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June 13, 2011

Via Hand Delivery

Jean Jewell, Secretary
Idaho Public Utilities Commission
472 W. Washington St.
Boise, Idaho 83720

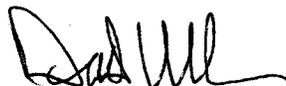
Re: TFW-T-09-01

Dear Ms. Jewell:

Enclosed for filing in the above matter, please find an original and seven (7) copies of Tracfone Wireless, Inc.'s Reply Brief and Partial Motion to Strike.

Kindly return a file stamped copy to me.

Very Truly Yours,
McDevitt & Miller LLP


Dean J. Miller

DJM/hh
Encl.

I. Partial Motion to Strike

In the Commission's April 21, 2011 Notice of Post-Hearing Briefing Schedule (Order No. 32231), the Commission expressly limited the scope of the briefs to two -- and only two -- issues: 1) whether TracFone is legally obligated to remit certain fees pursuant to the Idaho Emergency Communications Act ("IECA"); and 2) whether TracFone is legally obligated to remit certain fees pursuant to the Idaho Telecommunications Assistance Act ("ITSAP"). Accordingly, parties were invited to brief only the applicability of the IECA 911 fee and ITSAP to TracFone as a matter of law. Nothing else was contemplated by the Commission's order.

In contravention of the express limited scope of the Commission's briefing order, Staff's brief addresses such extraneous matters as: 1) the Commission's regulatory authority over public utilities and the federal and state standards for designation of Eligible Telecommunications Carriers (p. 1); 2) TracFone's intentions regarding IECA and ITSAP fees and its legal strategies involving other laws in other jurisdictions (p. 1.); 3) whether TracFone should "voluntarily" contribute to ITSAP if not legally obligated to do so (p. 3); 4) whether TracFone should contribute to the TRS Fund (pp. 3-4); and 5) cases involving laws of other states (pp. 4-6). Intervenors' brief is similarly cluttered with matters and assertions well outside the scope of the designated briefing issues. Examples of such extraneous material in Intervenors' brief include: 1) speculation of future TracFone litigation strategy (p.2); 2) the Federal Communications Commission's Forbearance Order (p. 4);¹ and 3) TracFone's legal challenges to the applicability of 911 laws in other states (p. 2).

¹ Intervenors' brief cites to Federal-State Joint Board on Universal Service; Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i), 20 FCC Rcd 15095 (2005) for the proposition that compliance with state 911 requirements is a condition of the FCC's grant of forbearance to TracFone. That is factually incorrect. The FCC's Forbearance Order does not address state 911 requirements.

In this reply brief, TracFone will respond to the substantive arguments of Staff and Intervenors which address the two designated legal issues noted in the Commission's April 21 Notice of Prehearing Briefing Schedule. However, all matters contained in those briefs which do not address TracFone's legal obligations, if any, to remit 911 and ITSAP fees should be stricken.

II. Nothing in Either Staff's or Intervenors' Brief Support a Conclusion That the Applicable Laws Obligate TracFone to Remit 911 and/or ITSAP Fees

In determining the applicability of statutes, it is necessary to parse the statutory language enacted by the Legislature. As Intervenors properly acknowledge, Idaho courts, like courts of virtually all jurisdictions, follow the "plain meaning" rule of statutory construction. Indeed, as noted in Intervenors' brief, under Idaho case law, analysis of statutory language "begins with the literal language of enactment. If the literal language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and there is no occasion for a court to consider rules of statutory construction." Canty v. Idaho State Tax Commission, 138 Idaho 178, 182, 59 P.3d 983, 987 (2002).²

Application of the command of the court in Canty leads to the conclusion that the literal language of the applicable statutes does not extend to the prepaid service of TracFone -- service which is neither provided on a billed basis nor on a monthly basis. The 911 fee remittance requirement is codified at Idaho Code § 31-4804(2). Pursuant to that statute, the 911 fee is imposed on and collected from: 1) purchasers of access lines or interconnected VoIP lines; 2) with a service address or place of primary use within the county or 911 service area; 3) on a monthly basis, by all telecommunications providers of such services. TracFone does not dispute that its service meets the first two prongs of the statutory language: 1) it provides services to purchasers of access lines and 2) those purchasers have service addresses within the county or

² Intervenors' Brief at 3.

