

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

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

REPLY COMMENTS OF TRACFONE WIRELESS, INC.

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SUMMARY

TracFone Wireless, Inc. (“TracFone”) has requested the Commission, pursuant to the Supremacy Clause of the United States Constitution and 47 U.S.C. § 253, to preempt enforcement of state laws and regulations that impose 911 taxes and fees on wireless Lifeline service that is provided to qualified low-income consumers for no charge. While several commenting parties support TracFone’s Petition, other commenters claim that no charge Lifeline customers are not negatively impacted by 911 fees and that no charge ETCs should either change their business models to bill the 911 fees to customers or pay the 911 fees from their own resources. The commenters fail to raise any issue that would warrant the Commission’s denial of TracFone’s Petition

Under the Supremacy Clause, a federal law preempts a state law when the state law conflicts with the federal law. State laws, such as those in Alabama and Indiana, that impose 911 fees on no charge Lifeline service conflict with 47 U.S.C. § 254(e), which, in the case on non-facilities telecommunications carriers, requires Lifeline support only to be used for providing service (not for paying state fees) and with 47 C.F.R. § 54.403, which requires ETCs to pass through the full amount of support to qualifying low-income consumers. Although Lifeline service enables low-income customers to gain access to 911 services, the cost of paying 911 fees is not a cost of providing service. Reducing the number of minutes of Lifeline service as a means for ETCs to cover the cost of 911 fees, as suggested by some commenters, is not a lawful option because the full amount of Lifeline support, which may only be used to provide services, would not be passed through to Lifeline consumers. Moreover, reducing Lifeline benefits as a way to pay for state 911 fees is unfair and inconsistent with the statutory goal of making affordable service available to the nation’s low-income consumers. Indeed, several states have held that their 911 fees are not applicable to no charge Lifeline service. ETCs also should not be

required to alter their national business models to establish billing mechanisms to collect 911 fees solely to accommodate individual states' views on 911 fees.

Several commenting parties incorrectly claim that 47 U.S.C. § 615a-1 gives states unlimited power to impose 911 fees on no charge Lifeline service. However, Section 615a-1 must be viewed in light of the longstanding legal principle that states may not tax the federal government or its instrumentalities. Under that principle, states may not impose taxes directly on the federal government, nor may they impose taxes the legal incidence of which falls on the federal government. The legal incidence of 911 taxes on no charge Lifeline service is on the Universal Service Administrative Company, an instrumentality of the federal government that is responsible for paying for no charge Lifeline service by providing ETCs with Lifeline support. Significantly, the United States General Accounting Office has found that a federal agency is constitutionally immune from the Alabama 911 fee and Indiana law specifically exempts the federal government and agencies from the 911 fee.

Finally, preemption of state 911 laws is justified under 47 U.S.C. § 253 because the imposition of state 911 taxes on no charge Lifeline service effectively prohibits no charge ETCs from providing Lifeline service because they have no viable means to comply with those laws. None of the following proposals by commenters is workable: (1) reducing airtime minutes is not lawful; (2) establishing a billing system is burdensome and would require ETCs to change a business model that is working for Lifeline consumers; and (3) paying the 911 fees from ETCs' own resources is not competitively neutral because ETCs that provide postpaid or billed Lifeline services are able to collect the fees from their customers.

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TracFone Wireless, Inc. (“TracFone”), by its attorneys, hereby replies to comments filed in response to its Emergency Petition for Declaratory Ruling (“Petition”). In that Petition, TracFone asked the Commission, pursuant to the Supremacy Clause of the United States Constitution and Section 253 of the Communications Act of 1934, as amended,¹ to preempt enforcement of state laws and regulations that impose 911 taxes and fees on no charge (*i.e.*, free) wireless Lifeline service. As described in the Petition, such state laws should be preempted for two reasons: (1) they unlawfully reduce the value of the federal Lifeline benefits provided to low-income customers by imposing a state tax on those benefits; and (2) they impede the ability of Eligible Telecommunications Carriers (“ETCs”) offering no charge Lifeline service to fairly compete in the Lifeline service market. Several commenters have expressed concern about the impact of 911 taxes on Lifeline consumers who rely on no charge Lifeline service and support TracFone’s Petition. Other commenters that oppose TracFone’s Petition overlook relevant law and recommend solutions that are inconsistent with the Constitution, the Communications Act, and the Commission’s rules and policies. As explained in detail in these Reply Comments, those opposing commenters fail to raise any valid basis for denying TracFone’s Petition.

¹ 47 U.S.C. 151 *et seq.* (“Communications Act” or “Act”).

BACKGROUND

Pursuant to Commission rules, ETCs receive \$9.25 per month per enrolled Lifeline customer from the federal Universal Service Fund (“USF”) provided that the ETCs “pass through the full amount of support to the qualifying low-income consumer.”² TracFone complies with the Commission’s rule by providing free monthly service, including a specified quantity of airtime minutes valued at \$9.25, to qualifying low-income consumers. As TracFone explained in its Petition, it is aware of two states that have enacted laws and promulgated regulations that they claim impose state 911 taxes and fees on no charge Lifeline service. Under Alabama regulations, effective August 1, 2014, a Lifeline subscriber, including a subscriber that receives no charge Lifeline service, is required to pay a monthly 911 tax of \$1.75 associated with a Lifeline benefit valued at \$9.25, thereby decreasing the amount of the subscriber’s Lifeline benefit by 19 percent.³ The Indiana Statewide 9-1-1 Board (“Indiana 911 Board”) claims that a new Indiana law, enacted in 2014, imposes a 911 tax of \$0.50 on monthly Lifeline service that is due from ETCs, including those ETCs that provide no charge service.⁴ Application of 911 taxes

² 47 C.F.R. § 54.403(a)(1).

³ See TracFone Petition, at 7-9; Ala. Admin. Code r. 585-X-4.01(2). Alabama Lifeline subscribers who supplement their Lifeline benefit by purchasing airtime cards in any given month are subject to multiple taxation. Such consumers also must pay a \$1.75 prepaid wireless 911 fee on each airtime purchase. See Ala. Code § 11-98-5.3.

⁴ See TracFone Petition, at 9-11; Ind. Code § 36-8-16.1-11(d). The State of Indiana asserts that if TracFone did not want to comply with Indiana law governing 911 fees, then it should have appealed the Indiana Utility Regulatory Commission (“IURC”) order designating TracFone as an ETC and requiring that TracFone comply with laws governing 911 fees. See Comments of State of Indiana, at 7-8. TracFone was designated as an ETC in 2011, but the Indiana law at issue in the Petition was not enacted until 2014. *In the Matter of Petition of TracFone Wireless, Inc. for Designation as an Eligible Telecommunications Carrier in the State of Indiana for the Limited Purpose of Offering Lifeline Service to Qualified Households*, Order, Cause No. 41052 ETC 54 (Indiana Util. Reg. Comm’n: June 29, 2011) (“Indiana ETC Order”), submitted as Exhibit 1 to Comments of State of Indiana. Therefore, TracFone’s decision not to exercise its right to appeal is not relevant to this proceeding.

to Lifeline consumers who receive Lifeline service for no charge is an unlawful tax on federal benefits whether the consumer or the consumer's Lifeline service provider is liable for the tax.

I. Pursuant to the Supremacy Clause of the Constitution, the Commission Should Preempt State Laws and Regulations Imposing 911 Taxes on No Charge Lifeline Service Because They Unlawfully Tax Federal Lifeline Support.

Under the Supremacy Clause, a federal law preempts a state law when the state law conflicts with the federal law or when it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁵ As TracFone explained in its Petition, Alabama and Indiana laws and regulations that purport to impose state 911 taxes on no charge Lifeline service conflict with a Lifeline consumer's right under Commission Rule 54.403 (47 C.F.R. § 54.403) to receive the full amount of the federal Lifeline benefit as set forth in the Commission's rules and with an ETC's obligation to pass through to Lifeline customers the full amount of USF Lifeline support. Some commenters assert that diverting a portion of the low-income consumers' Lifeline support received from the USF to pay a state 911 tax does not conflict with the legal requirement that Lifeline consumers receive the “full amount of support” because Lifeline service includes access to 911 services.⁶ Other commenters claim that states have an unlimited right to impose or collect fees applicable to wireless services for support of 911 services without regard to whether the effect of such 911 tax payments would be to reduce

⁵ *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

⁶ See, e.g., Comments of Arapahoe County E-911 Emergency Communications Service Authority (“Arapahoe County”), at 11. Comments filed by Arapahoe County, Adams County E-911 Emergency Telephone Service Authority, and Jefferson County Emergency Communications Authority are virtually identical. These commenters are jointly referenced in these Reply Comments as “Colorado 911 Authorities” and page number references reflect the page numbers as they appear in Arapahoe County's filing.

federal Lifeline benefits below the level established by the Commission.⁷ Neither assertion is supported by federal law or policies.

A. Federal Law Requires that ETCs Pass Through the Entire Amount of Federal Lifeline Support to the Benefit of Their Customers.

Section 254(e) of the Communications Act (47 USC § 254(e)) provides that an ETC that receives federal universal service support “shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.” TracFone, as a non-facilities-based reseller of wireless services, is not responsible for maintaining or upgrading facilities. As such, it may only use federal Lifeline support for the provision of services. Commission Rule 54.403(a)(1), which implements Section 254(e) of the Communications Act, provides as follows: “Federal 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 certifies to the Administrator that it will pass through the full amount of support to the qualifying low-income consumer” Finally, Commission Rule 54.403(b) governs how the Lifeline support is to be applied to offset the amount the ETC charges a Lifeline customer for service. Specifically, Section 54.403(b) provides:

(b) Application of Lifeline discount amount. (1) Eligible telecommunications carriers that charge federal End User Common Line charges or equivalent federal charges must apply federal Lifeline support to waive the federal End User Common Line charges for Lifeline subscribers. Such carriers must apply any additional federal support amount to a qualifying low-income consumer's intrastate rate, if the carrier has received the non-federal regulatory approvals necessary to implement the required rate reduction. Other eligible telecommunications carriers must apply the federal Lifeline support amount, plus any additional support amount, to reduce the cost of any generally available residential service plan or package offered by such carriers that provides voice

⁷ See, e.g., Comments of State of Indiana, at 4-7; Comments of State of Alabama and Its Statewide 9-1-1 Board (“State of Alabama”), at 4-7.

telephony service as described in § 54.101, and charge Lifeline subscribers the resulting amount.

As directed by Section 54.403(b), those ETCs that charge a federal End User Common Line (“EUCL”) charge must apply federal Lifeline support to cover that charge for Lifeline subscribers. The State of Indiana incorrectly states that the Commission’s rules support the use of Lifeline funds for applicable government charges and fees (including state 911 fees) because those rules allow Lifeline support to pay the EUCL charge.⁸ As an initial matter, the EUCL charge is not relevant to wireless service, such as that provided by TracFone, because it is a federal access charge imposed on wireline local exchange services by the Commission’s rules. Commercial mobile radio service providers are not required to assess EUCL charges on their end user customers. More importantly, the EUCL charge is a federal charge; unlike state 911 taxes, it is not a state-imposed tax or charge. Therefore, the federal EUCL charge, unlike the state 911 fees at issue, is not an attempt by a state to impose a tax on a federal benefit.

The fact that federal Lifeline support must be used for provision of telecommunications services, and may not be used to cover state 911 fees, is supported by Section 54.403(b). That regulation requires that other ETCs (*i.e.*, those ETCs that do not charge the federal EUCL charge) “must apply the federal Lifeline support amount, plus any additional support amount, to reduce the cost of any generally available residential service plan or package offered.” TracFone offers its non-Lifeline service primarily through prepaid airtime cards. TracFone’s prices for that service do not incorporate state fees. Consumers purchase TracFone’s non-Lifeline service either at retail locations or online through TracFone’s website (www.tracfone.com). In approximately 40 states, TracFone’s non-Lifeline customers are required to pay state 911 fees at the point of retail sale, and the third party retailer or TracFone (in the case of purchases made

⁸ See Comments of State of Indiana, at 10.

directly from TracFone rather than through an independent retail vendor) collects those fees and remits the 911 fees to the appropriate state government authority.⁹ In those states that have not yet adopted point of sale collection for 911 fees, TracFone complies with the relevant laws regarding the payment of 911 fees, which in some cases have been found not to apply to prepaid wireless services.¹⁰ By offering Lifeline service to qualifying low-income customers at no charge, TracFone is properly applying all Lifeline support received by it to reduce (to zero) the cost of service to Lifeline customers – a service that does not include payment of 911 fees.¹¹ As such, TracFone is complying with Commission Rule 54.403(b) regarding the application of the Lifeline discount amount.

As stated in Section 54.403(b), ETCs must apply the federal Lifeline support amount to reduce the cost of any plan that offers voice telephony service as described in Commission Rule 54.101. Section 54.101 provides that voice telephone service includes certain service elements, including “access to the emergency services provided by local government or other public safety organizations, such as 911 and enhanced 911” Some commenters have asserted that the fact

⁹ In states that have point of sale 911 collection laws, Lifeline customers who make additional airtime purchases are subject to the applicable 911 fees on those purchases of additional airtime.

¹⁰ TracFone has challenged the applicability of state 911 fees to prepaid wireless service in certain states and has abided by all state court orders that have required TracFone to remit 911 fees. TracFone’s exercise of its right to challenge the applicability of 911 fees does not amount to a “scheme” by TracFone to use litigation to avoid statutory obligations as pejoratively alleged by some commenters. *See, e.g.*, Comments of State of Indiana, at 2 n.2. Indeed, as the State of Indiana acknowledges, some state courts (including, for example, courts in Texas, Kentucky and Michigan) concluded that state 911 fees were not applicable to prepaid service under those states’ laws then at issue. The State of Indiana also admits that other prepaid wireless carriers have similarly challenged state 911 fees. *Id.* TracFone’s decision to challenge the applicability of states’ 911 fees to prepaid wireless also has no bearing on whether TracFone is in compliance with its obligation as an ETC to comply with 911 statutes, including those governing 911 funding. *See* Comments of State of Alabama, at 7-8 and 19.

¹¹ As the Commission has stated, “ETCs are required to pass through the Lifeline support they receive to the benefit of their subscribers.” *Telecommunications Carriers Eligible for Support et al.*, Memorandum Opinion and Order, 28 FCC Rcd 4859, 4865, ¶ 13 (2013) (emphasis added).

that ETCs are required to provide access to 911 emergency services somehow means that federal Lifeline support may be diverted from the intended recipient in order to pay state 911 fees. For example, the State of Indiana states: “Another reason the Lifeline subsidy can pay the 911 Charge without reducing the benefits to the customer is that Lifeline customers receive the benefit of access to 911 service through the Lifeline-subsidized phone and service.”¹² This self-serving argument is a non sequitur. While it is true that Lifeline service enables low-income customers to gain access to 911 services, as explained above, the cost associated with 911 fees is not a cost of providing service for which federal USF support may be used.¹³ As Sprint Corporation accurately states, “[d]iverting Lifeline dollars for other worthy causes, while perhaps well intentioned, is not permitted by federal law.”¹⁴ Furthermore, the notion that federal Lifeline support should be used to fund 911 service has been explicitly rejected by several states

¹² Comments of State of Indiana, at 9; *see also* Comments of Colorado 911 Authorities, at 11 (stating that it is acceptable to reduce Lifeline benefits to cover 911 fees because Lifeline consumers benefit from 911 service); Comments of BRETSA, at 9 (same).

¹³ Lifeline customers’ access to 911 services by virtue of having Lifeline service without having to pay 911 fees does not make those customers “free-riders” as condescendingly characterized by certain commenters. *See* Comments of BRETSA, at 18; Comments of State of Indiana, at 25. Only consumers who participate in government assistance programs that assist economically disadvantaged individuals or who have income no greater than 125 percent of the federal poverty level qualify for Lifeline service. Consumers apply for Lifeline service so that they can have access to essential telecommunications services that they could not otherwise afford, not so that they can get a “free ride”.

