

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| TRACFONE WIRELESS, INC. |) | Docket No. 11-42 |
| Petition for Declaratory Ruling |) | |
| |) | |
| _____ |) | |

**STATE OF INDIANA’S COMMENTS IN OPPOSITION
TO TRACFONE WIRELESS, INC.’S
EMERGENCY PETITION FOR DECLARATORY RULING**

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SUMMARY

The State of Indiana hereby respectfully requests that the Commission deny TracFone Wireless, Inc.'s October 23, 2014 request for a declaratory ruling on an emergency basis regarding state laws and regulations that impose 911 charges on providers of no-cost prepaid wireless Lifeline services.

A working 911 system is essential to the effectiveness of public emergency services. Like most states, Indiana funds its 911 service through a series of charges imposed on users of telecommunications services. Part of this system of fees is the “Enhanced Prepaid Wireless Charge” at issue here (“911 Charge” or “the Charge”), which is assessed on all prepaid wireless transactions. All monies collected through this Charge and the other 911 fees go into a fund that supports both state and local 911 access and services in Indiana.

The federal Lifeline program, whose benefits are distributed through “Eligible Telecommunications Carriers” (ETCs), provides a subsidy to carriers so that they may offer free or reduced-cost phone service to low-income consumers. Because ETCs provide telecommunications services and, by federal law, must provide access to 911 services, Indiana’s 911 Charge applies to transactions subsidized by Lifeline as well.

Contrary to TracFone’s claims, Indiana’s 911 Charge does not reduce the benefit received by Lifeline customers. Rather, the Charge is a federally protected exercise of the state’s police power to fund its statewide 911 system. *See, e.g.*, 47 U.S.C. § 615a-1(f)(1). As such, not only is Indiana’s 911 Charge permissible, but TracFone’s liability for the Charge does not impermissibly reduce the value passed through the service to Lifeline customers. Instead, the 911 Charge provides Lifeline customers the benefit of 911 access—thereby expanding the goals of universal service. Accordingly, using the Lifeline subsidy to pay this amount gives the customer

the full intended benefit of the program by covering a cost of obtaining phone service that the customer would otherwise have to pay. Thus, TracFone may rightly use the subsidy it receives from the Lifeline program to cover the 911 Charge.

TracFone's request that the Commission preempt Indiana's 911 Charge must fail, because the Commission lacks the authority to do so. First, the Charge does not fall within the Telecommunications Act's preemption clause. Section 253(a) of Title 47 of the U.S. Code narrowly preempts only those state laws that actually have the effect of prohibiting an entity's ability to provide telecommunications service. Indiana's 911 Charge does not create any barrier to entry, nor does it prevent TracFone from providing Lifeline services.

Second, even if Indiana's 911 Charge had this effect, the Charge is a competitively neutral regulation that is necessary for public safety and welfare. Access to 911 services is essential to protect the public safety and welfare. The 911 Charge serves the crucial role of funding these essential services. The Charge is both competitively neutral and necessary for competitive neutrality: since all Indiana telecommunications providers, including all prepaid wireless sellers and all ETCs, are subject to a 911 Charge, exempting TracFone would violate the very principle of competitive neutrality, privileging no-cost Lifeline services over other plans, and elevating prepaid wireless service over other services and technologies. TracFone should not be permitted to hide behind a veil of "competitive neutrality" in seeking this type of advantage for itself. In addition, Indiana's 911 Charge is consistent with 47 U.S.C. § 254's universal service provisions: funding 911 access supports the goals of providing both "quality services . . . at just, reasonable, and affordable rates," and access for "consumers in all regions of the Nation, including low-income consumers." 47 U.S.C. § 254(b)(1)-(2).

Therefore, Indiana's 911 should not and may not be preempted.

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**STATE OF INDIANA’S COMMENTS IN OPPOSITION
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EMERGENCY PETITION FOR DECLARATORY RULING**

The State of Indiana, by its Attorney General, respectfully submits these comments in opposition to TracFone Wireless, Inc.’s Emergency Petition for Declaratory Ruling, filed October 23, 2014.

A working 911 system is essential to the effectiveness of public emergency services. Like most states, Indiana funds its 911 service through a series of charges imposed on users of telecommunications services. Part of this system of fees is the “Enhanced Prepaid Wireless Charge” at issue here (“911 Charge” or “the Charge”), which is assessed on all prepaid wireless transactions. All monies collected through this Charge and the other 911 fees go into a fund that supports both state and local 911 access and services in Indiana.

The federal Lifeline program, whose benefits are distributed through “Eligible Telecommunications Carriers” (ETCs), provides a subsidy to carriers so that they may offer free or reduced-cost phone service to low-income consumers. ETCs receive reimbursement of up to \$9.25 per month from the Lifeline program for each eligible customer to whom they provide

service. Because ETCs provide telecommunications services and, by federal law, must provide access to 911 services, Indiana's 911 Charge applies to transactions subsidized by Lifeline as well. When TracFone was approved to be an ETC, it agreed to abide by the 911 requirement and remit the Charge. *See* Petition of TracFone Wireless, Inc. for Designation as an Eligible Telecomm. Carrier, Cause Nos. 41052 ETC 54, 43732, at 18 (Ind. Util. Regulatory Comm'n June 29, 2011) (order on ETC application) (hereinafter "IURC TracFone ETC Order") (attached as Exhibit 1); Petition of TracFone Wireless, Inc. for Designation as an Eligible Telecomm. Carrier, Cause No. 41052 ETC 54, at 3-4 (Ind. Util. Regulatory Comm'n Aug. 11, 2011) (TracFone compliance plan) (hereinafter "TracFone Compliance Plan") (attached as Exhibit 2) ("TracFone Wireless will also continue to pay applicable fees, such as . . . the wireless emergency enhanced 911 fee pursuant to Ind. Code 36-8-16.5-30.5 . . .").¹ TracFone declined to appeal this requirement in the Indiana Court of Appeals. *See* Ind. Code § 8-1-3-1.

Now, as part of a broad and aggressive nationwide scheme of using litigation as a means of avoiding its statutory and agreed-to obligations, TracFone seeks this Commission's help to gain an advantage for its business model of providing no-cost, prepaid wireless Lifeline service over those of its reduced-cost Lifeline competitors.² TracFone argues that the Charge

¹ Succeeded by Ind. Code § 36-8-16.6-11.