911 service area. However, TracFone is outside the all-important third prong. Its service is not provided on a monthly basis. Unless a service is provided on a monthly basis, it cannot be subject to a statutory tax to be collected on a monthly basis.

Some, including Intervenors, might find this statutory limitation frustrating. Indeed, Intervenors have even described it to be a “loophole.”³ Whether the statutory limitation to services provided on a monthly basis should be modified or amended so as to encompass non-monthly services is a matter for the Legislature; it is not for the Commission to rewrite legislative language to suit the wishes of its Staff, Intervenors, or anyone else.

Similarly, the language enacted by the Legislature governing remittance of ITSAP charges may not reflect the current preferences of the Commission or parties to this proceeding. Idaho Code § 56-904(1) clearly and unequivocally contains the following qualification: **“The surcharge shall be specifically stated on end user billings.”** It is hornbook law of statutory construction that the word “shall” is the language of command. The statute does not provide that ITSAP charges may be stated on end user billings; neither does it provide that ITSAP charges might be stated on end user billings. It says specifically that such charges **shall** be assessed on end user billings.⁴ If there are no end user billings, there is no way to assess surcharges on such non-existent end user billings. By its terms, the statute requires that ITSAP charges be stated on

³ *Id.*, at 10.

⁴ The statutory language “shall be specifically stated on end user billings” contradicts Intervenors’ assertion at p. 6 of its Brief that “the ITSAP does not mandate a monthly customer billing.” While the statute authorizes the Commission to allow less frequent than monthly billings (Idaho Code § 56-904(3)), the statute does not authorize the Commission to eliminate or waive the requirement that the ITSAP surcharge “be specifically stated on end user billings.”

end user billings. Absent end user billings, the statutory command of Section 56-904(1) is simply inapplicable.⁵

TracFone does not disagree that the growth of telecommunications services provided on prepaid, non-billed bases such as prepaid wireless service provided by TracFone and others may render the “shall be established on end user billings” language of Section 56-904(1) less inclusive than some would prefer. Again, however, changes in statutory language to accommodate changes in technology or changes in market strategies are a matter for the Legislature, not for the Commission, and certainly not for its Staff and Intervenors.

Intervenors’ brief attempts to explain away the disconnect between their interpretation of the applicable statutes and the plain meaning of the statutory language through a detailed summarization of their view of the statutes’ legislative history. Beginning at p. 12 of their brief, Intervenors trace the changes to the statutes over the years in response to technological and market developments. However, Intervenors disregard the unassailable fact that the critical and relevant portions of the statutes have not changed over the years. The monthly billing provision applicable to 911 fees (“billed on a monthly basis”) remains in Section 31-4804(2) without modification. So too does the requirement that the ITSAP surcharge “be specifically stated on end user billings” remain unchanged in Section 56-904(1). Given the history of changes to the statutes to accommodate changes in how services are provided as described by Intervenors, it

⁵ Curiously, Intervenors’ Brief ignores that statutory language of Section 56-904(1) and instead cites to Staff witness’s oral description of the statute. Intervenors’ Brief, at 5. Intervenors’ decision to base their explanation of the statute on Ms. Seaman’s testimony rather than on the statutory language itself is unexplained and unexplainable, except that Ms. Seaman’s description of the statute is more supportive of Intervenors’ argument than is the language of the statute itself. Not surprisingly, Ms. Seaman’s testimony relied upon by Intervenors totally ignores the critical statutory requirement that the ITSAP surcharge “shall be specifically stated on end user billings.” Neither Ms. Seaman nor the Commission are empowered to disregard that express statutory requirement.

strains credulity to suggest that the unchanged statutory language of those sections does not accurately reflect legislative intent.

