

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

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

**COMMENTS OF STATE OF ALABAMA AND ITS STATEWIDE 9-1-1 BOARD
OPPOSING TRACFONE WIRELESS’S PETITION FOR DECLARATORY RULING**

James T. Sasser
General Counsel, Ala. Statewide 9-1-1 Board
Deputy Ala. Attorney General
1678 Montgomery Hwy Ste 104 PMB 345
Birmingham, Alabama 35216
Phone: (256) 390-1050
Facsimile: (205) 985-2402
jtsasserlaw@gmail.com

John C. Neiman, Jr.
Deputy Ala. Attorney General
Prim Formby Escalona
Kasdin E. Miller
MAYNARD, COOPER & GALE, P.C.
1901 Sixth Ave N
2400 Regions/Harbert Plaza
Birmingham, AL 35203
Phone: 205.254.1228
jneiman@maynardcooper.com

Counsel for State of Alabama and Alabama Statewide 9-1-1 Board

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INTRODUCTION

TracFone has no basis for its unprecedented preemption request. Congress has long recognized that state and local 9-1-1 services play a vital role in protecting public safety. Congress also has long recognized that state and local charges on phone connections are a vital means of funding these services. For this reason Congress has stated, in language from 47 U.S.C. §615a-1 that TracFone does not quote, that “[n]othing in . . . the Communications Act of 1934 (47 U.S.C. §151 et seq.) . . . or any Commission regulation or order” can preempt states from collecting a fee or charge “applicable to commercial mobile services” that is “specifically designated . . . for the support or implementation of 9-1-1 or enhanced 9-1-1 services.”¹ This language by itself conclusively defeats TracFone’s request to the Commission, yet TracFone’s arguments would be meritless even if this savings clause did not apply. TracFone’s attempt to upset the federal-state balance in this area implicates the States’ “substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere” in light of the Tenth Amendment to the United States Constitution.² So in the pages that follow, the State

¹ 47 U.S.C. §615a-1(f)(1).

² *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

of Alabama and its Statewide 9-1-1 Board, whose members are appointed by the Alabama Governor,³ will address these issues in depth.

A few background facts bear emphasis at the outset. All people benefit from 9-1-1 services, so it is fair for governments to ask all persons who use phones to help fund these emergency systems. Yet TracFone has a long track record of trying to evade these fees in Alabama and throughout the United States.⁴ TracFone filed this meritless petition even while pursuing an equally meritless state-court lawsuit against Alabama's 9-1-1 fee, in which it also is litigating preemption arguments.⁵ And TracFone is pursuing this multi-front preemption strategy without acknowledging either the above-quoted language from 47 U.S.C. §615a-1 or the foundational principle that, as the Supreme Court has put it, “in all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”⁶ This is so for reasons with particular salience in the 9-1-1 context: “[t]he States traditionally have had great latitude under their police powers to legislate as to the

³ See ALA. CODE §11-98-4.1(b).

⁴ See, e.g., *Ky. Commercial Mobile Radio Serv. Emergency Telecommc'ns. Bd. v. TracFone Wireless, Inc.*, 712 F.3d 905, 912-16 (6th Cir. 2013) (requiring TracFone to pay 9-1-1 charges on prepaid service lines under Kentucky statute); *TracFone Wireless, Inc. v. Wash. Dep't of Revenue*, 242 P.3d 810, 814-22 (Wash. 2010) (en banc) (Washington statute); *TracFone Wireless, Inc. v. Neb. Pub. Serv. Comm'n*, 778 N.W.2d 452, 457-64 (Neb. 2010) (Nebraska statute); *T-Mobile South, LLC v. Bonet*, 85 So. 3d 963, 987 (Ala. 2011) (Alabama statute); Press Release, Idaho Public Utilities Commission, *Settlement Between TracFone, Commission Approved*, Case No. TFW-T-09-01, May 25, 2012, available at http://www.puc.idaho.gov/press/052512_TracFonefinal.htm.

⁵ See Pet. 8 n.18 (citing *TracFone Wireless, Inc. v. Ala. Statewide 9-1-1 Board, et al.*, No. CV-2014-900202 (Montgomery Cnty. Cir., filed Jan. 30, 2014)).

⁶ *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (internal quotation marks omitted).

protection of the lives, limbs, health, comfort, and quiet of all persons.”⁷ Courts thus have held that the “express preemption statutory provisions” of 47 U.S.C. §253(a) “should be given a narrow interpretation.”⁸

TracFone’s petition flies in the face of these realities, and the questions TracFone now raises are neither difficult nor close. Three considerations preclude TracFone’s request for a declaratory ruling of preemption:

- *First*, Section 615a-1(f)(1) provides that “[n]othing in . . . the Communications Act of 1934 (47 U.S.C. §151 et seq.) . . . or any Commission regulation or order shall prevent the imposition or collection of a fee or charge applicable to commercial mobile services . . . specifically designated by a State . . . 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 or enhanced 9-1-1 services, or enhancements of such services.”⁹ Likewise, in previous proceedings, the Commission repeatedly has conditioned TracFone’s participation in the Lifeline program on its compliance with state-level obligations regarding 911 funding. It is unclear how TracFone can believe *any* of its arguments can be consistent with the Section 615a-1(f)(1) savings clause and the Commission’s previous statements.
- *Second*, even if Section 615a-1(f)(1) had no role to play here, TracFone’s preemption claim under the Commission’s Lifeline regulations would fail. TracFone has no meaningful argument that Alabama’s imposition of a 9-1-1 fee somehow precludes the company from passing the full Lifeline benefit through to its customers. Whether or not the customers must pay a \$1.75 monthly fee, TracFone can pass the full \$9.25 subsidy through to them.
- *Third*, although Section 615a-1(f)(1) also precludes TracFone’s preemption claim under Section 253, that provision would have no preemptive effect in any event. TracFone does not have even a colorable argument that Alabama’s fee would “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”¹⁰ TracFone’s

⁷ *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (internal quotation marks omitted).

