

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

To: Chief, Wireline Competition Bureau

**OPPOSITION OF THE BOULDER REGIONAL
EMERGENCY TELEPHONE SERVICE AUTHORITY**

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Summary

The Boulder Regional Emergency Telephone Service Authority requests that the Commission deny the Emergency Petition for Declaratory Ruling (the “Petition”) filed by TracFone Wireless, Inc. (“TracFone”) on October 23, 2014.

State laws imposing 9-1-1 fees on no-charge Lifeline services do not violate section 253 of the Communications Act, 47 U.S.C. § 253 because the 9-1-1 fees do not *actually* or *effectively* prohibit TracFone or any other entity from providing telecommunications services. Subpart (a) of section 253 requires *actual* or *effective* prohibition, and TracFone has not alleged or proven that 9-1-1 fees prohibit it from providing telecommunications service. And even if the Commission were to determine that 9-1-1 fees violate subpart (a), the state laws are saved by the safe harbor of subpart (b) of section 253. The laws are competitively neutral because they are imposed upon all providers of voice telecommunications providers; they are consistent with section 254 because Lifeline consumers benefit from 9-1-1 services and therefore the entire Lifeline subsidy is passed through to the consumer; and they are necessary to protect the public safety and welfare.

Additionally, preempting the state laws imposing 9-1-1 fees on no-charge Lifeline service is bad policy. The Commission has long recognized the importance of 9-1-1 service. Reducing the funding to 9-1-1 service would curtail a state’s ability to provide a robust emergency communications system, and would not further the interests of Lifeline consumers or the public at large.

Section 253 does not require that state laws cater to every possible business model used to provide telecommunications services. The Lifeline subsidy is intended to benefit qualifying low-income consumers, not Lifeline providers.

The Commission should deny TracFone’s Petition and protect 9-1-1 service.

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**OPPOSITION OF THE BOULDER REGIONAL
EMERGENCY TELEPHONE SERVICE AUTHORITY¹**

The Boulder Regional Emergency Telephone Service Authority (“BRETSA”),² by its attorneys, hereby opposes the Emergency Petition for Declaratory Ruling (“Petition”) filed by TracFone Wireless, Inc. (“TracFone”) on October 23, 2014.³

I. Introduction.

TracFone Petitions the Commission to preempt all state laws that impose a 9-1-1 fee on no-charge Lifeline services.⁴ “No-charge Lifeline services” are voice telecommunications services provided without charge to qualifying low-income consumers. The services are subsidized by the Lifeline program at \$9.25 per month, which is funded by the federal universal service fund.

¹ Portions of this Opposition include common elements of the contemporaneously-filed Comments of the Adams County E-911 Emergency Telephone Service Authority, Comments of the Arapahoe County E-911 Emergency Communications Service Authority, and Comments of the Jefferson County Emergency Communications Authority.

² BRETSA is a Colorado 9-1-1 Authority which establishes, collects and distributes the Colorado Emergency Telephone Surcharge to fund 9-1-1 Service in Boulder County, Colorado. The BRETSA Board includes the Boulder County Sheriff, the City of Boulder Police Chief, representatives of the Boulder County Firefighters Association and the City of Longmont Division of Public Safety. The fifth seat of the Board is filled by representatives of the smaller cities and towns in Boulder County, Colorado on a rotating basis. These Comments are thus intended to represent the perspective of the entity responsible for funding 9-1-1 operations, *and* of the agencies and authorities responsible for PSAP operations and overall public safety services.

³ *TracFone Wireless, Inc. Emergency Petition for Declaratory Ruling*, WC Docket No. 11-42 (filed Oct. 23, 2014) (the “TracFone Petition”), <http://apps.fcc.gov/ecfs/document/view?id=60000975434>.

⁴ *TracFone Petition*, p. 21.

The Commission must deny TracFone's Petition because TracFone has failed to even allege, let alone demonstrate, that state 9-1-1 fees actually or effectively prohibit a telecommunications service as prohibited by 47 U.S.C. 253(a). Even if TracFone had alleged and shown that state 9-1-1 fees would prohibit a telecommunications service, the 9-1-1 fees would fall within the safe harbor exception of 47 U.S.C. §253(b).

II. TracFone Has Not Demonstrated That 9-1-1 Fees on No Charge Lifeline Services Are Preempted Under Section 253.

State laws may be preempted under the supremacy clause of the United States Constitution when the state law interferes with or is contrary to federal law.⁵ Congress may expressly preempt state law by stating its intention to do so.⁶

Subpart (a) of section 253 expressly prohibits state and local laws that “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”⁷ Subpart (b) is a safe harbor exception to the prohibition in subpart (a).⁸ The Commission is obligated to preempt state laws in violation of subpart (a) and not saved by subpart (b) “to the extent necessary to correct the violation or inconsistency.”⁹ Disputes involving subpart (b) are properly before Commission.¹⁰

⁵ *New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 299 F.3d 235, 241-42 (3rd Cir. 2002).

⁶ *New Jersey Payphone Ass'n*, 299 F.3d at 241-42.

⁷ 47 U.S.C. § 253(a); *New Jersey Payphone Ass'n*, 299 F.3d at 241-42.

⁸ *New Jersey Payphone Ass'n*, 299 F.3d at 240; *TracFone Wireless, Inc. v. Nebraska Public Service Commission*, 778 N.W.2d 452, 463-64 (Neb. 2010).

⁹ 47 U.S.C. § 253(d).

¹⁰ *Pacific Bell Telephone Co. v. City of Hawthorne*, 188 F. Supp. 2d 1169, 1174 (C.D. Cal. 2001) (“Congress intended that disputes arising under §§ 253(a) and (b) would be heard before the FCC and appeals from the FCC’s decisions heard by the U.S. Court of Appeals for the District of Columbia. Any complaints by telecommunications service providers that a state or local law violates either § 253(a) or (b) should be lodged with the FCC in Washington, DC. However, complaints that a state or municipal law violates § 253(c) should be filed locally in federal court.”); 47 U.S.C. § 253(d).