A relevant analogy involves the federal excise tax on telephone service. The U.S. Internal Revenue Code imposes an excise tax on certain types of telephone service.⁶ Among the categories of telephone service subject to the federal excise tax is “toll telephone service.” The Internal Revenue Code defines “toll telephone service” in relevant part, as

(1) a telephonic quality communication for which

(A) there is a toll charge which **varies in amount with the distance** and elapsed transmission time of each individual communication and

(B) the charge is paid within the United States

...⁷

Inclusion of the words “varies in amount with the distance” in the statutory definition of toll telephone service reflects the fact that at the time of the statute’s enactment, providers of toll services (sometimes referred to as long distance services) priced their services on a distance sensitive basis.⁸ For example, calls between Boise, Idaho and Denver, Colorado would cost less than calls of the same duration between Boise, Idaho and New York City. Subsequent to enactment of that statutory definition, as a result of increasing competition in the toll services market and changes in transmission technology, virtually all providers of toll services modified their rate structures to eliminate distance as a factor in pricing. Carriers now use postalized rates. The rate is the same for a toll call from anywhere in the United States to anywhere in the United States. In short, charges for toll calls no longer vary in amount with distance.

⁶ 26 U.S.C. § 4251.

⁷ 26 U.S.C. § 4252(b) (emphasis added).

⁸ When the definition of toll telephone service was added to the Internal Revenue Code in the mid-1960s, AT&T provided long distance (toll) telephone service on a monopoly basis throughout the United States.

However, Congress never amended the statutory definition of “toll telephone service” to reflect the fact that toll charges no longer vary in amount with the distance of the call. As a result, challenges to the applicability of the federal excise tax to toll telephone services were brought by consumers of such services. Those consumers argued that services the charges for which do not vary with distance are not toll telephone service within the statutory definition codified at 26 U.S.C. § 4252(b). The Internal Revenue Service contested those cases and asserted that the fact that toll services no longer were provided on a distance sensitive basis did not detract from Congress’s intent to subject long distance calling to the excise tax. In short, the IRS, like Staff and Intervenors in the instant case, asserted that the literal language of the statute should not be strictly followed in light of market changes in how services were provided.

Not surprisingly, every federal appeals court which considered the issue rejected the IRS’s expansive view of the statute. Each of those appeals courts agreed that long distance services whose rates do not vary with distance are not toll telephone service within the existing statutory definition, and therefore are not subject to the federal excise tax. See American Bankers Ins. Group v. United States, 408 F.3d 1328 (11th Cir. 2005); Office Max, Inc. v. United States, 428 F.3d 583 (6th Cir. 2005); National R.R. Passenger Corp. v. United States, 431 F.3d 374 (D.C. Cir. 2005); Fortis v. United States, 2006 U.S. App. LEXIS 10749 (2nd Cir. 2006); Reese Bros. v. United States, 2006 U.S. App. LEXIS 11468 (3rd Cir. 2006).⁹

The courts were not persuaded by claims of the U.S. Government that Congress meant to include all long distance services or that it was irrational to exclude toll charges which did not vary with distance. Each court applied the statute as it was enacted without regard to whether

⁹ After every court concluded that services whose charges did not vary with distance were not toll telephone service, the Department of the Treasury ceased efforts to enforce the federal excise tax against users of such services. See Department of the Treasury Notice 2006-50.

Congressional intent would suggest an interpretation which deviated from the statutory language. The courts resisted pleas by the government to rewrite the statute to cover services outside the statutory definition. So too should the Commission resist requests by Staff and Intervenors to write out of the IECA the statutory “on a monthly basis” provision and to eliminate from the ITSAP statute the statutory requirement that the surcharges be explicitly stated on end user billings.

