

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

In the Matter of)	
)	
Implementation of Section 6002(b) of the)	WT Docket No. 15-125
Omnibus Budget Reconciliation Act of 1993)	
)	
Annual Report and Analysis of Competitive)	
Market Conditions with Respect to Mobile)	
Wireless, Including Commercial Mobile Services)	
_____)	

COMMENTS OF TRACFONE WIRELESS, INC.

TracFone Wireless, Inc. (“TracFone”), by its attorneys, hereby comments in response to the Public Notice issued by the Wireless Telecommunications Bureau (“Bureau”) in this proceeding.¹ The Bureau’s focus in this proceeding is on obtaining input for the Commission’s statutorily required annual report to Congress on competitive conditions relevant to commercial mobile services.² The Bureau seeks comment on various issues related to the competitive dynamics present in the mobile wireless marketplace, including consumer behavior, financial indicators, industry metrics (such as coverage and pricing levels), and performance metrics for mobile broadband networks (such as speed and latency).³

In addition to requesting comment on several specific issues identified in the Public Notice, the Bureau seeks comments on any other issues or circumstances that may impact competition in the market for wireless service. The Bureau also seeks “comment on other factors or developments that may affect or be relevant to competition and consumer choice in the in the

¹ Public Notice – Wireless Telecommunications Bureau Seeks Comment on the State of Mobile Wireless Competition, DA 15-647, released May 29, 2015 (“Public Notice”).

² See 47 U.S.C. § 332(c)(1)(C).

³ See Public Notice, at 1.

mobile wireless marketplace,”⁴ TracFone’s comments address one specific matter which adversely affects competition in the provision of CMRS services: the manner in which certain state governments impose taxes and fees on wireless service which have the unintended and unfortunate consequence of picking winners and losers in the market for wireless services in general and in the provision of wireless Lifeline services supported by the federal Universal Service Fund in particular. As explained in these comments, recently-enacted state laws and regulations that impose 911 taxes and fees on no charge (*i.e.*, free) wireless Lifeline service impede the ability of ETCs offering no charge Lifeline service to fairly compete in the Lifeline service market.

TracFone is a leading provider of prepaid wireless telecommunications services throughout the United States. TracFone provides service by reselling services it obtains from licensed operators of wireless networks. TracFone provides service only on a prepaid non-billed basis. That is, consumers purchase quantities of TracFone service in advance by purchasing airtime cards either directly from TracFone or, more typically, by purchasing airtime cards from various retail establishments. The prepaid business model used by TracFone and others provides consumers with a means for acquiring wireless service without having to execute long-term contracts, undergo credit checks, and bear the responsibility for early termination penalties. The prepaid model provides consumers with an important competitive alternative to postpaid (billed) services. However, some states have skewed competition by imposing state tax requirements including, for example, state 911 taxes, in a manner that enables some competitors (*i.e.*, postpaid providers) to collect those taxes from consumers and remit to state tax authorities only the

⁴ *Id.* at 8.

amounts collected.⁵ Those same states impose the obligation to remit state taxes on providers of prepaid service with no means for the providers to recover those state taxes directly from consumers.⁶

In addition, some states' 911 tax laws are antithetical to competition in the growing and increasingly important market segment for Lifeline service. TracFone offers no charge wireless Lifeline service to those households that meet the statutory and regulatory qualifications to participate in the Lifeline program. In fact, TracFone is the nation's leading provider of Lifeline service – wireline or wireless. TracFone is aware of two states that have enacted laws and promulgated regulations in 2014 that seek to impose state 911 taxes and fees on no charge

⁵ Examples of states which accord favorable tax treatment to providers of postpaid billed wireless service as compared with prepaid service include Kentucky, Vermont, and Massachusetts. Prepaid wireless providers are also subject to discriminatory treatment in states that have statutes that on their face appear to impose the same level of 911 taxes on prepaid and postpaid wireless providers because the prepaid wireless average revenue per user (“ARPU”) is significantly lower than the postpaid wireless ARPU. Thus, even if a 911 tax is set at a fixed amount, such as in Pennsylvania where the 911 fee is \$1.65 per month for postpaid service and \$1.65 per transaction paid at the point of sale for prepaid service, the effective rate of the tax is higher on prepaid service. The regressive nature of such taxes disproportionately burdens prepaid service and is discriminatory.

⁶ The anticompetitive impact of certain states' taxation of prepaid services as compared with their taxation of postpaid services is compounded by the fact that some states have chosen to selectively enforce their unworkable and discriminatory state 911 tax laws against some companies which have no means for collecting 911 taxes from non-billed prepaid customers while giving similarly-situated providers a “pass” by not enforcing those same laws against other providers. For example, Texas and Kentucky have commenced litigation against TracFone and several other providers of prepaid service while not enforcing their 911 tax laws against other carriers' prepaid services.