A. State Laws Implementing 9-1-1 Fees On No-Charge Lifeline Service Are Not Prohibited by Section 253(a).

The Commission must deny TracFone’s Petition because TracFone has failed to even allege, let alone demonstrate, that state 9-1-1 fees actually or effectively prohibit a telecommunications service.

1. Section 253(a) Prohibits State Statutes or Regulations Which Actually or Effectively Prohibit a Telecommunications Service

Section 253(a) prohibits state laws which *actually* or *effectively* prohibit any entity to provide any interstate or intrastate telecommunications service.¹¹ The mere *possibility* of prohibition is not sufficient to violate subpart (a).¹² As explained below, 9-1-1 fees imposed on no-charge Lifeline services do not violate subpart (a).

TracFone’s Petition is based on bad law. TracFone argues that subpart (a) preempts state laws that *may* prohibit telecommunications services.¹³ In support of this, TracFone cites two cases from the Ninth Circuit.¹⁴ Both of those cases, however, have been expressly overruled.¹⁵ In the cases TracFone cites, the Ninth Circuit interprets subpart (a) to preempt state and local laws that *may possibly* prohibit or have the effect of prohibiting telecommunications services.¹⁶ However the Ninth Circuit subsequently reversed itself and agreed with the Eighth Circuit that

¹¹ *Level 3 Communications, L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528, 532 (8th Cir. 2007) (“Under a plain reading of the statute, we find that a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition.”); *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578-79 (9th Cir. 2008) (concurring with the Eighth Circuit in *Level 3* and overruling *City of Auburn v. Quest Corporation*, 260 F.2d 1160, 1175 (9th Cir. 2001), which interpreted section 253(a) inconsistently); *In the Matter of Silver Star Telephone Company, Inc., Petition for Preemption and Declaratory Ruling*; Memorandum Opinion and Order, 12 FCC Rcd. 15639, 15655-58 (1997) (¶¶ 37-38) (the “Silver Star Preemption Order”), *recon. denied by In the Matter of Silver Star Telephone Company, Inc., Petition for Preemption and Declaratory Ruling*; Memorandum Opinion and Order, 12 FCC Rcd. 16356 (1998) (the “Silver Star Reconsideration Denial”), *aff’d by RT Communications, Inc. v. F.C.C.*, 201 F.3d 1264 (10th Cir. 2000).

¹² *Level 3 Communications*, 477 F.3d at 532.

¹³ *TracFone Petition*, p. 19.

¹⁴ *TracFone Petition*, p. 19, footnote 40.

¹⁵ *Sprint Telephony PCS*, 543 F.3d at 578-79.

¹⁶ *Quest Corporation v. City of Portland, et al.*, 385 F.3d 1236, 1240-41 (9th Cir. 2004); *City of Auburn v. Quest Corporation*, 260 F.3d 1160, 1175 (9th Cir. 2001).

subpart (a) of section 253 requires *actual* or *effective* prohibition to trigger preemption.¹⁷ ***The Nebraska Supreme Court explained this to TracFone in 2010. TracFone Wireless, Inc. v. Nebraska Public Service Commission***, 778 N.W.2d at 464 (“[a]lthough TracFone claims that it is only required to demonstrate ‘a *possible* prohibition on the provision of services,’ more recent federal authority recognizes that under the plain language of § 253(a), to demonstrate preemption, a party must show actual or effective prohibition, rather than the mere possibility of prohibition.”) (emphasis in original).

2. TracFone Has Neither Alleged Nor Shown That State 9-1-1 Fees Actually or Effectively Prohibit Telecommunications service.

TracFone has alleged that the “failure to address and resolve the issue raised by [its Petition] in an expedited manner will jeopardize the ability of Lifeline providers to continue to offer no charge Lifeline services to low-income households.”¹⁸ TracFone does not allege actual or effective prohibition.

The Eighth Circuit dealt with a nearly identical situation in *Level 3 Communications, L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528 (8th Cir. 2007). In that case, Level 3 could not point to any telecommunications services that it was actually or effectively prohibited from providing due to the city’s requirements. In finding St. Louis’s requirements not violate subpart (a), the Eighth Circuit stated:

Level 3 is entitled to summary judgment only if it has carried its burden of showing that there exists no genuine issue of material fact as to whether the City’s ordinance actually or effectively prohibited or materially inhibited Level 3’s ability to provide telecommunications services, and that it is entitled to judgment as a matter of law.

Level 3’s own motion for summary judgment answers this inquiry. Level 3 claims the proper focus of a threshold § 253(a) inquiry ... is the *scope* of the regulatory

¹⁷ *Sprint Telephony PCS*, 543 F.3d at 578-79.

¹⁸ *TracFone Petition*, p.21.

authority that a city purports to wield – not whether the city has used that authority to *actually* exclude a provider or service. Level 3 further admits in its response to interrogatories that it cannot state with specificity what additional services it might have provided had it been able to freely use the money that it was forced to pay to the City for access to the public right-of-way. This admission establishes that Level 3 has not carried its burden of proof on the record we have before us.¹⁹

Similar to Level 3, TracFone has not shown that it or any other Lifeline provider is actually or effectively prohibited from providing Lifeline services. TracFone has not shown how or why Lifeline service will be jeopardized by 9-1-1 fees, or whether jeopardy equates to actual or effective prohibition. Thus, because TracFone has not shown that state laws imposing 9-1-1 fees on no-charge Lifeline service violates subpart (a), the Commission should deny TracFone’s Petition.