III. The Commission Is Not Empowered to Subject a Telecommunications Provider to Otherwise Inapplicable Laws as a Condition of ETC Designation

As noted above, the Commission has directed briefing of two issues -- whether the 911 fee law is applicable to TracFone, and whether the ITSAP fee law is applicable to TracFone. As explained in TracFone’s initial brief and in this reply brief, neither law as currently enacted is applicable to TracFone. However, Staff’s brief goes beyond those legal questions and asks the Commission to require TracFone to subject itself to those laws without regard to whether they are applicable. For example, at p. 3, Staff’s brief states: “If TracFone’s telecommunications services are truly in the public interest then the Company should be required to make a good faith demonstration of its willingness to provide critical funding support for programs that will ensure that its services will reach **all** Idahoans in an effective manner.”¹⁰ Later, Staff insists that as a condition of ETC designation TracFone should volunteer to contribute to the ITSAP fund. Specifically, Staff brief states “. . . if TracFone is unwilling to **voluntarily** contribute to the ITSAP Fund then the Company’s Amended Application should be denied.”¹¹

Conspicuously absent from Staff’s brief is any supporting authority for its novel proposition that ETC designations may be withheld unless companies volunteer to contribute to funds to which they are not otherwise legally obligated to contribute. This absence of any

¹⁰ Staff Brief at 3 (emphasis in original).

¹¹ *Id.* (emphasis added).

supporting authority is not surprising. No such statutory or case law authority exists -- not in Idaho, not in any other state. To date, TracFone has been designated as an ETC in not fewer than 37 states. Not one of those states has required TracFone as a condition of ETC designation to contribute to any fund to which it is not required to contribute by applicable law.¹² While TracFone does not dispute that state commissions are required to make public interest determinations in ETC designations, there is no legal basis upon which to condition a public interest determination on commitments by ETC applicants to comply with inapplicable legal requirements.¹³

IV. References to Litigation of Fee-Related Issues in Other States Are Inappropriate; Reliance on Cases Construing Other States' Laws Is Misplaced; Staff and Intervenors Conceal from the Commission the Fact That Other States Have Designated TracFone as an ETC Notwithstanding Pending Fee Litigation

Staff and Intervenors each expend significant portions of their briefs discussing 911 and other fee-related laws from other states and describing challenges to such laws which have been brought by TracFone.¹⁴ As noted in Section I of this reply brief, other states' laws and TracFone's litigation decisions in other states are not relevant to the issues before the Commission in this ETC proceeding and are far outside the scope of the two issues which the Commission has directed the parties to brief. For that reason, all discussion of other state laws and other state cases should be stricken. However, since Staff and Intervenors are so desirous of burdening the Commission with their respective interpretations of other states' legal

¹² Some states have required TracFone to contribute to certain funds following a legal determination by a department or court of competent authority that the contribution requirements were applicable to TracFone. No state has imposed such a voluntary contribution obligation as suggested by Staff.

¹³ Staff's suggestion that TracFone should "voluntarily" remit fees as a condition of being designated as an ETC is contrary to its own testimony in this proceeding. When asked by Commissioner Smith whether TracFone should pay the fees if not legally required to do so, Staff witness Seaman responded unequivocally, "No." Tr. at 350.

¹⁴ See, e.g., Staff Brief, at 5-6; Intervenors' Brief, at 17-21.

requirements and TracFone's litigation strategies in other states, TracFone is compelled to briefly address those assertions.

At the outset, states' telecommunications tax and fee laws differ from each other. As described in the preceding sections of this reply brief and in TracFone's initial brief, the "on a monthly basis" language in the 911 fee law and the requirement that ITSAP surcharges be "explicitly stated on end user billings" are provisions specific and unique to Idaho. Accordingly, reliance on other state decisions would be relevant only if those states' laws had the same statutory requirements. Neither Staff nor Intervenors have made any such showing.