¹⁴ Comments of Sprint Corporation (“Sprint”), at 4; *see also id.*, at 1-2 (“Surcharges that reduce the value of the federal Lifeline benefit or that divert Lifeline support to pay for non-Lifeline services are contrary to the Telecommunications Act, to the Commission’s Rules, and to the public interest, and the Commission should take action where needed to ensure that Lifeline funds are only used as permitted under federal law.”); *see also* Comments of CTIA – The Wireless Association[®] (“CTIA”), at 2.

either through legislation or through attorney general opinions which have held that their states' 911 laws simply are not applicable to no charge Lifeline services.¹⁵

The State of Indiana claims that since its 911 fee applies to all prepaid wireless transactions, "applying that Lifeline service amount to the Charge satisfies the requirement that TracFone pass through the 'full amount' [of Lifeline support] to the Lifeline customer."¹⁶ This assertion does not alter the conclusion that state 911 fees are not a cost of providing service, which is the only cost that Lifeline support may cover. Moreover, Indiana's reference to the fact that the 911 applies to all prepaid wireless transactions is irrelevant for two reasons. First, no charge wireless service is not prepaid service (nor is it postpaid service). No charge Lifeline customers do not pay in advance (*i.e.*, prepay) for service; they do not pay at all. Second, imposing 911 taxes on no charge Lifeline customers would result in duplicate payments into the 911 fund whenever a no charge Lifeline customer purchases additional airtime since each such airtime purchase is subject to Indiana's point of sale 911 fee on prepaid service. The State of Indiana fails even to acknowledge, let alone address, the issue of duplicate taxation imposed on Lifeline customers who purchase additional airtime minutes.

¹⁵ Several states, including California, Delaware, Maryland, Ohio, Rhode Island, South Carolina, and Tennessee have determined that 911 fees should not apply to Lifeline recipients. *See* Cal. Rev. & Tax. Code § 41011(b)(4); Del. Code Ann. tit. 16, § 10103; 99 Md. Op. Atty. Gen. 208, 2014 WL 7139497 (Dec. 5, 2014); Ohio Rev. Code Ann. § 128.42(A)(2)(b); Letter from Attorney General of Rhode Island to the Honorable Gordon D. Fox (Oct. 12, 2012); Letter from the Attorney General of South Carolina to the Honorable Leon Joe Howard, 2011 WL 5304075 (Oct. 10, 2011); Tenn. Op. Atty. Gen. No. 09-87, 2009 WL 1430917 (May 18, 2009). Copies of the Attorney General Opinions are attached as Exhibit 1.

¹⁶ Comments of State of Indiana, at 10.

B. Reducing the Number of Minutes Provided No Charge Lifeline Customers Does Not Comply with the Commission Requirement that ETCs Pass Through the Full Amount of Federal Lifeline Support.

Some commenters assert that TracFone could simply reduce the number of minutes it provides with its no charge Lifeline service and then use the excess Lifeline support to pay the 911 fee.¹⁷ As explained above, ETCs must use the entire amount of federal Lifeline support to provide service, not to pay state fees. Moreover, it is surprising that states would advocate that ETCs decrease the Lifeline benefits provided to their own low-income residents as a means to recover 911 fees. Indeed, several commenters agree that reducing monthly airtime minutes provided with Lifeline service minutes is not a legal option.¹⁸

Although NTCA – The Rural Broadband Association (“NTCA”) opposes TracFone’s Petition, it agrees with TracFone that “reducing the free monthly airtime minutes afforded each customer per month . . . would violate Commission regulation because the full amount of support would not be passed on.”¹⁹ NTCA, then suggests that TracFone simply collect the fee from subscribers or develop another way “so long as the federal benefit is passed through.”²⁰ As explained below, TracFone does not have a billing system and has no reason to alter its business

¹⁷ See, e.g., Comments of State of Indiana, at 19; Comments of State of Alabama, at 9-10. The State of Indiana’s suggestion that TracFone reduce the number of minutes it provides to Lifeline customers ignores the fact that pursuant to the IURC’s 2011 order designating TracFone as an ETC, TracFone is obligated “to offer Lifeline-eligible customers at least one plan with a minimum of 250 free minutes per month” Indiana ETC Order, at 17. Since a reduction in minutes would violate an explicit IURC ETC designation condition, TracFone could not simply file a revised tariff notifying the IURC of a reduction in minutes as suggested by the State of Indiana.

¹⁸ See, e.g., Comments of National ALEC Association/Prepaid Communications Association (“NALA”), at 4 (“The Telecommunications Act requires that the carrier pass through the entire benefit to the customer. Withholding certain amounts to pay state 911 funds would violate this requirement.”).

¹⁹ Comments of NTCA, at 3.

²⁰ *Id.*, at 3-4.

model to incorporate a billing system other than to collect 911 fees for no charge Lifeline service in two states. A solution that would require TracFone to change its structure by developing a costly and otherwise unnecessary billing mechanism would create a deadweight economic loss and would also place TracFone at a significant competitive disadvantage in the marketplace for Lifeline service.

Alabama ILECs also agree with TracFone that federal law prohibits ETCs from using part of the Lifeline support to pay 911 taxes, but then blames TracFone for not having an alternative method to collect 911 fees, such as a billing system. The Alabama ILECs explain their position as follows:

The Alabama law does not, as TracFone claims, require an ETC to use part of a Lifeline subscriber's monthly Lifeline benefit to cover the statewide 911 charge, and thus prevent the Lifeline subscriber from receiving the full monthly benefit. The use of a portion of a subscriber's monthly Lifeline benefit to cover the monthly 911 charge owed by the subscriber is nothing more than an **improper** alternative means of collection that has been created by TracFone because TracFone does not yet have adequate billing processes in place to easily collect the monthly fee.²¹

TracFone and other no charge ETCs do not have established billing mechanisms and should not be required to establish them for a few states that have determined, contrary to the decisions in several other states that no charge Lifeline service should be subject to 911 fees.²² TracFone does not have a billing system and has no need to invest in a billing system since its services are provided on a non-billed basis. TracFone would have no reason to develop a billing

²¹ Comments of Alabama ILECs, at 7 (emphasis added).

²² Although TracFone does not have a billing mechanism, in order to attempt to comply with Alabama law governing the collection of 911 fees, TracFone has requested its Alabama customers to remit \$1.75 a month (a 19 percent tax on their no charge federal Lifeline service). To date, less than 10 percent of TracFone's Lifeline customers have remitted the fee. *See* TracFone's Petition, at 20 n.46. The Alabama 911 Board has commenced legal action against TracFone in state court to collect from TracFone 911 fee payments on behalf of those low-income Lifeline customers who have not remitted payment in response to TracFone's request.

system other than to collect 911 taxes on no charge Lifeline customers in Alabama and Indiana. Furthermore, as noted by NALA, “[n]o-charge providers cannot simply absorb these costs without affecting their entire business plan and ultimately limiting the kinds and amounts of service they can provide.”²³ Even if states could require no charge Lifeline ETCs to alter their national business models so as to accommodate each state’s views as to its own taxes, “[s]uch a requirement would place these providers at a disadvantage in the marketplace.”²⁴

The Kentucky Commercial Mobile Radio Services Emergency Telecommunications Board (“Kentucky CMRS Board”) also admits that “[i]f TracFone and other prepaid providers choose to use a portion of the federal \$9.25 monthly benefit to pay 911 charges, rather than providing the full amount of the benefit in airtime for their customers, then TracFone is in violation of the Commission’s rules which require ETCs to pass through to the customer the entire monthly Lifeline benefit of \$9.25.”²⁵ Although the Kentucky CMRS Board acknowledges that reducing minutes would not be a lawful option, it blames TracFone’s inability to collect 911 fees from its Lifeline customers on TracFone, asserting that it “chose a prepaid model rather than billing customers on a monthly basis.”²⁶ The “solution” offered by the Kentucky CMRS Board

²³ Comments of NALA, at 3.

²⁴ *Id.*

²⁵ Comments of Kentucky CMRS Board, at 7-8; *see also id.* at 8 (“If the Lifeline benefits to TracFone’s customers are ‘unlawfully decreased’ below the federally mandated benefit, the action is being taken by TracFone and not the state entities to which the 911 service charges are remitted.”).

²⁶ *Id.* at 7-8. The Kentucky CMRS Board also incorrectly states that Kentucky federal law rejected TracFone’s position that it is unable to collect the 911 fees from Lifeline customers. *See id.* at 6-7. The Kentucky CMRS Board overlooks the fact that a more recent decision of the Kentucky Supreme Court holds that prepaid wireless carriers were not required to collect or pay Kentucky’s then-applicable 911 fee (the relevant law was amended in 2006). *Virgin Mobile U.S.A., L.P. v. Commonwealth*, No. 2012-SC-000621-DG, 2014 WL 4116480 (Ky., Aug. 21, 2014).

is for TracFone and other ETCs to pay 911 fees from their own revenues.²⁷ As explained *infra* in Section II of these Reply Comments, requiring some telecommunications carriers, but not others, to pay 911 fees from their own resources would violate the competitive neutrality requirement of 47 U.S.C. § 253. Since such a requirement would not be competitively neutral, it would not be subject to the so-called “safe harbor” codified at Section 253(b).

C. State Laws and Regulations Imposing 911 Taxes on No Charge Lifeline Service are Inconsistent with Commission Policy and the Goals of Universal Service.

State 911 fees that impose a tax on recipients of no charge non-billed Lifeline service are an obstacle to the accomplishment of the purposes and objectives expressed by Congress when it empowered the Commission to promulgate rules to advance universal service. Two important universal service principles articulated by Congress are that “[q]uality services should be available at just, reasonable, and affordable rates”²⁸ and that “[c]onsumers in all regions of the Nation, **including low-income consumers**, ... should have access to telecommunications and information services ... that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.”²⁹ Several commenters correctly stress that imposing 911 fees on no charge Lifeline service is unfair and inconsistent with the statutory goal of making affordable service available to the nation’s low-income consumers.

²⁷ See Comments of the Kentucky CMRS Board, at 8 (“Free Lifeline subscribers are required to receive the full benefit of the \$9.25 monthly reimbursement to ETCs. These subscribers receive their benefits – it is TracFone and other ETCs that may be required to pay 911 service charges from revenues.”); see also Comments of Kentucky Office of the 911 Coordinators, at 8.

²⁸ 47 U.S.C. § 254(b)(1).

²⁹ 47 U.S.C. § 254(b)(3) (emphasis added).

The Free State Foundation, a free market think tank, cogently explains the negative impact of imposing 911 fees on no charge Lifeline service:

Imposing 911 taxes and fees on a service provided at no charge to low-income consumers under a federal program intended to enhance their access to communications services seems illogical. One way or the other, whether the state contemplates that the fee will be paid directly by the consumer or by the provider on the consumer's behalf, the amount of the funds available to support Lifeline service is diminished.³⁰

The Free State Foundation is correct – whether low-income consumers pay the 911 fees from their own funds or receive a lower amount of Lifeline-supported services so that the 911 fee can be paid out of Lifeline support, those customers receive a lower amount of Lifeline benefits. States that impose a 911 tax on Lifeline “tramp[le] upon a federal program whose purpose, helping the poor afford emergency telephone service, is clearly delineated.”³¹ Making Lifeline service “less affordable with higher taxes”³² contradicts the goal of the Lifeline program, which is to make telephone service more affordable to low-income consumers.³³

TracFone agrees with commenters' suggestions that the Commission should exempt all Lifeline subscribers from additional fees, including state 911 fees, because such fees are regressive and “unfairly penalize the low-income consumers that the Lifeline program is intended to benefit.”³⁴ As noted by Sprint and CTIA, the Commission has already exempted

³⁰ Comments of the Free State Foundation, at 4.

³¹ Comments of National Taxpayers Union, at 2; *see also* Comments of Consumer Action *et al.*, at 1 (“Allowing fees or taxes to reduce the value of a federal benefit to a qualified low-income consumer is counterproductive and unjustly punitive to these consumers.”).

³² *Id.*

³³ *See* Comments of Americans for Tax Reform, at 1 (the goal of the USF's fund's Lifeline program is to “connect low-income individuals to phone service and emergency services that they may not be able to access otherwise due to cost.”); *see also id.* (“[a]dding a state level tax to the federally subsidized program is misplaced and legislatively inconsistent with the goals of universal service.”).

³⁴ Comments of National Consumers League, at 1.

Lifeline subscribers from the Local Number Portability charge and from USF charges assessed by incumbent local exchange carriers.³⁵ The Commission should similarly “consider ruling that all Lifeline subscribers – wireless and wireline alike – be exempted from paying state E-911 fees.”³⁶ TracFone supports the suggestion by the United States Telecom Association (“USTA”) that “[g]iven the importance of these issues, the Commission should determine how various fees should apply to Lifeline service as part of a comprehensive rulemaking more broadly examining the current Low-Income program.”³⁷ As USTA notes at page 3 of its comments, “[t]he application of any fee to Lifeline service necessarily increases the cost of that service or leads to decreases in the value of that service to the customer, and, thus, may discourage adoption of that service.” Pending completion of a proceeding as proposed by USTA, the Commission should exercise its constitutional and statutory preemption authority to protect low-income households receiving Lifeline support from having that support eroded by improper state taxation of that support. In the alternative, TracFone supports Sprint’s suggestion that the Commission adopt an order clarifying that Commission rules prohibit ETCs and states from using federal Lifeline support for any purpose other than providing service, including for the payment of state 911 fees.³⁸

³⁵ See Comments of Sprint, at 4 (citing 47 C.F.R. §§ 54.401(e), 69.158); see also Comments of CTIA, at 3. BRETSA argues that TracFone fails to cite to any statute or regulation that specifically exempts Lifeline providers from remitting 911 fees. See Comments of BRETSA, at 15. The fact that there is not such a law does not preclude the Commission from preempting state laws pursuant to the Supremacy Clause. As detailed in the Petition and in these Reply Comments, application of 911 fees to no charge Lifeline service violates the Commission rule requiring that the full amount of Lifeline support be passed through to the Lifeline subscriber.

³⁶ Comments of National Consumers Union, at 1.

³⁷ Comments of USTA, at 1.

³⁸ See Comments of Sprint, at 2 n.2.

D. States Do Not Enjoy an Unlimited Right to Impose 911 Fees on No Charge Lifeline Service That Tax Federal Benefits.

Several commenting parties, including, *e.g.*, the State of Alabama, have asserted that preemption of state taxation of no charge Lifeline service supported entirely by the federal USF is prohibited by 47 U.S.C. § 615a-1(f).³⁹ That statute states, in relevant part:

Nothing in this Act, the Communications Act of 1934, the New and Emerging Technologies 9-1-1 Improvement Act of 2008, or any Commission regulation or order shall prevent the imposition and collection of a free 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 and enhanced 9-1-1 services, or enhancements of such services, as specified in the provision of State or local law adopting the fee or charge.

TracFone does not dispute that Section 615a-1(f) allows states to enact and implement 911 fees.⁴⁰ However, that statutory provision must be viewed in light of the longstanding principle of constitutional jurisprudence that states may not tax the federal government, *i.e.*, that the United States and its instrumentalities are constitutionally immune from state and local taxation. That immunity includes state and local taxation to support 911 service.

That principle of constitutional law was established nearly two centuries ago in the seminal case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819). To understand the applicability of *McCulloch* and its progeny, it is necessary to identify who is the payor of no charge Lifeline service. The entirety of the Lifeline benefit provided by TracFone and other companies offering similar Lifeline services is paid for by the Universal Service Administrative Company (“USAC”). USAC is an entity established by the Commission to manage the USF and

³⁹ See Comments of State of Alabama, at 4-7; Comments of State of Indiana, at 4-7.

⁴⁰ The State of Indiana that “every other state” places a 911 charge on telecommunications service. Comments of State of Indiana, at 22. However, the State of Indiana ignores the fact that only one other state (*i.e.*, Alabama) has enacted legislation or promulgated rules for the purpose of funding 911 services by taxing no charge Lifeline service and it fails to explain what unique circumstances exist in Indiana which make such a punitive tax on the poor necessary.

administer the programs supported by that fund.⁴¹ USAC is unquestionably an instrumentality of the federal government.⁴² Since USAC, an instrumentality of the federal government, is the entity which pays for no charge Lifeline service, *i.e.*, the entity which purchases said service, the legal incidence of state 911 taxes such as those sought to be imposed on no charge Lifeline services by Alabama and Indiana, is on the federal government. The legal incidence of state 911 taxes on Lifeline services which are paid for by USAC is not on the end user recipient of the service, nor is it on the provider of the service, neither of whom would be the taxpayer. In the wake of *McCulloch*, it has long been recognized that States may not impose taxes directly on the federal government, nor may they impose taxes the legal incidence of which falls on the federal government.⁴³ The constitutional prohibition against State and local taxation of the federal government and instrumentalities of the federal government takes precedence over 47 U.S.C. § 615a-1. Accordingly, that statute does not stand as an impediment to the Commission exercising its constitutional responsibility to preempt states from taxing no charge Lifeline service paid for by the federal government.⁴⁴

In accordance with the principle of constitutional law first articulated in *McCulloch* that states may not impose taxes on the federal government, the United States General Accounting Office issued a Decision in 2003 stating that the National Weather Service, a federal agency, is

⁴¹ USAC's powers and responsibilities are codified in the Commission's rules. *See* 47 C.F.R. § 54.702.

