

**Before the  
Federal Communications Commission  
Washington, DC 20554**

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

**SECOND SUPPLEMENT TO EMERGENCY PETITION  
FOR DECLARATORY RULING AND, IN THE ALTERNATIVE,  
PETITION FOR RULEMAKING**

TracFone Wireless, Inc. (“TracFone”) hereby files a second supplement to its Emergency Petition for Declaratory Ruling filed with the Commission on October 23, 2014 and previously supplemented by a Petition for Rulemaking filed on March 13, 2015 (jointly referenced as “Petitions”) and states as follows:

**INTRODUCTION**

TracFone’s Petitions asked the Commission to preempt state laws that impose 911 fees or taxes on Lifeline service funded by the federal Universal Service Fund (“USF”) and provided to qualifying low-income consumers for no charge (“no charge Lifeline service”), or in the alternative, to promulgate rules to ensure that (1) as required by law, the full value of Lifeline benefits is passed through to those low-income households in all states who receive no charge Lifeline service; and (2) eligible telecommunications carriers (“ETCs”) that provide no charge Lifeline service are not unduly economically burdened by being forced to pay state 911 fees or taxes on behalf of their Lifeline customers. By this Second Supplement, TracFone advises the Commission of a recently-enacted amendment to Indiana law that overtly interferes with Lifeline consumers’ statutory right to receive federal USF benefits and ETCs’ ability to provide those

federal benefits to Lifeline consumers without being subjected to an unfair financial encumbrance. This legislative action reflects Indiana’s disregard for the Lifeline program and the federal Lifeline benefits to which its low-income households are entitled and demonstrates an even greater need for prompt action on TracFone’s Petitions.

As detailed in TracFone’s Emergency Petition, such state laws unlawfully reduce the value of federal Lifeline benefits below federally-mandated levels by taxing those benefits such that the full amount of the federal benefit is not passed through to the Lifeline support recipient in violation of Commission Rule 54.403(a)(1).<sup>1</sup> The amount of federal Lifeline benefits is unlawfully decreased whether the Lifeline customer pays the 911 tax or the ETC reduces the value of the Lifeline benefits so that the ETC can pay the 911 tax on behalf of its customers. Moreover, when state laws are interpreted to require ETCs to use their own resources to pay 911 taxes on behalf of their Lifeline customers, those laws violate the requirement that such laws be competitively neutral as required by Section 253 of the Communications Act of 1934, as amended (“Communications Act”)<sup>2</sup> since those laws do not impose a similar payment burden on other service providers with whom those ETCs compete.

TracFone’s Emergency Petition described how the Commission could lawfully exercise its authority to preempt such state laws under the Supremacy Clause of the Constitution of the United States and under Section 253 of the Communications Act. TracFone’s first supplement to that petition proposed that, as an alternative to preemption, the Commission exercise its statutory rulemaking authority pursuant to Sections 4(i), 201(b), and 254 of the Communications Act<sup>3</sup> to

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<sup>1</sup> 47 C.F.R. § 54.403(a).

<sup>2</sup> 47 U.S.C. § 253.

<sup>3</sup> 47 U.S.C. §§ 154(i), 201(b), 254.

revise its rules.<sup>4</sup> TracFone suggested two amendments to the Commission's rules: (1) a prohibition on any state requiring ETCs to collect from their Lifeline customers state or local taxes where the effect of such tax collection would result in Lifeline customers having to contribute any portion of their federally-mandated Lifeline benefit to pay for the tax or fee thereby reducing the net Lifeline support received by the Lifeline customer below the support level mandated by the Commission; and (2) a prohibition against any state requiring any ETC to pay a state or local tax or fee on behalf of the ETC's Lifeline customers where the effect would be to place additional financial obligations on the ETC's provision of federally-funded Lifeline service.

