe harbor exception:

(b) Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis ... , requirements necessary to preserve and advance universal service, **protect the public safety and welfare**, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

TracFone does not dispute that 911 service charges are necessary to protect the public safety and welfare. However, it claims that for ETC's that provide no-charge Lifeline service, billing and collecting 911 service charges from those customers is impracticable and that the ETC's who provide no-charge service are treated differently than providers of billed Lifeline service, as those providers can collect the service charges from their customers. Thus, TracFone argues that Alabama and Indiana statutes do not impose service charges on a "competitively neutral" basis.

The FCC should not even get to the consideration of the "competitively neutral" issue in the safe harbor provision because TracFone has failed to prove that the Alabama regulation and Indiana statute prohibit TracFone's ability to provide telecommunications service. A party seeking preemption must first prove that there is a prohibition of entry into the telecommunications service market before the state government must be required to prove that a safe harbor provision, i.e., public safety and welfare, of Section 253 is applicable. *Level 3 Communications, LLC v. City of St.*

Louis, Missouri, 477 F.3d 528, 532 (8th Cir. 2007). The party seeking prohibition must show an “**existing material interference with ability to compete in a fair and balanced market**,” not the mere possibility of prohibition. *Id.* at 533.

In addition, the Court in *Global NAPs Inc. v. Verizon New England, Inc.*, 454 F.3d 91 (2nd Cir. 2006) held that a federal agency may preempt state law under Section 253 only if it is acting within the scope of its authority and the agency makes the intent to preempt clear. The FCC rules at issue herein, which require ETC’s to “pass through the full amount of support to the qualifying low-income consumer,” did not state any intent of the FCC to preempt state law regarding 911 fees assessed for Lifeline customers.

Finally, TracFone consistently refers to the 911 service charges as a tax. A tax is not subject to preemption pursuant to Section 253. In *Time Warner Telecom of Oregon, LLC v. City of Portland*, 452 F.Supp.3d 1084 (D. Or. 2006), a telecom provider claimed that a 5% gross revenue fee for using Portland’s right of way should be preempted pursuant to Section 253. The Court noted that there could be no preemption of the gross revenue fee because the Tax Injunction Act, 28 U.S.C. §1341, forbids courts from restraining the assessment of a tax under state law. *Id.* at 1099. *See also, Qwest Corp. v. City of Surprise*, 434 F.2d 1176 (2nd Cir. 2006) (Tax Injunction Act prohibits a court from invalidating state or local taxes on telecommunications providers).

TracFone has failed to show that if it is required to pay 911 service charges for Lifeline customers from its revenues, that this constitutes a material interference with TracFone’s ability to compete with other ETC’s. In fact, TracFone failed to provide any information regarding its overall revenues and the impact of the Alabama and Indiana

statutes on its revenues or ability to compete with other ETC's. TracFone cannot claim that a statute should be preempted merely because the statute requires TracFone to pay fees from its revenues. It must show a material interference with its ability to compete and TracFone has completely failed to make any such showing in its Petition for Emergency Relief.

Even if TracFone has shown that the 911 service charges applied to Lifeline customers in Alabama and Indiana constitutes a "material interference with its ability to compete in a fair and balanced market," these charges, according to TracFone, are a tax and not subject to restraint or preemption.

C. Kentucky Policies Regarding 911 Service Charges for Lifeline Customers

The CMRS Board's policy consistently has been that all providers of wireless telephone service in the Commonwealth of Kentucky are required to remit 911 service charges to the CMRS Board for all customers, including Lifeline customers. Since Lifeline phone customers can initiate 911 calls, the providers should be required to remit service charges for those customers. The purpose of the service charges is to support the 911 infrastructure in the Commonwealth; therefore, the service charge should apply to all devices which have the ability to access 911 services. The state and federal reimbursements to providers for their Lifeline subscribers are revenues to be factored into the Option B remittance formula established by KRS 65.7635.

The Kentucky Public Service Commission ("KPSC") agrees with the CMRS Board's position. The KPSC has granted ETC status to over twenty applicants in the last four years who sought ETC status for the purpose of participation in the Lifeline program. As part of the condition for obtaining ETC status, the applicants were required

to acknowledge their obligation to pay 911 service charges for all customers, including Lifeline customers² (See, Request for Information and Responses; and relevant portions of various Orders granting ETC status as examples of KPSC's position, attached hereto as collective Exhibit "3").

The Lifeline program significantly increased nationwide from 2009 through 2012. Lifeline reimbursements to providers more than doubled in just three years from \$775 million in 2008 to over a billion dollars (\$1,640,000,000) in 2011. Lifeline reimbursements peaked at \$2 billion in 2012 before the program was reformed to reduce abuse and decreased to \$1,790,000,000 in 2013. TracFone alone has received federal reimbursements for Lifeline in excess of \$2.156 billion, over 23% of the total Lifeline reimbursements made since 2009.

The CMRS Board currently receives approximately \$460,000 in 911 service charges for Lifeline customers in Kentucky. This money assists the CMRS Board in maintaining the 911 infrastructure and allows all telecommunications customers, including Lifeline customers, to have the ability to access the 911 system in an efficient manner in emergency situations. The CMRS Board is strongly opposed to a declaratory judgment which would in any way inhibit its ability to receive 911 service charges for Lifeline customers in Kentucky.

In conclusion, there are over 12 million active Lifeline cell phones "out there" at any given time. All of these Lifeline cell phones have the capacity to initiate a 911 call;

² The KPSC also requires the ETC's to acknowledge they will pay a 4¢ per connection fee for a "deaf and hard of hearing" program and an 8¢ per connection fee for the state's USF program which includes state Lifeline funds. Of note, TracFone has refused to pay a KPSC assessment placed on all regulated utilities based on each company's respective reporting of its state revenues. The KPSC has ruled that TracFone is a utility and required to report its earnings and pay the appropriate assessment. TracFone has appealed the KPSC decision to state court.

this impacts the 911 system in each state; thus, these subscribers should be supporting the 911 system. If the FCC grants TracFone's petition for emergency relief and declaratory judgment, states that want to collect a 911 fee on Lifeline services could lose hundreds of thousands of dollars in potential revenues from a segment of the wireless world, i.e., prepaid, that is already underpaying their fair share of the cost to provide 911 services. The CMRS Board's position is that TracFone receives federal reimbursement for providing Lifeline to its customers; the Lifeline customers have the ability to access 911 services; and providers should be required to remit service charges for Lifeline customers, whether they are able to collect those charges from customers or remit the charges from their revenues.

Respectfully submitted,



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