² *See Ky. Commercial Mobile Radio Serv. Emergency Telecomm. Bd. v. TracFone Wireless, Inc.*, 712 F.3d 905 (6th Cir. 2013) (losing on statutory interpretation argument); *TracFone Wireless, Inc. v. Dep't of Treasury*, Docket Nos. 275065, 275942, 2008 WL 2468462 (Mich. Ct. App. June 19, 2008) (unpublished opinion) (prevailing on same); *TracFone Wireless, Inc. v. Neb. Public Serv. Comm'n*, 778 N.W.2d 452 (Neb. 2010) (losing on same); *TracFone Wireless, Inc. v. Comm'n on State Emergency Commc'ns*, 397 S.W.3d 173 (Tex. 2013) (prevailing on double taxation theory because Texas has a separate fee for prepaid wireless); *TracFone Wireless, Inc. v. Wash. Dep't of Revenue*, 242 P.3d 810 (Wash. 2010) (en banc) (losing on statutory interpretation argument); *TracFone Wireless, Inc. v. Wash. State Dep't of Revenue*, 179 Wash App. 1036 (Wash. Ct. App. 2014) (unpublished opinion) (losing as moot attempt to include an excise tax as part of the retail price rather than as a separate charge). Although the majority of decided cases have been initiated by TracFone, other prepaid wireless providers have employed

impermissibly reduces the value of the Lifeline benefit to Lifeline customers. Alternatively, TracFone seeks the shelter of federal “preemption” to rid itself of the need to comply with the Charge. Should its arguments succeed, TracFone and potentially other no-cost prepaid wireless Lifeline providers would gain a competitive advantage over other Lifeline providers who must still pay the Charge.

Neither of TracFone’s arguments withstands scrutiny, however. Indiana’s 911 Charge applies without regard to whether a customer’s prepaid wireless service is fully covered by Lifeline, partially subsidized by Lifeline, or completely the customer’s responsibility. Using the Lifeline funds to pay this amount, therefore, gives the customer the full intended benefit—it covers a cost of obtaining phone service that the customer would otherwise have to pay. Thus, contrary to TracFone’s claims, the payment of the 911 Charge through the Lifeline subsidy *expands* the goals of universal service in a competitively neutral manner.

Preempting Indiana’s 911 Charge with respect to no-cost Lifeline prepaid wireless services would privilege one technology and business model—no-cost prepaid wireless Lifeline services—over those of all other Lifeline providers. In so doing, the Commission—not Indiana—would violate the statutory principle of competitive neutrality. *See* 47 U.S.C. § 253(b); Fed.-State Joint Bd. on Universal Serv., CC Docket No. 96-45, *Declaratory Ruling*, 15 F.C.C. Rcd. 15168, 15176 ¶ 19 (2000) (*Western Wireless Declaratory Ruling*) (citing Fed.-State Joint Bd. on Universal Serv., CC Docket 96-45, *Report and Order*, 12 F.C.C. Rcd. 8776, 8801 ¶ 47 (1997) (hereinafter *Universal Service Order*)).

the same strategy. *See, e.g., T-Mobile South, LLC v. Bonet*, 85 So. 3d 963 (Ala. 2011) (losing on statutory interpretation argument, TracFone filing an amicus brief); *Virgin Mobile USA, LP v. Ariz. Dep’t of Revenue*, 282 P.3d 1281 (Ariz. Ct. App. 2012) (losing on same); *Virgin Mobile U.S.A., L.P. v. Commonwealth ex rel. Commercial Mobile Radio Serv. Telecomm. Bd.*, Nos. 621, 626, 2014 WL 4116480 (Ky. Aug. 21, 2014) (prevailing on statutory interpretation argument).

For these reasons, the Charge should not be preempted.

ARGUMENT

I. Indiana's 911 Charge Does Not Reduce the Benefit Received by Lifeline Customers

A. The 911 Charge is a federally protected exercise of the state's police power to fund its statewide 911 system

Like most states, Indiana imposes a fee on the purchase of telecommunications services.³ Ind. Code § 36-8-16.7-29(a). The proceeds of this fee are used to “creat[e] and maintain[] a uniform statewide 911 system.” *Id.* The “statewide 911 fee” of \$0.90 is assessed monthly on all non-prepaid telephone (wireless and wired) services. *Id.* § 36-8-16.7-32(a). Prepaid wireless services are subject to the “enhanced prepaid wireless charge” at issue here (“911 Charge” or “Charge”) of \$0.50 per transaction. *Id.* § 36-8-16.6-11. With the exception of ETC-provided service, ultimate liability rests with the user, but the seller of services has a duty to collect the amount of the fee or charge and remit that amount to the statewide 911 board. *Id.* §§ 36-8-16.6-13, -16.7-4, -16.7-34.⁴ ETCs are directly liable for the amount of the Charge on Lifeline-subsidized transactions. *Id.* § 36-8-16.6-11(d). The proceeds of both fees are deposited into a uniform “statewide 911 fund.” *Id.* § 36-8-16.7-29.⁵ The statewide 911 board retains a percentage of the fund's annual proceeds “to develop, operate, and maintain a statewide 911 system,” and

³ See Report To Congress On State Collection and Distribution Of 911 and Enhanced 911 Fees and Charges, 2012 WL 6892830, at *5, ¶ 14 (F.C.C. Dec. 21, 2012); see also *9-1-1 Surcharge—User Fees by State*, Nat'l Emergency Number Ass'n, <https://www.nena.org/?page=911RateByState> (last visited Dec. 5, 2014).

⁴ The significance of this difference is discussed *infra*, Part II.B.2.

⁵ Until 2012, the fees for landline services and for wireless services (including prepaid wireless services until 2010, see P.L.113-2010, § 151) were separate and the proceeds of each went to separate emergency 911 funds: the former went to county or municipal emergency telephone system funds, the latter went to the “wireless emergency telephone system fund.” Ind. Code §§ 36-8-16-5, -13 [repealed by P.L.132-2012, § 11]; *id.* §§ 36-8-16.5-21, -22, -25.5 [repealed by P.L.132-2012, § 12].

distributes the remainder to Indiana’s ninety-two counties for their respective 911 operations. *Id.* § 36-8-16.7-37.⁶

Indiana’s general authority to enact laws promoting public safety, including the Charge at issue here, is unquestioned. *See, e.g., Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (“The promotion of safety of persons and property is unquestionably at the core of the State’s police power”); *see also Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (“[T]he structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.” (internal quotation marks omitted)); *United States v. Morrison*, 529 U.S. 598, 618 (2000) (“[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime”); *Auto. Workers v. Wis. Emp’t Relations Bd.*, 351 U.S. 266, 274 (1956) (“The dominant interest of the State in preventing violence and property damage cannot be questioned.”).