TracFone's Petitions specifically reference Alabama and Indiana as states which have attempted to construe and enforce state 911 tax laws in a manner that requires Lifeline service providers either to collect state 911 taxes from their Lifeline support recipients or to pay those state taxes themselves on behalf of their Lifeline consumers out of the service providers' own resources. As described in the Emergency Petition for Declaratory Ruling, Indiana Code § 36-8-16.6 provides for an Enhanced Prepaid Wireless Telecommunications Service Charge to finance that state's 911 fund. Prior to 2014, the Indiana Enhanced Prepaid Wireless 911 fee was imposed solely on each "retail transaction" which is defined in the statute as "the purchase of prepaid wireless service from a seller for any purpose other than resale."<sup>5</sup> Pursuant to Indiana Code § 36-8-16.6-13, the purchaser is liable for payment of the 911 fee, but the seller is responsible for collecting the fee from the purchaser of the service and remitting all collected amounts to the Department of State Revenue. However, because there is no purchase involved

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<sup>4</sup> See generally, Supplement to Emergency Petition for Declaratory Ruling and, in the Alternative, Petition for Rulemaking, Docket No. 11-42, filed March 13, 2015.

<sup>5</sup> IC 36-8-16.6-9 and -11.

with the provision of no charge Lifeline service, such as that provided by TracFone, there is no seller, no purchaser, and no “retail transaction” during which a seller could collect the fee. As such, the 911 fee, as imposed by Indiana Code § 36-6-16.6 prior to 2014, was not applicable to no charge Lifeline service. As explained in the Petition, in 2014, the Indiana Legislature enacted a new subsection (d) to Indiana Code § 36-8-16.6-11 which stated that an ETC is not an agency of the federal government for purposes of an exemption in the statute for federal agency consumers, and declared explicitly that an ETC “[i]s liable for the enhanced prepaid wireless charge ... with respect to prepaid wireless telecommunications service provided by the provider in its capacity as an eligible telecommunications carrier.”

In the Emergency Petition, TracFone described how ETCs that provide no charge Lifeline service to qualified low-income households lack any reasonable opportunity and ability to collect the 911 charge from their Lifeline customers. If such ETCs are required to collect and remit Indiana’s 911 fees, then they face two untenable options. They must either (1) reduce federal USF-supported benefits provided to their Lifeline customers to cover the 911 fees, in violation of the requirement in 47 C.F.R. § 54.403(a)(1) that ETCs pass through the entire amount of federal Lifeline support to Lifeline customer; or (2) pay the fees on behalf of those Lifeline customers from their own resources.

A recently-enacted amendment to Indiana Code § 36-8-16.6-11 further demonstrates Indiana’s disdain for the Lifeline program and its intent to limit availability of Lifeline-supported service to low-income Indiana households. As explained in this Second Supplement, Indiana’s amended 911 fee statute underscores the necessity of Commission action to ensure that Lifeline consumers receive the full amount of the federal Lifeline benefit to which they are entitled by

law and that no charge Lifeline service providers are not required to undertake an unlawful and unfair economic burden.

### **INDIANA’S AMENDED 911 FEE STATUTE**

On May 4, 2015, Indiana’s Governor Michael Pence signed into law House Bill No. 1475, which amended Indiana Code § 36-8-16.6-11 in several significant ways.<sup>6</sup> First, the 911 fee imposed on each retail transaction was doubled — from \$0.50 to \$1.00. This substantially increases the financial impact of the 911 fee whether paid by Lifeline benefit recipients or by ETCs. Given that the value of the monthly Lifeline benefit is \$9.25,<sup>7</sup> a \$1.00 911 fee represents a tax of nearly 11 percent on federal Lifeline benefits. Importantly, any Indiana Lifeline consumers who purchase additional airtime in any month to supplement their Lifeline benefit will engage in a retail transaction and will be required to pay the full \$1.00 911 fee on each additional airtime purchase. Those payments would be in addition to the monthly 11 percent tax which Indiana will impose on Lifeline service pursuant to House Bill No. 1475. As a result, many of Indiana’s neediest residents may become subject to multiple state 911 tax obligations in any given month.