Just because a provider elects not to offer Lifeline service or to discontinue offering Lifeline service in a state that imposes a 9-1-1 fee does not necessarily mean that the 9-1-1 fee prohibited the provision of that service. For example, Colorado imposes a 9-1-1 fee on no-charge Lifeline service, and 14 wireless providers have elected to provide no-charge Lifeline service in Colorado and pay the 9-1-1 fee. However, some providers, such as TracFone, have elected not to provide Lifeline service in Colorado.²⁰ TracFone withdrew its then-pending Colorado ETC application when it became apparent to TracFone that the Colorado PUC would impose obligations to pay the 9-1-1 fee.²¹ Thus, TracFone elected not to provide Lifeline services in Colorado; Colorado did not prohibit TracFone from doing so. Similarly, in Alabama there are at least three ETCs that provide wireless Lifeline services pay the Alabama 9-1-1 fee. In Indiana,

¹⁹ *Level 3 Communications*, 477 F.3d at 533-34 (emphasis in original) (internal quotations omitted).

²⁰ See generally *In the Matter of the Application of TracFone Wireless, Inc. for Designation as an Eligible Telecommunications Carrier in the State of Colorado for the Limited Purpose of Offering Lifeline Service to Qualified Households*, Docket No. 09A-393T, Colorado Public Utilities Commission, https://www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=09A-393T.

²¹ See *TracFone’s Notice of Withdrawal*, Docket No. 09A-393T, Colorado Public Utilities Commission, https://www.dora.state.co.us/pls/efi/efi_p2_v2_demo.show_document?p_dms_document_id=25263&p_session_id=

there are also ETCs that offer wireless Lifeline services and pay the Indiana 9-1-1 fee. Thus, 9-1-1 fees on Lifeline services do not actually or effectively prohibit providers from providing Lifeline services and therefore such laws do not violate subpart (a).

To demonstrate that a state law imposing 9-1-1 Fees violates Section 253(a), TracFone would have to demonstrate that such state laws make Lifeline Services non-economic, e.g. that no provider of lifeline services could profitably offer Lifeline Services. TracFone has no vested interest in offering its no charge Lifeline service.²² TracFone has not even alleged that *it* cannot profitably offer no charge Lifeline service. A 9-1-1 fee that merely prevents a Lifeline provider from earning its desired profit margin does not prohibit the provision of service.²³

If subpart (a) does not prohibit the state law in question, then the Commission has no authority to preempt and there is no need to examine subpart (b).²⁴

B. State Laws Implementing 9-1-1 Fees On No-Charge Lifeline Service Violate Section 253(a), They Are Saved By Section 253(b).

If subpart (a) of Section 253 is violated, the Commission must proceed to determine whether the state law meets the safe harbor requirements of subpart (b).²⁵ A state law meets the requirements of subpart (b) if it is (i) is competitively neutral, (ii) conforms with section 254 concerning universal service, and (iii) is necessary to protect the public safety and welfare.²⁶ As

²² *In the Matter of Lifeline and Link Up Reform and Modernization, et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 6656, 6759 (2012) (¶ 238) (“carriers have no vested property interest in specific levels of support for the provision of supported services”) (the “2012 Lifeline Order”).

²³ Insofar as TracFone may seek a determination that state 9-1-1 Fees on Lifeline services are unconstitutional for the purpose of increasing its profit margin, it seeks to do so at the expense of 9-1-1 services.

²⁴ *Level 3 Communications*, 477 F.3d at 534 and footnote 2 (“because Level 3 has not carried its burden of establishing a violation under section 253(a), the district court’s [safe harbor] analysis was premature.”); *Silver Star Preemption Order*, 12 FCC Rcd. at 15655-56 (¶ 37); *TracFone Wireless, Inc. v. Nebraska Public Service Commission*, 778 N.W.2d at 463-64 (“the ‘safe harbor’ provisions of subsections (b) and (c) are affirmative defenses to preemption of state and local exercises of authority that would otherwise violate subsection (a), and are not implicated unless a regulation is determined to be prohibitive in the first place.”).

²⁵ *Silver Star Preemption Order*, 12 FCC Rcd. at 15655-56 (¶ 37); 47 U.S.C. § 253(a); *TracFone Wireless, Inc. v. Nebraska Public Service Commission*, 778 N.W.2d at 463-64.

²⁶ *Silver Star Preemption Order*, 12 FCC Rcd. at 15657 (¶ 40); see 47 U.S.C. § 253(b).

explained below, state laws that impose 9-1-1 fees on no-charge Lifeline services meet the requirements of subpart (b), and therefore the Commission lacks authority to preempt such laws.

1. The Laws At Issue Are Competitively Neutral.

“The Commission has consistently construed the term ‘competitively neutral’ as requiring competitive neutrality among the entire universe of participants and potential participants in a market.”²⁷ The Tenth Circuit determined that the phrase “competitively neutral” is ambiguous, and therefore reviewed the Commission’s interpretation of the phrase with deference.²⁸ The Tenth Circuit quoted the Commission with approval and affirmed the Commission’s decision, stating “[n]either the language of section 253(b) nor its legislative history suggests that the requirement of competitive neutrality applies only to one portion of a local exchange market – new entrants – and not the market as a whole.”²⁹ Thus, competitive neutrality must apply to the *entire universe* of participants in the market. As explained below, the market in this proceeding is *all* providers of voice telephony services for consumers.

Competitive neutrality requires that the state law be analyzed “among the entire universe of participants and potential participants in a market.”³⁰ Lifeline is a subsidy, not a market.

²⁷ *Silver Star Reconsideration Denial*, 12 FCC Rcd. at 16361-62 (¶ 10); accord *In the Matter of Avr, L.P. d/b/a Hyperion of Tennessee, L.P., Petition for Preemption of Tennessee Code Annotated S 65-4-201(d) and Tennessee Regulatory Auth. Decision Denying Hyperion’s Application Requesting Auth. to Provide Serv. in Tennessee Rural LEC Serv. Areas*; Memorandum Opinion and Order, 14 FCC Rcd. 11064, 11072 (1999) (¶ 16) (“We reaffirm our holding in the *Silver Star Reconsideration* that section 253(b) cannot save a state legal requirement from preemption pursuant to sections 253(a) and (d) unless, *inter alia*, the requirement is competitively neutral with respect to, and as between, *all* of the participants and potential participants in the market at issue.”) (emphasis in original) (the “Hyperion Order”), *recon. denied by In the Matter of Avr, L.P. d/b/a Hyperion of Tennessee, L.P., Petition for Preemption of Tennessee Code Annotated S 65-4-201(d) and Tennessee Regulatory Auth. Decision Denying Hyperion’s Application Requesting Auth. to Provide Serv. in Tennessee Rural LEC Serv. Areas*; Memorandum Opinion and Order, 14 FCC Rcd. 1247 (2001).