Indiana’s specific authority to impose and collect a fee for 911 services is both recognized and protected by federal law. The Wireless Communications and Public Safety Act of 1999 provides that

[n]othing in this Act, the Communications Act of 1934 (47 U.S.C. 151 et seq.), . . . or any Commission regulation or order shall prevent the imposition and

⁶ These county 911 funds are distributed to 24-hour call centers known as “public safety answering points,” who “receive incoming requests for emergency assistance and relay those requests to an appropriate responding public safety agency.” Ind. Code § 36-8-16.7-20. Permitted uses for the funds include: communications service equipment; necessary hardware, software, and data base equipment; personnel expenses reasonable and necessary for the provision and maintenance of the statewide 911 system; operational costs; an emergency notification system; connectivity to the Indiana data and communications system (IDACS); rates for communication service providers’ enhanced emergency communication system network services; mobile radio equipment used by first responders; up to fifty percent of the costs associated with narrow banding. *Id.* § 36-8-16.7-38(a). Prohibited uses include building expenses and vehicle expenses. *Id.* § 36-8-16.7-38(b).

collection of a fee or charge applicable to commercial mobile services . . . specifically designated by a State [or] political subdivision thereof . . . for the support or implementation of 9-1-1 or enhanced 9-1-1 services, provided that the fee or charge is obligated or expended only in support of 9-1-1 and enhanced 9-1-1 services, or enhancements of such services, as specified in the provision of State or local law adopting the fee or charge.

47 U.S.C. § 615a-1(f)(1).

Indiana’s 911 Charge is exactly the type of state law protected by this section. It applies to the purchase or provision of commercial mobile services—specifically, prepaid wireless services—and the revenue is dedicated solely to creating and maintaining Indiana’s state and local 911 systems. Ind. Code §§ 36-8-16.7-20, -29, -37, -38. TracFone is a self-described and recognized provider of such “commercial mobile services.”⁷ See TracFone Wireless, Inc., Petition for Designation as an Eligible Telecomm. Carrier in the Commonwealth of Mass., CC Docket No. 96-45, at 2 (F.C.C. Nov. 9, 2004) (describing itself as a “reseller of Commercial Mobile Radio Service”); *Ind. Wireless Enhanced 9-1-1 Advisory Bd. v. TracFone Wireless, Inc.*, Cause No. 43524, at 1 (Ind. Util. Regulatory Comm’n. Aug. 4, 2010) (order on motion to dismiss) (attached as Exhibit 3) (recognizing TracFone as a “commercial mobile radio service provider”). The statutory basis for TracFone’s preemption request, 47 U.S.C. §§ 253-254, is part of the Communications Act of 1934 as amended. Furthermore, the above-quoted statute additionally precludes the Commission from issuing a regulation or order to prevent Indiana

⁷ “[C]ommercial mobile service” is defined as “any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public” 47 U.S.C. § 332(d)(1).

The Commission’s term “commercial mobile radio services” has the same definition: “[a] mobile service that is (a)(1) provided for profit, i.e., with the intent of receiving compensation or monetary gain; (2) [a]n interconnected service; and (3) [a]vailable to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or (b) The functional equivalent of such a mobile service described in paragraph (a) of this section.” 47 C.F.R. § 20.3.

from imposing and collecting the Charge. *See* 47 U.S.C. § 615a-1(f)(1). Therefore, the Commission has no authority to preempt Indiana’s 911 Charge with respect to TracFone’s Lifeline services or any other telecommunications services.

All TracFone customers in Indiana are subject to the 911 Charge because they all receive prepaid wireless telecommunications services, regardless of whether a customer’s purchases are subsidized by Lifeline. Ind. Code § 36-8-16.6-11.⁸ Despite TracFone’s choice of words suggesting the contrary, the Charge does not tax the federal benefit provided by the Lifeline program. TracFone does not directly argue this point, and its language suggesting otherwise should be disregarded.

Accordingly, Indiana’s 911 Charge is a valid and federally recognized exercise of the State’s police power to provide for the safety and public welfare of its citizens. The Charge is a fee assessed on the use of telecommunications services. It applies generally to all telephone services, at different rates for prepaid wireless and non-prepaid services. Not only does Indiana have broad and general authority under its police power to levy the Charge, but federal law also grants specific protections that preserve Indiana’s authority in this area.

B. TracFone’s liability for Indiana’s 911 Charge does not impermissibly reduce the value passed through to Lifeline customers

Both by law, *see* Ind. Code § 36-8-16.6-11(d), and by agreement, *see* IURC TracFone ETC Order (Ex. 1) at 18, TracFone is liable to remit Indiana’s 911 Charge. TracFone could have appealed the IURC order within thirty days of the June 29, 2011 decision. *See* Ind. Code § 8-1-3-1. However, not only did TracFone fail to appeal that order, but it also explicitly agreed to

⁸ Of note, in order to be designated as an ETC in Indiana, TracFone has *always* been required to “pay applicable fees, such as the . . . applicable wireless emergency E911 fee pursuant to Indiana Code § 36-8-16.5-30.5.” IURC TracFone ETC Order (Ex. 1) at 18 (citing the predecessor to the current fee structure, which was replaced by the fees described in Ind. Code §§ 36-8-16.6-11, -16.7-32).

“continue to pay applicable fees, such as . . . the wireless emergency enhanced 911 fee pursuant to [Ind.] Code § 36-8-16.5-30.5.”⁹ TracFone Compliance Plan (Ex. 2) at 3-4.

Yet, as it has done with regard to the similar 911 charges of several other states, *see* cases cited *supra* note 2, TracFone attempts to escape its statutory and agreed-to liability, arguing here that the Charge impermissibly reduces the value it passes through to Lifeline customers. Specifically, TracFone argues that reducing the number of minutes included in its free plans would violate its duty to pass along the “full amount” of that support to the customer. *See* Emergency Petition at 14; 47 C.F.R. § 54.403.

This argument, however, does not withstand scrutiny—applying the Charge to ETCs does not reduce the value of the benefit that Lifeline customers receive. Because the Charge applies to all prepaid wireless service, including non-Lifeline plans, Lifeline customers receive a benefit from its payment on their behalf. Additionally, since TracFone is required to provide 911 capabilities regardless of activation status, Lifeline customers receive the benefit from the cost.

1. The 911 Charge provides Lifeline customers the benefit of 911 access

Indiana’s 911 Charge applies to all prepaid wireless service transactions.¹⁰ Ind. Code § 36-8-16.6-11. Were any Lifeline customer to purchase prepaid wireless service outside the Lifeline program, that customer would be liable for, and would pay, the 911 Charge. (In fact, when Lifeline customers purchase additional airtime beyond the free minutes provided each month, they are responsible for the Charge applied to those transactions.) Since the Charge is a cost that the consumer would otherwise have to pay, using a portion of the Lifeline support amount to pay it passes the full benefit to the consumer. There is functionally no difference between the benefit received from paying the Charge and the benefit received from paying for

⁹ Succeeded by Ind. Code § 36-8-16.6-11.