⁸ *Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (internal quotation marks omitted).

⁹ 47 U.S.C. §615a-1(f)(1).

¹⁰ 47 U.S.C. §253(a).

assertion that the fee may require it to change its business model is not enough to give rise to preemption under Section 253(a), and TracFone has not substantiated that assertion in any event. And Section 253(b) states that “[n]othing in” 47 U.S.C. §253 “shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to . . . protect the public safety and welfare.”¹¹ The only basis on which TracFone has sought to distinguish this clause is the untenable argument that Alabama’s 9-1-1 law—which requires collections by *all* providers for “each active voice communications service connection in Alabama that is technically capable of accessing a 911 system”¹²—is somehow not “competitively neutral.” TracFone is the one that is seeking, through this very petition, to exempt itself from collecting and remitting a fee its competitors must collect and remit.

Each of these considerations is discussed in more detail below.

ARGUMENT

A. Section 615a-1(f)(1)’s savings clause precludes each of TracFone’s arguments.

The Commission need look no further than 47 U.S.C. §615a-1(f)(1) in evaluating TracFone’s arguments. TracFone ignores both this statute and the Commission’s enforcement of the policies that underlie it.

1. Alabama’s 9-1-1 fee falls within the language of Section 615a-1(f)(1).

TracFone’s petition is meritless in light of Section 615a-1(f). This provision forbids any interpretation of “the Communications Act of 1934 (47 U.S.C. §151 et seq.),” of which 47 U.S.C. §253(a) is a part,¹³ as preempting certain state 9-1-1 fees. It also forbids “any

¹¹ 47 U.S.C. §253(b).

¹² ALA. CODE §11-98-5(a).

¹³ As TracFone acknowledges in its petition, the provisions of the Telecommunications Act of 1996 that are relevant here, including Section 253(a), became a part of the Communications Act of 1934. *See* TracFone Pet. 2 (noting that TracFone is seeking preemption “pursuant to Section 253 of the Communications Act of 1934, as amended”). This is why Section 615a-1(f)(1) describes the Communications Act of 1934 as “47 U.S.C. §151 et seq.”

Commission regulation or order” from “prevent[ing] the imposition and collection of” such fees.¹⁴ TracFone is arguing in this petition that this Commission’s regulations and the Communications Act of 1934 preempt Alabama’s fee, and TracFone is requesting that the Commission issue an order preventing Alabama from imposing and collecting the fee. Section 615a-1(f)(1) thus precludes TracFone’s petition so long Alabama’s 9-1-1 fee satisfies the following three requirements under the statute:

- (1) the fee applies to “commercial mobile services;”
- (2) the fee is “specifically designated” for the “support or implementation of 9-1-1 or enhanced 9-1-1 services;” and
- (3) the funds collected are expended “only in support of 9-1-1 or enhanced 9-1-1 services” or enhancements.¹⁵

Alabama’s 9-1-1 fee satisfies each of these requirements.

First, Alabama’s 9-1-1 fee is “applicable to commercial mobile services.”¹⁶ Alabama law directs the State to collect a 9-1-1 fee on “each active voice communication service connection in Alabama that is technically capable of accessing a 911 system,” including mobile connections, from “each voice communication service provider.”¹⁷ Alabama law requires that the “statewide 911 charge” be “collected on prepaid wireless telephone service” like that provided by TracFone.¹⁸ The Alabama Supreme Court has specified that “the legislature’s intent was to impose the service charge on *all* CMRS connections, including those provided by [a provider] to its customers who prepay.”¹⁹ Alabama regulations further provide that the 9-1-1 charge applies

¹⁴ 47 U.S.C. § 615a-1(f)(1).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ ALA. CODE §11-98-5(a).

¹⁸ ALA. CODE §11-98-5.3(b)(1).

¹⁹ *T-Mobile South, LLC v. Bonet*, 85 So. 3d 963, 987 (Ala. 2011).

to “[a]ll Lifeline connections in Alabama, both wire line and wireless.”²⁰ The regulations further direct “[a]ny telecommunications carrier that has been designated and certified . . . to offer Lifeline service” to “collect from any Lifeline subscriber, the monthly 9-1-1 service charge.”²¹

Second, Alabama’s fee is “specifically designated” for the “support or implementation of 9-1-1 or enhanced 9-1-1 services.”²² Alabama’s statute designates the fee as a “monthly statewide 911 charge” that “shall be uniformly applied and shall be imposed throughout the state, and shall replace all other 911 fees or 911 taxes.”²³

Third, Alabama’s 9-1-1 fee also is “obligated or expended only in support of 9-1-1 and enhanced 9-1-1 services, or enhancements of such services.”²⁴ The Alabama statute provides that “all revenues derived from the service charge levied on voice communications service providers under this chapter and all prepaid wireless 911 charges received” may be used only to provide 9-1-1 services.²⁵ The Alabama Supreme Court has elaborated that “the money from the service charge is used to fund the emergency 911 service provided via that connection” and “does not provide general revenue that can be used for any purpose.”²⁶

TracFone offers no means of circumventing Section 615a-1(f)(1)’s unambiguous language. As the Supreme Court has held, when the plain language of a statute “admits of no exception,” courts cannot “create their own limitations on [the] legislation, no matter how

²⁰ ALA. ADMIN. CODE r. 585-x-4-.01(2)(b)(4).