²⁸ *RT Communications, Inc.*, 201 F.3d at 1268.

²⁹ *RT Communications, Inc.*, 201 F.3d at 1268 (citing the *Silver Star Reconsideration Denial*, 12 FCC Rcd. at 16361-62 (¶ 10)).

³⁰ *Silver Star Reconsideration Denial*, 12 FCC Rcd. at 16361-62 (¶ 10); accord. *Hyperion Order*, 14 FCC Rcd. at 11072 (¶ 16) (“We reaffirm our holding in the *Silver Star Reconsideration* that section 253(b) cannot save a state legal requirement from preemption pursuant to sections 253(a) and (d) unless, *inter alia*, the requirement is

Lifeline providers compete with other voice telephony providers for consumers. A Lifeline provider is only awarded the Lifeline subsidy when service is provided to low income consumers; the competition is to provide telecommunications services to consumers, and the Lifeline subsidy is offered for the benefit of low income consumers to assist them in purchasing voice telephony services.

When looking at this market, even taking TracFone's claim in the light most favorable to it, state laws that impose a 9-1-1 fee on all telecommunications services are competitively neutral. TracFone's claimed lack of an effective method to collect the 9-1-1 fee results from TracFone's choice of business model, not the state's action. The Constitution does not grant commercial entities the option to adopt a business model that skirts the law, and then require that the law be changed to accommodate their business model. And as noted above, other no-charge Lifeline providers pay the 9-1-1 fee on Lifeline service, including 14 ETCs in Colorado, so TracFone's contention that it cannot pay 9-1-1 fees is meritless.

Taking TracFone's argument in the light most favorable to it, however, ignores the fact that if the customer is required by state law to pay a competitively neutral 9-1-1 fee, and the subsidy provided *for the benefit of the consumer* is applied to that fee so that the customer can obtain service, then the full subsidy is passed through for the account of the consumer. There is no violation of the pass-through requirement since the full subsidy benefits the customer.

Moreover, if the Commission were to preempt state laws imposing a 9-1-1 fee on no-charge Lifeline services, the result would be that the state laws would *not* be competitively neutral. The customers to whom Lifeline subsidies are provided to assure they have access to emergency calling would be provided a free ride, and TracFone's no-charge Lifeline service

competitively neutral with respect to, and as between, *all* of the participants and potential participants in the market at issue.") (emphasis in original).

would enjoy a competitive advantage vis-a-vis other voice telephony services, including other subsidized telephony services. TracFone's Petition actually seeks to retain as profit subsidies which would otherwise be passed through for the account of the low-income consumer, and which would pay those consumer's fair share of the cost of 9-1-1 service availability. At a minimum, TracFone would benefit from favorable treatment for no-charge Lifeline providers to the detriment of all other providers (and customers) in the market.

2. The Laws At Issue Are Consistent With Section 254 on Universal Service.

The second part of the Section 253(b) test is whether the state law violates section 254 concerning universal service. The Commission has promulgated rules under section 254, including 47 C.F.R. § 54.403(a)(1), which provides that “[f]ederal Lifeline support in the amount of \$9.25 per month will be made available to an eligible telecommunications carrier providing Lifeline service to a qualifying low-income consumer, if that carrier certified to the Administrator that it will pass through the full amount of support to the qualifying low-income consumer and that it has received any non-federal regulatory approvals necessary to implement the rate reduction.”³¹

State laws imposing a 9-1-1 fee on voice telephony service including no-charge Lifeline services are consistent with 47 C.F.R. § 54.403(a)(1). Remitting 9-1-1 fees is passing the entire benefit through to the Lifeline consumer because the Lifeline consumer benefits from 9-1-1 service.

The Lifeline subsidy is a subsidy for the benefit of low-income consumers. The benefit is not intended for TracFone or other Lifeline providers, and Lifeline providers have no expectation

³¹ 47 C.F.R. § 54.403(a)(1).

or property rights in the subsidy.³² Lifeline providers are required by the Commission to offer 9-1-1 services to their consumers.³³ Requiring that Lifeline providers offer 9-1-1 service, but exempting Lifeline providers and their consumers from contributing to the cost of 9-1-1 service, is neither fair nor good public policy.

Where low income consumers subscribe to voice telephony services which exceed \$9.25 per month, including without limitation tariffed basic wireline telephone services, the customer is liable for the costs of service including 9-1-1 fees, subject to the full credit of \$9.25 passed through by the provider. Because money is fungible, it cannot be gainsaid that the subsidy passed through by the Lifeline provider pays the 9-1-1 fees.

3. The Laws At Issue Are Necessary to Accomplish at Least One of the Enumerated Objectives of Section 253(b).

The third part of the Section 253(b) test is whether the state law is “necessary” to accomplish one of the specifically enumerated public interest objectives.³⁴ The protection of the public safety and welfare is one of these objectives.³⁵ The Commission’s “goal in interpreting the term ‘necessary’ in [section 253] is to foster the overall pro-competitive, de-regulatory framework that Congress sought to establish through the 1996 Act and the directive in section 253 to remove barriers to entry.”³⁶ “The ‘necessary’ question requires a detailed analysis of means and ends.”³⁷

³² *2012 Lifeline Order, supra*, 27 FCC Rcd. 6656, 6759 (2012).

³³ *2012 Lifeline Order*, 27 FCC Rcd. at 6814 (2012) (¶ 373).

³⁴ 47 U.S.C. § 253(b).

³⁵ 47 U.S.C. § 253(b).

³⁶ *In the Matter of New England Pub. Commc’ns Council Petition for Preemption Pursuant to Section 253*, 11 F.C.C. Rcd. 19713, 19725 (1996) (¶ 25).