¹⁰ Except if the consumer is the federal government or an agency of the federal government. *See* Ind. Code § 36-8-16.6-11(c).

minutes—the latter cannot be purchased without incurring liability for the former. Thus, when TracFone pays the Charge from the Lifeline subsidy it receives, it directly passes the benefit of that amount to the consumer.

Another reason the Lifeline subsidy can pay the 911 Charge without reducing the benefit to the customer is that Lifeline customers receive the benefit of access to 911 service through the Lifeline-subsidized phone and service. Federal law requires TracFone to provide 911 service to all Lifeline customers, including those who do not have active service. *See* 47 C.F.R. § 54.101(a)-(b); *see also* 47 C.F.R. § 20.18(a), (b) (requiring CMRS providers such as TracFone to provide “[b]asic 911 service”); *Universal Service Order*, 12 F.C.C. Rcd. at 8815 ¶ 72 (recognizing that 911 service is “essential to public safety” and including access to emergency services among supported services for universal service under 47 U.S.C. § 254), *rev’d in part on other grounds*, *Tex. Office of Pub. Util. Counsel v. F.C.C.*, 183 F.3d 393 (5th Cir. 1999). TracFone is thus required to “provid[e] its Lifeline customers with 911 and enhanced 911 (E911) access regardless of activation status and availability of prepaid minutes.” Fed.-State Joint Bd. on Universal Serv., CC Docket No. 96-45, *Order*, 20 F.C.C. Rcd. 15095, 15098 ¶6 (2005) (petition of TracFone Wireless, Inc. for forbearance from certain regulations).

Not only is TracFone required to provide 911 access as part of its Lifeline service, it *advertises* free 911 service among its plan features. *Plan Features*, SafeLink Wireless, https://www.safelinkwireless.com/Enrollment/Safelink/en/NewPublic/plan_features.html.

TracFone therefore believes—or wants its customers to believe—that Lifeline customers receive a benefit from the 911 Charge. Since Lifeline customers receive this benefit with their service, and because the Charge is part of the cost of non-Lifeline prepaid wireless transactions, the

Lifeline support amount can cover the Charge without reducing the benefit received by the Lifeline customer.

The Lifeline regulations further support the use of the Lifeline funds for applicable government charges and fees. The “Lifeline support amount” is defined in 47 C.F.R. § 54.403. TracFone relies on subsection (a), which requires a carrier to “pass through the full amount of [the basic] support [amount] to the qualifying low-income consumer.” But subsection (b) then dictates how that support amount applies to certain federal charges (including “End User Common Line Charges”). When those charges apply, the Lifeline amount covers them *first*. The remaining amount (if any) goes toward the customer’s regular charges. As it immediately follows the “full amount” requirement, subsection (b) indicates that providing the “full amount” of the benefit is consistent with using that benefit to cover applicable fees that would have to be paid anyway. Since Indiana’s 911 Charge applies to *all* prepaid wireless transactions, applying the Lifeline service amount to the Charge satisfies the requirement that TracFone pass through the “full amount” to the Lifeline consumer.

What is more, 911 access is one of the “supported services” under 47 U.S.C. § 254 (the statutory authority for the Lifeline program). *See Universal Service Order*, 12 F.C.C. Rcd. at 8815 ¶ 72. The primary method of funding 911 access is through state charges placed on users’ phone service. Since fees like Indiana’s 911 Charge are recognized by federal law, *see* 47 U.S.C. § 615a-1(f)(1), and support a component of the “universal service” promoted by the Lifeline program, applying the Lifeline support amount to that Charge complies with the requirement that the full amount of that support be passed on to the customer.

2. *TracFone may use the Lifeline support amount to cover the 911 Charge*

Nevertheless, TracFone’s Emergency Petition complains that it is impracticable for TracFone to collect the Charge from customers with whom it has no prior billing relationship,

assuming no other valid solutions. *See* Emergency Petition at 14. However, as the same Petition acknowledges, TracFone has other available options for remitting the Charge. Although TracFone dismisses these as unreasonable or violative of federal law, closer examination reveals several legal and viable alternatives for complying with Indiana's 911 Charge.

The most obvious alternative is for TracFone to reduce the minutes or other services offered in each plan in order to compensate for the cost of the Charge. This option could take various forms because TracFone has several plan options and numerous features. All of its Lifeline plans include a free phone, no-charge roaming, free 411 directory assistance, free texting (up to 1,000 texts), voicemail, caller ID, and call-waiting capability. Certain plans also include international long-distance calling and carry-over minutes. The number of free minutes that TracFone provides its Indiana Lifeline customers per month ranges from 68 to 250. *See* SafeLink Wireless, *Plan Features*, https://www.safelinkwireless.com/Enrollment/Safelink/en/NewPublic/plan_features.html.

TracFone did not always offer such generous Lifeline service packages. Rather, its early Lifeline offerings in other states initially provided only 68 free minutes; yet, competition from other Lifeline providers induced TracFone to increase its basic offering to 250 minutes a month. *See* Lifeline & Link Up Reform & Modernization, WC Docket No. 11-42, 03-109, 12-23, CC Docket No. 96-45, *Report and Order and Further Notice of Proposed Rulemaking*, 27 F.C.C. Rcd. 6656, 6680 ¶ 50 (2012) (*Lifeline Order*). The introduction of 1000 free texts per month is also new: texts cost up to one minute per text when TracFone applied for ETC designation in Indiana in 2011. IURC TracFone ETC Order (Ex. 1) at 10-11.

Importantly, no federal law or regulation prevents TracFone from reducing the services it offers, because no federal law or regulation establishes a minimum requirement for Lifeline

service. This is intentional: the Commission has specifically indicated that the number of minutes should be determined by marketplace competition rather than government fiat. *Lifeline Order*, 27 F.C.C. Rcd. at 6679-80 ¶ 50. The Commission only requires that the Lifeline rate be less than or equal to the normal, non-Lifeline rate. 47 U.S.C. § 254(b)(3); 47 C.F.R. § 54.407(b).