Second, subsection (e)(1) was added to Indiana Code § 36-8-16.6-11. This subsection explicitly singles out ETCs and attempts to impose on them liability for 911 fees. This is in stark contrast to how all other providers of service are treated. All other carriers are explicitly not liable for payment of the 911 fee. *See* Ind. Code § 36-8-16.6-13 (“The enhanced prepaid wireless charge is the liability of the consumer and not of the seller or a provider.”); Ind. Code § 36-6-16.7-24 (“the statewide 911 fee is the liability of the user and not of the provider.”).

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<sup>6</sup> The relevant excerpts of House Bill No. 1475 that amend Indiana Code § 36-8-16.6-11 are provided as Exhibit 1.

<sup>7</sup> 47 C.F.R. §54.403(a)(1).

Moreover, newly-enacted subsection (e)(1) of IC 26-8-16.6-11 attempts to impose the 911 fee retroactively on ETCs who have been providing Lifeline service to low-income Indiana households. Subsection (e)(1) requires that by August 1, 2015, ETCs must pay to the Board a one-time charge equal to the product of: (1) the enhanced prepaid wireless charge (\$1.00); (2) the number of end users for which the ETC received reimbursement from the USF during the preceding month; and (3) the number of months under the current service agreement between each end user and the ETC for which the ETC received reimbursement from the USF before August 1, 2015.

Third, newly-enacted subsection (e)(2) singles out ETCs and attempts to impose directly on them prospective liability for the 911 fee commencing September 1, 2015 and each month thereafter. As with subsection (e)(1) described above, this is disparate and discriminatory treatment and stands on its head the all-important concept of competitive neutrality codified at Section 253 of the Communications Act. The prospective monthly 911 fee which Indiana's new law will impose only on ETCs is equal to the product of: (1) the enhanced prepaid wireless charge (\$1.00) and (2) the number of end users for which the ETC received reimbursement from the USF during the preceding month. Subsection (e)(2) further provides that an ETC "may bill and collect from each end user the charges calculated under this subdivision with respect to the end user." While presented in subsection (e)(2) as an option (ETCs "may bill and collect . . . ."), it is at best an illusory option for any Lifeline provider who offers no charge, otherwise non-billed Lifeline service. Establishing a billing system for no purpose other than to bill and collect a state 911 tax is inefficient, impractical, and unnecessary. Moreover, no other state (with the exception of Alabama as described in the Petitions) has sought to impose such a tax collection and remittance requirement on no charge Lifeline services.

These recent changes to Indiana law violate the Commission's rule that the full amount of Lifeline benefits be passed through to customers and limit the ability of no charge service providers to fairly compete in the increasingly competitive market for Lifeline service in violation of Section 253 of the Communications Act. Moreover, the amendments to the Indiana statute described in this Second Supplement demonstrate Indiana's continued refusal to recognize the unique characteristics of no charge Lifeline service and that state's continuing misguided efforts to deny Indiana's low-income enrolled Lifeline customers the full benefits available to them pursuant to federal law under the federal Lifeline program. Neither Indiana nor any other state should be allowed to subject federal Lifeline service recipients or their providers to state taxation which has the effect of limiting the amount of Lifeline support available

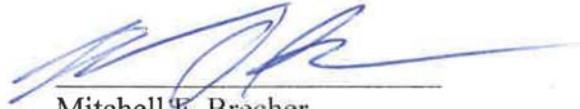
### **CONCLUSION**

For the reasons set forth in this Second Supplement, as well as those set forth in TracFone's previously-filed Emergency Petition for Declaratory Ruling, Supplement to Emergency Petition for Declaratory Ruling and, in the Alternative, Petition for Rulemaking, and reply comments in this matter, TracFone respectfully requests that the Commission promptly commence a rulemaking proceeding for the purpose of promulgating the rule revisions proposed in TracFone's Petition for Rulemaking. Whether achieved through preemption or through promulgation of appropriate rules, the continued national availability of federal Lifeline benefits to low-income households in all states, including Indiana, in a nationally-uniform manner

compels that states be precluded from interference with those federal benefits through state or local taxation.