⁴² *In the Matter of Charles Breckenridge*, Memorandum Opinion and Order, 26 FCC Rcd 2971 (2011) (communications between the Commission and USAC are intra-agency communications).

⁴³ *United States v. New Mexico*, 455 U.S. 720 (1982); *United States v. County of Fresno*, 429 U.S. 452 (1977). In both of these cases, the Supreme Court cited to *McCulloch*.

⁴⁴ As noted by one commenter, state taxation powers are not unlimited. *See* Comments of National Taxpayers Union, at 2. Moreover, “[i]t is just as readily apparent that from the intent of the Lifeline program that states should not be given blanket authority to slap taxes on what is effectively a federalized service requirement – a slippery slope to be sure.” *Id.* at 3.

constitutionally immune from the Alabama monthly 911 fee codified at Ala. Code § 11-98-5.⁴⁵ Moreover, the Attorney General of the State of Alabama has acknowledged that whether the federal government is exempt from state 911 taxes and fees is a question of federal law.⁴⁶ Furthermore, Indiana specifically exempts the federal government and agencies of the federal government from the 911 fee imposed on wireless telecommunications service.⁴⁷ Thus, Indiana’s application of 911 fees that effectively tax an instrumentality of the federal government violates the long-standing prohibition against states taxing the federal government, as well as its own law.

The legislative history of Section 615a-1 further supports the conclusion that a state’s right to assess 911 fees is not unlimited and does not encompass a right to impose a tax on Lifeline benefits. The House Energy and Commerce Committee Report on Section 615a-1 states the following:

The Committee also encourages States and their political subdivisions to apply 911 fees equitably to providers of different types of communications services to the extent possible. In particular, the Committee urges States and their political subdivisions, when adopting 911 and E-911 fees, to examine fee structures that accommodate pre-paid telecommunications services.⁴⁸

⁴⁵ See *National Weather Service – Alabama 911 Service Charge and Utility Service Use Tax*, B-300737 (Comp. Gen. June 27, 2003) (attached as Exhibit 2).

⁴⁶ Ala. Op. Atty. Gen. No. 2013-064, 2013 WL 9809263 (Aug. 27, 2013), at 3 (“The federal government may, however, be exempt from the 911 service charge under principles of federal law [citing to *McCulloch* and subsequent cases]”) (attached as Exhibit 3).

⁴⁷ See Ind. Code § 36-8-16.6-11(c). Indiana attempted to get around its own statutory exemption of the federal government from State 911 fees by enactment in 2014 of Ind. Code § 36-8-16.6-11(d). That recently-enacted subsection states that a designated ETC (*i.e.*, a Lifeline provider) is not an agency of the federal government and that the provider is liable for the 911 charge. That ill-advised and poorly-worded legislative “fix” disregards the fact that the ultimate payor of federal Lifeline benefits in all states, including Indiana, is not the provider of the service; it is USAC, an entity which is unquestionably an instrumentality of the federal government and therefore immune from state taxation.

⁴⁸ H.R. Rep. 110-442 (Nov. 13, 2007).

State laws that impose a 911 tax on no charge Lifeline services are inconsistent with the Committee's recommendation that 911 fees equitably apply to providers of all types of communications services. As explained in the Petition and these Reply Comments, when no charge Lifeline service providers are subject to a 911 tax, they are not treated equitably as compared to other telecommunications service providers. No charge Lifeline service providers, because they have no means to collect the 911 fee from customers and because their customers do not engage in retail transactions to obtain services, have the untenable option either of using part of Lifeline support to pay 911 fees (which is unlawful) or paying the 911 fees from their own resources. Given that other telecommunications service providers can collect 911 fees from their customers and not have to pay those fees themselves, imposition on no charge Lifeline service providers of state 911 fees would place them at a competitive disadvantage and would not constitute equitable treatment as contemplated by Congress.

The State of Alabama asserts that Alabama law requires that the state 911 charge is applicable to each active voice communication service connection in Alabama that is capable of accessing the 911 system.⁴⁹ However, Alabama's assertion that Alabama state law requires that 911 fees be imposed on all connections capable of accessing 911 is contradicted by the Alabama Statewide 911 Board's ("Alabama 911 Board") own codified regulations and proposed changes to those regulations. Those regulations exempt from 911 fee responsibility those connections capable of accessing 911 that belong to Alabama state agencies, cities and county governments and their school boards, and all educational institutions. Recently, the Alabama 911 Board has proposed to expand that list of favored "exempted" entities by limiting 911 fee liability of large telecommunications users to 300 voice communication wireline connections. If that proposed

⁴⁹ Comments of the State of Alabama, at 5 (citing Ala. Code § 11-98-5)(a)).

rule is adopted, the largest corporate and institutional telecommunications users in the State of Alabama (some with thousands of voice connections) will be immunized from 911 fee liability for all such connections above their first 300 connections. Given these existing exemptions and the Alabama 911 Board's proposed additional exemptions, the State of Alabama's claim that under Alabama law 911 fees are imposed on each active voice connection is simply untrue.

II. Pursuant to Section 253 of the Communications Act, the Commission Should Preempt State Laws and Regulations Imposing 911 Taxes on No Charge Lifeline Service Because They Materially Limit the Ability of No Charge Lifeline ETCs to Compete in a Fair and Balanced Legal and Regulatory Environment and Are Not Competitively Neutral.

The Commission should preempt Alabama and Indiana laws imposing 911 taxes on no charge Lifeline subscribers to the extent those laws are interpreted to require ETCs to pay those taxes on behalf of their Lifeline customers from the providers' own resources. Under Section 253 of the Communications Act states may not enact or enforce laws that prohibit or have the effect of prohibiting the ability of an entity to provide telecommunications service. However, states are permitted to enact laws that protect the public safety and welfare (such as laws related to 911 funding mechanisms) if those laws are not imposed on a competitively neutral basis.⁵⁰ Some commenters allege that TracFone relies on an incorrect standard for applying Section 253 and that the laws at issue, even if they do prohibit the ability of TracFone and other no charge ETCs from providing telecommunications service, are competitively neutral. As explained below, these commenters overlook relevant law and fail to demonstrate that 911 laws that impose taxes on no charge Lifeline service meet the competitive neutrality standard codified at 47 U.S.C. 253(b).

⁵⁰ See 47 U.S.C. § 253(a)-(b).

Several commenters urge the Commission to adopt an interpretation of Section 253 espoused by the United States Courts of Appeals for the Eighth and Ninth Circuits.⁵¹ In particular, they ask the Commission to follow decisions of those courts holding that a plaintiff under section 253(a) must show “actual or effective prohibition, rather than the mere possibility of prohibition.”⁵² However, the commenters fail to acknowledge other relevant precedent governing the meaning of “actual or effective prohibition.” For example, in *Level 3 Communc’ns*, the Eighth Circuit further clarified that “[t]he plaintiff need not show a complete or insurmountable prohibition, but it must show an existing material interference with the ability to compete in a fair and balanced market.”⁵³ Courts have found that a law can cause “material interference” if the law causes an entity to incur increased costs⁵⁴ or negatively affects an entity’s profitability.⁵⁵ Thus, contrary to the State of Indiana’s claim, TracFone does not need to prove an “actual prohibitive effect” to meet the preemption standard in Section 253(a).⁵⁶ In addition,

⁵¹ See Comments of Colorado 911 Authorities, at 3-4, and 7; Comments of BRETSA, at 4-5; Comments of State of Alabama, at 16; Comments of State of Indiana, at 16.

⁵² *Sprint Telephony PCS, LP v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (citing *Level 3 Commc’ns v. City of St. Louis, Mo.*, 477 F.3d 528, 532 (8th Cir. 2007)).

⁵³ *Level 3 Commc’ns*, 477 F.3d at 533 (citing *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir.2002); *Cal. Payphone Ass’n*, 12 FCC Rcd 14,191, 14,206, 1997 WL 400726 (FCC) ¶ 31 (July 17, 1997)); see also *Puerto Rico Tel. Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (prohibition does not need to be complete or insurmountable); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269 (10th Cir. 2004) (“regulation need not erect an absolute barrier to entry in order to be found prohibitive.”).

⁵⁴ See *Qwest Corp.*, 380 F.3d at 1270-71 (ordinance setting a high rent for rights-of-way and requiring telecommunications companies to install conduits with greater capacity found to violate Section 253 because it generated substantial cost).

⁵⁵ See *Puerto Rico Tel. C.*, 450 F.3d at 18-19 (gross revenue fee found to violate Section 253 because it negatively affected profitability by substantially increasing costs).

⁵⁶ See Comments of State of Indiana, at 18; see also Comments of Alabama ILECs, at 3.

TracFone does not need to show that it is not able to pay the 911 fees itself to prove that the state 911 fees are materially interfering with TracFone's ability to compete.⁵⁷

The imposition of state 911 taxes on no charge Lifeline service effectively prohibits TracFone from providing Lifeline service because it leaves TracFone with three unworkable options. First, TracFone could incur the burdensome and otherwise unnecessary expense of establishing an otherwise unnecessary billing system for no purpose other than to collect the 911 fees from customers. However, this would unfairly require TracFone to not only incur the expense of establishing such a system, but also to change its Lifeline business model which has worked well for millions of low income Lifeline customers throughout the nation for over six years. Second, TracFone could decrease the benefits it provides to no charge Lifeline customers to cover TracFone's payment of 911 fees, but as explained above, this would violate Commission rules and, more importantly, would deprive Lifeline households in those states of federal Lifeline support to which they are entitled and which they need to ensure connectivity to essential telecommunications services. It would also cause Lifeline benefits in those states to be less than those available to similarly-situated low-income households enrolled in Lifeline in other states, including neighboring states. Third, TracFone could pay the 911 from its own resources, but this is not a fair or equitable solution given that ETCs that provide postpaid or billed Lifeline services are able to collect the fees from their customers.⁵⁸ Given that TracFone

⁵⁷ See Comments of State of Alabama, at 14.

⁵⁸ The fact that some no charge Lifeline providers in Colorado may have chosen to pay 911 fees from their own resources does not mean that 911 fees imposed on no charge Lifeline service do not violate Section 253 of the Communications Act. See Comments of Colorado 911 Authorities, at 8 and 14; Comments of BRETSA, at 5 and 8. In Colorado, unlike Alabama and Indiana, there are no laws that require no charge Lifeline providers to pay the 911 fee on behalf of their customers. TracFone understands that no charge Lifeline providers in Colorado have agreed to remit 911 fees as a condition for becoming designated as an ETC by the Colorado Public Utilities Commission. Whether a State commission may lawfully impose such a

and other ETCs have no viable means to comply with state laws imposing 911 fees on no charge Lifeline service, those laws materially interfere with their ability to compete.

Section 253(b) of the Communications Act allows states to enact laws that protect the public safety and welfare, even if those laws prohibit or effectively prohibit an entity from providing service, so long as those laws are competitively neutral. When examining whether a law is competitively neutral the Commission must look to all participants in the market for telecommunications services.⁵⁹ The State of Indiana incorrectly claims that its 911 fee is competitively neutral because it applies to all prepaid services.⁶⁰ The State of Indiana admits that the only difference is in the liability of the two types of providers. As explained by the State of Indiana, “Indiana Code § 36-8-16.6-11(d) makes ETCs directly liable for the Charge itself, while sellers and providers of non-Lifeline services are liable for collecting the Charge from the consumer and remitting it to 911 Board.”⁶¹ This is a significant difference and is the very reason

condition on ETC designation is doubtful in light of the explicit limitations on State ETC designation authority codified at 47 U.S.C. § 214(e)(2). However, that question is beyond the scope of TracFone’s Petition.

⁵⁹ The Colorado 911 Authorities correctly state that “competitive neutrality must apply to the *entire universe* of participants in the market.” Comments of Colorado 911 Authorities, at 5; *see also* Comments of BRETSA, at 7. While TracFone agrees with the Colorado 911 Authorities’ definition of the relevant market for purposes of determining competitive neutrality, it disagrees with their characterization, at page 10, of no charge Lifeline service is a “loss leader” since companies offering no charge Lifeline also sell additional minutes to their Lifeline customers. This statement is not supported by any evidence as to the number of Lifeline customers who purchase additional minutes. In fact, a very small percentage of TracFone’s Lifeline customers actually purchase additional airtime minutes. Moreover, TracFone offers additional airtime minutes to Lifeline customers at rates that are often lower than the rates at which airtime cards are sold to non-Lifeline customers.

⁶⁰ *See* Comments of State of Indiana, at 24.

⁶¹ *Id.*

why Indiana’s 911 fee, as modified by Section 36-8-16.6-11(d) enacted in 2014, is not competitively neutral – it does not treat all service providers in like fashion.⁶²

The State of Alabama similarly claims that its 911 fee is competitively neutral because it applies to all subscribers of voice communications.⁶³ As TracFone explained in detail in its Petition, providers of no charge non-billed Lifeline service have no means of collecting Alabama 911 fees from their subscribers, but are still being held liable for such fees. Such providers must either change their business structure to incorporate an otherwise unnecessary billing mechanism or pay the 911 from their own resources. Both options place a no charge Lifeline service provider at a significant competitive disadvantage in relation to all other telecommunications service providers, and especially other Lifeline service providers.

Finally, commenters’ claims that TracFone’s difficulty in collecting 911 fees are “entirely of TracFone’s own making” are snide, condescending and invalid.⁶⁴ TracFone has chosen a certain business model for its Lifeline service – one that works well in nearly all states, and, more importantly, one which has brought the benefits of the federal Lifeline program to millions of low-income households who previously were not enrolled in Lifeline and often lacked any access to telecommunications services. It is only in a few states that impose a 911 tax on no charge Lifeline service where TracFone’s business model makes it impossible to collect 911 fees from its Lifeline customers. While TracFone is not legally required to offer no charge Lifeline

⁶² See *Nixon v. Missouri Municipal League*, 124 S.Ct. 1555, 1564 (2004) (“The FCC has understood § 253(b) neutrality to require a statute or regulation affecting all types of utilities in like fashion”) (citation omitted).

⁶³ See Comments of State of Alabama, at 17-18; see also Comments of Alabama ILECs, at 4-5 (claiming that the 911 fee does not impose a unique obligation on any certain type of service provider to cover their subscribers’ 911 charges). As explained *supra* at 18-19, the State of Alabama’s claim that its 911 fee applies to all subscribers is belied by the fact that the Alabama 911 Board’s regulations exempt several types of entities from the Alabama 911 fee.

⁶⁴ See Comments of NTCA, at 2 and 4; Comments of State of Alabama, at 9.

service, there are no laws that prevent such offerings.⁶⁵ Indeed, “the Commission specifically considered the merits of no-charge Lifeline service and concluded that Lifeline customers should have the benefits of such service.”⁶⁶ Thus, the Commission has decided to allow competitive forces determine how to market Lifeline service and no state may not favor or disfavor any particular model.

CONCLUSION

For reasons set forth in the Petition and in these Reply Comments, TracFone respectfully requests that the Commission promptly issue a declaratory ruling preempting state laws that unlawfully impose a state 911 fee or tax on no charge Lifeline service funded by the federal USF.

Respectfully submitted,

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⁶⁵ See Comments of NTCA, at 3.

⁶⁶ Comments of CTIA, at 3 (citing *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656, ¶ 268 (2012), in which the Commission decided that that “imposing a minimum charge [for Lifeline service] could impose a significant burden on some classes of Lifeline consumers” and could “potentially pose a significant barrier to participation for those in severe economic need.”).