³⁷ *Silver Star Preemption Order*, 12 FCC Rcd. at 15660 (¶ 45).

There is no doubt that 9-1-1 services are intended to “protect the public safety and welfare.”³⁸ Providing reliable 9-1-1 services costs money. Without proper funding, the 9-1-1 system would not operate as effectively as it does. If funding is removed, the 9-1-1 system will be compromised. Therefore, the 9-1-1 fees are necessary to protect the public safety and welfare.

Assuming that a 9-1-1 fee violates subpart (a) of section 253, such law is within the safe harbor exception of subpart (b). Therefore, the Commission lacks the authority to preempt the state laws. Additionally, since such preemption would endanger the public safety by compromising 9-1-1 service, the Commission should not preempt the state laws as a matter of policy.

III. TracFone’s Request Is Overly Broad, and TracFone Lacks Standing To Challenge State Laws That Do Not Apply To It.

The subsidies at issue are intended for the benefit of low income consumers, not TracFone, and TracFone has no vested interest in offering the service. If TracFone is in fact passing the full subsidy through to its low-income customers, then TracFone should have no vested interest in whether the subsidy offsets the cost of customer minutes of use or customer obligations for 9-1-1 Fees.

TracFone urges the preemption of *all* state laws imposing 9-1-1 fees on no-charge Lifeline services, but TracFone only discusses Alabama’s and Indiana’s laws. This request is overly broad. The determination of whether Alabama’s and Indiana’s law should be preempted under section 253 has no bearing on *all other* state laws. Each state has unique laws – TracFone even points this out in its Petition when it notes that Alabama’s 9-1-1 fee is \$1.75 and Indiana’s 9-1-1 fee is \$0.50.³⁹ And not all states impose or collect the 9-1-1 fee in the same way. It is

³⁸ 47 U.S.C. § 253(b); *see* footnotes 41 through 45, *below*.

³⁹ *TracFone Petition*, p. 12.

therefore not appropriate to preempt all state laws based upon the analysis of a small sample. Additionally, TracFone is not an eligible telecommunications carrier in all states, so TracFone lacks standing to seek preemption of state law that do not apply to it.⁴⁰ For these reasons, TracFone's request that *all* state laws imposing 9-1-1 fees on no-charge Lifeline services should be denied.

IV. The Provision of 9-1-1 Service Is One of The Reasons The Lifeline Subsidy Was Created.

9-1-1 service and emergency communications are vital to protecting all people in this country. The Commission has long recognized this, such as when it stated the following:

We reaffirm the Commission's previous finding that ensuring consumers' access to 911 and E911 services is an essential element of consumer protection. Given the importance of public safety, we condition this grant of forbearance on each carrier's compliance with certain obligations as an ETC. Specifically, our forbearance from the facilities requirement of section 214(e) is conditioned on each carrier: (a) providing its Lifeline subscribers with 911 and E911 access, regardless of activation status and availability of minutes; [and] (b) providing its Lifeline subscribers with E911-compliant handsets and replacing, at no additional charge to the subscriber, noncompliant handsets of Lifeline-eligible subscribers who obtain Lifeline-supported services.⁴¹

In the same vein, former Chairman Genachowski stated: "Who are the people that benefit from Lifeline? They are people like a woman we heard about in South Pittsburg, Tennessee, who was thrown from her car in a severe accident and used her phone to call 9-1-1 and receive immediate assistance."⁴² Commissioner Clyburn likewise noted the importance of 9-1-1 service to Lifeline consumers: "Without the capability to call employers, schools, doctors, 9-1-1, and

⁴⁰ *Global Network Commc'ns, Inc. v. City of New York*, 562 F.3d 145, 152 (2d Cir. 2009) ("[T]he district court correctly refused to adjudicate Global's claims that several provisions of the City's regulatory scheme, including advertising restrictions, violate the TCA. The provisions noted by Global affect only entities operating under a license, and Global, which had no license to operate, was not affected by them. It therefore lacked standing to challenge them.").

⁴¹ *2012 Lifeline Order*, 27 FCC Rcd. at 6814 (¶ 373).

⁴² *2012 Lifeline Order*, 27 FCC Rcd. at 6944 (Statement of Chairman Julius Genachowski).

family and friends, those already vulnerable consumers are further isolated, and managing their day-to-day lives becomes extremely difficult.”⁴³ BRETSA does not believe that the Commission or Congress intended to defund 9-1-1 service by implementing Lifeline.

The Commission even stressed the importance of 9-1-1 service in the Forbearance Order authorizing TracFone to offer no-charge Lifeline Services. The Commission stated that “[g]iven the importance of public safety, we condition this grant of forbearance on TracFone’s compliance with the E9-1-1 requirements applicable to wireless resellers, as modified below, for all Lifeline consumers.”⁴⁴ Wireless resellers are required to collect and remit 9-1-1 fees. The Commission went on to state that “[t]he Commission has an obligation to promote ‘safety of life and property’ and to ‘encourage and facilitate the prompt deployment throughout the United States of a seamless, ubiquitous, and reliable end-to-end infrastructure’ for public safety. The provision of 9-1-1 and E9-1-1 services is critical to our nation’s ability to respond to a host of crises, and this Commission has a longstanding and continuing commitment to a nationwide communications system that promotes the safety and welfare of all Americans, including Lifeline consumers.”⁴⁵ As the Commission has recognized, 9-1-1 service is a vital part of public safety. The 9-1-1 system should not be compromised. Since TracFone’s Petition seeks to reduce funding to the 9-1-1 system, it should be denied.

⁴³ *2012 Lifeline Order*, 27 FCC Rcd. at 6950 (Statement of Commissioner Mignon L. Clyburn Approving in Part, Concurring in Part).

⁴⁴ *In the Matter of Federal State Joint Board on Universal Service; Petition of TracFone Wireless, Inc. for Forbearance*, Order, 20 FCC Rcd. 15095, 15102 (2005) (¶ 16) (the “TracFone Forbearance Order”).