²¹ ALA. ADMIN. CODE r. 585-x-4-.05(1).

²² 47 U.S.C. §615a-1(f)(1).

²³ ALA. CODE §11-98-5(a).

²⁴ 47 U.S.C. §615a-1(f)(1).

²⁵ ALA. CODE §11-98-5.2(a); ALA. CODE §11-98-6.

²⁶ *T-Mobile South, LLC v. Bonet*, 85 So. 3d 963, 984 (Ala. 2011).

alluring the policy arguments for doing so.”²⁷ And a Lifeline-specific exception to Section 615a-1(f)(1) would not make sense. As the legislative history associated with the provision shows, Congress sought to ensure that states and local governments made “direct improvements to the 911 system.”²⁸ Congress contemplated that the fees needed to fund these systems would apply “equitably to providers of different types of communications services.”²⁹ Congress thus chose to give States wide latitude to fund 9-1-1 services, and that policy would be undermined if Congress left States without flexibility in deciding how to fund Lifeline users’ access to the 9-1-1 system.

2. The Commission has specifically conditioned TracFone’s participation in Lifeline on its adherence to state 9-1-1 support obligations.

It is also unclear how TracFone thinks its petition can be consistent with the Commission’s enforcement of the federal policy deferring to state funding choices in this area. The Commission has taken action consistent with that policy, albeit without citing Section 615a-1, in proceedings involving TracFone and Lifeline. As an initial matter, the Commission expressly conditioned TracFone’s eligibility for Lifeline support upon, among other things, “TracFone’s certification 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.”³⁰ Then, in rejecting TracFone’s later request to rescind “the state 911/E911 compliance

²⁷ *Brogan v. United States*, 522 U.S. 398, 408 (1998).

²⁸ H.R. REP. NO. 110-442, at 15 (2007), *as reprinted in* 2008 U.S.C.C.A.N. 1011, 1020.

²⁹ *Id.*

³⁰ *In re Fed.-State Joint Bd. on Universal Serv. Tracfone Wireless, Inc.*, 24 FCC Rcd. 3375, 3379 (2009).

certification requirement,”³¹ the Commission specifically noted its general policy that “Lifeline funds should not be disbursed to any carrier that is not . . . *complying with state-level obligations regarding 911 funding.*”³² The Commission observed that this “principle should be especially potent here, where extending emergency services to the most needy was a motivating factor in the Commission’s initial grant of forbearance to TracFone.”³³

The Commission’s previous statements ought to preclude TracFone from seeking a third bite at the apple, and TracFone’s silence as to the Commission’s actions is just as deafening as its silence with respect to the language of Section 615a-1(f). Taken together, these considerations conclusively refute TracFone’s assertion that a Commission order or regulation, or some part of the Communications Act of 1934, can exempt it from its duty to collect and remit State 9-1-1 fees.

B. Even absent Section 615a-1(f)(1), Alabama’s 9-1-1 fee would not be preempted.

Although the foregoing considerations preclude all of TracFone’s preemption arguments, TracFone’s petition would fail even if Section 615a-1(f)(1) had no role to play in the analysis. TracFone has made two principal preemption arguments—first, that Alabama’s 9-1-1 fee conflicts with the Commission’s regulation concerning the amount of the Lifeline subsidy providers must “pass through” to customers;³⁴ and second, that Alabama’s 9-1-1 fee would violate Section 253(a) of the Communications Act of 1934 by “prohibit[ing] or hav[ing] the effect of prohibiting the ability of any entity to provide any interstate or intrastate

³¹ *In re Fed.-State Joint Bd. on Universal Serv.; TracFone Wireless, Inc.*, 25 FCC Rcd. 4661, 4663 (2010).

³² *Id.* at 4664.

³³ *Id.*

³⁴ TracFone Pet. 12-18 (discussing 47 C.F.R. §54.403(a)(1)).

telecommunications service.”³⁵ As discussed below, neither of those arguments would be correct even if TracFone could simply ignore what Section 615a-1(f)(1) says.

1. Alabama’s 9-1-1 fee does not conflict with the Commission’s Lifeline regulations.

TracFone has no viable argument that Alabama’s 9-1-1 fee conflicts with the Commission’s Lifeline regulations. The key regulation makes “Federal Lifeline support in the amount of \$9.25 per month” available to a carrier that “certifies to the Administrator that it will pass through the full amount of support to the qualifying low-income consumer.”³⁶ Nothing in that language suggests that States cannot impose 9-1-1 fees on Lifeline participants.

This is so because the Lifeline carriers are not required to offer their customers no-charge service. TracFone acknowledges that numerous carriers bill their Lifeline customers certain amounts; those carriers use the subsidy to give their customers “a discount below the standard charges.”³⁷ Customers thus make *some* payment to those carriers, and those customers pay Alabama’s 9-1-1 fee. Yet this arrangement is consistent with the pass-through regulation because each customer is receiving a full \$9.25 Lifeline subsidy for telephony service.