Exhibit 1

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December 5, 2014

The Honorable James E. DeGrange, Sr.
The Senate of Maryland
James Senate Office Building, Room 101
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Annapolis, Maryland 21401

Dear Senator DeGrange:

You have asked whether low-income individuals who receive a free cellphone and a monthly allotment of free minutes from a prepaid wireless company through the federal government's Lifeline program ("prepaid Lifeline participants") must pay the fees that fund Maryland's 9-1-1 system. There are two kinds of 9-1-1 fees. The first is a fee of up to \$1.00 per month on "subscribers" of telephone service; service providers add this fee to their subscribers' monthly bills. See Md. Code Ann., Public Safety ("PS") §§ 1-310 (authorizing collection of 9-1-1 fee of \$0.25 per month), 1-311 (authorizing counties to impose additional monthly fee of up to \$0.75) (2011 Repl. Vol. & 2014 Supp.).¹ The second fee applies to prepaid wireless telephone service. See PS § 1-313. This 60-cent fee is imposed on every "retail transaction" for prepaid service and is collected by the "seller" from the "consumer" at the time of purchase. PS § 1-313. You have asked whether prepaid Lifeline participants must pay either fee.

In our opinion, prepaid Lifeline participants are not required to pay either fee under the law as it currently reads. Because we conclude that these particular Lifeline

99 Opinions of the Attorney General (2014)

¹ All citations to the Public Safety Article are to the 2011 Replacement Volume and 2014 Supplement unless otherwise noted.

participants receive “prepaid wireless telecommunications service,” the fee on “subscribers” imposed by PS § 1-310 does not apply. Instead, we must look to the fee that is imposed by PS § 1-313 on a “retail transaction” of “prepaid wireless communications service.” The plain language of that section, however, provides no mechanism for collecting the fee from Lifeline participants, who do not participate directly in a “retail transaction.” And while there is some indication that, at an abstract level, the Legislature intended everyone with access to the 9-1-1 system to pay the fees that support the system, we have found no evidence that the Legislature specifically considered whether prepaid Lifeline participants should pay a 9-1-1 fee. Given the language of the statute and the lack of a clear collection mechanism, we cannot conclude that the General Assembly intended prepaid Lifeline participants who receive free cellphone service to pay a 9-1-1 fee.

The decision about whether these low-income individuals should pay the fee is a matter of public policy that we must leave to the Legislature. The General Assembly has twice before considered whether to amend the 9-1-1 fee regime to take account of emerging technologies and new business models in the telecommunications industry. We see this as another instance where the Legislature must decide whether the statute should be amended.

I

Background

A. *Maryland’s Two 9-1-1 Fees*

In 1979, the General Assembly established 9-1-1 as the primary emergency telephone number in the State and created the Emergency Number Systems Board² to oversee the installation of 9-1-1 systems in every county. 87 *Opinions of the Attorney General* 83, 85 (2002). In doing so, the Legislature also established a fee to fund the installation of the system and any necessary enhancements. 1979 Md. Laws, ch. 730 (codified as Md. Code. Ann., Art. 41, § 204H-5(b)).

² The Board is an entity within the Department of Public Safety and Correctional Services and is composed of 17 members appointed by the Governor with the advice and consent of the Senate. PS § 1-305(a), (b). The members include representatives from the telephone industry, State government, and local government as well as two members of the general public. PS § 1-305(b).

Over the next few decades, this fee evolved into what is now the enhanced 9-1-1 (or “E 9-1-1”) fee regime encompassed by sections 1-310 and 1-311 of the Public Safety Article.³ These statutes impose a fee on “[e]ach subscriber to switch local exchange access service [*i.e.*, landline service] or CMRS [*i.e.*, “Commercial Mobile Radio Service” or, more simply, cellphone service] or other 9-1-1-accessible service.” PS § 1-310(b); *see also* PS § 1-311(b). The fee is then “payable when the bill for the telephone service or CMRS or other 9-1-1-accessible service is due.” PS § 1-310(c). In other words, the fee is added to every subscriber’s monthly bill, and the service provider remits the funds to the Comptroller on behalf of the subscriber. PS §§ 1-310(d), (e), 1-311(f)–(h). The statewide fee is 25 cents per month, and counties may impose an additional 75 cents per month on top of the statewide fee for a total of \$1.00 per month. PS §§ 1-310(c), 1-311(c)(1).

During the 1990s, however, a new business model emerged that did not fit easily within the State’s method of collecting the fee through customers’ monthly bills. Wireless carriers like TracFone began offering prepaid cellphone service, which allowed customers to buy a fixed allotment of minutes in advance without the need for annual contracts or monthly bills. *See TracFone Wireless, Inc. v. Comm’n on State Emergency Comm’ns*, 397 S.W.3d 173, 176 (Tex. 2012) (explaining the basics of prepaid wireless service). At first, many prepaid wireless companies remitted 9-1-1 fees to state governments, but they soon stopped, contending that they were not required to collect the fees because their customers did not receive bills for their service. *See, e.g., id.* at 176-77. In some states, the issue was resolved through litigation, though with different outcomes. In Texas and Kentucky, for example, courts agreed that the fee did not apply to prepaid wireless service, *see id.* at 178, *Virgin Mobile U.S.A., L.P. v. Kentucky*, ___ S.W.3d ___, 2014 WL 4116480 (Ky. Aug. 21, 2014), while in Alabama and Washington, courts held that the lack of an explicit collection mechanism did not excuse wireless providers from the statutory obligation to pay the fee. *See T-Mobile South, LLC v. Bonet*, 85 So.3d 963, 976-77 (Ala. 2011); *TracFone Wireless, Inc. v. Dep’t of Revenue*, 242 P.3d 810, 818-19 (Wash. 2010).

In Maryland, the issue was resolved by legislation. In 2013, the General Assembly established a new 9-1-1 fee that explicitly applied to “prepaid wireless telecommunications service.” 2013 Md. Laws, ch. 313 (codified as PS § 1-313). This

³ Further information on the development of “enhanced” 9-1-1 systems can be found in 87 *Opinions of the Attorney General* 83. Because the distinction between the two systems is not important here, we use the terms “9-1-1 fees” and “E 9-1-1 fees” interchangeably throughout this opinion.

statute imposes a 60-cent fee per “retail transaction,” which is defined as the “purchase of prepaid wireless telecommunications service from a seller for any purpose other than resale.” PS § 1-313(a)(4), (b). The fee is then “collected by the seller from the consumer for each retail transaction in the State.” PS § 1-313(c). In other words, the fee is levied at the point of sale, much like a sales tax. Every time a consumer purchases a prepaid cellphone or prepaid cellphone minutes from a seller, the seller collects a 60-cent fee on behalf of the State by adding it to the purchase price. The “fee is the liability of the consumer and not of the seller or of any provider,” except that the seller must remit the fees it collects to the Comptroller. PS § 1-313(e), (g).

The two fee regimes are mutually exclusive. The new prepaid wireless E 9-1-1 fee governs only “prepaid wireless telecommunications service.” PS § 1-313. Conversely, the older fee, which is levied on “[e]ach subscriber to switch local exchange access service or CMRS or other 9-1-1-accessible service,” explicitly *excludes* “prepaid wireless telecommunications service” from its scope. PS §§ 1-310(a), 1-311(a). Many states have similar dual systems that impose different fees on prepaid wireless service and other 9-1-1-accessible service. Some of these states have explicitly exempted all Lifeline participants from paying either 9-1-1 fee. *See, e.g.*, Del. Code Ann. tit. 16, § 10103(a)(1); N.Y. County Law §§ 304, 334, 335; Ohio Rev. Code Ann. § 128.42(A)(2)(b). The Maryland statutes, however, contain no such express exemption.

B. The Lifeline Program

Lifeline is a federally-funded program administered by the FCC which, since 1985, has provided subsidized telephone service to qualifying low-income individuals. *See* Federal Communications Commission, Lifeline Program for Low-Income Consumers, <http://www.fcc.gov/lifeline> (last visited, Dec. 2, 2014). The purpose of the program is to ensure that low-income Americans can “connect to jobs, family, and emergency services.” *Id.* Federal regulations thus specifically require that Lifeline service include access to the 9-1-1 system. 47 C.F.R. § 54.101(b).

Individuals qualify for Lifeline if their income is at or below 135% of the federal Poverty Guidelines or they participate in one of various public assistance programs, such as Medicaid, the Supplemental Nutrition Assistance Program, or Temporary Assistance to Needy Families. 47 C.F.R. § 54.409. States may also create broader eligibility criteria, 47 C.F.R. § 54.409(a)(3), which Maryland has elected to do for landline subscribers.⁴ *See* Md. Code Ann., Public Utilities (“PU”) § 8-201(a)(2). But each

⁴ Maryland has also established an additional discount for eligible landline subscribers under State law. *See* PU § 8-201(c). This additional discount does not apply to wireless carriers,

household may only have one Lifeline-subsidized connection. 47 C.F.R. § 54.409(c). Telephone companies, for their part, may offer Lifeline service within a state only if they have been deemed an “eligible telecommunications carrier” (“ETC”) by that state’s regulating body.⁵ 47 C.F.R. §§ 54.201, 54.405. The program is financed through the Universal Service Fund, which levies a charge on telecommunication providers, who, in turn, may pass it on to their customers. 47 C.F.R. §§ 54.706, 54.712.

The federal program typically works as follows: A telephone company will give an eligible participant a “reduced charge” or “discount” of \$9.25 per month on his or her bill, and the federal government will reimburse the service provider for that discount. *See* 47 C.F.R. §§ 54.401, 54.403(a)(1), 54.407. Although providers that are authorized to impose an “End User Common Line Charge” are subject to slightly different rules, the cellphone providers at issue in this opinion must apply the entire \$9.25 subsidy “to reduce the cost of any generally available residential service plan or package.” 47 C.F.R. § 54.403(b)(1).

C. *Prepaid Wireless Providers, the Lifeline Program, and “Free” Cell Phones*

Because prepaid wireless customers pay up front, providers cannot give Lifeline participants a discount on their monthly bills, as the federal regulations contemplate. Instead, these carriers give Lifeline customers a free cellphone and a monthly allotment of “free” minutes. This monthly allotment of minutes is at least equal in retail value to the \$9.25 per month subsidy provided by the federal government. *See* Matt Richtel, *Providing Cellphones for the Poor*, N.Y. Times (June 15, 2009), available at http://www.nytimes.com/2009/06/15/technology/15cell.html?_r=0. The federal government then reimburses the provider \$9.25 per month for the prepaid phone service.

You asked in particular about SafeLink Wireless, a subsidiary of TracFone, but other prepaid wireless companies also offer the same kind of “free” plans.⁶ Indeed,

however, who are covered instead by the standard federal regulations. *See* PU §§ 8-201(b) (providing that the State program applies only to “local telephone compan[ies]”), 1-101(*l*)(2) (defining “telephone company” to exclude “a cellular telephone company”).

⁵ In Maryland, the regulating body is the Public Service Commission. A service provider can also petition the FCC for recognition as an ETC if the provider is “not subject to the jurisdiction of a State commission.” 47 U.S.C. § 214(e)(6).

⁶ *See, e.g.*, SafeLink Wireless, <https://www.safelinkwireless.com/Enrollment/Safelink/en/NewPublic/index.html> (last visited Dec. 3, 2014) (“SafeLink Wireless Website”); Life Wireless, <http://www.lifewireless.com/phones.php> (last visited Dec. 2, 2014); Access Wireless, <http://www.accesswireless.com/Lifeline> (last visited Dec. 2, 2014).

TracFone and other wireless companies have become ETCs for the limited purpose of providing Lifeline in numerous states, including Maryland. *See, e.g.*, Letter Order of Maryland Public Serv. Comm'n (Aug. 19, 2009) (approving Petition of TracFone Wireless, Inc. for Designation as an Eligible Telecommunications Carrier in the State of Maryland for the Limited Purpose of Offering Lifeline Service to Qualified Households). The plan offered by SafeLink to Lifeline participants includes either 68, 125, or 250 minutes per month, depending on whether the participant wants free international calling, rollover minutes, or both. *See* SafeLink Wireless Website, Terms & Conditions. Customers may also purchase additional minutes to supplement their subsidized monthly allotment. *Id.*

Because it is not clear how these Lifeline customers fit into the point-of-sale fee regimes adopted in Maryland and other states, SafeLink's service model has again led to uncertainty about whether prepaid wireless providers must collect 9-1-1 fees. Most of the states that have considered the issue concluded that the fee does not apply to Lifeline participants who receive "free" prepaid service. *See, e.g.*, Letter from the Attorney General of Rhode Island to Speaker of the House Gordon D. Fox (Oct. 12, 2012); Op. Att'y Gen. S.C., 2011 WL 5304075, at *3-4 (Oct. 10, 2011); Op. Att'y Gen. Tenn. No. 09-87, 2009 WL 1430917, at *5-6 (May 18, 2009); Virginia Department of Taxation, Prepaid Wireless E-911 Fee, <http://www.tax.virginia.gov/site.cfm?alias=PrepaidWirelessE-911> (last visited Aug. 4, 2014). Other states, however, specifically require Lifeline customers or other recipients of free phone service to pay their 9-1-1 fee.

The Alabama 9-1-1 Board, for example, recently issued regulations requiring all ETCs to collect a monthly fee from Lifeline participants, including those who receive a free phone.⁷ *See* Ala. Admin. Code r. 585-X-4-.05. Texas regulations also appear to require that sellers or providers remit a fee even if they provide free service. *See* 34 Tex. Admin. Code § 3.1271(d)(4)(B) (applying fee to "prepaid wireless telecommunication service not sold at retail but used by a seller or other person in Texas," including, for example, free service provided by the wireless company to employees). And Colorado entered into a settlement agreement with a number of prepaid wireless providers that allowed them to operate as ETCs if, among other things, they agreed to pay the 9-1-1 fee on behalf of their Lifeline customers. *See, e.g.*, Colorado Public Utilities Comm'n,

⁷ TracFone has filed a lawsuit challenging these regulations, and certain interest groups sent a letter to Alabama's Governor in July 2014 urging him to rescind the regulations. Mike Cason, *Users of Free Government Cellphones to Start Paying State 911 Tax*, AL.com, http://www.al.com/news/index.ssf/2014/07/users_of_free_government_cellp.html (last visited Dec. 2, 2014).

Docket No. 13A-0150T, Stipulation & Settlement Agreement, at 12, ¶11E (July 3, 2013) (attached to Colorado Public Utilities Comm'n, Recommended Decision, *In the Matter of Telrite Corp.*, 2013 WL 4013300 (July 30, 2013)). As we understand it, prepaid service providers in Maryland do not currently collect any 9-1-1 fee from their Lifeline customers.

II Analysis

You have asked whether any of Maryland's 9-1-1 fees apply to prepaid Lifeline participants who receive a free allotment of monthly minutes from SafeLink Wireless or other prepaid wireless companies. As always, the "cardinal rule" of statutory interpretation "is to ascertain and effectuate legislative intent." *Mayor and City Council of Baltimore v. Chase*, 360 Md. 121, 128 (2000). Although we begin our analysis with "the plain language of the statute," *La Valle v. La Valle*, 432 Md. 343, 355 (2013), "the plain language rule of construction is not absolute; rather, the statute must be construed reasonably with reference to the purpose, aim, or policy of the enacting body." *Pelican Nat'l Bank v. Provident Bank*, 381 Md. 327, 336 (2004) (internal quotation marks and citation omitted). "[I]f the true legislative intent cannot readily be determined from the statutory language alone," we must "look to other indicia of that intent, including . . . its legislative history, its general purpose, and the relative rationality and legal effect of various competing constructions [of the statute]." *Baltimore County v. RTKL Assocs.*, 380 Md. 670, 678 (2004).

A. *Which 9-1-1 Fee Statute Governs?*

Before we address whether prepaid Lifeline participants must pay the 9-1-1 fee, we must first determine which of Maryland's two 9-1-1 fee regimes governs the situation here. SafeLink's service is either "prepaid wireless telecommunications service," in which case it must be analyzed under the new point-of-sale fee imposed by PS § 1-313, or it is not, in which case the fee may be assessed only if SafeLink's customers are "subscribers" within the meaning of the older 9-1-1 fee set forth in PS § 1-310. A cellphone service qualifies as "prepaid wireless telecommunications service" if it satisfies the following four elements: It must (1) be "a commercial mobile radio service" and it must also (2) "allow[] a consumer to dial 9-1-1 to access the 9-1-1 system;" (3) "be paid for in advance;" and (4) be "sold in predetermined units that decline with use in a known amount." PS § 1-301(r).