On this score, the difference between TracFone's Lifeline and non-Lifeline offerings reveals a considerable buffer within which TracFone can compensate for the cost of the 911 Charge. Non-Lifeline customers pay \$9.99 per month for only 50 minutes of airtime. TracFone, *Value Plans*, <https://www.tracfone.com/direct/ValuePlans>. Pay-as-you-go airtime cards are even more costly per minute, providing only 30 minutes and a month of service for \$9.99, or 120 minutes and three months of service for \$29.99. TracFone, *Pay As You Go*, <https://www.tracfone.com/direct/Purchase?payGo=true>. These plans do not include international calling or any free texts. TracFone's Lifeline plans include *more* monthly minutes *and* free texts, all for the lesser rate of \$9.25 per month. Thus, TracFone can easily reduce the number of minutes or decrease the services it provides while still maintaining Lifeline rates at far less than the non-Lifeline rate charged, all in compliance with the Commission's guidelines.

Similarly, Indiana law does not mandate a minimum level of Lifeline service. Rather, TracFone and other ETCs only must comply with the IURC order granting it ETC status. The IURC conditions ETC status on "whether designation as an ETC will 'ensur[e] the availability of quality telecommunications services at just, reasonable, and affordable rates.'" Virgin Mobile USA, L.C., Cause No. 41052 ETC 55, at 9 (Ind. Util. Regulatory Comm'n Nov. 10, 2010) (order on ETC application) (hereinafter "IURC Virgin Mobile ETC Order") (attached as Exhibit 4) (alteration in original) (quoting Fed.-State Joint Bd. on Universal Serv., CC Docket No. 96-45, *Report and Order*, 20 F.C.C. Rcd. 6371, 6388 ¶ 40 (2005)); *see also* IURC TracFone ETC Order

(Ex. 1) at 15. For no-charge prepaid Lifeline wireless services, IURC’s current benchmark for “just, reasonable, and affordable rates” is at least one plan with “a minimum of 250 free minutes per month,” and “a maximum of 10 cents for each additional minute and each text message.” IURC Virgin Mobile ETC Order (Ex. 4) at 13; IURC TracFone ETC Order (Ex. 1) at 17. TracFone is also currently bound by its agreement to provide Indiana consumers with a free handset and free 611 access to TracFone customer services. IURC TracFone ETC Order (Ex. 1) at 7-8. To change the services offered, TracFone need only “notify the [Indiana Utility Regulatory] Commission in the form of a new tariff if any terms, conditions or allocation of free minutes changes.” IURC Virgin Mobile ETC Order (Ex. 4) at 13; *see also* IURC TracFone ETC Order (Ex. 1) at 17.

Thus, neither federal nor Indiana statutes or regulations bind TracFone to its current levels of free minutes and services. If current levels are not sustainable with the required payment of the 911 Charge, TracFone is free to decrease its services or to approach IURC with a proposal. Other than the few requirements already discussed, TracFone’s additional services are simply a response to the marketplace competition this Commission encouraged. And as the same Charge applies to all providers of prepaid wireless Lifeline plans, the only pressure TracFone faces is competition from other Lifeline providers. It is not this Commission’s job to protect Lifeline providers from these market pressures—indeed, the Commission has explicitly declined to do so.

But if reducing the number of minutes or services is not acceptable, there are other options. For one, TracFone could discontinue its free plans and offer only plans that establish a billing relationship with the customer. Free plans are not required by federal law, and some

providers do not offer any free plans. *See, e.g., Choose the Plan That is Right for You*, T-Mobile: InReach, <https://lifeline.t-mobile.com/Home/Plans> (last accessed Dec. 8, 2014).

For another, TracFone could continue providing all the same services and simply absorb the cost of the 911 Charge in order to continue competing. Although TracFone declares that it will not and should not bear this burden itself, Emergency Petition at 2, it cannot deny that this is a business option if market competition does not permit a decrease in its offerings. Businesses frequently choose to absorb some costs in order to better compete: TracFone itself offers free handsets to its Lifeline customers as an incentive to enroll. Indiana certainly does not require TracFone to shoulder the weight of funding access to 911 services, but it remains an option. Each of these alternatives—none of which contravenes Lifeline program regulations—supports application of Indiana’s 911 Charge to prepaid wireless services subsidized by Lifeline.

II. The Commission Lacks Authority to Preempt Indiana’s 911 Charge

In light of the above, Indiana’s 911 Charge does not effectively prohibit TracFone from providing Lifeline services, and the Commission has no authority to preempt it. Section 253 of the Telecommunications Act of 1996 expressly preempts only “[s]tate [and] local statute[s] and] regulation[s] . . . [that] prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” 47 U.S.C. § 253(a). Even this limited preemption clause does not apply to state “requirements necessary to . . . protect the public safety and welfare,” among other exceptions. *Id.* at § 253(b). The Commission’s authority to preempt is limited to violations of this section, *id.* at § 253(d), and Indiana’s Charge does not violate it.

A. Indiana’s 911 Charge does not fall within the Telecommunications Act’s preemption clause

The sole authority on which TracFone bases its preemption argument comes from 47 U.S.C. § 253(d): if a state “impose[s] any statute . . . that violates [47 U.S.C. § 253(a) or (b)],” the Commission has the authority to “preempt the enforcement of such statute . . . to the extent necessary to correct such violation or inconsistency.” *Id.* at § 253(d). Subsection (a) provides that “[n]o State or local statute . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” *Id.* at § 253(a). The “saving clause” in subsection (b) further circumscribes the Commission’s authority, and is discussed in subpart B *infra*.

1. *Section 253(a) narrowly preempts only state laws that actually have the effect of prohibiting an entity’s ability to provide telecommunications service*

To determine whether the Commission even has the authority to preempt Indiana’s 911 Charge, we must look first to the text of § 253 of the Telecommunications Act of 1996. “[T]he purpose of Congress is the ultimate touchstone in every pre-emption case,” *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)), and congressional intent is displayed first and foremost in the plain meaning of the text. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004).

The text itself preempts state statutes and regulations that “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” 47 U.S.C. § 253(a). The Commission’s own interpretations narrowly apply this text to conduct that “actually prohibit[s] or effectively prohibit[s] the ability of a . . . service provider to provide service.” Cal. Payphone Ass’n, CCB Pol 96-26, FCC 97-251, *Memorandum Opinion and Order*, 12 F.C.C. Rcd. 14191, 14209 ¶ 38 (1997). This interpretation has been adopted by a

majority of the circuits that have addressed the question. *See Level 3 Commc'ns, L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528, 533 (8th Cir. 2007) (holding that section 253(a) requires “actual or effective prohibition, rather than the mere possibility of prohibition, . . . [which means] an existing material interference with the ability to compete in a fair and balanced market”); *Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (en banc) (overruling circuit precedent in favor of the Eighth Circuit’s interpretation). *But see P.R. Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (reading the word “may” in section 253(a) to reach a broader interpretation).