⁴⁵ *TracFone Forbearance Order*, 20 FCC Rcd. at 15102 (¶ 16).

V. State Commissions Are Specifically Allowed to Impose Non-Entry and Non-Rate Regulations, Including Consumer Protection Regulations, on Wireless Carriers As A Condition of ETC Designation.

The Commission has noted that “consumer protection requirements imposed [by states] on wireless carriers as a condition for ETC designation” are not necessarily inconsistent with section 332, which “preempts state from regulating the *rates and entry* of [wireless] providers, [but] allows states to regulate the other terms and conditions of [wireless] services.”⁴⁶ The Commission has also noted that 9-1-1 service “is an essential element of consumer protection.”⁴⁷ The requirement to remit 9-1-1 fees is a condition imposed by states. Thus, states are specifically allowed to impose 9-1-1 fees on no-charge Lifeline service.

VI. Grant of TracFone’s Petition Would Undermine The 9-1-1 System.

TracFone has long objected to, and sought relief from, remittance of 9-1-1 fees. It is now seeking to exempt Lifeline service from responsibility for contribution to the cost of 9-1-1 Service to undermine the 9-1-1 funding system and force the states to develop some alternative funding mechanism. The existing funding mechanism works well, and should not be abandoned so that TracFone can avoid the burden of remitting 9-1-1 fees. State and local governments should not be put to the hundreds of millions of dollars or more in expenses in transitioning from a 9-1-1 surcharge, fee or tax mechanism to funding 9-1-1 services out of their General Funds, as TracFone has argued, including in the face of limitations on tax increases such as Colorado’s Taxpayer Bill of Rights (“TABOR”).

⁴⁶ *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, 20 FCC Rcd. 6371, 6384-85 (2005) (¶ 31); accord. *WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262, 1273 (10th Cir. 2007)(*Emphasis added*); see also 47 U.S.C. § 332.

⁴⁷ *2012 Lifeline Order*, 27 FCC Rcd. at 6814 (¶ 373).

A. TracFone Provides A False Dilemma.

TracFone presents the Commission with a false dilemma in stating that application of 9-1-1 Fees to the Lifeline “market” may prevent or impair competition in the “market” by requiring it to either violate the Commission Rules by not passing through the entire benefit to Lifeline customers, or by remitting 9-1-1 Fees itself.

First, the relevant market is voice telephony services, and non-discriminatory 9-1-1 Fees are applied to wireline, VoIP and wireless voice telephony services including those offered by TracFone.⁴⁸ See 47 USC §615a-1(f)(1)(2008). Thus, voice telephony providers *including wireless providers* are required to remit 9-1-1 Fees. TracFone has failed to cite any statute or regulation exempting providers from remitting 9-1-1 fees for any reason whatsoever. TracFone fails to cite any regulation equivalent to 7 C.F.R. §272.1 which conditions the availability of foodstamp benefits on states not assessing sales tax on food stamp purchases.⁴⁹ The very existence of 7 C.F.R. §272.1 rebuts TracFone’s assertion that 9-1-1 Fees on federally-subsidized services are *per se* Unconstitutional, or that they *per se* interfere with the federal subsidy program. If state and local fees and taxes on federal benefits were unconstitutional or necessarily interfered in the benefit programs, 7 C.F.R. §272.1 would be superfluous.

The Commission is not obligated to assure that TracFone can profitably compete in any telecommunications market, or that it can profitably offer subsidized wireless telephony service. Indeed, the Commission fosters competition to encourage innovation and development of more efficient services rather than coddle lowest-common-denominator providers. As long as there is some provider which can and will provide the subsidized service, then neither the intended

⁴⁸ However the market is defined, if TracFone were permitted to evade remittance of 9-1-1 Fees for its subsidized voice telephony service, it would enjoy a discriminatory advantage over providers of other subsidized or non-subsidized voice telephony services.

⁴⁹ TracFone Petition, fn. 29 at 15

beneficiaries of the service (the low income individuals who qualify for the subsidy) nor the incidental beneficiaries (the providers from whom the Lifeline subscribers take service) have grounds for complaint.

B. There Is No Emergency.

TracFone captions its Petition an “Emergency Petition.” There is no emergency. TracFone has long been aware of state 9-1-1 fees. Other voice telephony providers supply Lifeline service, and TracFone has not shown that other providers will cease to offer Lifeline service even should TracFone cease to offer its Lifeline service.

Nor is this a new issue for TracFone. On June 1, 2009, TracFone filed an application for certification by the Colorado Public Utilities Commission (“CPUC”) as an ETC. That application was assigned Docket No. 090-393T. Several Colorado 9-1-1 Authorities intervened stating:

The proposed Intervenors, and all other E-911 Authorities in the State of Colorado, have a direct interest in whether TracFone receives designation to offer Lifeline Services. This is so because TracFone has refused and continues to refuse to pay the emergency telephone charge.

All existing ETC Lifeline Service providers pay the emergency telephone charge.

* * *

The more Lifeline customers TracFone can acquire, the less funding there is available for paying 911 expenses.

Adams County E-911 Emergency Telephone Service Authority, Arapahoe County Emergency Communications Service Authority and Jefferson County E-911 Emergency Communications Service Authority joint Motion to Intervene, filed September 15, 2009, at 2.⁵⁰ The Colorado 9-1-1 Task Force also filed informal comments stating in part:

⁵⁰ TracFone disputed that it was required to pay Emergency Telephone Charge in Colorado based on the wording of the applicable Colorado statute that the surcharge applied to “billed service users,” and its contention that prepaid services are not “billed.” TracFone also disputed the statement that all existing ETC Lifeline providers pay the surcharge. TracFone participated with the Colorado 9-1-1 Task Force and other providers of prepaid wireless service in negotiating and promoting a revision to the Colorado statutes to provide for point-of-sale collection of fees for pre-paid wireless service.