Lifeline service.⁷ Under Alabama regulations, effective August 1, 2014, a Lifeline subscriber, including a subscriber who 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.⁸ The Indiana Statewide 9-1-1 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.⁹

As TracFone explained in detail in its Emergency Petition for Declaratory Ruling and related Reply Comments, states' imposition of 911 taxes on no charge Lifeline service impedes the ability of ETCs offering such no charge Lifeline service to fairly compete in the Lifeline service market in violation of 47 U.S.C. 253. Section 253 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.¹⁰

The 911 taxes at issue in TracFone's Emergency Petition for Declaratory Ruling violate Section 253 because they effectively prohibit no charge ETCs from providing service by leaving

⁷ TracFone previously has brought to the Commission's attention the situations involving Alabama's and Indiana's efforts to reduce federal Lifeline benefits by imposing state taxes on federally-supported Lifeline service. See TracFone's Emergency Petition for Declaratory Ruling, filed October 23, 2014, its Supplement to Emergency Petition for Declaratory Ruling and, in the Alternative, Petition for Rulemaking, filed March 13, 2015, and its Second Supplement to Emergency Petition for Declaratory Ruling and, in the Alternative, Petition for Rulemaking, filed May 12, 2015. Although it has been more than eight months since TracFone first described to the Commission how those states were taxing federal Lifeline benefits, the petitions remain pending and state taxation of federal Lifeline benefits continues.

⁸ See Ala. Admin. Code r. 585-X-4.01(2).

⁹ See IC § 36-8-16.6. Legislation enacted in Indiana earlier this year increases the 911 tax from \$0.50 to \$1.00 per Lifeline customer per month and the Indiana 911 Board is demanding that the increased amount be paid by Lifeline providers retroactively.

¹⁰ TracFone also asserted in its Petition for Declaratory Ruling and related Reply Comments that states' imposition of 911 taxes on no charge Lifeline service constitutes an unlawful state-imposed tax on a federal benefit in violation of the Supremacy Clause of the United States Constitution. As noted *supra* note 5, the petition remains pending.

such ETCs with three unworkable options that are either unlawful or not competitively neutral. Under the first option, a Lifeline service provider could reduce airtime minutes, but such a reduction would violate Commission rules requiring the entire amount of Lifeline support to be passed through to customers in the form of Lifeline benefits.¹¹

Under the second option, a no charge ETC could establish a billing system, but such a change would be costly and burdensome and would serve no purpose other than to collect taxes in a few states which have sought to tax Lifeline service. Moreover, “the Commission specifically considered the merits of no-charge Lifeline service and concluded that Lifeline customers should have the benefits of such service.”¹² In short, the Commission has decided to allow competitive forces to determine how to market Lifeline service and no state may favor or disfavor any particular model. Requiring no charge Lifeline providers to incur the expense of creating and maintaining billing system while other providers do not have make any changes to their business model is not competitively neutral, and the existence of such requirements undermines the emergence of competitive market conditions in an important and growing segment of the wireless telecommunications service market.

¹¹ State tax laws and policies which reduce Lifeline benefits to low-income households are particularly inappropriate in light of the Commission’s recent proposal to establish minimum standards for Lifeline service, including potentially increasing the quantities of service to be provided. See *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 *et al.*, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, FCC 15-71, released June 22, 2015 (“2015 Lifeline Reform NPRM”). It defies logic and wisdom for the Commission to require Lifeline providers to increase the amount of service provided to Lifeline customers while, at the same time, acquiescing in state tax laws and policies which reduce the amount of service available to those same consumers.

¹² See *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) (noting 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.”).

The third option available to no charge ETCs in those states which tax Lifeline service is that the ETCs could pay the 911 taxes from their own resources. This third option is not a competitively neutral solution given that ETCs that provide postpaid or billed Lifeline services are able to collect the fees from their customers while no charge ETCs have no viable means to collect those fees from their customers.

As the Commission evaluates the state of competition in the mobile wireless market in general, and in particular, the Lifeline segment of the market, TracFone urges it to consider how certain states' imposition of 911 taxes on no charge Lifeline and prepaid wireless service creates an obstacle for providers to compete with other service providers. The Commission views the presence of fair and balanced competition in the market for Lifeline services as essential to the success of the Lifeline program. Indeed, the Commission recently initiated a rulemaking proceeding to reform the Lifeline program. Among the stated goals of that proposed reform is to "increase competition and innovation in the Lifeline marketplace ... [by] increas[ing] the number of service providers offering Lifeline services."¹³ In the Lifeline reform proceeding, the Commission seeks comment "on the best means to facilitate broader participation in the Lifeline program and encourage competition with most robust service offerings in the Lifeline market."¹⁴ Thus, the Commission's assessment of the state of competition in the market for mobile wireless services must consider any development that has an impact on competition, including states' imposition of 911 taxes on no charge Lifeline service.

¹³ 2015 Lifeline Reform NPRM, ¶ 121.

¹⁴ *Id.*

Accordingly, TracFone respectfully urges the Commission to consider the adverse impacts of certain states' tax laws in general and state 911 tax laws in particular (and the selective enforcement thereof) on the emergence and growth of competition in the overall wireless telecommunications market and in the important and growing Lifeline segment of the wireless telecommunications market.

Respectfully submitted,

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