To the extent § 253(a) contains any ambiguity, the presumption against preemption requires that it be read narrowly. When interpreting an express preemption clause, “courts ordinarily accept the reading that disfavors pre-emption.” *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (internal quotation marks omitted); *see also Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992) (plurality opinion) (stating that an ambiguous preemption clause should be read narrowly). Where the relevant state law regulates within a field traditionally occupied by the states—here, the police power, specifically health and safety regulations—the presumption is doubly applicable. *See Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985). State-provided 911 services fall squarely within the category of laws providing for public safety and welfare, and indeed, this Commission has mandated that to be eligible to receive the federal Lifeline subsidy, the underlying telecommunications service must include the ability to “access . . . the emergency services provided by local government or other public safety organizations, such as 911 and enhanced 911.” 47 C.F.R. § 54.101(a), (b); *see also* 47 C.F.R. § 20.18(a), (b) (requiring CMRS providers such as TracFone to provide “basic 911 service”); *Universal Service Order*, 12 F.C.C. Rcd. at 8815 ¶ 72 (recognizing that 911 service is “essential

to public safety” and including access to emergency services among supported services for universal service under 47 U.S.C. § 254). Indiana’s 911 Charge is integral to funding and providing the 911 network available to and utilized by all Lifeline and other consumers of telecommunications services. The presumption against preemption therefore applies to § 253’s preemption clause. This supports the Commission’s narrow reading that it lacks authority to preempt state law unless that law actually or effectively prohibits, or prevents, an entity from providing services.

What is more, Congress has provided specific, textual guidance indicating that § 253 should be read narrowly, and that it does not preempt regulations like state 911 charges. A separate statute protects Indiana’s ability to impose and collect its 911 Charge—the text of the Communications Act and any order or rule of the Commission notwithstanding. 47 U.S.C. § 615a-1(f)(1). And the saving clause in § 253(b) preserves state public safety regulations even when those regulations *do* prohibit an entity’s ability to provide telecommunications services. *See infra* subpart B. This further supports the plain meaning and narrow application of § 253(a)’s preemption clause in this context. *See Cipollone*, 505 U.S. at 529 n.27 (looking to Congress’s “plainly express[ed] . . . intent to preserve the ‘police regulations’ of the States” in applying a narrowing construction to an express preemption clause).

To the extent TracFone’s Emergency Petition suggests that a broader interpretation is warranted, that interpretation should be rejected. The Emergency Petition states that the relevant question is “whether the requirement in question materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.” Emergency Petition at 19 (quoting Pittencrief Commc’ns, Inc., File No. WTB/POL 96-2, FCC 97-343, *Memorandum Opinion and Order*, 13 F.C.C. Rcd. 1735, 1751-52

¶ 32 (1997)). Yet in the same paragraph of the *Pittencrief Opinion* cited by TracFone, the Commission refused to preempt a nondiscriminatory, neutral requirement, because the record did not support a finding of actual prohibitive effect. *Pittencrief Opinion*, 13 F.C.C. Rcd. at 1752 ¶ 32. The *mere possibility* of prohibitive effects was insufficient for preemption. *Id.* This order comports with the narrow interpretation of § 253(a) required by the presumption against preemption. Since Indiana’s 911 Charge does not have any actual prohibitive effect on TracFone’s ability to provide telecommunications service, and TracFone cannot demonstrate—and has not demonstrated—such effect, § 253(a) precludes preemption of the Charge.

2. *Indiana’s 911 Charge does not create any barrier to entry*

TracFone bears the burden of demonstrating that Indiana’s law has the prohibitive effect necessary to support preemption. *See Am. Commc’ns Servs., Inc.*, CC Docket No. 97-100, FCC 99-386, *Memorandum Opinion and Order*, 14 F.C.C. Rcd. 21579, 21588 ¶ 17 (1999) (“[T]he burden of building a record sufficient to warrant preemption under section 253 rests principally on the party petitioning the Commission for such relief.”); *see also Wos v. E.M.A. ex rel. Johnson*, 133 S. Ct. 1391, 1409 (2013) (Roberts, C.J., dissenting) (“The burden [in a preemption case] is, of course, on those challenging the law.” (citing *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 661–662 (2003) (plurality opinion))). TracFone has not done so in its Emergency Petition. At most, it has shown that compliance is an annoyance, not unlike other public safety regulations with which it may prefer not to have to comply. But Indiana’s 911 Charge does not in any way prevent TracFone from providing Lifeline services.

As explained above in Part I.B, TracFone has multiple options for collecting and remitting the 911 charges for its customers, so that it is not effectively prohibited from providing Lifeline services in Indiana. To recap, TracFone could

- provide \$8.75-worth of minutes and services to each customer and use the remaining \$0.50 from the support amount to cover the Charge;
- establish a billing relationship with each of its customers by discontinuing free service, enabling it to collect the Charge from each customer as appropriate; or
- remit the Charge out of its general operating budget.

None of these options has the effect of prohibiting TracFone from providing Lifeline services.

Regarding the first option, TracFone can reduce the number of services it provides each month. Because no federal or state law or regulation establishes minimum requirements, the only minimum requirements at issue are those to which TracFone consented, and which it may revise subject to IURC approval. TracFone may choose to discontinue other, non-required services, or may notify the IURC of its desire to reduce the minutes offered by its plans—a move that this Commission has explicitly made available by leaving the number of minutes provided per month for Lifeline plans subject to market competition. *See Lifeline Order*, 27 F.C.C. Rcd. at 6680 ¶ 50. If other Lifeline service providers can comply with Ind. Code § 36-8-16.6-11(d) and provide the same level of service, TracFone’s lack of business would be due to market competition, not to the Charge. Accordingly, TracFone’s choice to reduce the number of services it provides in no way prohibits it from providing Lifeline services; decreased competitiveness is not the same as *prohibiting* TracFone from providing service.

Regarding the second option, federal Lifeline guidelines do not require plans to be free; providers have the option of applying the \$9.25 as a credit toward the customer’s plan of choice instead. 47 C.F.R. § 54.401(b). Some prepaid wireless Lifeline providers do just that, and do not provide any free plans. *See, e.g., Choose the Plan That is Right for You*, T-Mobile: InReach, <https://lifeline.t-mobile.com/Home/Plans> (last accessed Dec. 2, 2014). TracFone has opted to provide free plans because they presumably attract a greater number of customers, but, as stated above, decreased competitiveness does not prohibit TracFone from providing service.