TracFone makes no effort to collect the emergency telephone charge and does not pay the emergency telephone charge. TracFone asserts that there are 350,000 households eligible to participate in the Lifeline Program. Currently Qwest and the other landline and post-paid wireless carriers participating in the program pay the emergency telephone charge. If TracFone also offers Lifeline, TracFone will take Lifeline customers from the carriers that are collecting and paying the emergency telephone charge. Revenues are decreasing, or at least not increasing like they were when the economy was better. To permit Lifeline customers with a carrier that collects and pays the emergency telephone charge to switch to TracFone would cause a decrease in revenues available to fund 9-1-1 services across the state.

Comments of the Colorado 911 Task Force, filed November 2, 2009 in CPUC Docket No. 09A-393T, at 1.

In its second set of data requests to TracFone, the CPUC Staff propounded Data Request PUC 2-13:

Does TracFone admit that it must fully comply with C.R.S. § 29-11-100.5, Emergency Telephone Service obligations including 911 funding requirements? If TracFone admits such compliance obligation, please provide a detailed explanation and all underlying documentation showing how and when TracFone has complied with such obligations, or when such obligations and documentation will be completed. If not, please provide all factual, not legal explanations for non compliance.

TracFone responded in pertinent part:

TracFone denies that it has an obligation to pay the 911 surcharge referenced in C.R.S. § 29-11-102. Section 29-11-102 (2)(b)(4) provides: "[e]very billed service user shall be liable for any charge imposed under this article until it has been paid to the service supplier." TracFone, as a prepaid wireless carrier, does not issue bills, and therefore, has no "billed subscribers" As such, it is not obligated to collect the 911 surcharge from its customers. Moreover, TracFone is not aware of any wireless service provider which remits 911 fees on its sales of prepaid service. It is aware that TracFone and other wireless providers are working with industry and other stakeholders to craft a legislative solution which ensures that all users of prepaid wireless services contribute to the support of 911.

Tracfone Wireless, Inc.'s Objections and Responses to Staff of the Colorado Public Utilities Commission's Second Set of Data Requests, filed August 24, 2009 in CPUC Docket 09A-393T, at 10-11. TracFone ultimately withdrew its application.

TracFone subsequently promoted, and apparently assisted in drafting, Colorado Senate Bill 10-135 which would have exempted payment of Emergency Telephone Charges for Lifeline services. Representatives of Colorado 9-1-1 Authorities testified against the Bill, which was laid over and not passed.⁵¹ At the time, information was being provided to the Colorado 9-1-1 Community by other states regarding their respective actions to require payment of 9-1-1 Fees by Lifeline and prepaid wireless providers in general and TracFone specifically. This included circulation of the decision of the Nebraska Supreme Court in *TracFone Wireless v. Neb. Pub. Serv. Com'n*, 778 N.W.2d 452 (Neb. 2010) holding that neither Nebraska's 9-1-1 Act nor the Nebraska Commission's interpretation requiring prepaid wireless providers to collect 9-1-1 Fees were preempted.

It is difficult to understand how the issue raised by the TracFone Petition could rise to the level of an "emergency" when TracFone has been aware of and dealing with the issue of state 9-1-1 fees on subsidized service since at least 2009.

C. The Elimination Of 9-1-1 Fees By The Large Number Of Subsidized Customers Would Imperil The 9-1-1 System.

Using the numbers provided by TracFone in its Petition, approximately 16 percent of adults in Indiana and 19 percent of adults in Alabama are living at or below the poverty line, and would presumably be eligible for TracFone's Lifeline Service. If this large a percentage of customers cease paying their share of 9-1-1 Fees and become free riders, such that 15% to 20% of fees supporting 9-1-1 service are lost, the continuation of 9-1-1 service might well be imperiled. Alternatively, the remaining providers and customers which are not free-riders would be required to meet a disproportionate share of expenses, without any express *state or federal* intent to create such a large subsidy, also undermining 9-1-1 service. In states like Colorado

⁵¹ Legislation providing for point-of-sale collection of 9-1-1 Fees in Colorado was adopted and passed in cooperation with the Colorado 9-1-1 Task Force and prepaid wireless providers.

where 9-1-1 Fees are established and remitted on a county-by-county basis, impacts on 9-1-1 funding could be even more significant.

The Commission's requirement that ETCs make 9-1-1 calling available to Lifeline customers will be meaningless if TracFone succeeds in undermining funding for 9-1-1 service.

D. TracFone's Petition Is The Latest In A Long Line Of Its Efforts To Avoid Remitting 9-1-1 Fees.

As discussed above, in 2009 and 2010 TracFone was resisting remitting 9-1-1 Fees to State and local authorities in Colorado by arguing that the reference to "billed" users was intended to exclude prepaid users, and appealing decisions of utility commissions.⁵²

In 2012, TracFone argued to the Commission that federal standards are necessary "to assure that funding methods for both existing and NG9-1-1 systems are equitable, non-discriminatory and competitively and technologically neutral, especially with respect to one of the fastest growing segments of the telecommunications industry – prepaid wireless services." *TracFone Legal and Statutory Framework Comments*, at 2. TracFone argued that the monthly assessment of 9-1-1 Fees as a line-item on post-paid telephone bills does not work for prepaid services, but the solution is for point-of-sale collection of 9-1-1 fees either as a flat fee per card or as a percentage of the retail purchase price. *Id.*, at 3-4. TracFone also stated:

Although those laws require the providers to collect 9-1-1 fees through line-item charges on monthly bills to those end users and to remit the amounts collected to the state, the providers are liable for remitting only the amounts collected from customers through the billing process. Those laws do not require the carriers to serve as the guarantor to the state if the customer does not pay the charges.

⁵² It is BRETSA's understanding that prepaid wireless services were not available, or were not generally available, at the time statutes requiring collection and remittance of 9-1-1 fees from "billed" users were adopted, and that the use of the term billed were to distinguish active services from wireline service in "soft dialtone" after a disconnection order, or which were used by providers for testing, maintenance or other such purposes. The term "billed" does not necessarily distinguish between pre-paid and post-paid services.