The same analysis applies to TracFone. If TracFone were to bill its Lifeline customers the \$1.75 fee, TracFone still would be passing through \$9.25 worth of telephony service to them. Moreover, TracFone does not persuasively explain why it could not comply with the regulation by adopting the alternative approach it mentions in its petition—allowing customers to choose to apply \$1.75 of their \$9.25 subsidy to the 9-1-1 fee and, correspondingly, “reducing the number of airtime benefits provided each month” to some number that would allow them to avoid paying

³⁵ TracFone Pet. 19-22 (discussing 47 U.S.C. §253(a)).

³⁶ 47 C.F.R. §54.403(a)(1).

³⁷ TracFone Pet. 17.

anything out-of-pocket.³⁸ A customer’s decision to allocate part of his or her \$9.25 subsidy to the 9-1-1 fee would be permissible because “access to . . . 911 and enhanced 911” services is an aspect of “voice telephony services” under the Commission’s regulations.³⁹ And TracFone could reduce customers’ monthly airtime below the current package of 250 minutes because the Commission has not “adopt[ed] minimum Lifeline service requirements” governing “minutes per month” a customer must receive.⁴⁰ Thus, whether the customer paid the 9-1-1 fee out-of-pocket or instead asked TracFone to apply a portion of his or her subsidy to pay the fee, TracFone would be complying with its obligation to pass through the entire subsidy to the customer.

The various policy arguments to which TracFone adverts in discussing the pass-through regulation are no basis for preemption. TracFone has not provided credible and probative evidence supporting its assertion that the fee saddles customers with an “undue burden,”⁴¹ and that assertion is not relevant under the regulations in any event. The same is true of TracFone’s contention that the fee subjects Lifeline recipients to “multiple 911 state tax obligations” if they “purchase additional airtime”: TracFone has not shown that “multiple . . . obligations” occur with any frequency, and that assertion would not be any basis for preemption if it were true.⁴² Tracfone is similarly mischaracterizing the issues when it contends that the 9-1-1 fee constitutes an “unlawful tax on a federal benefit.”⁴³ As one court has explained, “[b]ecause the E911 charge is based on provision of telephone service, and is used to fund a specific service (911 service),

³⁸ TracFone Pet. 14.

³⁹ 47 C.F.R. §54.101.

⁴⁰ Letter from Mignon L. Clyburn, Acting Chairwoman, Federal Communications Commission, to the Honorable Jeff Sessions, United States Senate, Sept. 27, 2013, *available at* 2013 WL 5870155, at *5.

⁴¹ TracFone Pet. 14 n.28.

⁴² TracFone Pet. 13.

⁴³ TracFone Pet. 15 n.29.

the charge is not a revenue-raising measure and, therefore, not a tax.”⁴⁴ Likewise, the fee is not charged on the \$9.25 subsidy; it is charged on the act of subscribing to voice-communications services. At any rate, when the federal government has wished to preempt state laws that would effectively tax federal benefits, it has done so through provisions that expressly preempt those state laws, such as those TracFone cites addressing the Supplemental Nutrition Assistance Program.⁴⁵ Congress took the opposite approach to state 9-1-1 fees when it saved them under Section 615a-1(f)(1).

2. Alabama’s 9-1-1 fee is not preempted by 47 U.S.C. §253.

TracFone’s claim under Section 253 fares no better. As was true of TracFone’s argument based on the Lifeline regulation, Section 615a-1(f) precludes TracFone’s claim based on Section 253. And as explained below, TracFone’s arguments would fail even if Section 615a-1(f) had no relevance to this proceeding.

a. TracFone has not shown that Alabama’s 9-1-1 fee is contrary to Section 253(a).

TracFone has not shown that Section 253(a) even applies here. Section 253(a) preempts only those state laws that “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”⁴⁶ TracFone has not established that Alabama’s fee would have that effect for at least two reasons.

⁴⁴ *Madison Cnty. Commc’ns Dist. v. Bellsouth Telecommc’ns, Inc.*, No. CV-06-S-1786-NE, 2009 WL 9087783, at *10 (N.D. Ala. Mar. 31, 2009).

⁴⁵ See Pet. 15 n.29 (citing 7 C.F.R. §272.1).

⁴⁶ 47 U.S.C. §253(a).

- i. “No-charge Lifeline service” is a payment arrangement, not a “telecommunications service” under Section 253(a).

First, TracFone’s argument is premised on a fundamental misinterpretation of Section 253(a). TracFone appears to concede that Alabama’s fee would not preclude TracFone or any other company from providing mobile “telecommunications service” as a general matter. TracFone’s claim is instead that the fee prevents TracFone from providing Lifeline service *without a charge*.⁴⁷ But when Section 253(a) says state and local laws cannot have the effect of prohibiting “any . . . telecommunications service,” it is referring to general *types* of service. It is not referring to a particular pricing model or payment arrangement. The “telecommunications service” TracFone is providing is “mobile service,” not “no-charge mobile service.” The “no charge” aspect is TracFone’s business decision. A carrier cannot claim that a law violates Section 253(a) merely because it may require the carrier to change a pricing decision.

This conclusion is evident from the Act’s definition of the term “telecommunications service.” The Act defines the term “the offering of telecommunications *for a fee* directly to the public, . . . regardless of the facilities used.”⁴⁸ Section 253(a) cannot possibly mean that a state law is preempted because it makes it more difficult for carriers to provide telecommunications *without a fee*.