As for the third option, for TracFone to cover the 911 Charge itself is not inherently unreasonable. TracFone already provides a free headset to Lifeline customers; it is not separately reimbursed for that expense. Emergency Petition at 4 n.9; IURC TracFone ETC Order (Ex. 1) at 15. TracFone has asserted the difficulty in collecting the charges from its customers, and that declining to offer free plans would significantly reduce its customer base. Emergency Petition at 2-3, 20-21. Given its situation, TracFone could therefore reasonably make the business decision to absorb the cost of the 911 Charge rather than pass it on to consumers. Whether that would be a good business decision is beside the point; what is relevant is that this is an option TracFone may choose or reject. Indiana’s 911 Charge does not effectively prohibit TracFone’s services.

The best that TracFone could argue in its Emergency Petition is that compliance with Indiana’s 911 Charge is “impracticable” and that it imposes a “substantial impediment.” Emergency Petition at 20, 21. However, the suggested alternatives belie these claims, and TracFone does not prove otherwise. TracFone does not assert that implementation of the 911 Charge would render it unable to remain an ETC, but only that it “will be forced to consider whether it can continue to provide Lifeline service in . . . Indiana.” Emergency Petition at 2. The Commission lacks authority to preempt § 36-8-16.6-11(d) merely on “the possibility that . . . [it] might under some circumstances effectively prohibit [TracFone] from offering a service”—TracFone must show that the law will *actually have that effect*. *Pittencrieff Opinion.*, 13 F.C.C. Rcd. at 1752 ¶ 32. TracFone’s unsupported assertions simply do not demonstrate the necessary prohibitive effect.

Overall, TracFone’s complaints about the viability of its options speak not to whether TracFone is *prohibited* from the ability to provide services, but to whether its business model is

successful when competing with the eleven other prepaid wireless service providers that offer Lifeline services in the State of Indiana. *See Lifeline: Participating Companies*, Indiana Office of Utility Consumer Counselor, <http://www.in.gov/oucc/2384.htm> (last accessed Dec. 8, 2014).¹¹

Crucially, TracFone has not been singled out for adverse treatment here: Indiana’s 911 Charge applies equally to all prepaid wireless providers, including their Lifeline services. If TracFone finds itself unable to effectively provide Lifeline services, that inability reflects normal marketplace competition, not some supposedly “prohibitive” effect of the statute. Since the Commission has authority to preempt only state laws that effectively prohibit an entity from providing service, the Commission has no authority to preempt Indiana’s 911 Charge.

B. Indiana’s 911 Charge is a competitively neutral regulation necessary for public safety and welfare

Even if the text of § 253(a) covers Indiana’s 911 Charge, the Commission still may not preempt Indiana’s law because it is exempted under § 253(b). This “safe harbor” clause saves from preemption “competitively neutral” state laws and regulations that are “consistent with section 254[’s goal of universal service]” and that are “necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, [or] safeguard the rights of consumers.” 47 U.S.C. § 253(b). Indiana’s 911 Charge is clearly necessary for public safety and welfare. The Charge applies neutrally to all prepaid wireless providers, it is in fact necessary to maintain neutrality among the various telecommunications providers, and it does not interfere with or undermine the universal service provisions in section 254.

¹¹ Note, effective November 30, 2014, Cricket Wireless stopped accepting new applications for its Lifeline service offerings in the Indiana market and, effective February 28, 2015, will be “discontinuing participation in the Lifeline program in Indiana” Cricket, *Application Info by State (G-L): Indiana Cricket Lifeline Credit*, <https://www.cricketwireless.com/o/support/account-management/cricket-lifeline-credit/application-info-by-state-g-l.html#indiana> (last accessed Dec. 2, 2014).

1. *Providing 911 services is necessary to protect the public safety and welfare*

The three digits 9-1-1 are universally recognizable as the phone number in the United States that provides access to emergency services. Americans take for granted the ability to dial those three numbers and immediately receive the assistance of emergency personnel. Access to 911 lies at the very core of public services for the safety and welfare of a state's citizens. Yet 911 services, like every other government service, must be funded. Thus Indiana, like every other state, places a Charge or other fee on wired and wireless telecommunications services. *See* Ind. Code §§ 36-8-16.6 *et seq.*, 36-8-16.7 *et seq.*¹² Congress has specifically recognized and protected the States' ability to impose these charges. *See* 47 U.S.C. § 615a-1(f)(1) ("Nothing in . . . the Communications Act of 1934, . . . or any Commission regulation or order shall prevent the imposition and collection of a fee or charge applicable to commercial mobile services . . . for the support or implementation of 9-1-1 or enhanced 9-1-1 services . . .").

Providing 911 service is the quintessential public safety and welfare regulation, and a surcharge funding that service may fairly be said to be necessary to that end. Confirming this obvious interpretation, the House Committee report on the Telecommunications Act of 1996 specified that, "[b]y 'public safety and welfare,' the Committee means, among other things, making certain that emergency services, such as 9-1-1, are available to the public." H.R. Rep. No. 104-204(I), at 75 (1995), reprinted in 1996 U.S.C.C.A.N. 10, at 41. On this basis alone the Commission can conclude that § 253(b)'s safe harbor for public safety and welfare regulations includes Indiana's 911 Charge.

¹² Report To Congress On State Collection and Distribution Of 911 and Enhanced 911 Fees and Charges, 2012 WL 6892830, at *5, ¶ 14 (F.C.C. Dec. 21, 2012); *see also 9-1-1 Surcharge—User Fees by State*, Nat'l Emergency Number Ass'n, <https://www.nena.org/?page=911RateByState> (last visited Dec. 5, 2014).

But Congress has elsewhere confirmed the essential character of reliable 911 access. The Wireless Communications and Public Safety Act of 1999 and the ENHANCE 911 Act both speak to the high priority placed on 911 service availability. *See* Pub. L. No. 106-81, 113 Stat. 1286 (codified at scattered sections of 47 U.S.C.); Pub. L. No. 108-494, 118 Stat. 3986 (2004) (codified at 47 U.S.C. § 942). And the Commission has previously recognized the importance of 911 service as well. *See Nuvio Corp. v. F.C.C.*, 473 F.3d 302, 311-12 (D.C. Cir. 2006) (Kavanaugh, J., concurring) (citing FCC orders). The high level of importance is most clearly reflected in the explicit protection of state 911 charges in 47 U.S.C. § 615a-1(f)(1). Since “adequate 911 service is vital to the personal security of American citizens,” *Nuvio Corp.*, 473 F.3d at 312, Indiana’s 911 Charge is therefore necessary to protect the public safety and welfare of Indiana citizens.