Moreover, Staff's and Intervenors' reliance on other state fee dispute cases disregards what the instant proceeding is about -- whether TracFone should be designated as an ETC for the limited purpose of providing Lifeline service to low-income Idaho households. Staff and Intervenors note the existence of disputes and, in some cases, judicial proceedings, brought by TracFone in other states challenging the applicability of those states' laws. In some states, including, *e.g.*, Washington and Kentucky, TracFone's legal challenges were not completely successful.¹⁵ In other states, including, for example, Michigan, the court of appeals agreed with TracFone that the 911 fee law was not applicable on the basis that the Michigan law tied the obligation to collect and remit 911 charges on customers having a "billing address" and that, by

¹⁵ In the Kentucky case, Commonwealth of Kentucky Commercial Mobile Radio Service Emergency Telecommunications Board v. TracFone Wireless, Inc., 735 F.Supp. 2d 713 (W.D. KY 2010), the court concluded that TracFone was subject to a prior, no longer in effect version of that state's 911 fee law, but that it could not be required to contribute 911 fees under the current version of the law until such time as the Commercial Mobile Radio Service Emergency Telecommunications Board complied with a statutory directive to develop and implement a collection method for prepaid services.

definition, customers of prepaid services do not receive bills and therefore do not have billing addresses.¹⁶

Importantly, in all of those states, the state commissions have designated TracFone as an ETC. Notwithstanding the fee-related disputes noted by Staff and Intervenors, TracFone has been designated as an ETC in Washington, Kentucky, Michigan, Maine, Ohio, Arizona, and Iowa -- all states referenced in the briefs of Staff and/or Intervenors.¹⁷

Each of those state commissions concluded that designation of TracFone as an ETC would serve the public interest and would benefit that state's consumers despite the existence of unresolved disputes regarding obligations to remit certain 911 and other public purpose fees. As a result, low-income consumers in those states (including, Washington, Kentucky, Michigan, Maine, Ohio, Arizona, and Iowa) as well as nearly 30 other states are enjoying the benefits of SafeLink Wireless[®] Lifeline service. More than three million such qualified low-income consumers are receiving free handsets and up to 250 minutes per month of wireless airtime with a nationwide "local calling area" -- benefits which no currently-designated ETC in Idaho, including Intervenors, can or has chosen to match.¹⁸

¹⁶ Just as consumers of prepaid, non-billed services do not have billing addresses, neither do they receive end user billings.

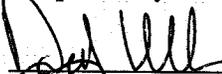
¹⁷ Of the other states referenced in Staff's and Intervenors' briefs, TracFone has not sought ETC designation in Nebraska; it withdrew its petition for ETC designation in Colorado for reasons not related to fee issues; it has completed a hearing in Indiana on its ETC application where there are no current fee disputes and the Indiana Utility Regulatory Commission is expected to issue an order designating TracFone as an ETC in that state not later than June 30, 2011.

¹⁸ The undisputed fact that no Idaho ETC in general and no Idaho wireless ETC in particular is willing to provide a Lifeline service to low-income Idaho households comparable to TracFone's SafeLink Wireless[®] service may explain why Intervenors have invested such significant resources to oppose TracFone's designation as an ETC in Idaho and resulting entry into the emerging competitive market for Lifeline services.

Conclusion

For the reasons described herein as well as in TracFone's initial brief, the 911 fee remittance requirement codified at Idaho Code § 31-4804(2) and the ITSAP remittance requirement codified at Idaho Code § 56-901, as currently enacted, are not applicable to TracFone's pay-as-you go non-monthly, non-billed prepaid wireless services. Any modification of those laws to encompass such services must be implemented through legislation, not through regulatory fiat. Moreover, the record in this proceeding conclusively demonstrates that designation of TracFone as an ETC for the limited purpose of providing Lifeline service to qualified low-income households would serve the public interest by making the security and convenience of full-featured mobile telecommunications available to all Idahoans irrespective of their economic circumstances. For these reasons, TracFone respectfully urges the Commission to designate it as an ETC expeditiously so that Idaho consumers, like those of more than thirty other states, may soon enjoy the benefits of Lifeline-supported SafeLink Wireless[®] service.

Respectfully submitted,



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June 13, 2011

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June, 2011, I caused to be served, via the method(s) indicated below, true and correct copies of the foregoing document, upon:

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