- ii. Even if Section 253(a) preempted state laws that had the effect of making it impossible for TracFone to provide services at no charge, TracFone has not shown that the 9-1-1 fee would have that effect.

Second, even if TracFone’s legal premise were correct—and Section 253(a) could be interpreted as prohibiting state laws that have the effect of precluding carriers from offering

⁴⁷ See TracFone Pet. 21 (claiming that the fees “create a substantial impediment to providing no charge federal Lifeline service”).

⁴⁸ 47 U.S.C. §153(53).

service at no charge—TracFone has not established facts that would allow the Commission to conclude that Alabama’s fee has that effect. The Commission has “emphasize[d] that the burden of building a record sufficient to warrant preemption under section 253 rests principally on the party petitioning the Commission for such relief.”⁴⁹ TracFone, as the party “seeking preemption[,] . . . must supply [the Commission] with credible and probative evidence that the challenged requirement falls within the proscription of section 253(a).”⁵⁰ TracFone has not built that record here.

For example, TracFone has not shown that in light of its current profitability, it cannot simply pay the 9-1-1 fee itself.⁵¹ As TracFone’s petition concedes, TracFone and other “no charge” carriers currently dominate the market.⁵² A local 9-1-1 board from another State has speculated that TracFone might “make \$7 in profit off of every [Lifeline] customer” each month.⁵³ At the very least, TracFone’s profits are so high that, in TracFone’s words, “[t]he handsets provided to TracFone’s Lifeline customers are paid for by TracFone and are not

⁴⁹ *In re Am. Commc’ns Servs., Inc. MCI Telecommc’ns Corp.*, 14 FCC Rcd. 21579 (1999) (footnotes and citations omitted).

⁵⁰ *Id.*

⁵¹ *Cf. TracFone Wireless, Inc. v. Wash. Dep’t of Revenue*, 242 P.3d 810, 820 (Wash. 2010) (en banc) (observing that TracFone could, to avoid asserted difficulties in collecting 9-1-1 fees from prepaid customers, “pay the tax itself”).

⁵² *See* TracFone Pet. 17 (asserting that TracFone and another no-charge carrier “serve over 83 percent of the Lifeline customer base in Alabama”). Attached to these Comments are spreadsheets setting forth publicly available data on what the Alabama Statewide 9-1-1 Board understands to be TracFone’s share of the Alabama Lifeline market.

⁵³ *See* 911 Authorities’ Response to TracFone Wireless, Inc.’s Motion to Set Aside Interim Order and Alternative Motion to Certify Interim Order as Immediately Appealable, No. 09A-393T, *In re Application of TracFone Wireless, Inc. for Designation as an Eligible Telecommc’ns Carrier in the State of Colorado for the Limited Purpose of Offering Lifeline Service to Qualified Households* (Colo. Pub. Serv. Comm’n, filed Nov. 24, 2009), at 2 (quoting Matt Richtel, *Providing Cellphones for the Poor*, N.Y. TIMES, June 14, 2009, available at http://www.nytimes.com/2009/06/15/technology/15cell.html?_r=0).

subsidized or supported by the USF.”⁵⁴ To establish that the 9-1-1 fee will prevent it from offering no-charge service, TracFone would need to show that it cannot pay for the fee as well.

TracFone also would need to show that it cannot develop the capacity to pay the fee by reducing the number of minutes it offers to Lifeline customers.⁵⁵ As the Commission has noted, “TracFone initially provided approximately 68 minutes of airtime per month to subscribers.”⁵⁶ It currently provides 250, but not because of any “minimum Lifeline service requirements.”⁵⁷ There are none.⁵⁸ Instead, TracFone increased its allotment of minutes “due to competition from other providers.”⁵⁹ There is no reason TracFone could not save costs by reducing its allotment now, and there is good reason to think that doing so could give it room to pay the 9-1-1 fee. TracFone “does not own or operate any wireless network facilities but instead contracts with other radio communication service companies to provide wireless telephone service and radio

⁵⁴ TracFone Pet. 4 n.9. As Commissioner Clyburn has written, “[t]he Commission’s rules do not permit Lifeline support to be used to support a phone,” and “[i]f an ETC chooses to offer a free or discounted phone to Lifeline subscribers, . . . that is an independent business decision of the ETC.” Letter from Mignon L. Clyburn, Acting Chairwoman, Federal Communications Commission, to the Honorable Jeff Sessions, United States Senate, Sept. 27, 2013, *available at* 2013 WL 5870155, at *5.

⁵⁵ *Cf. TracFone Wireless, Inc. v. Wash. Dep’t of Revenue*, 242 P.3d 810, 820 (Wash. 2010) (en banc) (observing that TracFone could avoid asserted difficulties collecting a 911 fee from prepaid customers in general by “deducting minutes from the subscriber’s account to pay the taxes”).

⁵⁶ *Lifeline and Link Up Reform and Modernization*, 27 FCC Rcd. 6656, 6680 (2012).

⁵⁷ Letter from Mignon L. Clyburn, Acting Chairwoman, Federal Communications Commission, to the Honorable Jeff Sessions, United States Senate, Sept. 27, 2013, *available at* 2013 WL 5870155, at *5.

⁵⁸ *See id.*

⁵⁹ *Lifeline and Link Up Reform and Modernization*, 27 FCC Rcd. 6656, 6680 (2012).

access lines and then resells the service.”⁶⁰ TracFone can cut costs by buying fewer minutes from those companies.