Id., at 3. BRETSA sees little difference between collection of 9-1-1 Fees through line item surcharges or taxes included in the total charges on monthly post-paid bills, and a line-item surcharge or tax included in the total charges on prepaid minutes. Nor does BRETSA see a difference between the remittance requirements applicable to post-paid and pre-paid service. Providers of post-paid service are at risk of customers not paying a bill including 9-1-1 Fees, and would be “out-of-pocket” if required to remit 9-1-1 Fees not collected from the customer. In the case of prepaid services, payment of charges and 9-1-1 Fees are paid in advance so providers *will never be at risk of going “out-of-pocket”* to remit them; at least where the 9-1-1 Fee is included in the wholesale cost of minutes and remitted by the provider. (Collection of 9-1-1 Fees at the point of sale is inconsistent, but are remitted by the point-of-sale vendor if collected, not by the service provider.)

In 2013 TracFone argued to the Commission that “[i]t is impossible to collect 9-1-1 surcharges and fees through carrier billing processes when the carriers' services are non-billed services,” and that NG9-1-1 should be funded out of states’ general funds. TracFone January 29, 2013 Ex Parte Notice in PS Docket Nos. 11-153, 10-255 and 12-333. *See, also*, the January 14 Reply Comments of TracFone Wireless Inc. in PS Docket Nos. 11-153, 10-255 and 12-333, at 2; March 11, 2013 Comments of TracFone Wireless, Inc. in Docket Nos. 11-153 and 10-255, at 4. Again, BRETSA fails to understand why it would be “impossible to collect 9-1-1 Fees” through including the 9-1-1 Fee as a line item in the wholesale and retail price of prepaid minutes. This would be possible, and more reliable than postpaid collection of line-item 9-1-1 Fees. BRETSA rejects the assertion that customers cannot compare the cost of (i) prepaid minutes with line-item 9-1-1 Fees with (ii) post-paid services with line-item 9-1-1 Fees. It is not clear that the absence of a line-item for 9-1-1 Fees in the wholesale/retail price of prepaid minutes is the reason some

customers choose to purchase prepaid service, but if it is that would be evidence that the current surcharge system provides prepaid providers an unfair competitive advantage.

Now, in 2014, TracFone has progressed to arguing in its Petition that imposition of competitively neutral 9-1-1 Fees on certain prepaid services is unconstitutional. This argument must also be rejected.

E. A National Surcharge on Pre-paid (Non-Billed) Wireless Service Would Assure An Even Playing Field.

As the Boulder Regional Emergency Telephone Service Authority has previously submitted, the Commission should establish, or should urge Congress to establish, a national prepaid wireless 9-1-1 Fee program, which will be applicable to prepaid Lifeline services as well as other prepaid services.

Point-of-sale collection of prepaid surcharges is inconsistent. Prepaid minutes are sold at large and small brick and mortar retailers, as well as over the Internet. Given the small amount of individual surcharges, auditing of surcharge remittances by small retailers such as gas stations and convenience stores will rarely be cost-effective. Compelling Internet retailers to collect and remit point-of-sale 9-1-1 Fees can be even more challenging. 9-1-1 fees on prepaid wireless service actually collected in Colorado are far less than half the amount projected at the time the Colorado statutes were amended to provide for point-of-sale collection of the fees, based upon available information as to the size of the prepaid wireless market in Colorado.

If a uniform pre-paid 9-1-1 Fee was established nationwide, approximating the fees set in the various states; then the prepaid providers could include the 9-1-1 Fee (identified separately) in the wholesale price of its minutes and remit them upon activation of minutes. Remittance could be based upon the distribution of airtime usage, or upon the customer's identification of their jurisdiction when activating airtime (minutes). Consistent and reliable collection and

remittance of 9-1-1 fees by all providers, including prepaid and Lifeline providers, will eliminate free riders and may reduce fees which have been raised due to inconsistent remittances.⁵³

VII. Conclusion.

TracFone has filed an “Emergency Petition” raising issues of which it has been aware for at least five years. TracFone basis its claim for relief on bad law; and which is contrary to the holding of at least one Court on the very issue it raises, in a case in which TracFone was a named party, but which TracFone has omitted to cite and distinguish.

TracFone has not met its burden of showing that (i) state 9-1-1 fees violate Section 253(a) of the Communications Act, and (ii) state 9-1-1 fees do not fall within the safe harbor exception of Section 253(b). Thus TracFone has not shown that the fees violate the Constitution.

Further, grant of the TracFone Petition would provide it a competitive advantage, undermine 9-1-1 Service and require state and local governments to incur untold sums of money to convert from a surcharge, fee or tax on voice telephony services, to other sources of funding for essential 9-1-1 service. TracFone has not shown that Lifeline service will not be available absent a Commission finding that state 9-1-1 fees violate the Constitution. TracFone has not even shown that TracFone and other providers will lose money offering Lifeline service, and that Lifeline service will not be available. It would appear that TracFone’s simply prefers that all subsidies flow to it rather than to support essential 9-1-1 service, notwithstanding that it has no

⁵³ With the advent of services provided by VoIP providers which may not have any physical facilities in the state, and over-the-top voice and other services provided over CMRS networks, the Boulder Regional Emergency Telephone Service Authority has also suggested that the funding mechanism should migrate to assessment of 9-1-1 Fees on telecommunications *connections* per unit of upstream bandwidth, including wireline, broadband and wireless connections used over which various communications services may be provided and 9-1-1 may be called. In addition to keeping 9-1-1 Fees more practically enforceable, it would assure a level playing field. Facilities-based VoIP and Wireless providers are subject to practically enforceable surcharges for their voice and other communications services. Over the top providers are not subject to practically enforceable surcharges. Assessing the surcharges on the underlying, facilities-based connection, would permit the voice and other telecommunications services of the facilities-based providers to compete on an even playing field with over-the-top providers.

vested interest in the service and the subsidies are for the benefit of consumers, not providers including TracFone.

TracFone's Petition must be denied.

Respectfully submitted,

**BOULDER REGIONAL EMERGENCY
TELEPHONE SERVICE AUTHORITY**

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