Respectfully submitted,

**TRACFONE WIRELESS, INC.**



Mitchell F. Brecher  
Debra McGuire Mercer  
GREENBERG TRAURIG, LLP  
2101 L Street, N.W., Suite 1000  
Washington, DC 20037  
(202) 331-3100

*Its Attorneys*

May 12, 2015

# Exhibit 1

First Regular Session of the 119th General Assembly (2015)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2014 Regular Session and 2014 Second Regular Technical Session of the General Assembly.

## HOUSE ENROLLED ACT No. 1475

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AN ACT to amend the Indiana Code concerning local government.

*Be it enacted by the General Assembly of the State of Indiana:*

SECTION 1. IC 6-1.1-18.5-23 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2015]: **Sec. 23. (a) This section applies to a county in which the county has contractually assumed from another political subdivision the responsibility of operating a public safety answering point.**

**(b) The fiscal bodies of a county and another political subdivision that are parties to a contract described in subsection (a) may jointly petition the department of local government finance to adjust the maximum permissible ad valorem property tax levies for the ensuing calendar year of the petitioning units as follows:**

**(1) To increase the county's maximum permissible ad valorem property tax levy for the ensuing calendar year by an amount not greater than the amount levied in the preceding calendar year by the petitioning political subdivision to pay expenses incurred to operate the public safety answering point.**

**(2) To decrease the maximum permissible ad valorem property tax levy for the ensuing calendar year of the petitioning political subdivision by an amount not greater than the amount that the petitioning political subdivision**

HEA 1475 — Concur



distributed under this section during the following calendar year. A resolution approved under this subsection providing for a distribution to one (1) or more fire departments, volunteer fire departments, or emergency services providers applies only to distributions in the following calendar year. Any amount of tax revenue distributed under this subsection to a fire department, volunteer fire department, or emergency medical services provider shall be distributed before the remainder of the tax revenue is distributed under subsection (f).

**(n) This subsection applies to a county in which a tax rate under this section is not in effect on July 1, 2015. The county income tax council or, in Lake County, the county council, may adopt a resolution providing that up to one hundred percent (100%) of the tax revenue to be distributed under this section shall be dedicated to a PSAP (as defined in IC 36-8-16.7-20) that is part of the statewide 911 system (as defined in IC 36-8-16.7-22) and contained in the county. Any amount of tax revenue dedicated to a PSAP under this subsection shall be distributed before the remainder of the tax revenue is distributed under this section.**

**(o) This subsection applies to a county in which a tax rate under this section is in effect on July 1, 2015. If the tax rate under this section is increased after July 1, 2015, the county income tax council or, in Lake County, the county council, may adopt a resolution providing that up to one hundred percent (100%) of the tax revenue derived from the part of the tax rate under this section that exceeds the tax rate in effect on July 1, 2015, shall be dedicated to a PSAP (as defined in IC 36-8-16.7-20) that is part of the statewide 911 system (as defined in IC 36-8-16.7-22) and contained in the county. Any amount of tax revenue dedicated to a PSAP under this subsection shall be distributed before the remainder of the tax revenue is distributed under this section.**

SECTION 4. IC 36-8-16.6-11, AS AMENDED BY P.L.107-2014, SECTION 6, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2015]: Sec. 11. (a) The board shall impose an enhanced prepaid wireless charge on each retail transaction. ~~that occurs after June 30, 2010. Except as provided in subsection (e), the amount of the initial charge imposed under this section may not exceed one-half (1/2) of the monthly wireless emergency enhanced 911 fee assessed under IC 36-8-16.5-25.5 (before its repeal on July 1, 2012). The board shall increase the amount of the charge imposed under this section so that the amount of the charge imposed after June 30, 2012, under this section equals fifty cents (\$0.50).~~ **is one dollar (\$1).**