As an initial matter, SafeLink provides commercial mobile radio service through the Lifeline program. CMRS “means mobile telecommunications service that is: (1) provided for profit with the intent of receiving compensation or monetary gain; (2) an interconnected, two-way voice service; and (3) available to the public.” PS § 1-301(d). SafeLink clearly satisfies the second and third criteria; it provides voice service to the public in the same way as other cellphone plans. Although one might question whether the service is “provided for profit,” the prepaid wireless companies indeed turn a profit from the \$9.25 per month federal reimbursement because that reimbursement covers the *retail price*, not the per-unit cost to the provider. *See Richtel, supra*.⁸

Turning back to the other three elements of “prepaid wireless telecommunication service,” SafeLink easily satisfies most of these as well. It certainly allows a consumer to dial 9-1-1. In fact, federal law *requires* Lifeline providers to ensure access to the 9-1-1 system. *See* 47 C.F.R. § 54.101(b). And the service is provided “in predetermined units that decline with use in a known amount.” But it is not as clear that the service is “paid for in advance” given that Lifeline participants do not pay anything to their providers before receiving their monthly allotment of minutes. Although the federal government pays for the service, it technically does not do so “in advance” because it reimburses the provider.

We do not believe, however, that the General Assembly intended for the determination of which 9-1-1 fee should govern to hinge on the timing of federal reimbursement. Common sense must guide us in the interpretation of statutes, *Marriott Emps. Fed. Credit Union v. Motor Vehicle Admin.*, 346 Md. 437, 445 (1997), and, from a common sense perspective, SafeLink offers prepaid service. The customer signs up for a set number of minutes of phone service and, if he uses up all of the minutes before his next allotment, he cannot make another call unless he purchases more. It seems to us that the Legislature, in defining “prepaid wireless telecommunications service,” was trying to distinguish prepaid service from the traditional “post-paid” model of wireless service covered by PS § 1-310, where a consumer is billed at the end of the month based on usage during that month. The phrase “paid for in advance,” therefore, was probably meant only to distinguish prepaid service from more traditional subscription service.

Our conclusion is bolstered by the fact that SafeLink customers who purchase additional minutes on top of their subsidized monthly allotment unquestionably receive

⁸ A provider may earn more profit still if the Lifeline participant purchases additional minutes or becomes a loyal, paying customer when he is no longer eligible for the federal program. *See Richtel, supra*.

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“prepaid wireless telecommunications service” that would be governed by PS § 1-313. It seems unlikely that the General Assembly intended consumers to be governed by two different, mutually exclusive fee statutes for the same service. We will therefore categorize SafeLink as a “prepaid wireless” provider and focus on PS § 1-313 to determine whether its customers are subject to a 9-1-1 fee.

B. The Plain Language of § 1-313 of the Public Safety Article

We begin our analysis of § 1-313 with the plain language of the statute. The provision imposes “a prepaid wireless E 9-1-1 fee of 60 cents per retail transaction.” PS § 1-313(b). “Retail transaction” is defined as “the purchase of prepaid wireless telecommunications service from a seller for any purpose other than resale.” PS § 1-313(a)(4). The statute requires that the “amount of the [fee] shall be disclosed to the consumer *at the time of* the retail transaction,” PS § 1-313(d) (emphasis added), and it provides an explicit collection mechanism: “[T]he fee shall be collected by the seller from the consumer for each retail transaction in the State.” PS § 1-313(c). In sum, the statutory scheme apparently envisions that a consumer will buy his or her phone service from a retailer and that the fee will be added to the purchase price, collected by the retailer, and remitted to the Comptroller.

Just based on these few provisions, it seems unlikely that the General Assembly specifically intended the fee to apply to prepaid Lifeline participants. The way in which Lifeline participants receive their service is not something that most people would normally think of as a “retail transaction.” SafeLink customers do not buy their phone service, and no obvious transaction occurs when the 60-cent fee can be charged to the customer. If the customer chooses to buy additional minutes, he certainly must pay the fee on those minutes. But requiring Lifeline participants who do not pay for their service to pay the 9-1-1 fee does not seem to fit very comfortably within the statutory language.

The statutory definition of “retail transaction”—at least on its face—seems to confirm our initial sense that there is no such transaction here. As noted above, the statutory definition of “retail transaction” depends on whether a consumer “purchases” wireless service from a “seller.” See PS § 1-313(a)(4). “Purchase” is not defined by the statute, but it generally means to “acquire by the payment of money or its equivalent.” Webster’s Encyclopedic Unabridged Dictionary 1568 (1996). “Seller” is defined by statute, but the definition is not very helpful: a “person that sells prepaid wireless telecommunications service to another person.” PS § 1-301(v). The dictionary definition is somewhat more helpful; it defines “sell” as “to transfer (goods) or render (services) for another in exchange for money.” Webster’s Encyclopedic Unabridged Dictionary 1739. Together, then, the terms “purchase” and “seller” imply that some exchange of “money

or its equivalent” must take place between the buyer and seller during the transaction—something that does not happen between the provider and the Lifeline participant here.

On similar grounds, two other Attorneys General have concluded that providing free service to Lifeline participants does not qualify as a “retail transaction” because the participants are not “charged for” and do not “purchase” their phones or phone service. *See* Letter from the Attorney General of Rhode Island to Gordon D. Fox, *supra*; Op. Att’y Gen. S.C., 2011 WL 5304075, at *3-4. The Rhode Island Attorney General, for example, reasoned that, “[s]ince . . . the qualifying consumer receives the telephone and service free of charge, no ‘purchase’ takes place,” and there is thus no “retail transaction upon or for which E-911 charges must be collected.” Letter from the Attorney General of Rhode Island to Gordon D. Fox, *supra* (internal quotation marks omitted).

Although this plain reading has considerable merit, we are not sure that the meaning of the statute is so clear as to foreclose all further inquiry. *See Mayor & Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 551-52 (2002) (noting that the “intrinsic meaning [of a statute] may be fairly clear, but its application to a particular object or circumstance may be uncertain” (internal quotations omitted)). The notion that SafeLink provides free service is, after all, a fiction. The service is not actually free; the federal government pays for it. In this way, the *government* arguably “purchases” the minutes from the provider every month on behalf of the Lifeline participant. If the federal government implemented Lifeline by giving eligible participants a \$9.25 voucher every month, and the participant exchanged that voucher for prepaid minutes from TracFone, it seems likely that the exchange would qualify as a “retail transaction.” It is not obvious why the same participant should be exempt from the fee merely because the federal government has chosen a different way to administer its program.

Moreover, if the Legislature had specifically intended to exempt these customers, it could have explicitly excluded Lifeline participants from the fee regime, as a number of other state legislatures have done. *See, e.g.*, Del. Code Ann. tit. 16, § 10103(a)(1); N.Y. County Law §§ 304, 334, 335; Ohio Rev. Code Ann. § 128.42(A)(2)(b). But it did not provide for such an explicit exemption. In light of this ambiguity in how the plain language should apply, we will turn to “other indicia of [the Legislature’s] intent” to help us interpret the statute. *RTKL Assoc.*, 380 Md. at 678; *see also Rylyns Enterprises*, 372 Md. at 552.

C. Other Indicia of Legislative Intent

Unfortunately, these other indicia of legislative intent also do not provide a definitive answer. The legislative history of PS § 1-313, for example, is not instructive.

There is only one mention of Lifeline participants in the legislative record and no evidence whatsoever that the General Assembly considered this issue one way or the other.⁹ To be sure, the 9-1-1 fee statute includes a declaration of purpose that, at first blush, appears to offer guidance: The General Assembly explicitly declared when enacting the prepaid wireless fee in 2013 that “*all* end user customers of 9-1-1-accessible services, including consumers of prepaid wireless communications service, should contribute in a fair and equitable manner to the 9-1-1 Trust Fund.” PS § 1-302(a)(6) (emphasis added). This provision arguably reflects a legislative intent that everyone who has access to the 9-1-1 system should pay the fee that supports the system.

Although the principle makes sense in the abstract, we are not convinced that the Legislature, when it made this statement, was thinking about Lifeline participants who do not pay for their phone service. In 2013, the General Assembly was focused on *paying* customers who, at the time, were not required to contribute to the 9-1-1 Fund simply because they paid for their service in advance rather than receiving monthly bills. The Legislature did not have the opportunity to consider whether it would be “fair and equitable” to impose the same burden on low-income individuals who receive phone service at no cost through a federal benefit program. Nor does the “everyone pays” principle have universal appeal. As the Tennessee Attorney General noted, it would “seem peculiar for persons who are supplied a free phone to be subjected to a monthly service charge.” Op. Att’y Gen. Tenn. No. 09-87, 2009 WL 1430917, at *6.

The collection mechanism established by the General Assembly provides perhaps the best evidence that the Legislature did not have Lifeline participants in mind when creating the new prepaid wireless fee. The fee is supposed to be collected “by the seller from the consumer” for each “retail transaction.” PS § 1-313(c)(1)(i). A person only qualifies as a “consumer” if he “purchases prepaid wireless telecommunications service

⁹ The only mention of Lifeline that we could find in the legislative history came from DPSCS’s legislative affairs director, Kevin Loeb, during the hearings on Senate Bill 745, and it does not shed much light on the applicability of the 9-1-1 fee. Responding to concerns about the impact a prepaid wireless 9-1-1 fee could have on Maryland’s low-income residents, Mr. Loeb explained that data showed that people of all incomes used prepaid phones and that, in any event, the poorest of the poor received federal subsidies through the Lifeline program. See 2013 Leg., Reg. Sess., Hearings on S.B. 745 Before the Senate Finance Comm. (Feb. 19, 2013) and the House Health and Gov’t Operations Comm. (March 26, 2013) (testimony of Kevin Loeb). It is unclear whether Mr. Loeb meant that the Lifeline participants would not have to pay the fee or merely that the fee would not inflict a significant financial burden on Lifeline participants because they already received discounted service. In any event, there is no evidence of how the members of the General Assembly regarded his remarks.

in a retail transaction.” PS § 1-313(a)(2). Even assuming that a “purchase” occurs when the federal government pays for Lifeline service, the Lifeline participant is not the one doing the purchasing and thus would seem not to qualify as a “consumer” from which the fee may be collected.

Moreover, even if a Lifeline participant were considered a “consumer,” there would be no obvious way to collect the fee. The statute envisions that the seller will collect the fee from the consumer at the time of the retail transaction, but there is no direct financial transaction between the prepaid Lifeline participant and the service provider. If the General Assembly had specifically intended the fee to apply to these Lifeline participants, we suspect that it would have outlined a workable collection mechanism.¹⁰

The Kentucky Supreme Court recently found that the absence of a mechanism for collecting 9-1-1 fees from certain paying customers was relevant in determining whether the legislature intended prepaid wireless service providers to collect 9-1-1 fees from those customers. *See Virgin Mobile*, 2014 WL 4116480 at *5-7 (explaining that the legislature could not have intended to require service providers to fashion their own collection mechanisms where the legislature created an explicit mechanism and, thereby, “permitted or authorized no other means of collecting the fee”); *see also TracFone Wireless*, 397 S.W.3d at 176-78 (reaching a similar conclusion under Texas law). We similarly think that the absence of a workable mechanism for collecting the fee from prepaid Lifeline participants weighs against requiring these individuals to pay the fee.

We recognize that the “difficulty in collecting the tax” is largely “due to TracFone’s choice of business model.” *Wash. Dep’t of Revenue*, 242 P.3d at 818. If prepaid wireless companies implemented Lifeline in a different way, there might be no

¹⁰ Although we have concluded that the prepaid wireless fee governs this situation, we note that a similar problem would arise if we analyzed SafeLink’s service under PS §§ 1-310 and 1-311. This older fee regime, which applies to “subscriber[s] to . . . 911-accessible service,” requires that the fee be paid “when the bill for . . . service is due” and mandates that the service carrier “add the 9-1-1 fee to all current bills rendered.” PS § 1-310(b)–(d). Lifeline participants who receive free phone service may well be “subscriber[s],” but, even so, there is no clear collection mechanism. The fee must be paid when the bill is due, but SafeLink customers are not billed for their service. *See Op. Att’y Gen. Tenn. No. 09-87*, 2009 WL 1430917, at *5-6 (concluding that a similarly-worded statute did not require SafeLink customers to pay an E 9-1-1 fee). If the General Assembly were to consider legislation clarifying the applicability of the 9-1-1 fee to Lifeline participants, we would recommend that the legislation address both the prepaid and subscription services provided under the Lifeline program.

ambiguity in the statute as applied to Lifeline participants. Along these lines, some courts have held that the lack of a clear collection mechanism should not excuse prepaid wireless providers from collecting 9-1-1 fees from their paying customers. *Virgin Mobile USA, LP v. Arizona Dep't of Revenue*, 282 P.3d 1281, 1284 (Ariz. 2012); *Bonet*, 85 So.3d at 976-77; *TracFone Wireless*, 242 P.3d at 818-19.

In those cases, however, the plain language of the fee statutes in question explicitly covered *all* telephone users. In Alabama, for instance, the fee was imposed on each telephone “connection.” *Bonet*, 85 So.3d at 973; *see also Arizona Dep't of Revenue*, 282 P.3d at 1284 (imposing fee on each “customer” who receives “telephone or telecommunication services”); *Wash. Dep't of Revenue*, 242 P.3d at 817 (imposing fee on “all radio access lines”). A prepaid cellphone is still a “telephone connection,” telephone “service,” or “radio access line” even if the statute does not provide a clear way to collect the fee from that particular telephone user. Thus, the only question in those cases was whether the lack of a collection mechanism—by itself—somehow excused the providers from collecting an otherwise applicable fee for every “telephone connection” or every “radio access line.” Here, however, the plain language of PS § 1-313 does not clearly provide that the fee applies in the first place. We find the analysis of the Kentucky Supreme Court to be more relevant in this context.¹¹

In sum, it does not appear that the General Assembly specifically intended to exempt prepaid Lifeline participants from the new prepaid wireless 9-1-1 fee or specifically intended them to pay the fee. But, considered together, the statutory language and the absence of a specific collection mechanism lead us to conclude that the

¹¹ *Washington Department of Revenue* is distinguishable in another way as well. In that case, the state statute specifically identified the 9-1-1 fee as an “excise tax,” so the court applied the canon of statutory construction by which exemptions from taxation are construed narrowly in favor of the government. *See* 242 P.3d at 822; *see generally Comptroller v. Gannett Co.*, 356 Md. 699, 707-08 (1999) (describing the canon). Here, however, it seems unlikely that the “9-1-1 fee” constitutes a tax. *See Bonet*, 85 So.3d at 984-85 (concluding that Alabama 9-1-1 fee was not a tax); *see also W. Capital Associated Ltd. P'ship v. City of Annapolis*, 110 Md. App. 443, 450-51 (1996) (concluding that service charge applicable to people who use a government service is not a tax). And, even if we were to consider the fee a tax, there is a competing canon of construction by which the applicability of tax laws—as opposed to exemptions therefrom—is interpreted in favor of the taxpayer. *See Gannett Co.*, 356 Md. at 707-08. Given that the language of PS § 1-313 does not clearly provide that the fee applies here, we think that this second canon would probably control in the unlikely event a reviewing court were to consider the 9-1-1 fee a tax.

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best reading of the statute is that it does not require Lifeline participants to pay the fee on their free minutes.¹²

We do not mean to suggest that there is no way in which SafeLink and other service providers could collect the fee from prepaid Lifeline participants. For example, in Alabama—which requires all Lifeline customers to pay a 9-1-1 fee—SafeLink has notified its Lifeline customers that they should send it a check for \$1.75 every month to cover the fee, which SafeLink presumably then remits to the state. *See* SafeLink Wireless Website, Notice to Alabama SafeLink Customers, <https://www.safelinkwireless.com/Enrollment/Safelink/en/Public/AL.html> (last visited Dec. 3, 2014). Another way to collect the fee might be to require the provider to subtract 60 cents every month from the \$9.25 federal subsidy, remit those 60 cents to the Comptroller, and deduct 60 cents worth of minutes from the Lifeline participant’s phone.¹³ But, even if there are ways to collect the fee, it is not for us to determine the most appropriate collection mechanism. That is a policy choice for the General Assembly to make once it has had the opportunity to decide whether Lifeline participants should pay the 9-1-1 fee in the first place.