TracFone also has failed to show that it cannot, in the alternative, simply collect the 9-1-1 fee from its customers. TracFone must certify the eligibility of each of its Lifeline participants annually,⁶¹ and it has not shown that it cannot bill for the fee during that process. Nor has it shown that it cannot instead bill customers each month for the fee. Although TracFone has asserted that these steps are impracticable because it does not send monthly bills to its customers, that is not a necessary consequence of providing mobile service. It is, instead, a consequence of the particular business model TracFone has adopted. When TracFone has tried to dodge other States’ laws with similar arguments regarding prepaid service more generally, courts have rightly responded that TracFone’s “choice of business model does not give it license to throw up its hands and pay nothing.”⁶²

Although TracFone avers that it “will be forced to consider whether it can continue” operating in Alabama if it must collect the fee,⁶³ the mere possibility that it will “consider” that

⁶⁰ *TracFone Wireless, Inc. v. Wash. Dep’t of Revenue*, 242 P.3d 810, 812 (Wash. 2010) (en banc).

⁶¹ See 47 C.F.R. §54.410(f)(1); see also *Federal-State Joint Bd. on Universal Service, TracFone Wireless, Inc. Petition for Forbearance, Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. §214(e)(1)(A) and 47 C.F.R. §53.201(i)*, 20 FCC Rcd. 15095, 15103 (2005). (“[W]e require that TracFone track its Lifeline customer’s primary residential address and prohibit more than one supported TracFone service at each residential address.”).

⁶² *TracFone Wireless, Inc. v. Neb. Public Serv. Comm’n*, 778 N.W.2d 452, 459 (Neb. 2010); see also *TracFone Wireless, Inc. v. Wash. Dep’t of Revenue*, 242 P.3d 810, 818 (Wash. 2010) (en banc) (“We do not agree . . . that the manner in which a clearly taxable event (an assigned cell phone number) is marketed can negate a tax that is otherwise clearly payable.”); *Comm’n on State Emergency Commc’ns v. TracFone Wireless, Inc.*, 343 S.W.3d 233, 240 (Tex. Civ. App. 2011) (“While [the prepaid providers’] chosen business model may make it more difficult for them to assess and collect the fee, such a difficulty does not itself evince a legislative intent to exclude the telecommunications connections they provide from the reach of section 711.0711.”).

⁶³ TracFone Pet. 2 (emphasis added).

course of action does not preempt Alabama’s law. Although TracFone suggests that Section 253(a) preempts state laws that merely “*may* have the effect of prohibiting the provision of” certain telecommunications services,⁶⁴ the Ninth Circuit decisions TracFone cites for that proposition are no longer good law. A later Ninth Circuit panel “overrule[d] *Auburn* and join[ed] the Eighth Circuit in holding that ‘a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.’”⁶⁵ In so doing, the Ninth Circuit noted that its new interpretation was “consistent with the FCC’s.”⁶⁶ In light of TracFone’s refusal to offer the Commission anything close to definitive evidence that it will stop offering its services, TracFone’s Section 253(a) argument cannot possibly prevail.

b. Even if Alabama’s 9-1-1 fee were contrary to Section 253(a), it would be saved from preemption by Section 253(b).

Moreover, even if it were clear that the fee would preclude TracFone from offering a “telecommunications service” in Alabama, Section 253(b) still would save the fee from preemption. That subsection provides that “[n]othing in [Section 253(a)] shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to . . . protect the public safety and welfare.”⁶⁷ The Commission has explained that this provision saves laws that are “(i) ‘competitively neutral’; (ii) consistent with

⁶⁴ TracFone Pet. 19 & n.40 (emphasis added) (quoting *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004), and *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175 (9th Cir. 2001)).

⁶⁵ *Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (quoting *Level 3 Commc’ns, L.L.C. v. City of St. Louis*, 477 F.3d 528, 532–33 (8th Cir.2007)).

⁶⁶ *Id.* (citing *In re Cal. Payphone Ass’n*, 12 FCC Rcd. 14191, 14209 (1997)).

⁶⁷ 47 U.S.C. §253(b).

the Act’s universal service provisions under Section 254; and (iii) ‘necessary’ to accomplish certain enumerated public interest goals.”⁶⁸ Alabama’s law fits this bill.

TracFone does not appear to deny that Alabama’s fee satisfies the second and third of these requirements. It is consistent with the Act’s universal-service provisions, which require the Commission to work toward access to services “at comparable rates” in “all regions of the Nation,” because the fee helps ensure that 9-1-1 service is available throughout the State.⁶⁹ Indeed, the Commission previously has noted that “TracFone’s compliance with 911/E911 requirements was relevant to the issue of whether designation of TracFone as an ETC was in the public interest, as required by section 214(e) of the Act.”⁷⁰ Likewise, by funding emergency services, the fee “protect[s] the public safety and welfare.”⁷¹ As the Commission observed in a previous proceeding involving TracFone, “provision of 911 and E911 services is critical to our nation’s ability to respond to a host of crises.”⁷²

Meanwhile, TracFone’s argument that the fee is not “competitively neutral” does not pass the straight-face test. As the Commission has held, “competitively neutral” means “neither unfairly advantag[ing] nor disadvantag[ing] one provider over another, and neither unfairly favor[ing] nor disfavor[ing] one technology over another.”⁷³ To this end, Alabama’s law applies

⁶⁸ *In re Silver Star Tel. Co., Inc. Petition for Preemption & Declaratory Ruling*, 12 FCC Rcd. 15639, 15657 (1997).