(b) Subject to legislative approval, after the increase described in



~~subsection (a) and after June 30, 2012,~~ The board may increase the enhanced prepaid wireless charge to ensure adequate revenue for the board to fulfill its duties and obligations under this chapter and IC 36-8-16.7. **The following apply to an increase in the enhanced prepaid wireless charge:**

- (1) The board may increase the charge only one (1) time after June 30, 2015, and before July 1, 2020.**
- (2) The board may increase the charge only after review by the budget committee.**
- (3) If the board increases the charge, the amount of the increase must be ten cents (\$0.10).**

(c) A consumer that is the federal government or an agency of the federal government is exempt from the enhanced prepaid wireless charge imposed under this section.

(d) This subsection applies to a provider that is designated by the Indiana utility regulatory commission as an eligible telecommunications carrier for purposes of receiving reimbursement from the universal service fund through the administrator designated by the Federal Communications Commission. A provider:

- (1) is not considered an agency of the federal government for purposes of the exemption set forth in subsection (c); and
- ~~(2) is liable for the enhanced prepaid wireless charge imposed under this section~~ with respect to prepaid wireless telecommunications service provided **to end users** by the provider in its capacity as an eligible telecommunications carrier, **is liable for the enhanced prepaid wireless charge imposed under subsection (e).**

**(e) A provider described in subsection (d) shall pay to the board the following charges:**

- (1) Not later than August 1, 2015, a one (1) time charge equal to the product of the following factors:**
  - (A) The enhanced prepaid wireless charge established under subsection (a).**
  - (B) The number of unique end users for which the provider received reimbursement from the universal service fund during the immediately preceding month.**
  - (C) The number of months under the current service agreement between each end user described in clause (B) and the provider for which the provider has received reimbursement from the universal service fund before August 1, 2015.**
- (2) Beginning September 1, 2015, and on the first day of each**



month thereafter, a charge equal to the product of the following factors:

(A) The enhanced prepaid wireless charge established under subsection (a).

(B) The number of unique end users for which the provider received reimbursement from the universal service fund during the immediately preceding month.

The provider may bill and collect from each end user the charges calculated under this subdivision with respect to the end user. The provider shall determine the manner in which the provider bills and collects the charges. A provider may not bill and collect from an end user an amount greater than the charges paid by the provider to the board with respect to the end user.

SECTION 5. IC 36-8-16.6-17, AS ADDED BY P.L.113-2010, SECTION 151, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2015]: Sec. 17. (a) The department, in conjunction and coordination with the board, shall establish procedures:

(1) governing the collection and remittance of enhanced prepaid wireless charges in accordance with the procedures established under IC 6-8.1 concerning listed taxes; and

(2) allowing a seller to document that a sale of prepaid wireless telecommunications service is not a retail transaction.

(b) A procedure established under subsection (a)(1):

(1) must take into consideration the differences between large and small sellers, including smaller sales volumes; and

(2) may establish lower thresholds for the remittance of enhanced prepaid wireless charges by small sellers.

For purposes of this subsection, a small seller is a seller that sells less than one hundred dollars (\$100) of prepaid wireless telecommunications service each month.

(c) **On an annual basis, the board may audit providers to determine compliance with procedures established under subsection (a). Not later than March 1 of the year immediately following an audit, the board shall submit, in an electronic format under IC 5-14-6, a copy of the audit to the general assembly and the budget committee.**

SECTION 6. IC 36-8-16.7-10, AS ADDED BY P.L.132-2012, SECTION 20, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2015]: Sec. 10. (a) As used in this chapter, "exchange access facility" means the access from a particular service user's premises to a telephone system.