The General Assembly has twice before made similar policy decisions about whether to adapt the 9-1-1 fee regime to emerging business models in the telecommunications industry. In 1995, for example, the Legislature reacted to the increasing popularity of cellphones by extending the fee to “subscribers to . . . wireless telephone service and other 9-1-1-accessible service.” 1995 Md. Laws, ch. 158. Then,

¹² We do not decide whether the same analysis would apply to a customer who receives free minutes as part of a promotion or any other means. Such promotions might include the functional equivalent of a retail transaction between the seller and buyer—an exchange of loyalty points, for example—and, in any event, would require an entirely separate inquiry into the Legislature’s intent.

¹³ We are not certain whether this approach would be consistent with federal regulations, which require the subsidy to be used to “to reduce the cost of any generally available residential service plan or package” without any reference to state-imposed 9-1-1 fees. *See* 47 C.F.R. § 54.403(b)(1). It is not uncommon for federal benefit programs to prohibit the use of federal benefits to pay unrelated state-imposed charges. *See, e.g.,* 7 U.S.C. § 2013(a) (providing explicitly that states participating in the Supplemental Nutrition Assistance Program are prohibited from charging sales tax on purchases made with food stamps). But given that service providers *must* include access to the 9-1-1 system in order to qualify under the Lifeline program, 47 C.F.R. § 54.101(b), we suspect that the FCC would consider the 9-1-1 fee to be part of the “cost of [the] generally available” plan. Still, in the absence of federal guidance, we cannot say with confidence the FCC would permit the use of federal subsidies to pay the 9-1-1 fee.

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when prepaid service providers claimed that they did not need to collect the existing fee from their paying customers, the Legislature established the new prepaid wireless fee in PS § 1-313. Whether the statute should be amended to account for the Lifeline program is again a question for the General Assembly.

III

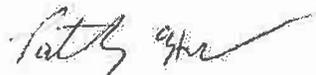
Conclusion

We conclude that, under current law, customers of SafeLink Wireless and similar prepaid wireless providers are not required to pay a 9-1-1 fee on the free allotment of minutes they receive through the Lifeline program. Although we see no evidence that the Legislature specifically considered whether Lifeline participants should pay the fee, both the terms of the statute and the lack of a specific collection mechanism suggest that the fee does not apply to them. The General Assembly may wish to consider amending the statute to clarify whether these individuals should pay the fee and, if so, how the fee should be collected.

Sincerely,



Douglas F. Gansler
Attorney General of Maryland



Patrick B. Hughes
Assistant Attorney General



Adam D. Snyder
Chief Counsel, Opinions & Advice



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

October 12, 2012

The Honorable Gordon D. Fox
House of Representatives
Office of the Speaker
Room 323, State House
Providence, RI 02903

Re: Request for an Opinion from the Rhode Island Department of Attorney General Concerning the Imposition of E911 Fees on Low-income Recipients of SafeLink Wireless Service

Dear Speaker Fox,

In correspondence dated October 1, 2012, you request this Department's opinion as to "whether low-income recipients of SafeLink Wireless are subject to E911 fees in Rhode Island." In the same letter, you observe that billed subscribers of wireless service and consumers of prepaid wireless service purchased in a retail transaction are required to pay E911 fees by statute. You also observe that SafeLink Wireless service is a wireless service that is provided free of charge to qualifying low-income Rhode Islanders and that both the Tennessee and South Carolina Attorney Generals have opined that participants in the SafeLink program under their States' respective statutory frameworks should not be charged E911 fees because they are not billed or charged for the phone service.

My office has reviewed the applicable Rhode Island General Laws. Under G.L. § 39-21.2-4(b), a seller of prepaid wireless service must collect from the consumer an E911 charge "with respect to each *retail transaction* occurring in this state." (Emphasis added). G.L. § 39-21.1-3(6) defines the term "retail transaction" as "the *purchase* of prepaid wireless telecommunications service from a seller for any purpose other than resale." (Emphasis added). Since under the SafeLink program, the qualifying consumer receives the telephone and service free of charge, no "purchase" takes place as that term is use in G.L. § 39-21.1-3(6). In the absence of a "purchase" transpiring, receipt of the free phone and service under the SafeLink program, in the Department's opinion, cannot constitute a "retail transaction" upon or for which E-911 charges must be collected.

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I trust this opinion is responsive to your request.

Sincerely,

A handwritten signature in cursive script, appearing to read "Peter F. Kilmartin".

Peter F. Kilmartin
Attorney General



ALAN WILSON
ATTORNEY GENERAL

October 10, 2011

The Honorable Leon Joe Howard
SC House of Representatives
District No. 76
2425 Barhamville Road
Columbia, SC 29204

Dear Representative Howard:

We received your letter requesting an opinion of this Office concerning E911 fees. As a way of background, you provided the following information:

South Carolina statutes impose E911 fees on both billed subscribers of wireless service under Section 23-47-50 and on consumers of prepaid wireless service purchased in a retail transaction under Section 23-47-68. SafeLink Wireless service is provided completely free to qualifying low-income citizens of South Carolina and is subsidized in its entirety by the federal Universal Service Fund. Citizens submit applications directly to SafeLink Wireless and if they are duly qualified, they receive the service free of charge. Accordingly, qualifying recipients of SafeLink Wireless service are neither billed subscribers, nor do they purchase prepaid wireless service in a retail transaction.

An opinion from the Tennessee Attorney General on the issue of whether that state's emergency telephone service charge imposed under Tenn. Code Ann. § 7-86-108(a)(1) applied to participants in the SafeLink program is instructive. See, Opinion 09-87 (May 18, 2009). Tennessee's emergency telephone service charge statute is functionally identical to South Carolina's E911 statute, in that fees are imposed on wireless subscribers billed retrospectively as well as on prepaid customers. The Tennessee Attorney General found it "peculiar for persons who are supplied a free phone to be subjected to a monthly service charge." He concluded that liability for the E911 charge is tied to the payment for the service and is implicitly limited to those who must make such payments. The Tennessee statute, just like the South Carolina E911 statute, provides no mechanism for payment of the E911 charge by someone who is neither charged nor billed for their wireless service.

You specifically requested that our Office address the question of "whether low-income recipients of SafeLink Wireless service are subject to E911 fees in South Carolina."

Law/Analysis

As mentioned above, S.C. Code § 23-47-50 addresses subscriber billing, explaining that the statute imposes an E911 fee on billed subscribers of wireless service. The statute reads as follows:

- < Section effective July 1, 2011. See, also, section effective until July 1, 2011 . >
- (A) The maximum 911 charge that a subscriber may be billed for an individual local exchange access facility must be in accordance with the following scale:
Tier I--1,000 to 40,999 access lines--\$1.50 for start-up costs, \$1.00 for on-going costs.
Tier II--41,000 to 99,999 access lines--\$1.00 for start-up costs, \$.60 for on-going costs.
Tier III--more than 100,000 access lines--\$.75 for start-up costs, \$.50 for on-going costs.
Start-up includes a combination of recurring and nonrecurring costs and up to a maximum of fifty local exchange lines an account.
- (B) **Every local telephone subscriber served by the 911 system is liable for the 911 charge imposed.** A service supplier has no obligation to take any legal action to enforce the collection of the 911 charges for which a subscriber is billed. However, a collection action may be initiated by the local government that imposed the charges. Reasonable costs and attorney's fees associated with that collection action may be awarded to the local government collecting the 911 charges.
- (C) The local government subscribing to 911 service is ultimately responsible to the service supplier for all 911 installation, service, equipment, operation, and maintenance charges owed to the service supplier. Upon request by the local government, the service supplier shall provide a list of amounts uncollected along with the names and addresses of telephone subscribers who have identified themselves as refusing to pay the 911 charges. Taxes due on a 911 system service provided by the service supplier must be billed to the local government subscribing to the service. State and local taxes do not apply to the 911 charge billed to the telephone subscriber.
- (D) Service suppliers that collect 911 charges on behalf of the local government are entitled to retain two percent of the gross 911 charges remitted to the local government as an administrative fee. The service supplier shall remit the remainder of charges collected during the month to the fiscal offices of the local government. The 911 charges collected by the service supplier must be remitted to the local government within forty-five days of the end of the month during which such charges were collected and must be deposited by and accounted for by the local government in a separate restricted fund known as the "emergency telephone system fund" maintained by the local government. The local government may invest the money in the fund in the same manner that other monies of the local government are invested and income earned from the investment must be deposited into the fund. Monies from this fund are totally restricted to use in the 911 system.

- (E) The “emergency telephone system” fund must be included in the annual audit of the local government in accordance with generally accepted auditing standards.
- (F) Fees collected by the service supplier pursuant to this section are not subject to any tax, fee, or assessment, nor are they considered revenue of the service supplier. A monthly CMRS 911 charge is levied for each CMRS connection for which there is a mobile identification number containing an area code assigned to South Carolina by the North American Numbering Plan Administrator. The amount of the levy must be approved annually by the board at a level not to exceed the average monthly telephone (local exchange access facility) 911 charges paid in South Carolina. The board and the committee may calculate the CMRS 911 charge based upon a review of one or more months during the year preceding the calculation of telephone (local exchange access facility) charges paid in South Carolina. The CMRS 911 charge must have uniform application and must be imposed throughout the State; however, trunks or service lines used to supply service to CMRS providers shall not be subject to a CMRS 911 levy. On or before the twentieth day of the second month succeeding each monthly collection of the CMRS 911 charges, every CMRS provider shall file with the Department of Revenue a return under oath, in a form prescribed by the department, showing the total amount of fees collected for the month and, at the same time, shall remit to the department the fees collected for that month. The department shall place the collected fees on deposit with the State Treasurer. The funds collected pursuant to this subsection are not general fund revenue of the State and must be kept by the State Treasurer in a fund separate and apart from the general fund to be expended as provided in Section 23-47-65.
- (G)
 - (1) Fees collected by the service supplier pursuant to this section are not subject to any tax, fee, or assessment, nor are they considered revenue of the service supplier.
 - (2) **A 911 charge**, including a CMRS 911 charge, **shall be added to the billing by the service supplier to the service *subscriber*** and may be stated separately.
 - (3) A billed subscriber shall be liable for any 911 charge, including a CMRS 911 charge, imposed under this chapter until it has been paid to the service supplier.

S.C. Code § 23-47-50 (emphasis added).

Also, S.C. Code § 23-47-68 explains that the statute imposes E911 fees on consumers of prepaid wireless service purchased in a retail transaction:

- (A) There is hereby imposed a prepaid wireless 911 charge in the amount equal to the average 911 charges calculated pursuant to Section 23-47-50(F).
- (B) **A prepaid wireless seller must collect the prepaid wireless 911 charge** established in subsection (A) **from a *prepaid wireless consumer*** with respect to each prepaid

- wireless retail transaction occurring in this State. The amount of the prepaid wireless 911 charge shall be either: separately stated on an invoice, receipt, or other similar document that is provided to the prepaid wireless consumer by the prepaid wireless seller or otherwise disclosed to the prepaid wireless consumer.
- (C) For the purposes of this section, a prepaid wireless retail transaction must be sourced as provided in Section 12-36-910(B)(5)(b).
 - (D) The prepaid wireless 911 charge is the liability of the prepaid wireless consumer and not the prepaid wireless seller or of any prepaid wireless provider. However, the prepaid wireless seller is liable to remit to the department all prepaid wireless 911 charges that the prepaid wireless seller collects from prepaid wireless consumers as provided in this section.
 - (E) The amount of the prepaid wireless 911 charge collected by a prepaid wireless seller from a prepaid wireless consumer, whether or not such amount is separately stated on an invoice, receipt, or other similar document provided to the prepaid wireless consumer by the prepaid wireless seller, shall not be included in the base for measuring any tax, fee, prepaid wireless 911 charge, or other charge that is imposed by this State, any political subdivision of this State, or any intergovernmental agency. This amount shall not be considered revenue of the prepaid wireless seller.
 - (F) A prepaid wireless seller is entitled to retain three percent of the gross prepaid wireless 911 charges remitted to the department as an administrative fee. A prepaid wireless seller must remit the remainder of the prepaid wireless 911 charges collected to the department on a monthly, quarterly, or annual basis.
 - (G) The audit and appeal procedures applicable under Chapter 36, Title 12 shall apply to the prepaid wireless 911 charge.
 - (H) The department shall establish procedures by which a prepaid wireless seller may document that a sale is not a prepaid wireless retail transaction, which procedures shall substantially coincide with the procedures for documenting sale for resale transactions under Section 12-36-950.
 - (I) The department shall transfer all remitted prepaid wireless 911 charges to the State Treasurer in the same manner as provided in Section 23-47-50(F). These funds are not general fund revenue of the State and must be kept by the State Treasurer in a fund separate and apart from the general fund to be expended as provided in Section 23-47-65.

S.C. Code § 23-47-68 (emphasis added).

The Tennessee Attorney General issued an opinion dated May 18, 2009 which specifically addressed the SafeLink Wireless service which is a federally-funded program:

[SafeLink Wireless] provides free mobile phones to eligible low-income households. The provided phones permit unlimited access to emergency (911) services, over an hour of air time each month, and other features.

The Honorable Leon Joe Howard
Page 5
October 10, 2011

Op. Tenn. Atty. Gen., May 18, 2009. Similar to our statute, S.C. Code § 23-47-50, Tenn. Code Ann. § 7-86-108(a)(1)(B) provides that “[e]ffective April 1, 1999, commercial mobile radio service (CMRS) **subscribers** and users shall be subject to the emergency telephone service charge, a flat statewide rate, not to exceed the business classification rate established in subdivision (a)(2)(A).” Tenn. Code Ann. § 7-86-108(a)(1)(B) (emphasis added). Also, Tenn. Code Ann. S.C. Code § 7-86-108(a)(1)(B)(iv) is comparable to our S.C. Code § 23-47-68, indicating that **prepaid customers** shall be required to pay a 911 charge. Tenn. Code Ann. S.C. Code § 7-86-108(a)(1)(B)(iv) (emphasis added).

While SafeLink program participants may use the emergency telephone service, such participants would not be considered “subscribers” or “prepaid customers” within the context of S.C. Code § 23-47-50 or S.C. Code § 23-47-68. Both S.C. Code § 23-47-50 and S.C. Code § 23-47-68 indicate that the 911 charge is associated with the subscribers or prepaid wireless customers, not persons to whom a free phone is supplied.

Conclusion

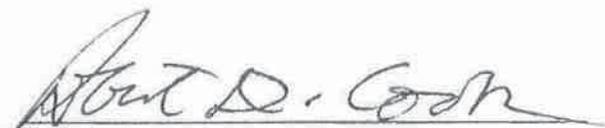
Similar to the findings of the Tennessee Attorney General, this Office finds that low-income recipients of SafeLink Wireless service are not subject to E911 fees in South Carolina. We agree that it would be “peculiar for persons who are supplied a free phone to be subjected to a monthly service charge.” Op. Tenn. Atty. Gen., May 18, 2009. Since these individuals are not billed or charged for the phone service like subscribers of wireless service or consumers of prepaid wireless service purchased in a retail transaction, they do not fall under the provisions of S.C. Code § 23-47-50 or S.C. Code § 23-47-68. Therefore, the low-income recipients at issue should not be charged an E911 fee.

Very truly yours,



Leigha Blackwell Sink
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General

STATE OF TENNESSEE
OFFICE OF THE
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May 18, 2009

Opinion No. 09-87

Allocation of Emergency Communications Fund: "SafeLink" Program

QUESTIONS

1. May the State government use for general purposes the Emergency Communications Fund (ECF), given the prohibition in Tenn. Code Ann. § 7-86-303(d)?

2. Does access to the ECF and/or the interest derived from it require specific and explicit repealing language, given the clear statement of intent by the General Assembly in Tenn. Code Ann. § 7-86-303(d) that prohibits such a diversion, and, if so, is the general reference language in the 2008 State budget act legally sufficient to override the prohibition in Tenn. Code Ann. § 7-86-303(d) and other expressions of legislative intent in Title 7, Chapter 86 concerning the use of 911 funds for 911 purposes only?