⁶⁹ 47 U.S.C. §254(b)(3).

⁷⁰ *In the Matter of Fed.-State Joint Bd. on Universal Service; TracFone Wireless, Inc.*, 25 FCC Rcd. 4661, 4663 (2010).

⁷¹ 47 U.S.C. §253(b).

⁷² *In the Matter of Fed.-State Joint Bd. on Universal Service; TracFone Wireless, Inc.*, 25 FCC Rcd. 4661, 4664 (2010).

⁷³ *In re Universal Serv. Contribution Methodology Fed.-State Joint Bd. on Universal Serv. 1998 Biennial Regulatory Review -- Streamlined Contributor Reporting Requirements Associated with Admin. of Telecommc’ns Relay Serv.*, 21 FCC Rcd. 7518, 7637 (2006), *vacated on other*

to all subscribers of voice communications services capable of accessing the 9-1-1 system—without regard to whether the service is wireless or wired, and without regard to whether the service is prepaid, postpaid, or “no charge.” The law is equivalent for all market participants and thus competitively neutral.

TracFone’s contrary argument turns competitive neutrality on its head. Although TracFone complains that the fee will “force[.]” it “to change the terms of [its] service” by either collecting the fee from its customers or paying the fee itself,⁷⁴ TracFone’s competitors who bill their customers face the same choice: they must either collect a fee their customers otherwise would not pay, or pay that fee for their customers. So at the end of the day, TracFone is seeking an exemption from a requirement to which its competitors are not exempt, based on TracFone’s familiar refrain that its compliance with the requirement will be difficult in light of the differences between its business model and its competitors’. When TracFone made similar arguments in an attempt to evade Kentucky’s application of 9-1-1 fees to prepaid services, the court rightly noted that “requiring TracFone to collect the fees actually treats all CMRS providers the same; it does not prejudice prepaid providers or advantage postpaid providers.”⁷⁵ To the contrary, “[i]f prepaid providers” such as TracFone “are not required to collect the fees, *they* would gain a competitive advantage over their postpaid rivals.”⁷⁶ Once again, “TracFone’s business choices do not alleviate its obligations” under state law.⁷⁷

grounds, Vonage Holdings Corp. v. Fed. Commc’ns Comm’n, 489 F.3d 1232, 1236 (D.C. Cir. 2007).

⁷⁴ TracFone Pet. 20.

⁷⁵ *Ky. Commercial Mobile Radio Serv. Emergency Telecommc’ns Bd. v. TracFone Wireless, Inc.*, 735 F. Supp. 2d 713, 726 (W.D. Ky. 2010), *aff’d sub nom. Ky. Commercial Mobile Radio Serv. Emergency Telecommc’ns Bd. v. TracFone Wireless, Inc.*, 712 F.3d 905 (6th Cir. 2013).

⁷⁶ *Id.* (emphasis added); *see also TracFone Wireless, Inc. v. Wash. Dep’t of Revenue*, 242 P.3d 810, 821 (Wash. 2010) (en banc) (explaining that when a fee treats “prepaid wireless service and

TracFone’s competitive-neutrality argument is especially untenable in light of its unique history, discussed above,⁷⁸ with the Commission. Before TracFone could participate in Lifeline, it had to obtain a Commission forbearance from one requirement with which its competitors must comply—namely, providing services from its own facilities.⁷⁹ TracFone also obtained a forbearance from a mandate requiring it to obtain particular certifications regarding its customers’ access to 9-1-1 and E9-1-1 services.⁸⁰ In granting those forbearances, the Commission took care to note that it had conditioned TracFone’s Lifeline eligibility on “full compliance with any applicable 911/E911 obligations, including obligations relating to the provision, *and support*, of 911 and E911 service.”⁸¹ The Commission later emphasized, in rejecting yet another TracFone request for an exemption to 9-1-1 requirements, that the need for TracFone to “comply[] with state-level obligations regarding 911 funding” was “especially potent” because “extending emergency services to the most needy was a motivating factor in the Commission’s initial grant of forbearance to TracFone.”⁸² It is ironic that TracFone is now claiming, without so much as a cite to these orders or to Section 615a-1(f), that its business

monthly billed service the same” because “both are subject to the . . . tax,” then “[n]either is competitively disadvantaged”).

⁷⁷ *Ky. Commercial Mobile Radio Serv. Emergency Telecommc’ns Bd. v. TracFone Wireless, Inc.*, 735 F. Supp. 2d 713, 725 (W.D. Ky. 2010), *aff’d sub nom. Ky. Commercial Mobile Radio Serv. Emergency Telecommc’ns Bd. v. TracFone Wireless, Inc.*, 712 F.3d 905 (6th Cir. 2013).

⁷⁸ *See supra* at 7-8.

⁷⁹ *See Federal-State Joint Bd. on Universal Service, TracFone Wireless, Inc. Petition for Forbearance, Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. §214(e)(1)(A) and 47 C.F.R. §53.201(i)*, 20 FCC Rcd. 15095 (2005).

⁸⁰ *See Federal-State Joint Bd. on Universal Service, TracFone Wireless, Inc.*, 24 FCC Rcd. 3375, 3378-79 (2009).

⁸¹ *Id.* at 3377 n.9 (emphasis added).