2. *The Charge is both competitively neutral and necessary for competitive neutrality*

Indiana’s 911 Charge is likewise neutral in its text and applications. The Commission “has understood § 253(b) neutrality to require a statute or regulation affecting all types of utilities in like fashion” *Nixon v. Mo. Mun. League*, 541 U.S. 125, 137 (2004) (citing *Western Wireless Declaratory Ruling*, 15 F.C.C. Rcd. at 15175–15178, ¶¶ 19–24). “[C]ompetitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.” *Western Wireless Declaratory Ruling*, 15 F.C.C. Rcd. at 15176 ¶ 21 (citing *Universal Service Order*, 12 F.C.C. Rcd. at 8801 ¶ 47). The 911 Charge easily satisfies this requirement. Not only that, exempting TracFone and other no-cost prepaid wireless Lifeline providers would actually give them a competitive *advantage* over other

Lifeline-subsidized telecommunications services subsidized by Lifeline. Such a result is plainly contrary to the intent of the statute.

Indiana's 911 Charge is competitively neutral in that it applies to all prepaid services, regardless whether they are Lifeline services. Ind. Code §§ 36-8-16.6-11 to -13. The only difference is in the liability of the two types of providers: Indiana Code § 36-8-16.6-11(d) makes ETCs directly liable for the Charge itself, while sellers and providers of non-Lifeline services are liable for collecting the Charge from the consumer and remitting it to the 911 Board. *Id.* §§ 36-8-16.6-12, -13. This is an accommodation, however, and not a hindrance. In situations where the advance purchase of prepaid wireless service involves a monetary exchange between the seller and consumer, it is efficient for the seller to collect the amount from the consumer and remit that amount to the Board. *See id.* § 36-8-16.6-11, -13. Thus, Indiana law *requires* the seller of services—whether it is a third party retailer or the provider itself dealing directly with the customer—to collect the Charge from the customer, and places a duty on that seller to remit that amount to the 911 Board. *Id.*

But, as TracFone itself has argued, the duty to collect and remit is burdensome when the provider lacks a billing relationship with the customer. Emergency Petition at 2-3, 20-21. This situation occurs when a provider such as TracFone chooses to be compensated for its Lifeline service entirely from the subsidy it receives from the Lifeline program (*i.e.*, the plan is free to the consumer). Thus, Indiana *accommodates* TracFone and similarly situated no-cost, prepaid Lifeline service providers, because it frees them from the duty of collecting the Charge from customers who would not otherwise make any payments. This accommodation does not disadvantage them with respect to non-Lifeline prepaid wireless services. Because the payment for Lifeline services goes directly to the provider, rather than first to the customer, liability for

the Charge naturally falls on the provider. *See id.* § 36-8-16.6-11(d). In this way, ETC provider liability for the 911 Charge is competitively neutral between Lifeline and non-Lifeline prepaid services.

The Charge is competitively neutral also with respect to providers that offer prepaid wireless Lifeline services. No such providers are exempt from the Charge. *See* Ind. Code §§ 36-8-16.6 *et seq.* Whether or not the provider offers any “free” options, the provider remains liable. *See* Ind. Code § 36-8-16.6-11(d). Indeed, if there is any lack of competitive neutrality, it works to the benefit of those who provide free Lifeline services. Rather than having the duty of collecting and remitting a separate, line-item charge on each transaction, TracFone need only allocate to the 911 Charge a portion of the Lifeline service amount it receives and remit that amount. This setup simply does not leave TracFone at a competitive disadvantage with respect to other prepaid wireless providers or other prepaid wireless Lifeline service providers.

In reality, TracFone is not seeking some competitively neutral alternative to the current system; rather, it hopes to have the Commission grant it a special protected status for its business model that would allow certain of its customers to escape having to pay for the ability to access Indiana’s 911 network, thereby shifting a greater burden of the cost of that network to other customers. TracFone’s Lifeline customers would be the classic free riders taking advantage of others’ payments. And while TracFone may prefer as a matter of policy that Lifeline customers be accorded such free-rider treatment, Indiana is under no obligation to accept TracFone’s policy preference in this regard. Since all Indiana telecommunications providers, including all prepaid wireless sellers and all ETCs, are subject to a 911 Charge, exempting TracFone would violate the principle of competitive neutrality. Such an exemption would privilege no-cost Lifeline services over other plans, and it would elevate prepaid wireless service over other services and

technologies. TracFone should not be permitted to hide behind a veil of “competitive neutrality” in seeking this type of advantage for itself. The Commission should not preempt Indiana’s 911 Charge, and § 253(b) does not permit it to do so.

3. *The Charge is consistent with § 254’s universal service provisions*

TracFone cites some of the “[u]niversal service principles” in 47 U.S.C. § 254(b) to suggest that the 911 Charge contravenes the purposes of Congress in creating the Lifeline program. Emergency Petition at 16. Yet, far from being inconsistent with § 254’s protection of universal service, Indiana’s 911 Charge actually furthers the same goals. These principles promote “quality services . . . available at just, reasonable, and affordable rates,” and access for “consumers in all regions of the Nation, including low-income consumers.” Emergency Petition at 16 (emphasis and internal quotation marks omitted). Funding 911 access supports both of these goals.

First, federal regulations explicitly require every ETC to provide “access to [] emergency services . . . such as 911 and enhanced 911” in order “to receive federal universal service support.” 47 C.F.R. § 54.101(a), (b). This includes providers that offer Lifeline services. Further, 47 U.S.C. § 615a-1 also expressly permits states to impose fees and charges to support those 911 services. § 615a-1(f). “[U]niversal service,” therefore, includes the 911 service that Indiana’s 911 Charge supports, and federal law protects Indiana’s authority in this area. Confirming this, the Commission has previously stated that 911 services are among “supported services” for the purpose of § 254. *Universal Service Order*, 12 F.C.C. Rcd. at 8815 ¶ 72. Thus, the liability of Lifeline consumers and of TracFone itself for Indiana’s 911 Charge directly furthers Congress’s intent of extending universal phone service—including 911 access—to low-income consumers.

In addition to this fundamental reason, as explained above, the context of federal Lifeline regulations indicates that applying the support amount to government fees and charges is entirely consistent with the program. Providers that charge “federal End User Common Line charges or equivalent federal charges,” must apply the Lifeline discount *first* to the amount of the federal charge; what is left applies toward the customer’s bill. 47 C.F.R. § 54.403(b)(1). This regulation is in the *very same section* as the requirement that the carrier “pass through the full amount of support” to the customer. *Id.* § 54.403(a)(1). Indiana’s 911 Charge, a cost which directly supports one of the essential services, is therefore perfectly consistent with the universal service requirements. It may not be preempted.

CONCLUSION

For the foregoing reasons, the Commission should reject TracFone Wireless, Inc.’s Emergency Petition to issue a declaratory ruling preempting state 911 charges on Lifeline services, and it should further reject all petitions to declare such laws preempted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of December, 2014, the foregoing was electronically served upon the following persons:

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