3. Does the recently enacted federal law, ENHANCE 911, prohibit the use and/or diversion of 911 funds for non-911 purposes by the State?

4. If the answer to Question 3 is yes, is the interest on the ECF affected by the federal law prohibition?

5. Is the State's recently implemented "SafeLink" program, which distributes prepaid cellular phones, defined by Tenn. Code Ann. § 7-86-103(3) as commercial mobile radio service (CMRS), subject to the funding requirement applicable to prepaid CMRS users set forth in Tenn. Code Ann. § 7-86-108(a)(1)(B)(iv)?

6. If the answer to Question 5 is yes, does the Executive Director of the Tennessee Emergency Communications Board have the authority to waive the requirements of Tenn. Code Ann. § 7-86-108(a)(1)(B)(iv)?

OPINIONS

1. The prohibition contained in Tenn. Code Ann. § 7-86-303(d) is not sufficient by itself to prevent the General Assembly from using the ECF for other purposes. Subsection 4-3-1016(d)(44) expressly authorizes transfers from the ECF. Chapter No. 1191 of the 2008 Public Acts, codified in Tenn. Code Ann. § 4-3-1016, permits the transfer of certain funds, including the ECF, to the general fund. This section applies "notwithstanding any provision of law to the

contrary.” Tenn. Code Ann. § 4-3-1016(a). Although Tenn. Code Ann. § 7-86-303(d) prohibits use of the ECF for other purposes, Tenn. Code Ann. § 4-3-1016 supersedes and controls. However, as explained in response to Questions 3 and 4, except as to the interest earned on the ECF, federal law preempts and prevents such use of the ECF and renders these State statutory issues moot.

2. Applying State law only, the answer is that because Tenn. Code Ann. § 4-3-1016 controls, no additional specific and explicit repealing language is necessary. Combined with the other provisions in Tenn. Code Ann. § 4-3-1016, the reference to the ECF in Tenn. Code Ann. § 4-3-1016(d)(44) is legally sufficient to allow the diversion of ECF funds to the general fund. Because of federal preemption, however, the State may not use the ECF for general purposes, notwithstanding Tenn. Code Ann. § 4-3-1016(d)(44), except that preemption does not affect the interest earned on the ECF.

3. Yes. Federal law prohibits the use of fees charged as part of the State’s 911 or enhanced 911 program for other purposes. The specific legislation named in the request, the ENHANCE 911 Act of 2004, enacted as Public Law 108-494, penalizes grantees if a state diverts 911 fees for other use. In addition, the New and Emerging Technologies 911 Improvement Act of 2008, enacted as Public Law 110-283, expressly preempts a State from using fees charged as part of the State’s 911 or enhanced 911 program for other purposes. The State may not, therefore, transfer fees collected and placed in the ECF to the general fund.

4. No. Neither federal law cited in response to Question 3 applies to the interest earned on the collected fees. The interest may be transferred to the general fund.

5. No. The emergency telephone service charge does not apply to users of mobile phones provided through the “SafeLink” program, since those persons are not billed or charged for their mobile phone use and thus do not come within the provisions implementing the service charge at Tenn. Code Ann. § 7-86-108(a)(1)(B)(iii) and (iv).

6. Since the answer to Question No. 5 is negative, this Office will not address Question No. 6.

ANALYSIS

1 The Emergency Communications Board (the “Board”) was established and operates under Tenn. Code Ann. §§ 7-86-301, *et seq.* The Board is funded through a charge on all commercial mobile radio service providers, established pursuant to Tenn. Code Ann. § 7-86-108(c). Tenn. Code Ann. § 7-86-303(d) provides in relevant part:

Any funds collected by the board shall be deposited in the state treasury in a separate interest-bearing fund to be known as the 911 Emergency Communications Fund. *Disbursements from this fund shall be limited solely to the operational and administrative expenses of the board and the purposes as expressed in this part. At no time during its existence shall the 911 Emergency*

Communications Fund be used to fund the general expenses of the state of Tennessee.

Tenn. Code Ann. § 7-86-303(d)(emphasis added). The rest of subsection (d) lists several purposes for which the funds may be used. All of these purposes relate to 911 service.

Tenn. Code Ann. § 4-3-1016, as amended by 2008 Tenn. Pub. Acts Ch. 1191, authorizes the Commissioner of Finance and Administration to transfer monies from various accounts to defray the expenses of state government. The statute provides in relevant part:

(a) *Notwithstanding any provision of the law to the contrary*, subject to the specific provisions of an appropriation act, the commissioner of finance and administration is authorized to deny carry forwards for, and to transfer funds from, the funds, reserve accounts or programs identified in this section to the state general fund for the purpose of meeting the requirements of funding the operations of state government for the fiscal year ending June 30, 2006, and subsequent fiscal years. *The authorization provided for in this subsection (a) shall not apply to allow the transfer of any fund balances that are mandated by federal law to be retained in such fund.* This authority shall only apply to transfers and carry forwards necessary to fund the expenditures for the state for the fiscal year ending June 30, 2006, and subsequent fiscal years.

(b) No funds shall be transferred unless specifically appropriated in an appropriations act and such funds shall only be expended in accordance with the provisions of such act.

* * *

(d) In the fiscal years ending June 30, 2008, and June 30, 2009, transfers are authorized from the following funds, reserve accounts and programs:

* * *

(44) Department of commerce and insurance, emergency communications funds, created or referenced in title 7, chapter 86, part 1;

* * *

Tenn. Code Ann. § 4-3-1016 (a), (b), and (d)(emphasis added). The question concerns whether, in light of the limitation on the use of emergency communications funds in Tenn. Code Ann. § 7-86-303(d), these funds may be transferred under Tenn. Code Ann. § 4-3-1016. By its terms, Tenn. Code Ann. § 4-3-1016 applies, “[n]otwithstanding any provision of law to the contrary.” Although the limitation in Tenn. Code Ann. § 7-86-303(d) is expressed in absolute terms, it is subject to amendment by the General Assembly. Tenn. Code Ann. § 7-86-303 has not been

amended since 1998. In contrast, Tenn. Code Ann. § 4-3-1016(d) was amended to include emergency communications funds in 2008. 2008 Tenn. Pub. Acts Ch. 1191. A statute adopted later in time controls over a conflicting statute adopted earlier in time. *Steinhouse v. Neal*, 723 S.W.2d 625, 627 (Tenn. 1987); *Stewart Title Guaranty Co. v. McReynolds*, 886 S.W.2d 233, 236 (Tenn. Ct. App. 1994). In this case, to the extent these two statutes conflict, Tenn. Code Ann. § 4-3-1016 controls. Thus, insofar as Tennessee law is concerned, these funds may be used for the purposes specified in § 4-3-1016.

2. Because Tenn. Code Ann. § 4-3-1016 controls, no specific and explicit repealing language is necessary. Combined with the other provisions in Tenn. Code Ann. § 4-3-1016, the reference to the ECF in the 2008 act is sufficient under Tennessee law to allow the diversion of ECF funds to the general fund.

3. The request refers to the ENHANCE 911 Act of 2004, which became Public Law 108-494. This Act provides for federal matching grants to eligible entities, which include state and local governments. The Act penalizes certain grantees if a state diverts 911 fees for some other use. An applicant for a grant must certify:

that no portion of any designated E-911 charges imposed by a State or other taxing jurisdiction within which the applicant is located are being obligated or expended for any purpose other than the purposes for which such charges are designated or presented during the period beginning 180 days immediately preceding the date of the application and continuing through the period of time during which the funds from the grant are available to the applicant.

47 U.S.C. § 942(c)(2). The term “designated E-911 charges” means

any taxes, fees, or other charges imposed by a State or other taxing jurisdiction that are designated or presented as dedicated to deliver or improve E-911 services.

47 U.S.C. § 942(c)(1). As a condition of the grant, grantees must agree that grant funds will be returned if the State or other taxing jurisdiction obligates or expends designated E-911 charges for any purpose other than the purposes for which such charges are designated or presented. 47 U.S.C. § 942(c)(3). The ENHANCE 911 Act, therefore, places strict limitations on states’ use of their E-911 charges. Use of E-911 charges for other purposes would prevent a State from receiving the federal matching grants.

A later provision in federal law has an even more direct preemptive effect. Effective July 23, 2008, Congress passed the New and Emerging Technologies 911 Improvement Act of 2008, PL 110-283. Among other provisions, that act added 47 U.S.C. § 615a-1 to the federal code. Subsection (f) of this statute provides:

(f) State authority over fees

(1) Authority

Nothing in this Act, the Communications Act of 1934 (47 U.S.C. 151 *et seq.*), the New and Emerging Technologies 911 Improvement Act of 2008, or any Commission regulation or order shall prevent the imposition and collection of a fee or charge applicable to commercial mobile services or IP-enabled voice 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 and enhanced 9-1-1 services, or enhancements of such services, as specified in the provision of State or local law adopting the fee or charge.* For each class of subscribers to IP-enabled voice services, the fee or charge may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services.

(2) Fee accountability report

To ensure efficiency, transparency, and accountability in the collection and expenditure of a fee or charge for the support or implementation of 9-1-1 or enhanced 9-1-1 services, the Commission shall submit a report within 1 year after July 23, 2008, and annually thereafter, to the Committee on Commerce, Science and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives detailing the status in each State of the collection and distribution of such fees or charges, and including findings on the amount of revenues obligated or expended by each State or political subdivision thereof for any purpose other than the purpose for which any such fees or charges are specified.

47 U.S.C. § 615a-1(f)(emphasis added). The committee report on this provision emphasizes Congress's intent to limit the expenditure of state-imposed fees to purposes related to 911 or E-911 services:

New subsection 6(f) would also provide that fees collected by States or their political subdivisions may only be used for 911 or E-911 services, or enhancements of such services, as specified in the law adopting the fee. States and their political subdivisions should use 911 or E-911 fees only for direct improvements to the 911 system. Such improvements could include improving the technical and operational aspects of PSAPs; establishing connections between PSAPs and other public safety operations, such as a poison control center; or implementing the migration of PSAPs to an IP-enabled emergency network. This provision is not intended to allow 911 or E-911 fees to be used for other public safety activities that, although potentially worthwhile, are not

directly tied to the operation and provision of emergency services by the PSAPs.

HOUSE REPORT NO. 110-442, 2008 U.S.C.C.A.N. 1011, 1020 (2007).

The Tenth Circuit Court of Appeals summarized the constitutional doctrine of preemption in the following words:

Congress' power to preempt state law arises from the Supremacy Clause, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl.2. Congressional intent is paramount in preemption analysis. *See Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir. 1998). Preemption may be either (1) expressed or (2) implied from a statute's structure and purpose. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L.Ed.2d 604 (1977). Nevertheless, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law. " *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 68 L.Ed.2d 576 (1981). Accordingly, in the absence of express preemptive language, federal courts should be "reluctant to infer pre-emption." *Building & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 224, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993).

United States v. Vasquez-Alvarez, 176 F.3d 1294, 1297 (10th Cir. 1999) (footnote omitted). 47 U.S.C. § 615a-1 expressly preempts a State from using fees charged as part of the State's 911 or enhanced 911 program for other purposes. The State may not, therefore, transfer fees collected and placed in the 911 Emergency Communications Fund to the general fund.

4. However, 47 U.S.C. § 615a-1 does not address any interest that may have accrued on fees collected by a State as part of its 911 or enhanced 911 program. The existence of interest on the Emergency Communications Fund is the result of the State's having deposited the fees collected in an interest-bearing account and not the State's having collected the fees pursuant to its 911 or enhanced 911 program. Thus, such monies are not fees charged as part of the 911 program, but are the result of the State's prudent fiscal management. Federal preemption, therefore, does not apply to the interest on this Fund. That being the case, Tenn. Code Ann. § 4-3-1016, as amended by 2008 Tenn. Pub. Acts Ch. 1191, permits the transfer of the interest from the Fund to the general fund, notwithstanding the provisions of Tenn. Code Ann. § 7-86-303(d), as stated above.

5. The Tennessee Department of Safety recently implemented SafeLink Wireless service, a federally-funded program which provides free mobile phones to eligible low-income households. The provided phones permit unlimited access to emergency (911) services, over an hour of air time each month, and other features.

Tenn. Code Ann. § 7-86-108(a)(1)(B) provides that:

Effective April 1, 1999, commercial mobile radio service (CMRS) subscribers and users shall be subject to the emergency telephone service charge, a flat statewide rate, not to exceed the business classification rate established in subdivision (a)(2)(A).

Participants in the SafeLink program may not be “subscribers” of mobile phone service in the full sense, but they are “users.” Accordingly, one might initially assume that the emergency telephone service charge would apply to them. It would nevertheless seem peculiar for persons who are supplied a free phone to be subjected to a monthly service charge, and the portions of the statute that implement the service charge do indeed tie liability for that charge to those customers who are charged and billed monthly for the service. Tenn. Code Ann. § 7-86-108(a)(1)(B)(iii) and (iv) provide:

(iii) For customers who are billed retrospectively, known as standard customers, CMRS providers shall collect the service charge on behalf of the board as part of their monthly billing process and as a separate line item within that billing process.

(iv) The service charge shall also be imposed upon customers who pay for service prospectively, known as prepaid customers. CMRS providers shall remit to the board the service charge under one of two methods:

- (a) The CMRS provider shall collect, on a monthly basis, the service charge from each active prepaid customer whose account balance is equal to or greater than the amount of the service charge; or
- (b) The CMRS provider shall divide the total earned prepaid wireless telephone revenue received by the CMRS provider within the monthly 911 reporting period by fifty dollars (\$50.00), and multiply the quotient by the service charge amount.

From these provisions, it is apparent that liability for the service charge is indeed tied to payment for the service and is implicitly limited to those who must make such payments. As to standard customers who pay retrospectively, the statute ties liability to the monthly billing process. Similarly, the statute also refers to customers “who pay for service prospectively, known as prepaid customers.” In neither instance is there a mechanism for payment of the service charge by someone who is not charged or billed and does not pay at all. Because the users of these phones will not be “customers who pay” for the service, the phones provided under the SafeLink program do not fall within the terms of Tenn. Code Ann. § 7-86-108(a)(1)(B)(iii) or (iv), and no service charge is due for them.

6. Since the answer to Question No. 5 is negative, this Office will not address Question No. 6.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

JONATHAN N. WIKE
Assistant Attorney General

Requested by:
The Honorable Bill Harmon
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Nashville, Tennessee 37243

Exhibit 2



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: National Weather Service – Alabama 911 Service Charge and Utility Service Use Tax

File: B-300737

Date: June 27, 2003

DIGEST

The federal government is constitutionally immune from paying the Alabama 911 Service Charge and the Alabama Utility Service Use Tax because they are both vendee taxes, the legal burdens of which fall directly on the federal government as a user of telephone services.

DECISION

The Chief of the Financial Management Division for the Mountain Administrative Support Center of the Department of Commerce has requested an advance decision under 31 U.S.C. § 3529 on the propriety of paying the 911 service charge and the utility service use tax assessed against National Weather Service telephone lines by the state of Alabama. For the reasons set forth below, we conclude that both the 911 service charge and the utility service use tax are vendee taxes, the legal burdens of which fall directly on the federal government as a user of telephone services, and that the federal government is therefore constitutionally immune from these taxes.

BACKGROUND

911 Service Charge

Under section 11-98-2 of the Alabama Statutes, municipal or county governments may establish emergency telephone communications districts, which are deemed political and legal subdivisions of the state. Ala. Code § 11-98-2 (LEXIS 2003). The districts may levy an emergency telephone service charge not to exceed five percent

of the tariff rate¹ after approval by a majority of voters within the district. Ala. Code § 11-98-5(a). The emergency telephone service charge is imposed only on the amount received from the tariff rate for exchange access lines.² Ala. Code § 11-98-5(c). Funds generated from emergency telephone service charges must be used to establish, operate, maintain, and replace any emergency communication system. Ala. Code § 11-95-5(i). If proceeds generated by the service charge exceed the amount necessary to fund it, the district must suspend or reduce the emergency telephone service charge rate to an amount adequate to fund the district. Ala. Code § 11-98-5(b). The district is permitted to reestablish the original rate, or lift the suspension up to the five percent ceiling, if funding becomes inadequate. Id.