⁸² *In the Matter of Fed.-State Joint Bd. on Universal Service; TracFone Wireless, Inc.*, 25 FCC Rcd. 4661, 4662 (2010) (emphasis added).

model now requires the Commission to grant it a special exemption from these critical obligations.

CONCLUSION

The Alabama Statewide 9-1-1 Board respectfully asks the Commission: (1) to deny TracFone's petition requesting preemption of the 9-1-1 laws and regulations of the State of Alabama for providers of no charge, non-billed Lifeline service; and (2) to enter an order upholding Alabama's imposition of the 9-1-1 fee in these circumstances.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John C. Neiman, Jr.", is written over a horizontal line.

James T. Sasser
General Counsel, Ala. Statewide 9-1-1 Board
Deputy Ala. Attorney General
1678 Montgomery Hwy Ste 104 PMB 345
Birmingham, Alabama 35216
Phone: (256) 390-1050
Facsimile: (205) 985-2402
jtsasserlaw@gmail.com

John C. Neiman, Jr.
Deputy Ala. Attorney General
Prim Formby Escalona
Kasdin E. Miller
MAYNARD, COOPER & GALE, P.C.
1901 Sixth Ave N
2400 Regions/Harbert Plaza
Birmingham, AL 35203 |
Phone: 205.254.1228
jneiman@maynardcooper.com

Counsel for State of Alabama and Alabama Statewide 9-1-1 Board

December 8, 2014

Attachment A

Name	Average Monthly Lifeline 2014 Distributions	Estimated Monthly Connections
BLOUNTSVILLE TELEPHONE LLC (WHOLLY OWNED SUB OF OTELCO INC)	\$951.00	102.81
BRINDLEE MOUNTAIN TELEPHONE LLC (WHOLLY OWNED SUB OTELCO INC	\$1,740.00	188.11
BUTLER TELEPHONE COMPANY INC.	\$2,703.00	292.22
CASTLEBERRY TELEPHONE COMPANY INC.	\$770.00	83.24
NATIONAL TELEPHONE OF ALABAMA INC.	\$1,056.00	114.16
FARMERS TELECOMMUNICATIONS COOPERATIVE INC.	\$6,789.00	733.95
KNOLOGY TOTAL COMMUNICATIONS INC.	\$654.00	70.70
CENTURYLINK GULF TELEPHONE COMPANY	\$2,735.00	295.68
HAYNEVILLE TELEPHONE COMPANY INC.	\$2,075.00	224.32
HOPPER TELECOMMUNICATIONS LLC (WHOLLY OWNED SUB OTELCO INC)	\$107.00	11.57
FRONTIER COMMUNICATIONS LAMAR COUNTY LLC	\$424.00	45.84
WINDSTREAM COMMUNICATIONS INC.	\$2,573.00	278.16
MILLRY TELEPHONE CO. INC.	\$2,827.00	305.62
MON-CRE TELEPHONE COOPERATIVE INC.	\$1,122.00	121.30
FRONTIER COMMUNICATIONS OF ALABAMA LLC	\$2,620.00	283.24
OAKMAN TELEPHONE COMPANY INC.	\$752.00	81.30
OTELCO TELEPHONE LLC (WHOLLY OWNED SUB OF OTELCO INC)	\$2,625.00	283.78
PEOPLES TELEPHONE COMPANY INC.	\$3,608.00	390.05
PINE BELT TELEPHONE CO INC	\$1,294.00	139.89
RAGLAND TELEPHONE COMPANY INC.	\$489.00	52.86
ROANOKE TELEPHONE CO. INC.	\$2,985.00	322.70
FRONTIER COMMUNICATIONS OF THE SOUTH LLC	\$283.00	30.59
UNION SPRINGS TELEPHONE CO INC	\$2,445.00	264.32
PINE BELT CELLULAR INC	\$870.00	94.05
HAYNEVILLE FIBER TRANSPORT INC.	\$4,319.00	466.92
BUDGET PREPAY INC.	\$5,930.00	641.08
SOUTHERN COMMUNICATIONS INC.	\$833.00	90.05
MICRO-COMM INC	\$15,037.00	1,625.62
TRACFONE WIRELESS INC.	\$1,054,112.00	113,958.05
GLOBAL CONNECTION INC OF AMERICA	\$2,084.00	225.30
PREMIER CONNECTION INC	\$12,320.00	1,331.89
NORTH AMERICAN LOCAL LLC	\$25,156.00	2,719.57
I-WIRELESS LLC	\$202,057.00	21,844.00
VIRGIN MOBILE USA LP	\$608,617.00	65,796.43
T-MOBILE USA INC.	\$1,201.00	129.84
CENTURYLINK CENTURYTEL OF ALABAMA (NORTHERN AND SOUTHERN)	\$27,477.00	2,970.49
	\$2,003,640.00	216,609.73
*****BELLSOUTH*****	\$136,849.33	14,794.52
	\$2,140,489.33	231,404.25

NOTES:

Virgin Mobile makes up 28.43%

Tracfone makes up 49.25%

i-Wireless makes up 9.44%

Wireline makes up 12.82%, of which Bellsouth is 6.39%

The fund currently receives \$51,925 for wireline Lifeline

Tracfone remitted \$19,267 in July, which is 1.83% of their monthly collections
and 10% of the monthly estimated amount paid at \$1.75

Attachment B

Alabama Lifeline from 2007-2014