The emergency telephone service charge is included and may be stated separately in the billing by the service supplier to the service user.³ Ala. Code § 11-98-5(c). Every billed service user is liable for any emergency telephone service charge imposed until it has been paid to the service supplier. Id. The service supplier has no obligation to take legal action to enforce collection of any emergency telephone service charge, but must provide the district with a quarterly list of uncollected amounts, including names and addresses of service users carrying an unpaid balance. Ala. Code § 11-98-5(d). Amounts collected by the service supplier for the emergency telephone service charge are due, and are remitted to the district, monthly. Ala. Code § 11-98-5(e). The service supplier is entitled to retain a one-percent administrative fee from the gross receipts to be remitted to the district. Id.

Utility Service Use Tax

Alabama also levies a tax on the storage, use, or other consumption of utility services in the state. Ala. Code §§ 40-21-101 to -107 (LEXIS 2003). This includes a six percent tax on telephone services. Ala. Code § 40-21-102(b). Every person storing, using or otherwise consuming utility services in the state is liable for the tax.

¹ "Tariff Rate" means the rate or rates billed by a service supplier as stated in the service supplier's tariffs and approved by the Alabama Public Service Commission, which represent the service supplier's recurring charges for exchange access facilities, exclusive of all taxes, licenses or similar charges. Ala. Code § 11-98-1(9).

² The statute does not define "exchange access lines," "exchange telephone service" or "local exchange service." See Ala. Code § 11-98-1(4) (defining "exchange access facilities"); see also Rule T-2, Tel. Rules, Ala. Pub. Serv. Comm'n, No. 15957 (June 29, 2000), available at <http://www.psc.state.al.us/Administrative/Revtelephonerulesoct6.pdf> (defining "exchange" and "exchange service area").

³ "Service supplier" means any person providing exchange telephone service to any service user throughout the county or municipality. Ala. Code § 11-98-1(7). "Service user" means any person, not otherwise exempt from taxation, who is provided exchange telephone service in the municipality or county. Ala. Code § 11-98-1(8).

Ala. Code § 40-21-102(c). The utility furnishing telephone services collects the tax and remits it to the Department of Revenue, retaining one-fourth of one percent of the gross amount of the tax billed to cover collection costs. Ala. Code § 40-21-102(b). All funds received from the utility service use tax remaining after administration and enforcement expenses are deposited into the state treasury to credit the Education Trust Fund. Ala. Code § 40-21-107. The storage, use or other consumption of utility services is expressly exempted from the utility service use tax whenever the State of Alabama is prohibited from taxing such storage, use, or consumption under the Constitution or the laws of the United States. Ala. Code § 40-21-103(1).⁴

ANALYSIS

The issue before us is whether the Alabama 911 service charge and the utility service use tax are the types of taxes which the National Weather Service must pay. It is an unquestioned principle of constitutional law that the United States and its instrumentalities are immune from direct taxation by state and local governments. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Direct taxation occurs where the legal incidence of the tax falls directly on the United States as the buyer of goods, Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954), or as the consumer of services, 53 Comp. Gen. 410 (1973), or as the owner of property, United States v. Allegheny County, 322 U.S. 174 (1944). When the legal incidence of such a tax falls directly on the federal government as the "vendee," the tax is not payable unless expressly authorized by Congress. 64 Comp. Gen. 655, 656-7 (1985).

On the other hand, if the legal incidence of the tax falls directly on a business enterprise (the "vendor"), which is supplying the federal government as a customer with goods or services, immunity does not apply. 61 Comp. Gen. 257 (1982) (requirement that a utility tax be passed on to the user must be part of the taxing statute for the government to invoke the principles of sovereign immunity). When the vendor is the entity being taxed, it may typically shift the economic burden of the tax to its customers. In such instances, federal agencies may use appropriated funds for costs necessary to obtain those goods and services, even though some of the cost of the item is attributable to taxes paid by the vendor. 64 Comp. Gen. 655, 656-7 (1985). In other words, a tax does not necessarily violate the government's immunity merely because the government must bear the financial burden of a tax levied on others. 61 Comp. Gen. 257 (1982). See also 63 Comp. Gen. 49 (1983).

⁴ Unlike the utility service use tax, the provisions of the emergency telephone service surcharge do not include such an exemption.

In determining whether a charge is a "tax" or "fee," the nomenclature is not determinative and the inquiry must focus on explicit factual circumstances. Valero Terrestrial Corp. v. Caffrey, 205 F.3d 130, 134 (4th Cir. 2000).⁵ One court described a "classic tax" as one imposed by a legislature upon many, or all citizens, raises money, and is spent for the benefit of the entire community. San Juan Cellular Tel. Co. v. Public Service Comm'n, 967 F.2d 683, 685 (1st Cir. 1992). Other courts employ this same three-part test in distinguishing a tax from a fee. See, e.g., Valero, 205 F.3d at 134; Bidart Bros. v. California Apple Comm'n, 73 F.3d 925, 931 (9th Cir. 1996).⁶

In addition to the analysis of where the legal incidence of the tax falls, we also consider additional characteristics of the 911 charges. First, does a local government or quasi-governmental unit provide the emergency telephone service; second, does the public funding of the service require legal authority, e.g., an ordinance or a referendum, and third, is the service charge actually based on a flat rate per telephone line, unrelated to levels of service. 64 Comp. Gen. 655 (1985); 65 Comp. Gen. 879 (1986).

911 Service Charge

Although the Alabama statute labels it a 911 "service charge," it is clearly a tax imposed by emergency telephone communications districts, state governmental units, on a class of citizens, namely, those with telephone service. San Juan. The five percent rate ceiling is set by statute and applies to every billed telephone user. Ala. Code § 11-98-5. The 911 service charge raises money which is spent to provide emergency telephone service for the benefit of the entire community. San Juan. While the telephone service provider is required to collect the 911 service charge and remit it to the communications district, sections 11-98-4 and 11-98-5(g)-(i) make it clear that the communications district provides the emergency telephone service. Funds generated by the 911 service charge must only be used to establish, operate, maintain and replace an emergency communication system. Ala. Code § 11-98-5(i). The statute mandates that local communications districts must lower or suspend the taxation if proceeds exceed the cost of providing the emergency telephone service. Ala. Code § 11-98-5(b).

⁵ We note here that the Alabama statute labels its 911 tax a "service charge," not a "fee." These terms, however, are synonymous. See Black's Law Dictionary 629 (7th ed. 1999) (defining "fee" as a charge for labor or services). See also Webster's Ninth New Collegiate Dictionary 1076 (1983) (defining "service charge" as a fee charged for a particular service).

⁶ See also Collins Holding Corp. v. Jasper County, 123 F.3d 797, 800 (4th Cir. 1997); National Cable Television Ass'n v. United States, 425 U.S. 336, 340 (1974); 49 Comp. Gen. 72 (1969).

The Alabama 911 service charge also satisfies the additional criteria of 64 Comp. Gen. 655 (1985). The emergency telephone communications districts, which § 11-98-2 defines as political and legal subdivisions of the state, establish, operate and maintain the emergency telephone service. Ala. Code §§ 11-98-5(g)-(i). Public funding of the emergency telephone service requires an initial referendum and, then an ordinance or resolution for subsequent rate changes. Ala. Code §§ 11-98-5(a)-(b). The 911 service charge is imposed only on the amount received from the tariff rate for exchange access lines. Ala. Code § 11-98-5(c).

We have examined 911 charges imposed by several states on nearly two dozen occasions, recently in Utah, B-283464, Feb. 28, 2000. See also B-265776, Nov. 29, 1995 (Illinois); B-259029, May 30, 1995 (Alaska); and B-254628, Apr. 7, 1994 (Michigan). In all of these cases, we held that the 911 surcharges were vendee taxes not payable by the federal government.⁷ Under the Alaska statute, for example, municipalities are authorized to impose a 911 surcharge on each local exchange access line; the telephone customer is explicitly liable for payment of the 911 surcharge; the funds collected are available only to pay the costs of the 911 emergency phone system; the local exchange carrier is required to collect the money and remit it to the local authority; and the carrier retains one percent of the funds collected for administrative collecting costs. There we found that the telephone company was merely collecting the tax for the local authority and that the Alaska 911 surcharge was a vendee tax. Because the legal incidence fell directly on the federal government as a user of telephone services, we found the federal government constitutionally immune from paying the Alaska 911 surcharge.

Contrast these cases with our decision in B-238410, Sept. 7, 1990, where we found that the offices of the two United States Senators from Arizona were not constitutionally immune from paying Arizona's 911 tax. Although we recognized that the economic burden of the tax would fall on the Senators' offices as the consumers, we concluded that the statute and the surrounding circumstances clearly indicated that the legal incidence of the Arizona 911 tax fell on the vendor, not the vendee. See also 61 Comp. Gen. 257, 260 (1982) (statute clearly imposed the utility license tax on the operator of electric utilities and Veterans' Administration Medical Centers not constitutionally immune).

Here, the Alabama 911 service charge statute is not materially different from those of other states where we concluded such surcharges were "vendee" taxes. In fact, the Alabama 911 service charge is nearly identical to the Alaska 911 statute. Local emergency telephone communications districts in Alabama are authorized to impose a 911 service charge on each local exchange access line; the telephone customer is

⁷ See also B-254712, Feb. 14, 1994 (North Carolina); B-255092, Feb. 14, 1994 (Wyoming); B-253695, July 28, 1993 (Pennsylvania); B-249007, Jan. 19, 1993 (Nebraska); B-248907, Jan. 19, 1993 (Wisconsin).

explicitly liable for payment of the 911 charge; the funds collected are available only to pay the costs of the 911 emergency phone system; and the local exchange carrier is required to collect the money and remit it to the local authority, retaining one percent of the funds collected for administrative collecting costs. As with the Alaska surcharge, we conclude that the Alabama 911 service charge is a vendee tax. The legal incidence of the tax falls unmistakably on the National Weather Service as a user of telephone services. The National Weather Service, therefore, is constitutionally immune from paying the Alabama 911 service charge.

Utility Service Use Tax

The next issue is whether the National Weather Service is constitutionally immune from paying the Alabama utility service use tax. The use tax is imposed by the state legislature on "every person storing, using or otherwise consuming utility services in the State of Alabama." Ala. Code § 40-21-102(c). Indeed, § 40-21-101 explicitly states that the tax is intended to apply to purchases of utility services from any utility. The tax is computed based on the sales price of the customer's total monthly utility consumption. Ala. Code § 40-21-102(b). The use tax revenue, minus administrative and enforcement expenses, are deposited to the credit of the Alabama Education Trust Fund.

The Alabama utility service use tax is clearly distinguishable from the Alabama public utility license tax we considered in 61 Comp. Gen. 257, 260 (1982). There we concluded that Veterans' Administration Medical Centers should pay the Alabama public utility license tax. The license tax was clearly imposed on the operator of electric or hydroelectric utilities. The legal incidence of the license tax was on the utility companies, not the consumer. Whereas the legal incidence of the license tax fell squarely on the utility vendor in 61 Comp. Gen. 257, the legal incidence of the utility service use tax imposed by § 40-21-102 falls unmistakably on the National Weather Service as vendee. Because the legal incidence of the tax falls on the National Weather Service as a user of telephone services, the National Weather Service is, therefore, constitutionally immune from paying the Alabama utility service use tax.

CONCLUSION

We find that the Alabama 911 service charge and the utility service use tax are both vendee taxes, the legal burdens of which fall directly on the federal government as a user of telephone services, and that the federal government is therefore constitutionally immune from these taxes. We note that although the National Weather Service has informed the telephone service provider of its constitutional immunity from these taxes, the provider has nevertheless refused to remove these assessments. To the extent that federal agencies are threatened with

discontinuation of telephone or other utility services for non-payment of such taxes, we suggest you first discuss the issue with the relevant state taxing authority, and if that fails, consult with the Department of Justice.

/Signed/

Anthony H. Gamboa
General Counsel

Exhibit 3



2013-064

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August 27, 2013

Honorable James T. Sasser
Attorney, Alabama Statewide 911 Board
1678 Montgomery Highway #104 PMB 345
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Alabama Wireless 911 Board –
Emergency Telephone Service – Fees
– Taxes – Federal Agencies

Alabama law does not exempt
instrumentalities of the United States
from the statewide 911 charge
imposed by section 11-98-5 of the
Code of Alabama. Whether they are
exempt pursuant to federal law is not
addressed.

Dear Mr. Sasser:

This opinion of the Attorney General is issued in response to your
request on behalf of the Alabama Statewide 911 Board.

QUESTION

Are instrumentalities of the United States
exempt from the statewide 911 charge set forth in
section 11-98-5 of the Code of Alabama?

FACTS AND ANALYSIS

Act 2012-293, signed into law by the Governor on May 8, 2012, and
now codified at section 11-98-1, *et seq.*, of the Code of Alabama, made
substantial changes to Alabama E-911 services in Alabama. Ala. Code §
11-98-1 to § 11-98-15 (Supp. 2012); *see, generally*, opinion to Honorable
Jay Murrill, Attorney, The Jefferson County 911 Emergency
Communications District, dated September 5, 2012, A.G. No. 2012-084.

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Pursuant to these amendments, section 11-98-5 of the Code provides, effective October 1, 2013, as follows:

“[a] single, monthly statewide 911 charge shall be imposed on each active voice communications service connection in Alabama that is technically capable of accessing a 911 system. ... The statewide 911 charge is payable by the *subscriber* to the voice communications service provider. ... The statewide 911 charge shall be uniformly applied and shall be imposed throughout the state, and shall replace all other 911 fees or 911 taxes.”

ALA. CODE § 11-98-5(a) (Supp. 2012) (emphasis added).

Prior to the amendments, section 11-98-1 of the Code exempted persons “otherwise exempt from taxation” from payment of the 911 service charge. ALA. CODE § 11-98-1(8) (2008). Because the federal government is generally exempt from taxation, the federal government was also exempt from the 911 service charge. Opinion to Steven R. Ballard, Chief Financial Officer, DeKalb County Commission, dated September 6, 1991, A.G. No. 91-00400.

The amended section 11-98-1 of the Code, however, now states, in part, as follows:

[P]rovided, however, that for purposes of the imposition and collection of the statewide 911 charge the term subscriber shall not include the State of Alabama, the counties within the state, incorporated municipalities of the State of Alabama, county and city school boards, independent school boards, and all educational institutions and agencies of the State of Alabama, the counties within the state, or any incorporated municipalities of the State of Alabama.

ALA. CODE § 11-98-1(16) (Supp. 2012). Accordingly, the State of Alabama, counties, municipalities, school boards, educational institutions, and agencies of the State of Alabama are exempt from the statewide 911 charge regardless of tax exempt status. This section makes no provision for the exemption of instrumentalities of the United States.

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The federal government may, however, be exempt from the 911 service charge under principles of federal law. This Office does not generally address questions of whether federal law may preempt state fees. Opinion to Honorable Don Davis, Mobile County Probate Judge, dated December 26, 2007, A.G. No. 2008-023. Nonetheless, it is generally accepted that the United States and its instrumentalities are exempt from *taxation* by state governments. *Ballard* at 2 (emphasis added), citing, *M'Culloch v. State of Maryland*, 17 U.S. 316, 4 L. Ed. 579 (1819) and *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 98 L. Ed. 546, 74 S. Ct. 403 (1954). Moreover, the Comptroller General of the United States has previously determined "that the Alabama 911 service charge and the utility service use tax are both vendee *taxes* . . . and that the federal government is therefore constitutionally immune from these *taxes*." Op. U.S. Comptroller Gen., No. B-300737 (June 27, 2003) (emphasis added). Recently, however, the Alabama Supreme Court, has held that 911 service charges are not taxes. *T-Mobile South, LLC v. Bonet*, 85 So. 3d 963, 984-985 (Ala. 2011), relying on, *Madison County Communications District v. BellSouth Telecommunications, Inc.*, Civil Action 06-S-1786-NE (N.D. Ala., decided April 15, 2009) (unpublished memorandum).

CONCLUSION

Alabama law does not exempt instrumentalities of the United States from the statewide 911 charge imposed by section 11-98-5 of the Code. Whether they are exempt pursuant to federal law is not addressed.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Ben Baxley of my staff.

Sincerely,

LUTHER STRANGE
Attorney General
By:



BRENDA F. SMITH
Chief, Opinions Division

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